DOWN UNDER – GETTING TO THE BOTTOM OF SUBMARINE CABLE PROJECTS IN AUSTRALIA AND THE OCEANIA REGION

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1. INTRODUCTION

Submarine cables are a vital component of Australia's telecommunications infrastructure, linking the country to the global telecommunications network and the world's digital economy. As a nation, Australia is particularly dependent on subsea cables, which carry the vast bulk of voice and data traffic in and out of the country. That dependence will only increase with the exponential growth in data generated by the internet and the manifold applications that rely on it.

There are over 200 submarine cables worldwide carrying up to 99% of internet traffic. Seven of these are connected to Australia. The main companies operating the cables are:

- Southern Cross Cable Ltd, which operates the Southern Cross Cable;
- PIPE International, which operates PPC-1;
- Telstra, which operates APNG-2 and Telstra Endeavour; and
- SingTel and Reach, which operate the SEA-ME-WE 3 cable.

In addition to these, there are further projects in the feasibility stage, progressing to contract close or under construction:[1]

- **Cables on the Perth to Singapore** route by the Nextgen Group, SubPartners and Trident. The Trident cable will provide an underwater link to Perth via Onslow, as well as to Jakarta, Indonesia and Singapore. SubPartners recently announced that its APX-West Project has switched from a project finance model to a consortium model to get the project going;[2]
- Proposals by SubPartners and Hawaiki Pty Ltd to construct cables connecting **Australia and the United States**; and

[1] https://www.telegeography.com/products/commsupdate/articles/2016/04/01/cable-compendium-a-guide-to-the-weeks-submarine-and-terrestrial-developments/

[2] Read more: http://www.itnews.com.au/news/australia-to-get-long-awaited-perth-to-singapore-subsea-cable-417567; http:/www.subtelforum.com

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- A joint venture between Telstra, Vodafone NZ and Telecom NZ to build another cable between **Australia and New Zealand**.

The number of projects is unsurprising as the growth in bandwidth requirements driven by the cloud, streaming OTT providers in Netland globalisation means that international cable capacity is at risk of becoming a bottleneck.

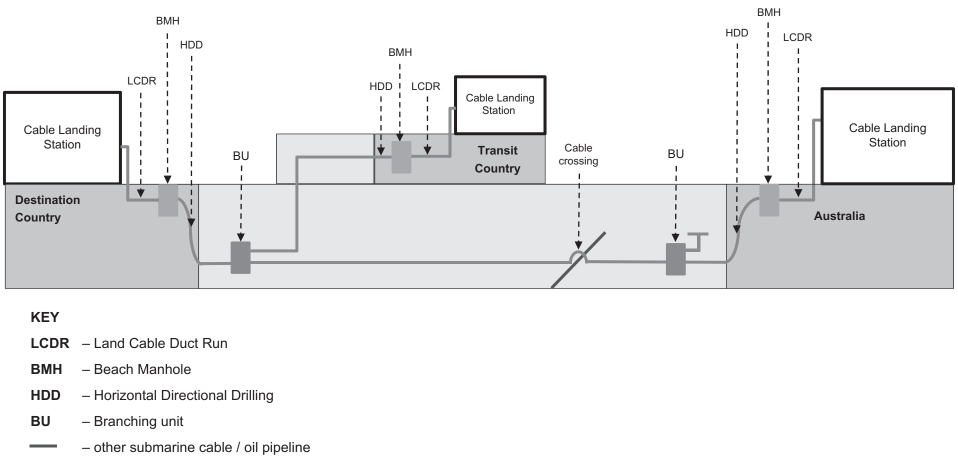
This paper focuses on the commercial arrangements and project procurement structures (including an overview of some key legal concepts) for a successful undersea cable project. It also addresses the key regulatory issues which need to be taken into account. Part 2 provides an overview of project structures. Part 3 discusses the revenue arrangements to support this type of project. Part 4 provides an overview of the project delivery issues including an overview of submarine cable laying contracts. Part 5 deals with issues in relation to rights of parties in international waters and arrangements with cable crossings. Part 6 deals with cable landing and overland permitting issues.

As the submarine cables traverse across the high seas and contracts are generally between international companies, contracts are generally governed by English or US law and a number of international treaties and conventions (such as the United Nations Convention on the Law of the Sea (UNCLOS) and the Limitation of Liability for Maritime Claims 1976, as amended by the 1996 Protocol (LLMC Convention)), which have much greater significance for these projects.

2. AN OVERVIEW OF SUBMARINE CABLE PROJECT STRUCTURES

The development of a submarine cable system is similar to the development of major infrastructure projects. However, significant commercial and legal ramifications come with the geographic scope of undersea cables and their cross-border characteristics. There are considerations such as international waters and dealing with territorial rights of various countries. Landing rights and permits must be put in place and different environmental and telecommunications regulatory regimes will need to be considered. An overview of a typical submarine cable system is illustrated below in Figure 1.

The laying of a deep sea cable system requires a high level of technical expertise and planning. It generally starts off with a desktop routing study over the seascape, avoiding deep sea trenches or troughs that cut across the ocean floor (such as the Marianas Trench, located on the western Pacific east of the Philippines, that stretches more than 2,550 km long and 69 km wide on average, with the deepest part measuring 11 km). A preliminary



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route position is produced, plotting the coordinates of the route of the intended new cable. The project owner then organises a marine cable route survey to analyse the seabed condition and identify obstacles (including other cables and pipelines).

Once the project owners are able to conclude the commercial arrangements for obtaining revenue via the IRUs[3] and financing, contracts are entered into for the manufacture and laying of the cable. Due to the specialised nature of the work and the limited number of EPC contractors in this field, the project owners will enter into an EPC contract for the manufacture and installation of the submarine cable. The contractor will organise the manufacture of the cable (including the appropriate length and type of cable and repeaters) to match the preliminary route position list, as refined by the marine cable route survey.

3. GETTING THE REVENUE – IRUS AND SUPPORTING THE FINANCING

In getting a submarine cable project up (or, more correctly, down), the project sponsors must understand how to develop and manage cable systems. This includes understanding how to:

- Select and negotiate landing, backhaul, metro fibre and interconnection rights;
- Market and sell the capacity on their cable system to their customers (or allocate it to their own use);

[3] See section 3 for details of IRUs.

- Establish and operate a network operations centre (a NOC); and
- Mitigate potential outages, whether due to earthquakes, ships' anchors or equipment failure.

A key element is getting the revenues and ensuring the project "investment grade". This involves demonstrating to financiers the viability of the project. Sponsors are generally expected to provide strong support for the project with debt-equity ratios of 50:50 (as compared to 60:40 or 70:30 for infrastructure projects).

The project owners will typically sell capacity by way of an IRU,[4] which in general terms, is an exclusive, unrestricted, and indefeasible right to use the relevant capacity (generally a certain number of channels of a given bandwidth). It is essentially a long term lease which gives rights akin to ownership and will typically last for 15 years or more. IRU fees are generally paid as a lump sum shortly after the RFS date. The capacity customer will then pay the owner an O&M (operations and maintenance) fee for the duration of the IRU term. However, this O&M fee typically will only be an amount equal to 3%–5% of the IRU fee.

The financing structure for submarine cables projects has evolved into two categories:

- Consortium model; and
- Project financing (including vendor financing).

In the first model, the project sponsors will form a consortium where generally each member provides funding for their portion of the submarine cable project and operation and maintenance of their respective portion. By way of example, Telstra and Singtel signed up to the SubPartners consortium to invest in the APX-West project.

Debt financing for a consortium project could be provided to a special purpose vehicle (SPV) established to own the cable, with recourse to the consortium members, or each consortium member could separately finance their participation in the project either on-balance sheet (especially if that consortium member is investment grade) or by way of external debt financing.

By contrast, the project financing route generally requires the sponsors to enter into IRUs with key customers to support the financial viability of the project to the financier's approval before financing is made available.

The cash flow structure creates interesting issues for sponsors and lenders to consider, as large amounts of revenue come into the project at the outset of its operational period. Naturally, sponsors would like these revenues to be distributed. However, as the debt is to be repaid over a long period of

[4] Sometimes, they are signed up in the form of a Telecommunications Services Agreement.

time, lenders will be concerned as to the project's ability to generate future revenues (by way of IRU fees) to repay the debt, especially as there is finite revenue generating capacity on the cable.

Typical benchmarks used for infrastructure projects become challenging for submarine cable projects including the tenor of the loan and standard project finance ratios such as DSCR and LLCR[5] with front-ended revenues.

Different mechanisms, such as senior debt pre-payments triggered by shareholder distributions and locked cash reserves, being included in financial ratios can help both lender and borrower reach satisfactory positions on these issues. The tenors on submarine cable projects are generally much shorter than infrastructure projects (less than five years).

Project financiers generally require anchor IRUs with strong credit ratings (such as network carriers or internet giants such as Google). With some initial capacity being pre-sold at the project commencement, sponsors generally like to preserve the ability to sell further capacity as the project progresses as they will be able to sell at a higher price (than to the anchor IRUs purchasers who pay a lower price for assuming partial development risk).

Both the project owners and project financiers tend to take a portfolio approach to managing project risk and optimising rate of returns for the project.

4. DELIVERING THE SUBMARINE CABLES – AN OVERVIEW OF SUBMARINE CABLE LAYING CONTRACTS

4.1. General considerations

Delivering a submarine cable project requires consideration of a range of project risks both onshore and offshore, legislative regimes at an international level as well as domestic regulatory frameworks where the cable lands. Risk mitigation strategies need to be put in place to deal with unforeseen or unexpected events where the work is done on the "high seas" and on the seabed.

The offshore delivery package is generally awarded to a turnkey contractor responsible for the design, manufacture, supply and installation of the sub-sea cables. There are a limited number of EPC contractors that are capable of carrying this work out. This is due to the fact that they must not only be able to manufacture the cable but must also have the fleet capability to lay the cable. Onshore delivery packages are more similar to typical construction packages, building trenches and manholes, and pulling the cables to the connection points.

[5] DSCR – Debt Service Coverage Ratio; LLCR – loan life cover ratio.

A key aspect of any submarine cable project is the project's ability to manage not just the construction aspects but also ensuring that the cable is able to deliver communications between the end points to the level required to meet the sponsors' obligations under the IRU agreements or network services agreements.

4.2. Overall project programme

A typical IRU will oblige the Project Company to meet certain conditions precedent including engaging and issuing instructions to the Offshore EPC contractor to commence the manufacture and laying of the subsea cable.

A key consideration is the overall programme agreed with the offshore EPC contractor to meet the various target dates so as to allow the Project Company to carry out the overall testing and commissioning of the whole system (onshore and offshore) and achieve the Ready for Service (RFS) date. Due to the multi-contracting structure, it is important that the programme allows sufficient contingency to meet the target dates under the IRUs. It is, therefore, important to align the extension of time entitlements under the IRUs with the Offshore EPC Contract packages.

4.3. Extensions of time

The extension of time regimes under the Offshore EPC Contract are generally more generous than those negotiated for projects carried onshore, having regard to the nature of the work and environment. A common EOT event is force majeure. As the project traverses the various oceans and is exposed to natural elements such as acts of God, cyclones, earthquakes, tsunamis and the like, that risk should be managed. This is achieved by having appropriate float contingencies and also ensuring that the Project Company is able to get similar extensions of time under its upstream IRUs, so that it is still able to meet its obligations should an extension be granted.[6]

4.4. Cable crossing interfaces

On the seabed, the submarine cable will inevitably need to cross other submarine cables (whether telecommunications or power). The risks and obligations assumed by the Project Company under those cable crossing cables will need to be addressed in the Offshore EPC Contract package. A typical cable crossing agreement will generally cover key notification periods, compliance with the other party's installation procedures, payment of counterparties' attendance costs and the provision of indemnities to cover any damage to the other parties' cable. It is not uncommon for those exposures to be up to US$50–100 million depending on the likely

[6] See section 4.7 for discussion of force majeure.

loss of revenue if the cable is damaged in the cable crossing installation process. Appropriate risk management strategies will need to be considered including passing through that risk exposure to the Offshore EPC contractor and insurance policies.

4.5. Liquidated damages regimes

Rewards will be given to the Offshore EPC contractor where certain performance standards are exceeded, often in the form of performance bonuses. Conversely, sanctions will be imposed on the Offshore EPC contractor if those standards are not met. Apart from termination of contract, the Offshore EPC Contract will often include a detailed liquidated damages and abatement regime.

When introducing a liquidated damages and abatement regime into the Offshore EPC Contract, it will be prudent to consider the issue of enforceability in light of the penalty doctrine and the different approaches to the doctrine in different jurisdictions. In Australia, the High Court in *Andrews v Australia and New Zealand Bank Group*[7] held that contractual breach is not required to engage the penalty doctrine. Rather, the doctrine can operate where a stipulation, collateral to a primary stipulation, is penal in substance. The doctrine will apply where there is a failure of that primary stipulation, and will not be dependent on whether that stipulation has been activated by a breach of contract. In applying this concept, the Full Federal Court in its decision in *Paciocco v Australian and New Zealand Banking Group*[8] held that in order to determine whether a stipulation is a penalty, it will be assessed against the greatest loss that can conceivably flow at the time the contract was entered into.

On the other hand, in English law as with other common law jurisdictions, the penalty doctrine is enlivened on a breach of contract and is accordingly more narrowly applied than in Australia. However, in assessing whether a provision is a penalty, the English Supreme Court has recently stated in *Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis*[9] that regard will be had as to whether the provision imposes a detriment on the contract-breaking party out of proportion to "any legitimate interest of the innocent party in enforcement of the primary obligation".[10] While the English Supreme Court commented that "legitimate interest" in a "straightforward damages clause" is not likely to extend beyond "compensation for the

[7] *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; [2012] 247 CLR 205; (2012) 290 ALR 595; (2012) 86 ALJR 1002; [2012] ASC 155.

[8] *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; (2015) 321 ALR 584.

[9] *Cavendish Square Holdings BV v El Makdessi; ParkingEye Ltd v Beavis* (SC) [2015] UKSC 67; [2016] BLR 1; [2016] 1 Lloyd's Rep 55, [2015] 3 WLR 1373; 162 Con LR 1.

[10] *Ibid*, paragraph 29.

breach", there is uncertainty as to the boundaries of what constitutes a "legitimate interest".[11]

The different approaches to applying the penalty doctrine will require the Project Company and the Offshore EPC contractor to structure their liquidated damages or abatement regimes in order to ensure enforceability, to the extent that the provisions give greater compensation than the loss actually sustained. Care should be taken in calculating loss for the purposes of the regimes such that the allocation of risk is fair. Further, the regimes should be drafted such that they are outside the scope of the penalty doctrine as applied in various jurisdictions.

4.6. Limitation of liability

Project companies may agree to an overall limitation range between 50 to 100% of the contract sum under an EPC contract. Insurance policy amounts are generally in addition to these monetary limitations. In addition, the exclusions to the agreed limitation amounts will often be negotiated. Common exclusions to the liability caps include liabilities arising from fraud, wilful default, abandonment of contract, breach of intellectual property warranties, breach of confidentiality obligations, death and injury to persons, damage to property, breach of privacy laws and liability that cannot be limited at law.

4.7. Exclusion of consequential loss or agreed categories of loss

The EPC contracts generally contain clauses excluding the parties' liability for certain categories of liability, such as loss of revenue and indirect and consequential loss.

Under current Australian law the term "consequential loss" or "indirect loss" should be given its ordinary and natural meaning. In *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd*[12] ("*Peerless*"), it was held that there is a distinction between:

- "normal loss", which is loss that every plaintiff in a like situation will suffer (i.e. direct loss); and
- "consequential loss", which is "anything beyond the normal measure, such as profits lost and expenses incurred through breach".[13]

Peerless has been followed in *Allianz v Waterbrook at Yowie Bay Ltd*[14] ("*Allianz*") in New South Wales, and by the South Australian Supreme Court in *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)*[15] ("*Alstom*").

[11] *Ibid*, paragraph 32.
[12] [2008] VSCA 26;(2008) 19 VR 358; (2008) 227 FLR 1.
[13] *Ibid*, paragraph 87.
[14] [2009] NSWCA 224.
[15] [2012] SASC 49.

However, in *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd (No 2)*[16] ("*Regional Power*"), the Supreme Court of Western Australia held that it is artificial to construe "consequential" or "indirect" loss with reference to the "normal measure of damages" as that term is vague and is fettered by a legal perspective. Rather, the court held that "consequential loss" should be construed commercially and emphasised that parties need to clearly define "consequential loss". In *Macmahon Mining Services Pty Ltd v Cobar Management Pty Ltd* ("*Macmahon*"),[17] the Supreme Court of New South Wales added that "consequential loss" should not be limited to the second limb of damages in *Hadley v Baxendale*.[18] Rather, the court held that "indirect loss" (which may be a substitute for "consequential loss")[19] is characterised by a causal relationship between breach and damage, as opposed to considerations of remoteness.[20] *Regional Power* was also followed in *Paterson Securities Ltd v Financial Ombudsman Service Ltd* ("*Patterson*").[21] The Supreme Court of Western Australia held that "consequential loss" and "direct and indirect loss" should be considered in the context of the particular contract rather than applying general rules developed in previous cases dealing with different contracts.

The effect of the diverging lines of decisions based on *Peerless* and *Regional Power* is that the meaning of "consequential loss" is not settled in Australia. Recent judgments have favoured construing the meaning of consequential loss on a case by case basis. This means that consequential loss exclusion clauses must be drafted with precision and clarity to ensure they are not misconstrued. When negotiating contracts, parties should carefully consider the losses for which they wish to exclude their liability. Parties should also be mindful of what their potential exposure is likely to be under the terms of any existing contracts where the expression "consequential loss" is used.

It is therefore prudent for parties to list the specific types of loss that they wish to exclude, in order to avoid uncertainty and clearly allocate risk.

The positions in England[22] and Singapore[23] are similarly unclear. An exclusion of indirect and consequential loss will not exclude loss of profits or other types of loss (such loss of revenue) where that loss is regarded

[16] [2013] WASC 356; (2013) 46 WAR 281.

[17] [2014] NSWSC 731.

[18] *Hadley v Baxendale* [1854] EWHC Exch J70; (1854) 9 ExCh 341; 156 ER 145; (1854) 9 Ex 341.

[19] Although the court noted that those terms are not exactly equivalent.

[20] In reaching this conclusion, the court considered (and approved of) Atkinson J in *Saint Line Ltd v Richardsons, Westgarth & Co Ltd* [1940] 2 KB 99 who commented that direct damage "flows naturally from the breach without other intervening cause and independently of special circumstances, while indirect damage does not so flow".

[21] [2015] WASC 321.

[22] *Croudace Construction Ltd v Cawoods Concrete Products Ltd* (CA) [1978] 2 Lloyd's Rep 55, *GB Gas Holdings Ltd v Accenture (UK) Ltd* (CA) [2010] EWCA Civ 912 at paragraphs 66–67, *McCain Foods GB Ltd v Eco-Tec (Europe) Ltd* [2011] EWHC 66 (TCC) at paragraphs 73 to 75 and *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* (CA) [2013] EWCA Civ 38.

[23] *Kay Lim Construction & Trading Pte Ltd* v *Soon Douglas (Pte) Ltd* [2012] SGHC 186.

as direct.[24] Similarly, it would be prudent to clearly identify the category of loss that the parties intend to exclude. The need for clarity in drafting has been highlighted in recent English case law, which suggests that where categories of loss are clearly identified, the courts will give effect to the parties' agreement and will be reluctant to interfere with commercial contracts made between parties of equal bargaining power.

In *Transocean Drilling UK Ltd v Providence Resources plc*,[25] at issue was the interpretation of a clause stating that the two contracting parties would hold each other harmless from their own consequential loss. In this case, the definition of consequential loss was extensive, clearly providing for a non-exhaustive list of examples of consequential loss such as loss of product, loss of use and business interruption. The court observed that "the principle of freedom of contract, which is still fundamental to our commercial law, requires the court to respect and give effect to the parties' agreement … If, as a result of incorporating several different provisions of that kind, the parties have effectively agreed to exclude any liability for damages for any breaches, it is difficult to see why the court should not give effect to their agreement".[26]

4.8. Security and parent company guarantees

It is common for project owners to require a contractor to provide parent company guarantees. As this parent company is likely to be incorporated in a foreign jurisdiction, project owners should seek to understand the counterparty risk and the location of incorporation of the parent company. In addition, it is prudent to consider the enforceability of the parent company guarantee in Australia or the foreign jurisdiction. The parent company guarantee may need to be accompanied by a legal opinion provided by that parent company's legal adviser confirming that the parent company guarantee can be enforced in the country of origin.

4.9. Dispute resolution process and enforceability of judgments stretch

In light of the multi-jurisdictional nature of the EPC contract, consideration will need to be given to the governing laws and rules for international dispute resolution. Arbitration is commonly used for dispute resolution.

It may be commercially and tactically prudent to adopt an appropriate international arbitration regime. In determining the place of arbitration, the parties need to take into account the ease of enforceability of the

[24] See *Pegler Ltd v Wang (UK) Ltd* [2000] BLR 218; [2000] EWHC Technology 137; 70 Con LR 68 and *Markerstudy Insurance Company Ltd v Endsleigh Insurance Services Ltd* [2010] EWHC 281 (Comm).

[25] [2016] EWCA Civ 372; 165 Con LR 1.

[26] *Transocean Drilling UK Ltd v Providence Resources plc* (CA) [2016] EWCA Civ 372, paragraph 28; 165 Con LR 1.

award, the neutrality and convenience of the place and the choice of the seat of arbitration. It is also prudent to have an express choice of law clause as this will allow the parties to anticipate the rules which will be applied or interpreted in the event of a dispute. It is common to incorporate, by reference, institutional rules such as the Rules of Arbitration of the International Chamber of Commerce, or the UNCITRAL Arbitration Rules. Most arbitration bodies provide standard or model arbitration clauses or agreements.[27]

Generally, international arbitral awards can be enforced in member countries who are signatories to the New York Convention.[28] Parties should, however, be wary of domestic legislation that may impact the enforcement of the arbitral award. In *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)*,[29] a European company, Traxys, was unable to enforce an arbitral award against Balaji, an Indian company, in India, because the seat was not a country which is officially gazetted by India as a New York Convention country. However, Traxys succeeded in enforcing the arbitral award in Australia, against assets which Balaji allegedly held in Australia. Parties should consider the location of the assets of a counterparty to the contract and the attitude of that jurisdiction to enforcement of international arbitral awards.

The judgments in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* ("*Castel Electronics*")[30] and *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* ("*Uganda Telecom*")[31] give greater clarity to enforcing international arbitral awards in Australia. The International Arbitration Act 1974 (Cth) confers jurisdiction on the Federal Court and State and Territory courts to enforce a "foreign award".[32] In *Castel Electronics*, the Federal Court confirmed its jurisdiction to enforce "non-foreign awards", that is, awards made in Australia, under the Judiciary Act 1903 (Cth).

In *Uganda Telecom*, the Federal Court held that there is no general discretion to refuse enforcement of a foreign arbitral award, and the public policy ground for refusal of enforcement[33] should be interpreted narrowly so as not to confer a residual discretion on the court. There was, therefore, no discretion to set the award aside on the basis of errors of fact and law in the arbitration decision.

Recent changes to the International Arbitration Act 1974 (Cth) have strengthened the role of Australian courts in supporting international

[27] For example, http://acica.org.au/acica-services/arbitration-clauses; http://www.siac.org.sg/model-clauses/siac-model-clause; http://www.hkiac.org/index.php/en/model-clauses

[28] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). As at 2013, there are 149 signatories: http://www.newyorkconvention.org/new-york-convention-countries/contracting-states

[29] [2012] FCA 276; (2012) 201 FCR 535; (2012) 291 ALR 99.

[30] [2012] FCA 1214.

[31] [2011] FCA 131; (2011) 277 ALR 415.

[32] International Arbitration Act 1974 (Cth) section 8.

[33] International Arbitration Act 1974 (Cth) section 8(7).

arbitration in Australia. The courts can better assist the parties in taking evidence for the arbitral proceedings,[34] applying confidentiality regimes unless the parties opt out,[35] or granting a stay in the arbitration proceeding.[36] The amendments, when combined with the decisions of the Federal Court in *Castel Electronics* and *Uganda Telecom*, demonstrate a commitment to increase certainty in the enforcement of foreign awards in Australia.

4.10. Title and security interest

It is important to clearly identify when both title and risk in goods pass to the owner.

Sale of goods legislation in Australia provides that ownership passes when the parties intend it to pass.[37] Payment for, delivery of, and ownership of goods are separate legal questions. Title usually passes upon the earlier of payment for, or delivery of, such items to the site (but this may be varied by the parties' express intention).

Risk and care of the goods usually belongs to the EPC contractor until "completion" or a similar concept under the contract. Alternatively, transfer of risk in goods will accompany the transfer of ownership. These issues can have significant impacts upon responsibility for care of the works and reinstatement of damage.

EPC contracts will require consideration of the application of the Personal Property Securities Act 2009 (Cth) (PPSA).[38] EPC contracts often contain security interests such as leases that meet certain threshold time periods and retention of title arrangements. Security interests need to be perfected, which is best done by registration, in order to preserve priority under the PPSA.

On the other hand, common law principles on security interests in and title to personal property continue to apply in the United Kingdom, where no overall statutory regime for the registration for security interest equivalent to the PPSA has been established. In the United Kingdom, the law concerning secured transactions is dependent on case law, supplemented by instances of statutory intervention, especially where registration is required for certain types of security interest.[39] For example, the Companies Act 1985 (UK) provides a system for registering charges given by companies in England and in Wales[40] while specialist registries exist for particular types

[34] International Arbitration Act 1974 (Cth) section 8(9).
[35] International Arbitration Act 1974 (Cth) sections 23C and 23D.
[36] International Arbitration Act 1974 (Cth) section 24(2).
[37] Sale of Goods Act 1923 (NSW) section 22.
[38] Andrew McKnight, "The reform of English law concerning secured transactions: Part 1" (2006) 21(6) *Journal of International Banking Law and Regulation* 497.
[39] Andrew McKnight, "The reform of English law concerning secured transactions: Part 1" (2006) 21(6) *Journal of International Banking Law and Regulation* 497.
[40] Andrew McKnight, "The reform of English law concerning secured transactions: Part 1" (2006) 21(6) *Journal of International Banking Law and Regulation* 497.

of assets that are subject to security interests, such as ships.[41] The law in the United Kingdom allows for security interests to arise by agreement through a pledge, contractual lien, mortgage and charge.

4.11. Vienna Convention

The United Nations Convention on Contracts for the International Sale of Goods (1980) ("Convention") applies to contracts for the sale of the goods between parties whose places of business are in different countries.

Australia is a party to the Convention[42] and all the states and territories in Australia have adopted the Convention.[43] More than 70 countries have ratified the Convention, including many of Australia's major trading partners (for example the United States, China and Japan). A significant exception is the United Kingdom.

The Convention is essentially a code for setting up a contract for sale. The parties to a contract may contract out of the application of the Convention or "derogate from or vary the effect" of any of its provisions.[44] Most EPC contracts originating from Australia contract out of the application of the Convention, as it has a largely civil law character which would alter the terms of the contract between the parties, including in respect of payment and the passing of risk. It is therefore common practice for Australian companies to contract out of the Convention to avoid its application altering the terms of the contract. Depending on the country of origin of the parties, the parties may wish to consider whether it wishes to contract out of the Convention.

4.12. Force majeure[45]

Force majeure is dealt with differently under common law and civil law jurisdictions. The common thread running through the doctrines in the various jurisdictions is that contractual non-performance will be excused if occasioned by unforeseen conditions or events materially different from the basic assumptions upon which the contract was formed.

There is no doctrine in the English common law which corresponds to the doctrine of force majeure under the French Civil Code. The common law jurisdictions generally construe a force majeure provision according to

[41] Statutory forms of mortgages for ships exist in the United Kingdom, with ship mortgages registered on the UK Ship Register, as required by the Merchant Shipping Act 1995 (UK).

[42] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

[43] Sales of Goods (Vienna Convention) Act 1986 (NSW); Sales of Goods (Vienna Convention) Act 1987 (Vic); Sales of Goods (Vienna Convention) Act 1986 (Qld); Sales of Goods (Vienna Convention) Act 1986 (WA); Sales of Goods (Vienna Convention) Act 1986 (SA); Sales of Goods (Vienna Convention) Act 1987 (Tas); Sales of Goods (Vienna Convention) Act 1987 (ACT); Sales of Goods (Vienna Convention) Act 1987 (NT).

[44] Vienna Convention, Article 6.

[45] A Chew, Force Majeure Clauses under Australian and other common law jurisdictions – Creatures of Contract, (2009) 28 *ARELJ* 399.

the intent given to it in the contract. However, in the United States, some states codify the definition of force majeure and have different tests for triggering force majeure clauses.[46] In some states, the definitions are very general, whereas other states are extremely specific in certain statutes as to what may qualify as a force majeure.

In the common law context, force majeure is a technique by which the parties may seek to contractually delay the application of the common law doctrine of frustration. Force majeure clauses operate to excuse a party from its obligation to perform if a force majeure event occurs (but only for the duration of that force majeure event). The scope and effect of a force majeure clause is a matter of construction of that clause in its particular contractual context and factual matrix.

Force majeure events can generally be divided into two groups:

(a) Natural events covering earthquakes, floods, so called "acts of God", fire and other natural disasters; and
(b) Political and special events covering such things as riots or civil disturbances, war (whether declared or not), strikes, nuclear or chemical contamination, pressure waves from devices travelling at supersonic speeds, failure of public infrastructure and terrorism.

It would be prudent to consider any additional force majeure events that may need to be included as part of the cable.

Some pertinent considerations include:

- What are the different likely force majeure scenarios (political, economic, natural) and the thresholds to trigger such an event for contractual purposes?
- Is each party to have a right to terminate the contract after a certain period of continuing force majeure?
- What is to be the contractual methodology for determining the consequences of that termination, including appropriate notice periods?
- Do all triggering events have the same impacts on contractual obligations? For example, an operational failure may warrant different relief from performance obligations to that which might be triggered from a natural force majeure event.

Different types of contracts and force majeure events may require different treatments of the consequences of force majeure.

It is important to consider the choice of governing law when entering into a contract. The definition of force majeure in the civil codes of civil law jurisdictions may be narrower than the definition in the contract.

[46] W Wright, "Force Majeure Delays" [2006] *The Construction Lawyer* (Fall). See also US Uniform Commercial Code § 2-615 – Excuse for failure of presupposed conditions.

In civil law systems, the concept of force majeure operates independently of the commercial agreement. Liability is based on a fault system. As force majeure applies to situations where the performance of the contract is substantially impossible (rather than fault), the affected party will not be liable in the event of a force majeure.

4.13. Insurance arrangements

The nature of the risks associated with submarine cable projects mean that insurance coverage is a key part of the risk management strategy in both delivering the project, and during the operating phase. Those risks include damage by natural causes such as earthquakes and subsea slides, or external sources such as ship anchors, fishing nets or even shark bites. It is common for the project owners to self-insure during the operating phase but cable repairs can cost between US$1–3 million.[47]

A key consideration is the protection that shipowners enjoy under international treaties.

Australia is a signatory to the Convention on Limitation of Liability for Maritime Claims 1976, as amended by the 1996 Protocol (LLMC Convention). It is given effect domestically by section 6 of the Limitation of Liability for Maritime Claims Act 1989 (Cth). Under the LLMC Convention, the amount that a court is able to award for maritime claims is limited. Liability for claims covered fall into two categories – those for loss of life or personal injury, and those for property claims (such as damage to other ships, property or harbour works). As a result the LLMC Convention may be relevant to insurance for damage to cables caused by shipping.

Under the LLMC Convention, the shipowner's liability limit is calculated based on the size of the ship. The liability limits set out in the LLMC Convention are:

- claims for loss of life or personal injury on ships not exceeding 2,000 gross tonnage is 3.02 million Special Drawing Rights (SDR) (plus additional amounts based on tonnage).
- property claims for ships not exceeding 2,000 gross tonnage is 1.51 million SDR (plus additional amounts based on tonnage).

Shipowners and salvors may limit their liability, except if "it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result".

[47] https://www.lloyds.com/~/media/files/news%20and%20insight/market%20magazine/2014/marketmagazinesummer2014.pdf

There are various Australian cases dealing with the LMMC Convention in relation to submarine cables, or submarine pipelines.[48]

In a recent Canadian case, *Société Telus Communications v Peracomo Inc*,[49] the Supreme Court of Canada also examined the level of fault that constitute conduct barring limitation under Article 4 of the LLMC Convention and whether the same behavior constituted wilful misconduct voiding insurance coverage under the Marine Insurance Act, SC 1993, c 22. The case involved a crab fisherman cutting a submarine cable which became entangled with his fishing gear. He cut the cable with a chain saw as he was under the mistaken belief (based on a handwritten note on some sort of map that he had briefly seen in a museum) that the cable was no longer in use.

The court told that "[i]n order to bar the benefit of the Convention's limitation on maritime liability, it must be proven that the loss resulted from an act or omission committed either with the *intent to cause such loss or recklessly and with knowledge that such loss would probably occur.*"

In that case, it was insufficient that the liable person intended to perform the act, namely cutting the cable. Rather, in order to overcome limitation, it must be proven that that person intended to cause the loss that actually resulted or had knowledge that the loss would probably occur, namely stopping communications.

4.14. Submarine Cables and Pipelines Protection Act 1963 (Cth)

The Submarine Cables and Pipelines Protection Act 1963 (Cth), which is refreshingly short, protects undersea start cables and pipelines which lie within Australia's exclusive economic zone but are not situated in a designated submarine cable protection zone (see section 5.2 below).

A person commits an offence if they engage in conduct or negligence that results in a ship registered in Australia or a Territory damaging a submarine cable in such a manner as might interrupt or obstruct communications.

Equally, if a person, in the course of laying or repairing a submarine cable or pipeline of which they are the owner, causes damage to another cable or pipeline, he or she is liable to bear the cost of repairing the damage.

5. WHAT HAPPENS UNDER THE SEA?

5.1. Rights of states – within extra-territorial waters

Submarine cables projects traverse jurisdictions of different countries and international waters. They (or the sponsors responsible for laying them and

[48] *Victrawl Pty Ltd v Telstra Corp Ltd* [1995] HCA 51; (1995) 183 CLR 595; (1995) 131 ALR 465; 69 ALJR 755, *Strong Wise Ltd v Esso Australia Resources Pty Ltd (No 2)* [2010] FCA 575; (2010) 185 FCR 237, *Qenos Pty Ltd v Ship "APL Sydney"* [2009] FCA 1090; (2009) 187 FCR 282; (2009) 260 ALR 692.

[49] 2014 SCC 29.

their contractors and subcontractors) are subject to several international treaties including the 1884 Convention for the Protection of Submarine Telegraph Cables; the 1958 Convention on the High Seas; the 1972 Convention for the Prevention of Collisions at Sea; and the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to which Australia is a signatory.[50]

UNCLOS sets out an extensive and comprehensive legal framework within which all activities in the oceans and seas must be carried out including:

- Defining the jurisdiction of member states over designated system of zones outside of the territorial seas of a nation[51] and regulates, among other things, the laying and operation of submarine cables outside of territorial seas.
- Providing rights to Member States to freely lay, repair and maintain submarine cables in their exclusive economic zones,[52] on the continental shelf[53] and on the high seas.[54] Australia has given legislative effect to UNCLOS by way of the Seas and Submerged Lands Act 1973 (Cth).
- Providing for the protection of the submarine cables on the high seas by imposing a duty on those laying submarine cables to inform owners of existing submarine cables or pipelines if cable crossing is to occur, and an obligation to negotiate the cable crossing. The coastal state may not impede the laying or maintenance of cables beyond the outer limits of the 12 nautical miles territorial sea.
- Establishing criminal and civil liability for damaging submarine cables in the high seas.[55] It requires all States to criminalise the "breaking or injury of a submarine cable", whether the offence was "done wilfully or through culpable negligence", and whether or not it resulted in an actual interruption of "telegraphic or telephonic communications". The only admissible defence for a vessel or master is to have "acted merely with the legitimate object of saving their

[50] UNCLOS came into force for Australia on 16 November 1994.

[51] UNCLOS defines a series of zones with reference to the baselines of a nation's coast. Outside of the territorial sea, which runs from the baseline out for 12 nautical miles, UNCLOS defines the Contiguous Zone, which is the, which extends a further 12 miles beyond the boundaries of the territorial sea, and the Exclusive Economic Zone (EEZ) which runs out for 200 miles from the baseline.

[52] UNCLOS Article 58 (Rights and duties of other States in the exclusive economic zone).

[53] UNCLOS Article 79 (Submarine cables and pipelines on the continental shelf).

[54] UNCLOS Article 87(c) and Article 112 (Right to lay submarine cables and pipelines). Article 87 recognises "the freedom to lay submarine cables" as a freedom of the high seas. It "shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area". Article 87 refers to Article 7 which specifies that "possibilities of repairing existing cables or pipelines shall not be prejudiced".

[55] Article 113.

lives or their ships, after having taken all necessary precautions to avoid such break or injury".

- Introducing the "first laid" rule. Cable owners who damaged another cable or pipeline while "laying or repairing" their own cable must "bear the cost of the repairs"[56] (which is why cable crossing agreements have become commonplace to manage that risk).

Under UNCLOS, submarine cable owners also enjoy extensive freedoms that are only limited by the obligation to exercise "due regard" for other users of the high seas. Although the expression appears in several provisions of UNCLOS, there is no clear definition of "due regard". It is generally understood that "due regard" requires all States, in exercising their high seas freedoms, to be aware of and consider the interests of other States in using the high seas, and to refrain from activities that interfere with the exercise by other States of the freedom of the high seas. In practical terms, "due regard" requires both notice and consultation.

However, the space in which the laying and maintaining of submarine cables had been considered a freedom of the high seas is reduced as a result of the delineation of the continental shelf beyond 200 nautical miles. The coverage of the area is similarly affected. The 1884 Convention remains in force, as amended by the 1886 Declaration on the Protection of Submarine Cables and the 1887 Protocol on the Protection of Submarine Cables. It contains some provisions such as safety distances from cable ships and repair buoys not found in UNCLOS.

5.2. Installation of cables in Australian and other Oceania waters

The matters referred to above provide a neat connection to Schedule 3A of the Telecommunications Act 1997 (Cth). Schedule 3A provides for the establishment of designated cable protection zones, where hazardous activities are strictly prohibited, and for the granting of permits to install submarine cables within (and outside) these zones. In so doing, the legislation recognises the importance of a rigorous and transparent regulatory framework for laying cables in Australian waters which is consistent with our international treaty obligations.

While it would be open to a cable sponsor to seek the declaration of a new cable protection zone, the process would be time consuming as lengthy consultation with affected parties and government departments is required. The simpler alternative is to apply to the Australian Communications and Media Authority (ACMA) for a permit to lay the cable in an existing cable protection zone of which two have been designated off the coast of Sydney and one off the coast of Perth. Details

[56] Article 1114.

of these protection zones, together with geographic coordinates, may be found at the ACMA website.[57]

It is an offence to lay an international submarine cable in Australian waters without a valid permit. [58] A permit will generally expire after 18 months so may require renewal if the installation is not completed by then.

The person who applies for the permit must be a licensed carrier or make the application on behalf of a carrier. This is unsurprising since Australian telecommunications regulation generally requires the owners of network links, such as fibre optic cables, which are used to supply public telecommunication services, to be licensed. Licences are granted by the ACMA in accordance with Part 3 of the Telecommunications Act 1997 (Cth) ("Telecommunications Act"), subject to the payment of a fee. Licence fees must comply with the Telecommunications Act and Part XIC of the Competition and Consumer Act 2010 (Cth), as well as with interception and universal service levy obligations found in related legislation.

On the plus side, possession of a permit for the installation of a cable in an international submarine cable protection zone brings significant benefits which facilitate the build. In particular, the carrier enjoys immunities from State and Territory legislation similar to those granted for land-based activities under Schedule 3 of the Telecommunications Act (discussed at section 6 below). Effectively they remove installation of cables from the normal State based planning and environmental processes and give the carrier rights to do things which may otherwise amount to a trespass. Penalties for non-compliance can be very high.

However there are some exceptions including in relation to areas of Aboriginal and Torres Strait Islander significance where the powers and immunities do not apply and caution must be exercised.[59] In addition, in exercising the powers, the carrier must take reasonable steps to avoid causing loss or damage and is liable to pay compensation if it does so.[60]

Figure 2, which can be found on the ACMA's website, below provides guidance on whether a carrier needs a permit to install a submarine cable in Australian waters and, if so, what type of permit is required. However, it should be remembered that it merely represents the regulator's view of the law, not the law itself.

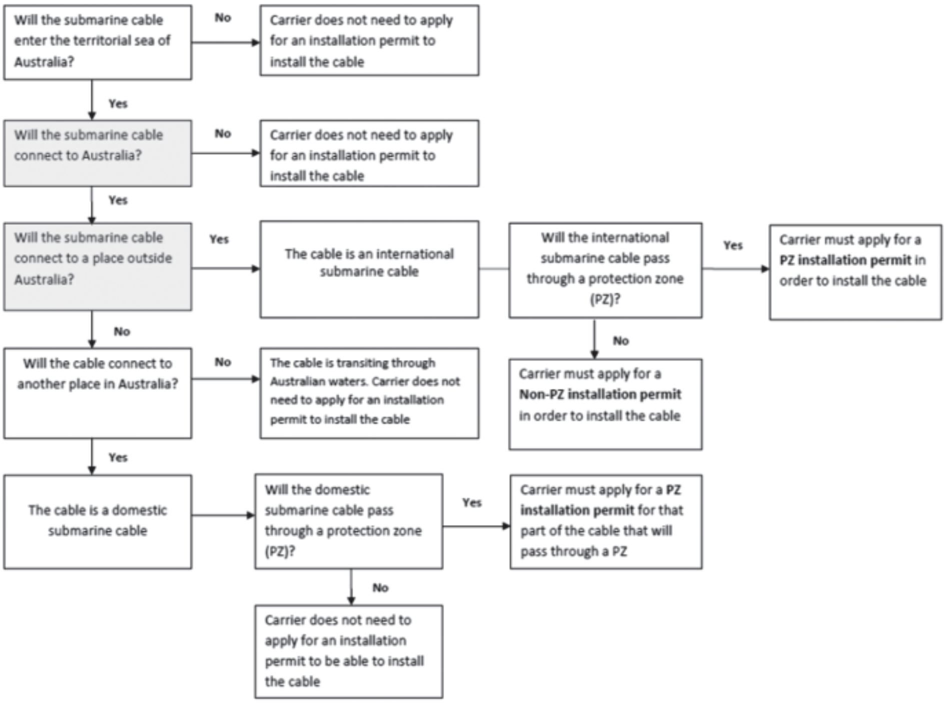
[57] http://www.acma.gov.au/Industry/Telco/Infrastructure/Submarine-cabling-and-protection-zones

[58] Part 3, Schedule 3A of the Telecommunications Act 1997 (Cth).

[59] Section 21, Schedule 3A of the Telecommunications Act 1997 (Cth).

[60] Section 38, Schedule 3A of the Telecommunications Act 1997 (Cth).

Figure 2[61]



Cable operators may also be required to notify cable owners of existing cables either inside or outside protection zones. Where the cable will cross an existing cable or pipeline, crossing agreements or approvals with the owners of the existing cables/pipelines should be obtained. Additionally, if the relevant area falls within an existing petroleum permit, cable operators may be required to seek an access permit to the area.

Depending on the precise path of the cable, other authorities or government departments may need to be consulted. These include, but are not limited to:

- the Department of Fisheries, for example, a rock lobster fishery permit may be required;
- the Port Authorities;
- the Australian Customs and Border Protection Service;
- the Department of the Environment; and
- the Department of Defence.

[61] Guide - Applying for a submarine cable installation permit (November 2015) available at: http://www.acma.gov.au/Industry/Telco/Infrastructure/Submarine-cabling-and-protection-zones/installation-permits-submarine-cable-zones-i-acma

New Zealand has a similar submarine cable protection legislation which is the Submarine Cables and Pipelines Protection Act (1996) (NZ). There are 11 cable protection zones in New Zealand.

5.3. International permits and licences

The cable sponsors also need to carefully consider the regulatory requirements in other jurisdictions the cable traverses or lands in. In some countries, such as Singapore, they are relatively transparent and well documented but in others, such as Indonesia, the position is more difficult to understand. For example the Singaporean communications regulator, the Infocom Development Authority (IDA), provides comprehensive guidance on the necessary licenses and permits for landing a cable in Singapore. These are likely to include a Facility Based Operator (FBO) licence.

However, in places such as Indonesia it may be useful (or even necessary) to partner with a domestic telecommunication operator who is familiar with local regulatory authorities and administrative requirements. The sponsors should be careful to obtain independent legal advice as the position is often opaque.

Cables going to Japan or the United States generally land at Guam. As Guam is a United States' territory, a cable landing licence is required from the Federal Communications Commission under section 1.767(a) of the US Code of Federal Regulations.[62] Applications for cable landing licences under 47 USC 34–39 and Executive Order No 10530, dated 10 May 1954, should be filed in accordance with the provisions of that Executive Order.

6. CABLES LANDING AND OVERLAND ISSUES

6.1. Carrier licence and carrier obligations

As stated above, a cable operator can only apply for a submarine cable permit if they hold a carrier licence (or nominated carrier declaration). Therefore, it is important that the carrier licence is held by the same entity that will be operating the submarine cable.

A carrier licence is also required if the operator of a submarine cable intends to be the owner of a network unit (cable or wireless facility) used to supply carriage services (such as telephone or internet) to the public unless there is a nominated carrier declaration in force in relation to the unit. A nominated carrier declaration occurs when the owner of the network unit arranges to a carrier to accept carrier–related responsibilities in relation to that unit.

[62] See also the US Code "Title 47 – Telegraphs, Telephones, and Radiotelegraphs Chapter 2 – Submarine Cable" which deals with the licencing requirements.

There are four categories of network units:

- a single link connecting two places in Australia that are at least 500 m apart;
- multiple links connecting distinct places where the aggregate distance is at least 5 km;
- a designated radio communications facility used for the supply of a carriage service between two points in Australia; and
- any facility determined by a Ministerial determination.

Thus, even if the wet segment of the cable does not require a licence, the section from the beach manhole to the cable landing station is likely to do so. Obviously a licence will also be required for any owned backhaul cable extending beyond the cable landing station (for example to a point of presence in the city).

6.2. Other permits, licences, agreements and notices

As set out above, under the Telecommunications Act, a carrier has the right to inspect land, install low-impact facilities and maintain telecommunications facilities. Low impact facilities include some radio communications facilities, underground and above-ground housing, underground and some aerial cables, emergency and co-located facilities. Most submarine cable landing man holes and the cables connecting the man holes to the overland telecommunication facilities should fall under the category of a low impact facility. Prior to installing a low impact facility, carriers are obliged to provide the owner or occupier of the relevant land or building with a 10-day Land Access and Activity Notice (LAAN).

Where facilities are not low impact facilities, additional permits will be required.

In addition to the above, the following may also be relevant:

- Planning approvals exemptions for low impact facilities;
- Native Title requirements;
- Any notifications to state/territory departments for transport; and
- Environmental permits such as a permit for removal of native vegetation.

THE POTENTIAL IMPACT OF FRENCH CONTRACT LAW REFORM ON THE CONSTRUCTION INDUSTRY

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From 1 October 2016, the reforms to French contract law set out in Ordinance No 2016-131 will come into force. This reform, the greatest since the Civil Code was first enacted in 1804, will affect many sectors. The construction industry, which is inherently based upon contract law, is likely to experience some impacts of the reform.

According to the former French Minister of Justice, Christiane Taubira, the reform will "clarify the principles on which the law of contract is founded, reorganise the provisions so as to render the Civil Code more readable and introduce some modifications. It is going also to permit the law of contract to be made more protective of the most vulnerable people. It is a reform guided by the will to put into the Civil Code more justice and solidarity[1]". Nevertheless, some have expressed fears that the reform may discourage foreign investors from conducting transactions under French law.

In reality, the changes brought by the reform will, for the most part, merely codify solutions conceived and applied by French courts over recent years. Indeed, until now, the development of French contract law has taken place outside the Civil Code. Some principles of contract law have been developed from doctrinal concepts, such as the distinction between obligations of means ("*obligation de moyens*") and of results ("*obligation de résultat*"). Other developments are found in other codes, for instance, the new forms of special contracts ("*contrats spéciaux*") introduced by the Construction Code. The French Cour de Cassation has itself established a number of new rules. However, the fundamental provisions of contract law laid down by the Civil Code have remained unchanged, such that the Civil Code no longer reflected the law as applied by the courts.

Since 1904, several attempts to produce a draft reform of the Civil Code have been made over the years. In 2005, an academic group published a draft bill to reform the law of obligations and limitations ("*Avant-projet de réforme du droit des obligations et de la prescription*"), paving the way for a series of other drafts. Finally, in February 2015 and after 15 months of debate, the French government obtained legislative authority from Parliament to reform the Civil Code by way of enabling legislation, which allows regulations to be

[1] Press conference by the former Minister of Justice, Christiane Taubira, on the reform of the law of contracts and of the general rules on obligations, on 25 February 2015.

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enacted into law by way of ordinance, circumventing the full Parliamentary legislative procedure. After a brief consultation period, and subsequent review by the Ministry of Justice and the Conseil d'Etat (resulting in several amendments to the initial draft), Ordinance No 2016-131 was published on 10 February 2016.

The reform illustrates a growing willingness to adapt French contract law to today's issues. By reaffirming freedom of contract as a guiding principle,[2] the reform enhances the appeal of contracting under French law. French law-makers also seem to have understood the importance of ensuring accessibility of their legal system so as to encourage parties to international commercial transactions to adopt French law. Case law and general principles will be integrated to the Civil Code so as to form a uniform body of rules, bringing more clarity for contracting parties.

The reform will have an extraterritorial scope and consequences for which professionals from many domains should be prepared. The changes implemented by the Ordinance do not deal directly with special contracts, but could well have an impact on construction contracts and consortium agreements, which are usually used in the infrastructure and energy sectors. Consortium agreements allow consortium members to regroup in order to execute contracts that they cannot or do not wish to complete by themselves due to insufficient financial standing or technical capacity. Consortium contracts are exclusively based on the law of obligations and could, as such, be affected by the key provisions of the reform. This article provides an overview of the provisions that will have the most impact on the construction industry, comparing French law concepts with common law equivalents where appropriate.

THE REMOVAL OF THE "CAUSE"

Traditionally, four elements were required under French law for a contract to be validly formed: an object, consent, capacity and a (lawful) cause.[3] The fourth element, "cause" (i.e. the reason which caused the parties to enter the contract), has always created uncertainty. For example, in a decision rendered by the French Supreme Court, the Cour de Cassation, on 8 February 2005,[4] the absence of a "cause" was grounds to strike out an

[2] Article 1102 of Ordinance No 2016-133, i.e. "*Chacun est libre de contracter ou de ne pas contracter, de choisir son cocontractant et de déterminer le contenu et la forme du contrat dans les limites fixées par la loi. La liberté contractuelle ne permet pas de déroger aux règles qui intéressent l'ordre public.*"

[3] Article 1108 of the Civil Code, i.e. "*Quatre conditions sont essentielles pour la validité d'une convention:*
Le consentement de la partie qui s'oblige;
Sa capacité de contracter;
Un objet certain qui forme la matière de l'engagement;
Une cause licite dans l'obligation."

[4] Decision of 8 February 2005, appeal no 03-10749.

exclusivity clause in a supply contract. In that case, bar owners contracted for the exclusive supply of beer by a brewery, in return for which the brewery guaranteed only 20% of a debt incurred by the owners. The business enterprise of the bar did not present a real risk, such that the exclusivity term appeared to be disproportionate to the limited guarantee offered by the brewery. The court decided that the bar owner's obligation of exclusivity was unfair due to the absence of "cause".

New Article 1128 of Ordinance No 2016-131 removes "cause" as an essential element of a valid contract. In place of this controversial concept, the reform codifies and extends a case law principle developed from this doctrine.[5] In practice, removal of the "cause" will have little impact on construction contracts based on French law as other provisions of the Ordinance will also have the same effect. For example, new Article 1170 deems null and void any clause which has the effect of purging the debtor's essential obligation of its substance.

IMPRÉVISION: REVISING THE CONTRACT IN CASE OF "UNFORESEEN CIRCUMSTANCES"

The Cour de Cassation has long refused to recognise an "unforseeability theory" ("*théorie de l'imprévision*"), insisting that a party's obligation to perform the contract is maintained even where unforeseen circumstances drastically change the price or the extent of performance required.[6] However, it permitted the possibility of relief through the principle of good faith by ruling that it is incumbent upon the party benefitting from the unforeseen circumstances to renegotiate the contract with the adversely affected party.[7] Breach of this duty was, however, sanctioned in tort, leaving the contract untouched and its performance unchanged.

On the other hand, modification or termination of public contracts on the basis of unforeseen circumstances rendering performance unduly onerous has been accepted by the Conseil d'Etat since 1916.[8]

Due to heavy criticism of the severity of the approach taken with regards to private contracts, the *théorie de l'imprévision* has been increasingly considered by private law courts[9] with the result that the theory will finally be codified in the new Civil Code. New Article 1195 of Ordinance No 2016-131 now provides a right to renegotiate the contract, upon the occurrence of circumstances which:

- were not foreseeable at the time the contract was entered into;

[5] *Chronopost*, Cour de Cassation, Chambre Commerciale, 22 October 1996, appeal no 93-18632.
[6] *Canal de Craponne*, Cour de Cassation, Chambre Civile, 6 March 1976, D. 1876, I, 193.
[7] *Huard*, Chambre Commerciale, 3 November 1992, appeal no 90-18547.
[8] *Compagnie générale d'éclairage de Bordeaux*, Conseil d'Etat, 30 March 1916, appeal no 59928.
[9] Cour de Cassation, Chambre Commerciale, 29 June 2010, appeal no 09-67.369.

- make performance of the contract excessively onerous for one party; and
- the risk of such onerous performance was not assumed by that party.

A crucial question is what constitutes "unforeseen circumstances" which will entitle a party to seek revision of the contract. One might come across some difficulties in determining their scope as economic predictability is today, very much relative. The decisions of the Cour de Cassation, however, can provide us with an indication as to what might suffice. In 2010, the Cour de Cassation considered that where a company entered into a contract under which it was to carry out maintenance work on the engines of a combined heat and power plant for a term of 12 years, unforeseen circumstances arose when the price of raw materials rose significantly over the duration of the contract, rendering replacement parts more expensive, and costing over and above what the company was being paid pursuant to the terms of the contract such that after 10 years, the company could no longer comply with its obligations under the contract.[10]

Thus, courts are likely to recognise that the occurrence of unforeseen circumstances could give rise to the right to revise the contract where there has been a drastic change in the price of raw materials. On the contrary however, a mere fluctuation in market price was held not to constitute "*unforeseen circumstances*" as it is presumed that parties have agreed to carry this risk.

The scope of the reform with regard to unforeseen circumstances is much wider than the English common law doctrine of frustration. It is not only when performance becomes impossible, illegal or changes drastically in nature that the contract may be terminated, but also when performance becomes excessively onerous.[11]

The codification of the *théorie de l'imprévision* marks a turning point in the construction industry. Some standard-form contracts, FIDIC for instance, do not at present contemplate unforeseeable circumstances which render performance uneconomical for a party, although they typically provide for "*force majeure*". Consortium agreements are likely to be affected as they are frequently subject to unforeseeable circumstances, which become particularly hard to manage due to the multilateral nature of the agreement and the divergent interests of its members. Where new circumstances render the performance of the contract excessively costly for the consortium, it seems that the representative of the consortium will be entitled to ask to renegotiate the terms of the consortium agreement. In case of refusal or failure of negotiations, new Article 1195 provides that the parties can agree

[10] For example, ICC arbitral award 8486 of 1996.

[11] This must be contrasted with the common law position found in *Davis Contractors v Fareham UDC* (HL) [1956] AC 969, where the fact that performance became more difficult was not held to be a valid ground for a finding of frustration.

to terminate the contract, or make a joint application to the courts for its modification. New Article 1195 will have the effect of encouraging the parties to renegotiate. Termination of the contract will rarely be the best solution for parties who wish to complete the project and economise time and cost.

Many have criticised the introduction of new Article 1195 as a threat to contractual certainty, the main argument being that the contract loses its binding force and certainty of performance if judges can intervene to modify its terms. According to some critics, new Article 1195 will create uncertainty and may increase litigation with regards to what constitutes "unforeseen circumstances" leading to "excessively onerous" performance.[12]

New Article 1195 could potentially undermine the owner's profit margin: where contract terms are renegotiated, the owner and contractor will have to agree on extra cost. In case of termination of the contract prior to completion of the project, re-tendering and replacement of the contractor will typically result in increased costs as well as inevitable delay.

Nonetheless, the reform's impact on construction contracts must not be overestimated as French civil courts had already taken a step towards recognising "unforeseeable circumstances" through the duty of good faith. In addition, ICC model terms and UNIDROIT principles of international commercial contracts,[13] frequently applied in the construction domain, already provide that a party who suffers unforeseeable circumstances which render its performance of the contract unduly onerous may ask to renegotiate the contract, and in case of failure to agree, request its termination or modification.

Also, it is worth mentioning that Article 1195 is not obligatory and will only apply in the absence of any contractual clause dealing with the allocation of risk in the case of unforeseen circumstances (i.e. a "hardship" clause). In civil law systems such as France, where the concept of good faith is applied, general and standard hardship clauses are generally recognised as valid by judges without much difficulty, particularly those which are precise and specific. For example, the use of a price revision clause which defines the events that trigger its application, requires good-faith renegotiation in order to achieve a specific result, specifies the mechanism according to which the price will be adjusted and which provides for recourse to a judge or arbitrator in the event of failure to agree would be enforceable and within the parties' control.

In fact, hardship clauses are almost systematically inserted into long-term contracts, including construction contracts. Such contracts should therefore remain safe from judicial intervention despite the reform. If not,

[12] Pascal Dessuet, "L'imprévision bientôt introduite en droit privé: quelles conséquences dans le domaine de la construction?", Revue générale du droit des assurances, no 4.

[13] UNIDROIT principles are established by the International Institute for the Unification of Private Law, an intergovernmental organisation founded in the aim of harmonising international private law.

parties to a construction contract or consortium agreement are advised to insert sufficiently detailed and precise hardship clauses in their contracts before the entry into force of Ordinance No 2016-133 on 1 October 2016.

ECONOMIC VIOLENCE (DURESS)

"*Violence*" in French law refers to circumstances where a party's consent was impaired. In broad terms, a common law equivalent would be the doctrine of duress, defined as illegitimate pressure, the practical effect of which compels or leaves no other practical choice for the victim and is a significant cause of the victim's decision to enter into the contract.[14]

French jurisprudence accepts the principle that consent to contract can be vitiated if a party to the contract abusively exploited the other party's situation of economic dependence.[15] Hence, it was understood that violence could emanate from economic circumstances directly affecting the party's financial interests, and not merely from a direct threat to the person. For instance, in the context of a company undergoing restructuring where an employee is threatened with redundancy, if the employer takes advantage of this situation to induce the employee into signing a new employment contract, the latter will be held to be victim of economic violence.

Article 1140 of Ordinance No 2016-133 reflects this approach, providing that: "*There is duress when one party contracts under the influence of pressure which makes him fear that his person or his wealth, or those of his near relatives, might be exposed to significant harm.*" It is widely understood that this provision seeks to codify previous case law on the matter.

In practice, French courts have actually shown some reluctance in applying the rule. For example,[16] it was held that the fact that a company was undergoing restructuring could not amount to economic violence unless it was proven that the employee would be potentially made redundant under the restructuring plan. The sole changes in the company, which created a stressful atmosphere, were not sufficient to found a claim for economic violence.

In a Cour de Cassation decision of 4 February 2015, however, a valid case of economic violence was recognised. Bouygues Immobilier and Karous entered into a contract under which Karous agreed not to pursue any legal action contesting the validity of building permits Bouygues had obtained for a project, in exchange for Karous receiving consideration of €500,000. It transpired that Karous' claims concerning the building permits were ill-founded and could never have succeeded at law. Bouygues had been

[14] *DSND Subsea Ltd v Petroleum Geo Services ASA* [2000] BLR 530; [2001] BLR 23.
[15] *Larousse*, Cour de cassation, Chambre Civile 1, 3 April 2002, appeal no 00-12932.
[16] As noted in G Loiseau, *La violence économique: du vice à la virtue,* Cahiers sociaux (1 March 2015), No 272, p 153.

beset by the urgency of the transaction for the purchase of land and the construction of costly projects and signed the agreement. The court found that given the excessively high consideration, the agreement was null and void on the grounds of economic violence.[17]

Here, the court chose to interfere with an agreement between two companies, both of significant financial standing. This suggests that the courts could equally interfere in construction contracts, irrespective of the fact that the contracting parties may be of a significant size and on a relatively equal footing. French courts have previously held that a commercial operator, like an individual, could be victim of economic violence. Indeed, both parties to a construction contract could be faced with a situation of economic duress: on the one hand, the project owner who is in charge of financial resources and on the other, the designer or contractor, who holds all the necessary technical knowledge.

The wording of new Article 1140 is broad in scope, which leaves open the possibility of wide interpretation by the courts. In practice, such circumstances of abuse could arise in the context of construction contracts, in particular in sub-contracting where economic dependence is rather frequent. However, given the reforms do not expand the principle beyond the existing case law position, it is likely to remain rarely applied.

It is worth noting that in common law, economic duress has also been applied restrictively. Courts have considered that it applied in circumstances where a party was under a crucial time constraint. For instance, in the case of *Atlas Express Ltd v Kafco (Importers & Distributors) Ltd*, the fact that higher delivery charges were forced upon the claimant right before Christmas was a factor showing that the claimant had no other choice but to sign the contract and led the High Court to recognise economic duress.[18]

FORCE MAJEURE

The provisions of Ordinance No 2016-131 on force majeure may well create some uncertainties in the context of construction contracts. New Article 1218 defines force majeure as "*an event beyond the debtor's control, which could not be have been foreseen at the time of conclusion of the contract, the effects of which cannot be prevented through appropriate measures and which prevents the performance of its obligations by the debtor*".[19] The second paragraph of Article

[17] As noted in G Loiseau, *La violence économique: du vice à la virtue,* Cahiers sociaux (1 March 2015), No 272, p 153.

[18] [1989] QB 833;[1989] 1 All ER 641.

[19] "*Il y a force majeure en matière contractuelle lorsqu'un événement échappant au contrôle du débiteur, qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées, empêche l'exécution de son obligation par le débiteur.*"

1218 provides that where the impediment to performance is permanent, the contract shall be automatically terminated.[20]

In French law, force majeure is a general principle which relieves a person from tortious or contractual liability by reason of an exceptional, insurmountable circumstance, unforeseeable at the time of entering the contract, and "external" to the person affected. With the reform, this last condition has been replaced with the more flexible language of "debtor's control". This should be welcomed by contractors, for whom the burden of proving the existence of an event of force majeure will be lightened.

The impact of new Article 1218 must not be overstated, since FIDIC standard-form contracts, typically used in large-scale international infrastructure projects, already contain force majeure clauses supplemented with a non-exhaustive list of events that could constitute force majeure.

ONEROUS TERMS

Many feared the introduction of a general mechanism sanctioning "onerous terms" of contract, i.e. terms which confer an excessive advantage on one party. In fact, such mechanisms already exist: in the French Consumer Code which prohibits abusive terms in consumer contracts,[21] and in the Commercial Code for contracts between businesses,[22] where such terms render the party imposing them liable to compensate the debtor for damages suffered as a result. The current Civil Code also confers limited powers on judges to revise exclusion clauses.[23] Thus, the current state of French contract law concerning abusive and unfair terms is similar to the English law position under the Unfair Terms in Consumer Contracts Regulation 1999 (SI 1999 No 2083) and the Unfair Contract Terms Act 1977.

New Article 1171 provides that any clause which creates a significant imbalance between the rights and obligations of the contracting parties is void.[24] Although this provision appears to introduce a general mechanism through which a clause, in any contract, may be declared abusive and struck out by the judge, its application is limited to standard-form contracts written up by one party exclusively and accepted by the other party with no negotiation of individual terms ("*contrats d'adhésion*"), which must be

[20] "*Si l'empêchement est temporaire, l'exécution de l'obligation est suspendue à moins que le retard qui en résulterait ne justifie la résolution du contrat. Si l'empêchement est définitif, le contrat est résolu de plein droit et les parties sont libérées de leurs obligations dans les conditions prévues aux articles 1351 et 1351-1.*"

[21] Articles L. 132-1 and L. 122-8 of the Consumer Code.

[22] Articles L.442–6 I 2 of the Commercial Code.

[23] See current Articles 1152 and 1231 of the Civil Code, which give power to the judge to modify the extent of contractual penalties.

[24] "*Dans un contrat d'adhésion, toute clause qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat est réputée non écrite. L'appréciation du déséquilibre significatif ne porte ni sur l'objet principal du contrat ni sur l'adéquation du prix à la prestation.*"

distinguished from directly negotiated private contracts ("*contrats de gré à gré*"). Hence, the mechanism will only be applied where there has been no negotiation.

What then, is new Article 1171's potential effect on the construction industry? International standard form contracts are frequently used in international trade and in construction projects. In such situations, both parties have adhered to a standard-form contract in most cases issued by international industry bodies or institutions and not written by the parties themselves. Though these standard-form contracts cannot be strictly qualified as *contrats d'adhésion*, they could, nevertheless, fall within the scope of new Article 1171, given that the individual terms have not be negotiated between the parties. However, courts may be sensitive to the fact that these are generally internationally-recommended forms of contract which tend to adopt a balanced approach in dealing with the rights and obligations of the parties, aimed at minimising the risk of disputes. As the parties have adhered to the same substance with equal input, courts may be more willing to accept that such contracts represent the actual bargain agreed between the parties. In this sense, establishing the existence of onerous terms would be more difficult. It is certainly hoped that the courts will not apply new Article 1171 to international standard-form construction contracts unless absolutely necessary.

THE DUTY OF GOOD FAITH, OR "BONNE FOI"

Unlike English law, which implies no duty of good faith into commercial contracts, French contract law recognises a general obligation on both parties to act in good faith during the performance of the contract. The current Article 1134 of the Civil Code provides that agreements "*must be performed in good faith*".[25]

French courts have expanded the scope of this provision to impose a duty of loyalty, cooperation and coherence not only during performance of the contract, but also during pre-contractual negotiations. Hence, the principle of good faith has been used to sanction wrongful termination of negotiations before the contract has even been executed. In the Cour de Cassation's decision of 26 November 2003 (*Manoukian*), it was held that a party who had unfairly broken-off pre-contractual negotiations was liable to compensate the other party, who had hoped to conclude a contract.[26] English law does not recognise such a principle as it is generally considered that negotiations are undertaken at each party's risk.

[25] Article 1134 of the Civil Code, i.e. "*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.*"

[26] Cour de Cassation, Chambre commerciale, 26 November 2003, appeal no 00-10243 00-10949.

French courts have recognised a breach of the duty to act in good faith where one party pursues pre-contractual negotiations, knowing that it will not be able or never wanted to conclude the contract, while letting the other party believe the contrary. This situation could be seen as analogous to the tort of deceit, meaning a misrepresentation made with the express intention of defrauding someone, which subsequently causes injury to that person. French courts have also recognised the existence of a breach of the duty of good faith where one party abruptly breaks off negotiations, without a legitimate reason, unilaterally and without prior notice. However, case law makes clear that compensation under this head of action cannot cover anticipated profits from the failed contract, but only expenditures incurred by the injured party in pursuing negotiations.

New Article 1104 of Ordinance No 2016-131 provides that: "*Contracts must be negotiated, formed and performed in good faith*".[27] This provision is a "public policy provision", which means it is cannot be excluded by the parties. There is not much more to be said in this respect, as the reform does not change the current state of the law.

More specifically, new Article 1112 codifies the extension of good faith to contractual negotiations which had been previously developed under French case law, including the limits on compensation. This should not lead to any change in approach by French judges.

DUTY TO DISCLOSE CRUCIAL INFORMATION

The importance of the good faith obligation under French law is underlined by its frequent usage in the new provisions of the French Civil Code chapters devoted to the sources of obligations, the general regime of obligations and the proof of obligations. The duty to disclose crucial information derives from the principle of good faith.

Article 1112-1 of the Ordinance, which codifies the general duty of disclosure incumbent on each contracting party, provides that: "*The party who holds information of decisive importance to the consent of the other party must inform that party when that party has, legitimately, overlooked that information or trusted the informed party*".[28]

This new wording imposes on the parties a duty to provide information and allows a judge to set aside the "law of contract" by rescuing the weaker or less-informed party. This provision provides parties with ultimate protection against unfair behaviour and dishonesty.

[27] i.e., "*les contrats doivent être négociés, formés et exécutés de bonne foi. Cette disposition est d'ordre public*".

[28] i.e., "*Celle des parties qui connaît une information dont l'importance est déterminante pour le consentement de l'autre doit l'en informer dès lors que, légitimement, cette dernière ignore cette information ou fait confiance à son cocontractant.*"

The AJFE (the French Association of Corporate Counsel) has criticised the generalisation of this duty in contract law and has advised that it should not apply to contracts between professionals in the same field.[29]

The AFJE's suggested restriction has not, however, been adopted. This is unsurprising, given new Article 1112-1 merely reflects the existing case law and current approach of the courts. However, as the reform does not give substantial guidance on when a party will be considered to have overlooked information "legitimately", current case law is still instructive. The duty to disclose information has been applied to different degrees by French courts depending on the capabilities of the parties. When the contract is concluded between a layman and a professional, the professional will owe a more extensive duty to inform the layman on the different aspects of the product or service.[30]

Depending on a party's profession, the duty to inform may even go further. A banker for instance, is obliged to warn his client about the risks of a loan (duty to warn, or "*devoir de conseil*"), irrespective of whether the borrower is a professional.[31] On the other hand, it has been held that it is up to the seller of goods to properly inform himself of its qualities. The purchaser, even if a professional, owes no duty of disclosure to the seller in respect of the quality of the seller's goods. If, as a result, a collector's item is sold at undervalue because the seller was not aware of its true value, his or her ignorance is not legitimate, and a purchaser who may be a collector is not obliged to inform the seller of the nature of the property.[32] Where the contract is between professionals in the same field, the duty to disclose information will not be an extensive one, so fears that this provision will have an extensive negative impact on commercial contracts seem to be exaggerated.

The duty of good faith will continue to apply to construction contracts and consortium agreements. Pursuant to new Articles 1104 and 1112, future members of a consortium shall collaborate and will be obliged to disclose all information necessary for each member to achieve its part of the overall project. Further, members shall not withdraw from the consortium abruptly and without legitimate reason. The duty to disclose crucial information should extend to a day-to-day monitoring of the progress of works and regular communication between members.

[29] Note of an "ad hoc" Working Group of the Association Française des Juristes d'Entreprise (AFJE) after reviewing the Draft Law for the refom of contract law, p 2.

[30] Cour de Cassation, Chambre Civile 1, 28 October 2010, appeal no 09-16913.

[31] Cour de Cassation, Chambre Mixte, 29 June 2007, appeal no 05-21104.

[32] Cour de Cassation, Chambre Civile 1, 3 May 2000, appeal no 98-11381.

PRICE REDUCTION

New Article 1223 of Ordinance No 2016-133 provides that "*the creditor may, after notice, accept [the debtor's] incomplete performance of the contract and request a proportional price reduction. If he has not paid, the creditor shall notify its decision to reduce the price as soon as possible*".[33]

In the event that construction industry players seek to invoke this general provision, its effect will be limited as French construction law already recognises that the owner can accept incomplete works.

CONCLUSION

This reform, for the most part, simply brings the Civil Code up to date with the current state of French contract law. The changes brought to French contract law reflect a progressive adjustment to today's commercial realities. While providing welcome clarity to contracting parties, the reform does not drastically alter French contract law as it stands, and is unlikely to throw open the door to judicial intervention in business relations.

[33] Article 1223 of the Ordinance No 2016-133, i.e. "*Le créancier peut, après mise en demeure, accepter une exécution imparfaite du contrat et solliciter une réduction proportionnelle du prix. S'il n'a pas encore payé, le créancier notifie sa décision de réduire le prix dans les meilleurs délais*".