The Projects and Construction Review

Ninth Edition

Editor
Júlio César Bueno

The LawReviews

THE PROJECTS AND CONSTRUCTION REVIEW

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Editor
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CONTENTS

PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey,
est de résister et de réagir contre les vices de son époque.
Michel Villey, *Critique de la pensée juridique modern* (Paris: Dalloz, 1976)

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association, the International Academy of Construction Lawyers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Arbitrators, the Society of Construction Law, the Dispute Resolution Board Foundation, the American Bar Association's Forum on the Construction Industry, the American College of Construction Lawyers, the Canadian College of Construction Lawyers and the International Construction Lawyers Association. All these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues relating to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are highly specialised areas of legal practice. They are intrinsically functional and pragmatic, and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have contributions from new jurisdictions in this edition: Ghana and the Philippines. Although there is an increased perception that project financing and construction law are global issues, the local knowledge offered by leading experts in 19 countries has shown us that to understand the world, we must first make sense of what happens locally; to further advance our understanding of the law we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors, and their law firms who graciously agreed to participate.

Finally, I dedicate this ninth edition of *The Projects and Construction Review* to a dear friend, the late John (Jack) Bernard Tieder, Jr, who died on 3 December 2017. Jack was the founding partner of Watt, Tieder, Hoffar & Fitzgerald LLP and the Global Construction and Infrastructure Law Alliance. He is much missed and I am most grateful for his friendship, and all his support and guidance during my path as a construction lawyer. He leaves behind a large extended family and many close friends and esteemed associates around the world.

Júlio César Bueno
Pinheiro Neto Advogados, São Paulo
June 2019

A dedication to Jack Tieder (1946-2017)
by Professor Doug Jones AO

Jack Tieder was one of the doyens of the International Construction Bar.

Graduating from John Hopkins University and Syracuse and American University School of Law in 1971, he commenced practice as lawyer with the firm of Lewis Mitchell & Moore where he progressed to the ranks of partnership. In 1978 he was a founding partner of the firm then called Watt Tieder Killian & Hoffar and was the senior partner of the firm now known as Watt Tieder Hoffar & Fitzgerald from March 1978 until his passing.

Over the course of his career he contributed to international construction projects practice through the establishment of project delivery and financing structures that ensured success for many major projects around the world. As counsel in court and arbitration he was formidable.

Jack though was more than an attorney. He was a contributor to legal education around the world and to the development of collegiate practice of construction law in the United States and elsewhere in the world. An example only was his foundation fellowship of the American College of Construction Lawyers.

I knew Jack for many years and his commitment in a variety of ways outside the law to the assistance of young people wanting to make their way in the law and to education of lawyers in parts of the world outside his home country was quite extraordinary. For many years he coached teams at the Willem C Vis Moot and regularly lectured in eastern Europe and Russia to local practitioners to bring to them an international perspective of the practice to which they aspired.

Jack was a runner of some note, who during his life maintained a fitness regime that was the envy of his friends. His expertise in, and love of, beer was legendary.

In recent times, Jack undertook a significant amount of work as an arbitrator and it has been my privilege to sit with him in that role. His experience of practice around the world equipped him well to decide disputes in the international construction context and his capacity for incisively cutting to the chase on the key issues in complex cases was awe-inspiring.

In a case recently concluded I worked with Jack in hearings during the period in which he was undergoing some quite significant medical procedures. His cheerful acceptance of what for many would be regarded as seriously debilitating effects of surgery and other treatment was inspiring to those of us who were working with him. His mind remained sharp until the end and in very recent times his dedication to the conclusion of issues in the case was remarkable, his work insightful and his judgement impeccable. Upon recent news of the return of his illness, he faced the position with courage and amazing good humour.

We have lost a giant of the construction law industry, who will remain a legend to all who knew him.

It has been our privilege to have Jack as a Fellow and mine to have him as a colleague and a friend.

He will be missed by all of us, but not nearly as much as by Rufus and the family. At this time all our thoughts and prayers are with Rufus and the children and grandchildren with whom doubtless the memories of Jack's personality and contribution to their lives will remain strong forever.

Chapter 14

QATAR

Andrew Jones, Zaher Nammour, Niall Clancy and Peter Motti[1]

I INTRODUCTION

Qatar is a small peninsular country on the west side of the Gulf, with a population of around 2.76 million.[2] The country is primarily comprised of economic migrants – Qatari citizens make up only 11.6 per cent of the total population.[3] Although it has lost its mantle as the country with the highest net migration in the world to the third highest this year,[4] its average population growth of 1.95 per cent[5] is still expected to continue as a result of these high migration levels. Qatar's economy has also continued to grow despite the new geopolitical context in the Gulf Cooperation Council (GCC) and it is likely that Qatar's economy will only continue to do so for the foreseeable future.

As a result of its economic success, and its commitment to hosting the 2022 FIFA World Cup, Qatar is undertaking an impressive array of infrastructure and industrial projects. The current Emir (in power since July 2013) is continuing to focus on the country's domestic welfare through implementing the Second National Development Strategy. Launched in March 2018, it sets national priorities aimed at transforming Qatar into a knowledge-based economy through infrastructure investments, economic diversification, private sector development, natural resources management, human development, sustainable social development and sustainable environmental development.[6] This strategy is being driven by expectations of growth for the real economy through activities within the non-oil and gas sector, especially in the areas of merchandise and traded services. There will be rationalisation of government spending to balance the public financial status of Qatar and it is hoped this will facilitate the creation of a wider space for private sector activities.[7] These projects will be funded to some extent by government surpluses generated through Qatar's extensive liquefied natural gas (LNG), oil, gas and petrochemical exports. While Qatar has managed to achieve

1 Andrew Jones and Zaher Nammour are partners and Niall Clancy and Peter Motti are senior associates at Dentons in Doha.
2 Ministry of Development Planning and Statistics, monthly figures on population, March 2019.
3 CIA World Factbook, updated 21 March 2019.
4 ibid.
5 ibid.
6 'New plan focuses on self-sufficiency, sustainable growth', *Gulf Times*, 14 March 2018 (https://www.gulf-times.com/story/585157/New-plan-focuses-on-self-sufficiency-sustainable-growth).
7 ibid.

its impressive growth (including having the second-highest gross domestic product (GDP) per capita in the world)[8] primarily because of having the third-largest natural gas reserves in the world, it is now planning on diversifying its economy to ensure its growth is sustained.

II THE YEAR IN REVIEW

It would be remiss to review Qatar's economic strength without considering its levels of hydrocarbon production, which remain strong and the significant definer of the country's economy. Although there was a slight contraction in the hydrocarbon sector of 0.7 per cent in 2017[9] as a result of output cuts by the Organization of the Petroleum Exporting Countries (OPEC) and maintenance on LNG trains, this has been offset by growth in the non-hydrocarbon sectors, which grew by 3.8 per cent.[10] This is primarily because of Qatar's continued expansion of its construction, transport, communication and finance industries.

While reduction in hydrocarbon growth is mostly attributable to OPEC's output cuts, after the discovery of a new field of 2.5 trillion cubic feet of natural gas in 2013, there was a general moratorium on further exploration and development in the much larger North Field (which holds approximately 900 trillion cubic feet of natural gas), further deterring hydrocarbon exploitation there. However, this moratorium was lifted in April 2017 and hydrocarbon production is predicted to increase dramatically in the coming years, with Qatar Petroleum announcing an increase of LNG production of 30 per cent by 2024.

Qatar has withdrawn from OPEC with effect from 1 January 2019 and is the first Gulf country to leave the bloc of 15 oil-producing countries. Qatar's energy minister, Saad Sherida al-Kaabi, said in December 2018: 'The withdrawal decision reflects Qatar's desire to focus its efforts on plans to develop and increase its natural gas production from 77 million tonnes per year to 100 million tonnes in the coming years.'[11] Since 2013, the amount of oil Qatar produces has declined steadily from about 728,000 barrels per day in 2013 to about 607,000 barrels per day in 2017, or just under 2 per cent of OPEC's total output.[12]

Previously Qatar successfully accumulated a substantial buffer to prevent its economy from suffering and it has expressed a desire to develop its economy sustainably by increasing its production in sectors other than hydrocarbons. However, in addition to this, it is aiming to increase production of oil to maximise profit, with forecasts estimating that Qatar will achieve production of around 608,000 barrels per day this year and trending to around 600,000 barrels per day by 2020.[13]

The slowdown of hydrocarbon growth is attributable to the large expansion of extraction and the processing of these resources coming to an end. This is part of the evolution of Qatar's hydrocarbon sector, as it moves from a phase of expansion into one of mature stability and lower growth. This is something that has been articulated in the Second National Development Strategy as Qatar aims to move to a less volatile and more

8 ibid.

9 'Qatar Economic Insight', Qatar National Bank [QNB] report dated September 2018 (access via https://www.qnb.com/cs/Satellite/QNBQatar/en_QA/InvestorReln/Publications/enEconomicInsightReports).

10 ibid.

11 'Qatar to withdraw from OPEC in January 2019', *Al Jazeera*, 3 December 2018

12 'Qatar to withdraw from OPEC in January 2019', *Gulf Times*, 3 December 2018 (https://www.gulf-times.com/story/615037/Qatar-to-withdraw-from-Opec-in-January-2019).

13 See https://tradingeconomics.com.

sustainable economy. Although this is the long-term ambition and Qatar has reduced the rate of growth of its LNG exports in previous years, it also wants to ensure that revenue from these industries remains as high as possible so as to continue developing infrastructure for the World Cup in 2022 and to meet Qatar's National Vision by 2030.[14]

Growth in manufacturing, construction and financial services has pushed up the non-hydrocarbon sectors, which now account for just over half of Qatar's nominal GDP.[15] Hydrocarbons account for 80 per cent of export earnings and 90 per cent of government revenues are derived from oil and gas.[16] Although much of the impetus and investment in infrastructure has been led by central government, Qatar is seeking to attract more private investment in forthcoming years, as shown in the Second Qatar National Strategy.

With regard to national debt, Qatar's government debt to GDP has decreased from 56.5 per cent in 2016 to 48.4 per cent in 2018. Further, the fiscal deficit narrowed to 1.6 per cent of GDP in 2017 from 4.7 per cent in 2016.[17] The fall reflects government expenditure restraints in the face of slowing revenue growth.[18]

In a statement regarding Qatar's 2018 budget, the Minister of Finance confirmed that the budget allocated to major projects in Qatar increased by 2.4 per cent from the budget plan for 2017, to US$55.8 billion.[19] This is to ensure the implementation of development projects, which mainly revolve around health, education and transport.[20] Allocations for the health sector were 22.7 billion Qatari riyals, representing 11.2 per cent of the total expenditure in 2018,[21] whereas the education sector had an allocation of 19 billion Qatari riyals in the 2018 budget, up by 19 per cent compared with 2017. However, transport continues to be the most significant sector in public projects, with allocations of 42 billion Qatari riyals (21 per cent of total expenditure). In the 2019 budget, revenues are expected to surge by 21 per cent and 48 billion Qatari riyals are earmarked for the award of new projects unrelated to the non-oil sector.

The main public projects that the government is currently undertaking include:

a Sports sector and 2022 FIFA World Cup stadiums: construction costs to amount to between US$8 billion and US$10 billion. In addition, up to US$200 billion is being spent on wider infrastructure required to host the 2022 World Cup. This is primarily focused on the completion of stadiums in Lusail, Qatar Foundation, Al Rayyan, Al Wakrah and Al Khor in addition to other sport projects. Qatar completed the Khalifa International Stadium, its first stadium, in May 2017;

b Qatar Integrated Rail: a new US$40 billion railway and metro system, including urban metro, high-speed passenger railway and freight line;

14 'Qatar Economic Insight', QNB report dated December 2017 (access via https://www.qnb.com/cs/Satellite/QNBQatar/en_QA/InvestorReln/Publications/enEconomicInsightReports).

15 CIA World Factbook, updated 21 March 2019.

16 See www.worldbank.org.

17 Qatar Economic Insight', QNB report dated September 2018 (access via https://www.qnb.com/cs/Satellite/QNBQatar/en_QA/InvestorReln/Publications/enEconomicInsightReports).

18 ibid.

19 'Huge outlay for major projects in Qatar's 2018 budget', *Gulf Times*, 12 December 2017 (https://www.gulf-times.com/story/574562/Huge-outlay-for-major-projects-in-Qatar-s-2018-budget).

20 See http://www.projectqatar.com/market-insights.

21 ibid.

c Ashghal Expressway Programme: the public works authority's US$20 billion project to develop a number of major motorways to relieve traffic congestion. These include the Al Bustan Highway, Orbital Expressway, Al Rayyan–Dukhan road and the Al Khor Coastal Road;

d Ashghal Local Roads and Drainage Programme: the US$14.6 billion project under which Ashghal will complete a network of roads, drainage, utilities and related infrastructure;

e Hamad International Airport Expansion: the project budget is US$15.5 billion for an additional 400,000 square metre extension of the existing airport terminal;

f Lusail City Development: a residential and commercial waterfront development valued at US$45 billion;

g Msheireb Downtown Doha Regeneration: a project valued at US$4.5 billion. Msheireb will be the first fully sustainable downtown regeneration project, conserving yet modernising the historical downtown of Doha in a mixed-use development;

h New Port: design and construction of food security facilities and warehouses valued at US$439 billion;

i Bul Hanine Oilfield Redevelopment: the US$11 billion Qatar Petroleum project to boost crude oil production in Qatar through new facilities expected to double the capacity of the oil field;

j Barzan Gas Development: the US$10.3 billion Ras Gas project to increase gas supply to the domestic market; and

k Kahramaa Solar Photovoltaic Power Plant independent power producer with a net capacity of 500 megawatts.

Of these projects, Qatar Integrated Rail is perhaps the most significant, in terms of its size both financially and from an engineering perspective. It is understood to be one of the largest civil engineering projects under way in the world, using 21 of the world's largest tunnel boring machines on its underground metro development. Eleven multibillion-dollar contracts had been awarded by 2014 for the design and construction of the tunnels and stations of the initial phase of the Doha Metro. These contracts will see the construction of the first 103 kilometres of the railway.[22] The metro system will be built in two phases: the first will see the construction of three of the four lines (Red, Gold and Green) and 37 stations.[23] These lines are expected to be open to the public by 2020.[24] The future phases involve the introduction of an additional line (Blue) and the expansion of the existing ones, with more than 60 additional stations. The first expansion is due to be completed by 2026.[25]

The Lusail Light Railway is scheduled for completion in 2020.[26] In conjunction with these major civil engineering contracts, Qatar Rail issued invitations to tender for the delivery of all rolling stock, signalling, track and all associated systems required for the initial phase of the Doha Metro. On 1 February 2016, a contract was awarded to a consortium of Mitsubishi

22 See www.qr.com.qa.
23 ibid.
24 ibid.
25 ibid.
26 See www.qdvc.com.

Heavy Industries, Mitsubishi Corporation, Hitachi, Kinki Sharyo and Thales for the turnkey construction of a fully automated driverless metro system and for a 20-year maintenance commitment.

All these projects are being funded directly or indirectly by the government. However, it is possible that project financing may play a greater role in the near future. Discussions about Qatar's plan to enact a new law to facilitate the use of public-private partnerships (PPPs) are continuing. It is possible that this move has been prompted by the enactment of new PPP legislation in Dubai in November 2015. Qatar has announced tenders for the development of eight new schools (by Ashghal, the Qatari public works authority) following the PPP model. Expressions of interest were submitted by developers or investors (or both) in Q1 2019.

The remainder of this chapter concentrates on forthcoming government-funded projects rather than project financing.

The deadlines for delivery of many of the projects referred to above were set in December 2010, when Qatar succeeded in its bid to host the 2022 FIFA World Cup. Most of this infrastructure is promised and necessary for that event. Meeting the deadlines will be very challenging. However, the projects relating to the health and education sectors are part of the Qatar National Strategy, which aims for a greater standard of living for its citizens while maintaining the importance of sustainability.

The deadline of 2022 is fast approaching, and the pressure is certainly on, given that there is now simply less time in which to complete the projects called for by the FIFA World Cup. The public organisations responsible for delivery of the key projects – notably Qatar Rail and the Supreme Committee for Legacy and Delivery – are now established and took appropriate steps to secure relevant powers and governance. For instance, the former Minister of Municipality and Urban Planning issued a number of decisions[27] and a new law was promulgated, enabling Qatar Rail to acquire land and carry out tunnelling. There has also been a Council of Ministers Decision concerning Ashghal and new safety laws relating to the Civil Defence Department. These bodies and the other key infrastructure participants for new projects (a new port authority, Ashghal and Kahramaa (the state water and electricity company)) have been engaged in construction since the beginning of 2014.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

Apart from conventional project finance in the oil, gas, independent water and power production and petrochemical sectors, there has been no private finance of infrastructure in Qatar – for example, in transport, waste-water or social infrastructure. However, as mentioned in Section II, if planned legislation is introduced to regulate PPPs, it is possible that there will be greater use of private financing. Previous failed attempts to introduce private finance into rail, road, port and water projects in Saudi Arabia, Abu Dhabi and Jordan provide salutary reminders of the difficulties posed by the additional complexity of risk allocation and documentation (and other factors). Nevertheless, successful PPP projects in the GCC have demonstrated that this vehicle is a viable option. Following the completion

27 The Ministry of Municipality and Urban Planning became the Ministry of Municipality and Environment on 27 January 2016 as a result of Emiri Decision No. 5 of 2016.

of the Madinah Airport PPP project in Saudi Arabia in 2015 (one of the first of its type in Saudi Arabia) and with new PPP projects in the rest of the GCC being tendered almost every week, there is an abundance of precedent models for PPP structures in the region.[28] To this end build-operate-transfer procurement, or longer term design-build-operate contracts, are under serious consideration in Qatar and may be used for limited categories of infrastructure, such as waste-water treatment plants. Although access to private capital is unlikely to be a driving factor, it could provide benefits through more efficient and economical procurement and operation. Up to now, almost all publicly funded procurement has been on the basis of the project owner appointing design consultants and issuing design to construction-only contractors. Design-build is the exception.

Ashghal has announced the development of eight new schools, which will be procured on the PPP model. More PPP projects are expected to be announced by Ashghal as part of its PPP programme.

ii Documentation

Documentation outside project financing is conventional and makes use of standard forms of construction contracts and consultants' appointments. Qatar Petroleum has historically been the repository for project management expertise in Qatar. It has sometimes managed projects on behalf of other public bodies, such as Qatar Foundation, and has used its own standard documents on those projects. For flagship buildings, for which architectural design and innovation are paramount (rather than functional performance), this has had mixed results. In 2009, Qatar Petroleum joined forces with Qatar Foundation to establish a joint venture separate project management arm called Astad Project Management. Ashghal has its own standard documentation.

International Federation of Consulting Engineers (FIDIC) forms of contract are becoming more widely used. In April 2012, tender invitation documents were issued by the Qatar Rail Company to pre-qualified consortiums for the first four large tunnelling contracts and one railway station contract for the new Doha Metro. Four of these packages have already been awarded. Further invitations to tender have been sent out for the procurement of all relevant systems required to operate the Doha Metro, including rolling stock, signalling, telecommunications, power and track works. All these contracts will be based on a bespoke design-build form of contract that Qatar Rail has developed, based on the 1999 FIDIC Yellow Book.

In the past, the quality of contract documentation has frequently not been as high as might be expected given the size and complexity of the projects undertaken.

The NEC contract is not used, neither are the UK JCT contracts.

iii Delivery methods and standard forms

In both the public and private sectors, attitudes to contracting are generally traditional, and long-term relationships and trust do not have a major role. There is some cynicism among international bidders as to the relative importance of quality and price in the evaluation of contractors' tenders.

28 'PPP laws in the Gulf – on the agenda', June 2016 publication, Norton Rose Fulbright (https://www.nortonrosefulbright.com/en/knowledge/publications/db04cc14/ppp-laws-in-the-gulf---on-the-agenda).

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

The prevailing approach by owners tends to be to maximise risk transfer to contractors (and consultants). It is common for the risk of unforeseen ground conditions to be placed on contractors, and sometimes for change-in-law risk to be transferred to the contractor. Risk of increases in the price of materials is expected to be borne by contractors as are delays caused by a scarcity of materials or delays in approval procedures and import procedures. An economic boom followed by a contraction of the regional construction market led to key material prices rising and falling dramatically, which caused considerable difficulties. With the anticipated boom in construction activity in Qatar, headline inflation was 2.7 per cent in 2016, compared with 1.7 per cent in 2015. Inflation slowed to 0.4 per cent throughout 2017 and remained subdued in 2018. A blockade from other GCC nations caused food prices to increase by 3.9 per cent from June 2017 to November 2017, resulting in Qatar having to import food from further afield. However, there was deflation in house prices by an average of 2.8 per cent owing to the increasing amount of accommodation becoming available in preparation for the World Cup.

Significantly higher inflation is likely in 2019, with the expected introduction of VAT by Q2, at a rate of 5 per cent, mainly on clothes, other durable goods and non-essential services.[29]

Generally speaking, Qatar should be considered a high-risk environment for contractors. Those who enter into fixed-price lump-sum contracts are expected to stick to the fixed price, with a reluctance to recognise rights to compensation for delays caused by variations, late or inadequate design or information issues, late site access or late payment (the latter being common).

ii Limitation of liability

Generally under Qatar law, parties enjoy freedom of contract. Express terms that either exclude, cap or estimate damages will in most cases be binding and enforceable between the parties. Some exceptions to this include the following:

a Liability resulting from deceit or gross mistake, which, under Article 259 of Law No. 22 of 2004 (the Civil Law), cannot be limited or excluded (except in the case of deceit or gross mistake on the part of subcontractors).

b It is not permissible to exclude liability arising in respect of future unjust acts (very broadly corresponding to *acte illicite* or tort).

c Decennial liability under Article 711 of the Civil Law is a joint guarantee imposed on a contractor and architect for 10 years against 'the total or partial collapse or fault in the buildings . . . or fixed constructions . . . and this guarantee shall cover whatever defects shall appear . . . which threaten its sturdiness and safety'. Liability under Article 711 cannot be excluded or limited.

d Under Article 171(2) of the Civil Law, a court or arbitral tribunal may, after weighing up the interests of the parties, reduce an 'exhausting' contractual obligation to 'a reasonable margin' if:

29 'Qatar Economic Insight', QNB report dated September 2018 (access via https://www.qnb.com/cs/Satellite/QNBQatar/en_QA/InvestorReln/Publications/enEconomicInsightReports).

- 'public exceptional incidents' occur that could not have been expected; and
- the occurrence of them makes fulfilment of the contractual obligation 'though not impossible, exhausting to the debtor and threatens him with grave loss'.

This provision may not be excluded by agreement.

e Under Article 266 of the Civil Law, if damages are estimated or liquidated, the agreed amount may not be due if the debtor can show that no loss has been suffered by the creditor; or the level of the agreed damages was 'exaggerated to a high degree'; or the obligation has been partially performed. In that case, the court or arbitral tribunal may reduce the compensation due. Article 266 may not be excluded by agreement.

Liability for liquidated damages for delay is often capped at between 5 and 10 per cent of the contract price. Overall contractual liability is often capped, depending upon the nature of the work, at between 100 and 200 per cent of the contract price. Examples of liabilities that are commonly excluded from the agreed overall liability cap include indemnities relating to intellectual property rights, liabilities recovered by the party in breach under insurance policies, liability for death and personal injury, and sometimes property damage.

Liquidated damages are commonly applied for delay in completion of work under contracts for both contractors and consultants. It is becoming common for employers to seek to impose liquidated damages upon consultants for failing to mobilise and maintain key personnel.

Force majeure provisions are common in contracts and are generally enforceable. Unclear drafting often makes it difficult to establish with any certainty the effect of the clause in specific cases. Article 171 of the Civil Law is also relevant in relation to force majeure situations. Article 258 of the Civil Law allows the parties to agree that the debtor will be liable for the consequences of force majeure. Accordingly, if a contract term places this risk on a party, it will generally be enforceable, subject to Article 171.

iii Political risks

Despite the current geopolitical context in the GCC, progress on Qatar's current construction projects has continued. In mid 2017, Saudi Arabia, the United Arab Emirates, Egypt and Bahrain elected to begin a blockade against Qatar. As a result of this, Qatar's existing alliances with trading partners (e.g., Turkey and Oman) have been strengthened. This boosted import levels to pre-blockade levels by August 2017.[30] Despite the blockade, the economy grew by 1.6 per cent in 2017.[31]

Despite the inevitable challenges of the blockade, with Qatar's newly established trading partners and routes, Qatar remains in a strong position for the World Cup in 2022. That said, long-term project finance lenders have been more cautious. Qatar's long-term debt presently has a credit rating of AA3 from Moody's (a decline from a rating of AA2 in March 2016).[32] Standard & Poor's has also maintained Qatar's AA-/A-1+ short-term foreign and local currency sovereign credit rating.[33]

30 'Qatar Economic Insight', QNB report dated December 2017 (access via https://www.qnb.com/cs/Satellite/QNBQatar/en_QA/InvestorReln/Publications/enEconomicInsightReports).

31 'Qatar Economic Insight', QNB report dated September 2018 (access via https://www.qnb.com/cs/Satellite/QNBQatar/en_QA/InvestorReln/Publications/enEconomicInsightReports).

32 See www.moodys.com.

33 See www.standardandpoors.com.

Article 27 of the Qatari Constitution states: 'Private property is inviolable; and no one shall be deprived of his property save by reason of public benefit and in the cases prescribed by the Law and in the manner stated therein provided that the person concerned is fairly compensated.'

The Qatari riyal is freely convertible and its value is pegged to a fixed rate of exchange with the US dollar. Corporate borrowings from banks licensed by the Qatar Central Bank are required to be guaranteed by the borrowing company's shareholders, except in the case of public companies or if the Qatar Central Bank specifically waives this requirement. If banks fund private development, lenders will also take traditional mortgage security or, if this is legally not possible, lenders will typically take an assignment of contractual rights. This happens, for example, when a borrower's legal interest in land that is being developed cannot be registered until the development is completed physically.

V BONDS

Public sector bodies are governed by Law No. 24 of 2015 Regulating Tenders and Bids, as amended by Law No. 18 of 2018. The new law aims to streamline and standardise the public procurement process by introducing clear guidelines to be implemented by each tender committee.[34]

Under this Law, public sector bodies are required, inter alia, to obtain tender bonds from bidders, payable on demand. Project owners commonly require from contractors (and consequently, contractors commonly require from subcontractors) on-demand performance bonds of no more than 10 per cent of the contract price. Advance payments are common and are made against on-demand bank guarantees. Also commonly required as security for performance of construction contracts are retentions of up to 10 per cent and robust forms of parent company guarantees. Collateral warranties, whether from main contractors and consultants in favour of end users, or from subcontractors and sub-consultants, are not common in the Qatar market and are seen as onerous by contractors and consultants. There are signs, however, of increasing expectations for these.

VI ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Insolvency is mainly dealt with in Law No. 27 of 2006, as amended by Law No. 7 of 2010 (the Commercial Law): the relevant provisions can be found under Title Six entitled 'Bankruptcy and Preventive Conciliation'. The following is an indicative list of other provisions that govern insolvency and preferential claims:

a the Civil Law;

b Law No. 11 of 2015 – the New Commercial Companies Law;

c Law No. 14 of 2004 (as amended by Decree-Law No. 22 of 2007, Law No. 6 of 2009; Law No. 3 of 2014; and Law No. 1 of 2015) – the Labour Law; and

d Law No. 40 of 2002 – the Customs Law.

34 See https://qatarlaw.com/qatar-new-tenders-and-auctions-law/.

Qatar's insolvency law provides that any contracts executed by a company prior to declaration of bankruptcy remain valid, unless they are contracts for personal services. This being the case, a contractual provision allowing an employer, in the event of the contractor's bankruptcy, to terminate the contract for contractor's default and complete the work itself will be valid.

VII SOCIO-ENVIRONMENTAL ISSUES

It is not possible to provide an exhaustive list of regulations and legislation that would affect projects. The following is therefore a general and selective commentary on some matters likely to affect publicly funded building projects:

a all entities carrying on business in Qatar must be properly registered with the Ministry of Economy and Commerce. Foreign ownership of companies is regulated;
b planning permission from the municipality;
c preliminary approval by the relevant municipality to open a file;
d fire safety clearance from the Civil Defence Department (CDD);
e clearance for road design and access from the Road Construction Department at the Ministry of Municipality and Urban Planning (MMUP);
f clearance for power and water service delivery from Kahramaa;
g clearance for telecommunications service delivery from Ooredoo (formerly QTel);
h clearance from the Building Permit Department of the MMUP;
i final building permit approval from the municipality;
j submitting a public announcement of the construction project at the municipality;
k fire safety approval from the CDD;
l certificate of completion from the municipality; and
m registration of the building at the municipality.

Engineering-related activities in Qatar are regulated by Law No. 19 of 2005 (the Engineering Law) and the executive regulations made under it. Engineering is widely defined and includes architecture, civil, electro-mechanical, mining, quantity surveying services and project management activities. Each person or firm performing engineering work in Qatar must obtain a licence from the Engineering Committee of the MMUP. The requirements to obtain a licence are extensive and usually take a long time to satisfy. In some circumstances, an exemption from the requirement to hold a licence may be granted to non-Qatari persons or organisations. An update to this law was passed in January 2014 (Law No. 2 of 2014), which amended some provisions of Law No. 19 of 2005 regarding the practice of the engineering profession. These changes do not amend the substantive requirement for engineers to obtain a licence before practising in Qatar or indeed any changes to the registration process, but amend (1) the length of validity of individual engineers' licences and (2) the make-up of the committee that approves the registration of engineers and engineering firms in Qatar.

i Environmental issues

The Supreme Council for Environment and Natural Reserves and the Ministry of the Environment are the competent authorities for environmental protection matters. There are a number of environmental laws, of which the following are the most relevant:

a Law No. 30 of 2002 – Law of Environment Protection and the executive regulations made under it. These provide that all plans for public or private development projects must be submitted to the authorities for approval.

b Law No. 4 of 1983 (as amended) concerning Exploitation and Protection of Aquatic Life in Qatar. This prohibits certain harmful discharges into internal waters without approval.

c Law No. 8 of 2017 regulating maritime business in the water of the State of Qatar provides that both Qatari and non-Qatari ships may not engage in maritime business in Qatari waters unless they have obtained a licence from the competent department in accordance with the provisions of this law.

Environmental protection is gaining more importance in Qatar and the role of the environmental authorities is expanding, especially in the approval process of construction projects. Environmental impact assessments may be required for some projects.

Sustainable development is also gaining increasing attention. Several projects are aiming to meet sustainable standards, such as the central Doha regeneration project for Msheireb Properties. The importance of sustainability was further expressed within the National Development Strategy for 2018–2022. This sets out plans for more food to be produced domestically and for optimising hydrocarbon sources to maximise their economic and strategic value to the nation. There is coupled with an intention to be more environmentally friendly with a smaller carbon footprint. The plan also includes increasing renewable energy sources, for example, through the issuing of Decree No. 19 of 2018 for Qatar General Electricity and Water Corporation to allocate land for a solar power plant.

ii Labour laws

An employer must obtain permission from the Recruitment Committee at the Labour Department of the Ministry of Labour and Social Affairs to employ foreign employees. Once obtained, the employer must apply for a work visa so that the employee may enter Qatar. Within seven days of the employee's arrival in Qatar, the residence permit procedure must be commenced so that an employee may work and reside in Qatar. The permit will have to be renewed periodically during the course of the employment in Qatar.

The vast majority of employees in Qatar, particularly those engaged in connection with the construction industry, are subject to the Labour Law. One of the few exceptions is employees of government entities, who are instead subject to Law No. 15 of 2016 (the Human Resources Law).

Although not strictly a labour law, Law No. 21 of 2015 (essentially, the Residency Law) is also relevant in relation to employee residency arrangements. This applies to all non-Qatari nationals working and residing in Qatar, aside from those working under the auspices of the Qatar Financial Centre (see Section X). Law No. 21 of 2015 came into force one year after being published in the Official Gazette on 27 October 2015, replacing the existing sponsorship system in favour of a contract-based one that gives expatriates more freedom to change jobs in Qatar. Previously, if an employee was unable to get a no-objection certificate from their sponsor while attempting a job transfer, he or she would be banned from the country for a period of two years before being able to come back in search of new employment. Articles 20 and 22 of the Residency Law allow employees who have completed their contracts to seek new employment and move to another sponsor without the approval of their previous recruiter. They are also able to change jobs before their contract finishes with the approval of their recruiter, the Ministry of Interior (MOI) and the Ministry of Labour and Social Affairs (MOLSA). However, employees with open-ended contracts are able to seek approval for a change of job after five years of employment. Nonetheless, if a company ceases to exist, the recruiter dies or the recruiter and the employee are involved a legal battle with each other, the employee is able to move to another recruiter after receiving permission from the MOI and the MOLSA. The existing exit permit system has been replaced, allowing expatriates to freely leave the country without obtaining their employer's permission. Additionally, the penalty for withholding employees' passports will be increased from 10,000 to 25,000 Qatari riyals.

Law No. 13 of 2017 amends certain provisions of the Labour Law and Law No. 13 of 1990 (the Civil and Commercial Procedures). The 2017 Law sets out a specific procedure for an employee to appeal a penalty imposed by an employer before the Committee for the Settlement of Labour Disputes. Disputes between employee and employer are also regulated under the Law.

iii Health and safety

Part 10 of the Labour Law imposes a range of health and safety-related obligations upon employers.

VIII PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

There has not been any trend towards PPP procurement as generally understood in Europe and the United States. Consideration is currently being given to the possible use of some kind of PPP-type arrangements. The most recent report on the subject was prepared for the Qatar Ministry of Economy and Finance and the Qatar Financial Centre Authority in February 2012.

There is no legislation that applies specifically to PPPs but, as mentioned above, the Ministry of Economy and Finance has announced its intention to introduce new legislation to govern PPP vehicles in Qatar. It remains to be seen whether this will prompt an upswing in the take-up of PPP arrangements, following the school PPP announced by Ashghal. In view of the very pressing deadlines for infrastructure delivery, the additional complexity of PPP arrangements and frequently prolonged negotiations prior to contract award are likely to dampen widespread use of PPP in the near future.

ii Public procurement

The principal law regulating public procurement is the Public Tenders Law (see Section V), which applies to all ministries and other government bodies and to public institutions and corporations, except as otherwise provided in the law establishing them. It does not apply to the armed forces or police in the case of confidential procurements, nor does it apply to Qatar Petroleum.

The legislation establishing publicly funded bodies may apply special procurement procedures to those bodies in place of, or in addition to, the Public Tenders Law. The laws establishing such bodies must be looked at to determine which procurement procedures apply.

Law No. 24 of 2015, as amended by Law No. 18 of 2018 (which took effect on 13 June 2016), regulates public tenders and auctions, and seeks to revamp and modernise the government contracting process by introducing competition as a method of procurement for technical works, including drawing and design. A two-stage tendering process has been instituted to assist bidders by defining the technical requirements and the scope of work. This should help secure appointments of the right contractor, agreed costs and an appropriate transfer of risk. The amended law requires relevant government employees to declare any potential conflicts of interest, direct or indirect, in any government contract to bring Qatar in line with international best practice. A dispute resolution committee hears all pre-contract disputes. This is headed by a senior judge and provides a specialised forum to resolve disputes, in relation to government contracts. The amended law applies to most government and quasi-government contracts of Qatar. It can also extend to apply to private entities in receipt of state funding. The amended law is subject to specific by-laws, which have not yet been made available by the Ministry of Finance; as a result it is difficult to predict how it will work in practice.

The Central Tenders Committee deals with tenders over 5 million Qatari riyals in value and is attached to the Ministry of Economy and Finance. As of 13 June 2016, the Local Tenders Committee processes all public tenders valued at 5 million Qatari riyals or less. The procedures are prescriptive and detailed.

IX FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Regulation of foreign ownership of Qatari companies has been mentioned but the detail is beyond the scope of this chapter.

Removal of profits and investment

There are currently no exchange control restrictions in Qatar and, subject to payment of taxes, there are no restrictions on remittances of investment returns. Under Law No. 21 of 2009 (the Income Tax Law) a withholding tax of 7 per cent was payable on interest payments made to non-residents. This has been removed by Law No. 24 of 2018 (the New Tax Law). Under the New Tax Law, a single withholding tax rate of 5 per cent now applies to payments made to non-residents for royalties and services that are performed in Qatar without a permanent establishment.[35]

X DISPUTE RESOLUTION

i Special jurisdiction

There are no specific courts or tribunals in Qatar dealing with project finance transactions or construction contracts. Disputes will be heard in the Qatari courts unless referred to arbitration or unless the Qatar Financial Centre (QFC) laws apply.

In 2005, the QFC was established under Law No. 7 of 2005, as amended (the Qatar Financial Centre Law). The QFC perhaps can best be considered as a separate jurisdiction within the state of Qatar, for businesses established in the QFC (i.e., pursuant to the specific QFC laws and regulations). To date, the QFC has had little impact on the project finance or construction sectors, as its objectives are to promote the establishment and conduct of international banking, financial services, insurance and associated businesses. The QFC has its own court, the Qatar International Court and Dispute Resolution Centre (QIC-DRC), formerly the Civil and Commercial Court of the Qatar Financial Centre. The court is staffed

35 Ernst & Young, Global Tax Alert, 17 January 2019 (https://www.ey.com/gl/en/services/tax/international-tax/alert--qatar-enacts-new-income-tax-law).

(on a visiting basis) by a number of very distinguished judges from various civil and common law jurisdictions. The Rt Hon the Lord Thomas, a former Chief Justice of England and Wales, is the current President of the QIC-DRC.

Since its establishment in 2009, few cases have been heard by the QIC-DRC. The boundaries of its jurisdiction are as yet untested. The QIC-DRC is currently promoting the use of its services, particularly for alternative dispute resolution (ADR), in the construction sector through a construction dispute resolution system known as Q-Construct, which is akin to construction adjudication in certain common law countries. So far, the public bodies now embarking on procurements have yet to show an appetite to provide in their contracts for use of services such as Q-Construct or dispute adjudication boards.

The language of the QIC-DRC may be Arabic or English and rights of audience are governed by Article 29 of the QFC Civil and Commercial Court Regulations and Procedural Rules (December 2010). The Court has extremely well-equipped modern facilities and hearings can take place by video link.

ii Arbitration and ADR

Construction contracts, particularly in the private sector, commonly provide for disputes to be resolved by arbitration. In the public sector and the oil and gas sector, some employers are willing to agree arbitration provisions, but others, such as Ashghal, are more traditional and their standard terms refer disputes to the Qatari courts. Traditionally the courts and practising lawyers have been circumspect in their view of arbitration. However, Law No. 2 of 2017 (the Arbitration Law) is a significant update to Qatar's arbitration law. Historically, lawyers have tended to regard arbitration as merely adding a tier to the bottom of the court process. However, through the introduction of the Arbitration Law, it is hoped that any lingering doubts about Qatar's approach to enforcement of arbitral awards have been removed, making arbitration a credible alternative to the local courts.

The major developments in the Arbitration Law include the following:

a arbitration agreements may be made electronically;
b authority for a public entity to arbitrate must come from the Prime Minister;
c the Ministry of Justice is to maintain a list of approved people who can act as arbitrators; and
d qualifications must be approved if parties wish to nominate an arbitrator who is not on the Ministry's list.

Public sector employers who accept arbitration provisions require Qatar to be the seat of the arbitration. This is also the norm (although not universal) in arbitration agreements between private sector bodies (e.g., between a main contractor and a subcontractor).

The International Chamber of Commerce (ICC) is the most commonly accepted international arbitration institution. The London Court of International Arbitration is occasionally an agreed choice. The Qatar International Centre for Conciliation and Arbitration operates under the auspices of the Qatar Chamber of Commerce and Industry and publishes its own rules for mediation and arbitration. The QIC-DRC also has its own procedural regulations for arbitration,[36] which apply when the QFC is the seat of arbitration.

36 Regulation No. 8 of 2005.

Apart from arbitration, the use of formal ADR is not widespread. A small number of projects have adopted FIDIC dispute adjudication boards, but others using FIDIC contracts have deleted these provisions. As noted in Section X.i, the QIC-DRC is promoting its services for ADR in the construction sector through its proposed Q-Construct scheme.

When construction disputes are referred to the courts, they are almost invariably referred by the judge to a court-appointed expert, who will investigate the facts and merits of the case and report to the judge. All proceedings in the Qatari courts are in Arabic and all documents referred to must be translated into Arabic. It would be difficult to predict with confidence the outcome of a large and complex construction dispute, heavy on documentation, as to the court's judgment and the time and costs involved.

Qatar became a signatory to the New York Convention in 2003. There have been few, if any, applications since then to enforce foreign awards. A small number of foreign awards had been enforced on other grounds prior to Qatar's accession to the Convention. However, a decision in 2014 has indicated a 'positive step towards a full recognition and enforcement of foreign awards' in the Qatari courts.[37] In this context, at a hearing in early April 2014, the Qatari Supreme Court (the highest jurisdiction of Qatar) overturned a judgment of the court of appeal that set aside an ICC arbitral award as being in violation of Qatari public policy.

XI OUTLOOK AND CONCLUSIONS

As Qatar continues to prepare for the 2022 FIFA World Cup, it is undertaking an extraordinary and ambitious programme of infrastructure development, which is almost entirely publicly funded rather than project financed. In the oil, gas, petrochemical and independent water and power plant sectors, there have been successful project financings and further development in these sectors could be expected to be project financed. When Qatar agreed to host the 2022 World Cup, it signed up to fixed deadlines for delivery of a number of major infrastructure projects. Those time limits were ambitious even in December 2010, when Qatar won the bid; since then there has been limited physical progress on a number of key projects. The coming years will be a period of great change in the built environment of Qatar and its transport systems, and one of great challenge to contractors, developers, designers, planners and logisticians. The anticipation of great opportunities has attracted keen interest from international contractors. Ensuring contracts have a successful financial outcome for those participants will, as ever, need skill and patience in navigating the risks involved.

37 Kluwer Arbitration Blog, 'A Halftone Application of the New York Convention by the Qatari Supreme Court', by Minas Khatchadourian, posted 14 April 2014.

Appendix 1

ABOUT THE AUTHORS

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Niall has particular strength in the resolution of construction and engineering disputes, having successfully represented clients in high-value and complex international arbitrations.

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