

Webinar : The Long View: What parties to long-term project contracts need to know about disputes (and avoiding them)

Hand Out Notes

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Introduction:

Sue has worked across the UK, Europe, Asia, Australia and the Middle East on projects with values up to US$18 billion and disputed sums in excess of US$2.5 billion. She is a Chartered Quantity Surveyor (UK-trained) and a qualified architectural engineer (South Korea-trained) with 20 years of experience in the engineering and construction industries, acting as a court-appointed, single joint quantity surveying expert (SJE) and a party appointed quantum expert in litigation, arbitration, adjudication and mediation across a series of projects including rail, mining and nuclear power.

As a fellow of the Royal Institution of Chartered Surveyors and the Chartered Institute of Arbitrators, as well as being an esteemed member of numerous other organisations, Sue specialises in the evaluation of variations in dispute, disruption, prolongation, acceleration and evaluation at termination – working with various standard and bespoke forms of construction contract. This immense level of experience is supported by her academic excellence, holding six degrees on the undergraduate and postgraduate level. She was called to the Bar of England and Waled in 2020.

Gordon started off his career in commercial litigation, but he soon got a taste for European and international cases and as served as UK Parliamentary Counsel. In this vein Gordon has served as Leader of the European Circuit of the Bar from July 2012 to November 2014, and was later Chair of the Bar Council's EU Law Committee, playing a leading role in the English Bar's intervention into the Brexit debate before and after the UK EU referendum, overall advising on a broad range of Brexit related issues. Furthermore, he is member of the Dutch Brussels Bar EU-List. This extensive experience of EU and public international law is put to use in a range of sectors (in particular utilities, telecoms and financial services), acting as a Fellow of the Chartered Institute of Arbitrators and as CEDR accredited mediator.

Through Twenty Essex he has also worked in Singapore and is on the arbitrators' panels of various institutions including the Asia International Arbitration Centre and the Shanghai International Arbitration Centre**.**

In summary Gordon is also an expert on disputes involving government bodies, so he knows how public authorities tick and what they do and don't respond to.

The Long View – GN/SK webinar with Barton Legal 25.03.21

Segment	Key Points/contributor
Setting the scene	**Gordon Nardell QC:** Key differences between "ordinary" construction contacts and long-term project arrangements: ▪ The obvious one – it's in the title! Duration. Construction of physical facility just starting point. Contract envisages long-term operation – typically 20-25 years. Parties have to live with each other! ▪ "Employer" usually a public authority procuring high-cost infrastructure: typically, utility/transport/energy ▪ Nature of work: large scale and physically complex/challenging – that shapes the kinds of practical problem that produce disputes. Eg linear infrastructure certain to produce unanticipated ground conditions *somewhere* along its route. ▪ Legal issues flowing from government/public sector involvement: overlay of public law and regulation. Public procurement; complex regulatory backdrop. Regulatory and fiscal environment often under control of employer itself! Can be a very unequal relationship. And a politicised one. ▪ Long duration means assumptions/objectives behind "base case" likely to change fundamentally over life of a project ▪ Contract structures – very complicated with multiple competing interests. Compare an ordinary construction project with a PFI (private finance initiative) project ▪ Relationship with standard forms of construction contracts: - Project K not really a construction K at all: it's a contract with the SPV to procure construction of the facility and operation of the services for agreed payments. - Actual construction contract is between SPV and Works sub-contractor (the builder), who in turn sub-contracts in the usual way. **Sue Kim:** Forms of contract in common use for UK/overseas projects: For the construction phase Typically, large infrastructure projects have been procured under: • **EPC/Turnkey contract** for a lump sum price, where the contractor takes single responsibility for the design, construction, timely completion and cost of the project, or • **EPCM (Engineering, Procurement, Construction Management) procurement** is increasingly common whereby SPV lets multiple works contracts to multiple contractors and engages an EPCM contractor to develop, design and manage the works contracts.

Segment	Key Points/contributor
	In relation to **the form of construction contracts**, the parties may use a standard form of contract which is tailored to fit the project or a completely bespoke form of contract. I have seen different **standard forms of contracts** which are commonly used, most often, FIDIC Silver Book, FIDIC Yellow Book, NEC ECC, IChemE,IMechE contracts and less often PPC 2000: • FIDIC Silver Book - commonly used on international EPC contracts/ suitable for process plant projects, where price certainty and time is critical / for turnkey projects designed by the Contractor. The Employer or the Employer's Representative administers the Contract. • FIDIC Yellow Book - for projects designed by the Contractor, with an Engineer administering the Contract – often for offshore wind projects. Often heavily amended, e.g. in the Middle East, the employers have their own standard form contracts, **a bespoke EPC/Turnkey contract**, which set out bespoke rules. **Example of clauses that are heavily amended** include: • Risk profiles – risks relating to cost, programme, design, site, planning and permit procurement are passed down to the contractor • Circumstances when a claim for additional costs or an extension of time can be made – i.e. fixed price provides certainty for funders • Interface issues – transfer of performance risks between construction and operating contracts • Performance guarantees, liability (e.g. exclusion of loss of profits and consequential loss), completion/ take-over requirements

Common causes of disputes	**Sue Kim**: Common causes of disputes – Construction phase: In long term contracts, construction risks remain a key concern in many regions, which often leads to high value disputes and negative impacts on project timelines. Common causes of disputes during construction phase: ▪ HKA's CRUX Insight 2020 reveals consistent causes of construction conflicts across the world, e.g. change in scope, incorrect or incomplete design and contract misinterpretation, especially in bespoke or heavily amended standard form contracts (https://www.hka.com/crux-interactive-dashboard) ▪ Not on the list – global disruption caused by the COVID-19 pandemic. Continued payment delays as faced by contractors, and diminished access to funding has also placed extreme pressure on margins and led to financial distress. ▪ Question is, to what extent the private party as opposed to public authority bears the risks and which risk is foreseeable at the time of the contract award. ▪ In long term contracts, I find the employer typically passes off all construction risk, including interface, site-contamination risk and procurement risk to the contractor who then passes onto its supply chain. **Gordon Nardell QC**: Link between introduction and actual disputes. Emphasise:

	▪ **Delayed or failed completion/commissioning of** physical **works**: the "stalled project" problem: - Project fails "handover" – fails to pass prescribed completion/commissioning tests by agreed date. Can't move from Construction/Works to Services phase - Whose fault? - Project Co/Construction contractor? Faulty design/construction - Authority? Faulty specification; non-compliant composition of test materials (e.g. waste) - Questions of right to terminate are very likely to arise at this stage - Mismatch between construction phase obligations and "real world" state of project, e.g. CAR insurance ▪ Services phase: Allocation of risk writ large! Changes in cost, regulatory framework. Loss of trust and confidence/breakdown in relations – or client simply wants out for economic/political reasons…

Claims, procedure and tactics at the construction stage	**Sue Kim**: 3 recommendations to avoid disputes include: • **Better contract drafting** is a possible means of averting the predicted "tidal wave" of litigation threatening the sector. • Avoiding and managing conflict is about **being proactive right from the very start.** • **Pushing for earlier engagement** – i.e. deal with and resolve issues as they arise. Certainty on budget and execution for all project stakeholders including funders. 2 examples where we can implement these recommendations Effective use of 1. Provisional Sum; and 2. Condition Precedent - Time-Bar **1. Provisional Sum** 1) What is a PS? • No formal definition • *Midland Expressway v Carillion Construction* [2006] EWCA Civ 936 • Defined vs. Undefined (Clause 2.9.1.2 NRM) 2) Why do we have a PS? • **some allowance**, for example, **in budgets (employer) and programmes (contractor)** • a useful tool to enable a project to start moving in circumstances **where the design is incomplete** or where a contractor **cannot verify its price at the time the contract is entered into** 3) PS under Standard Forms of Contract • JCT – PS & NRM

- NEC3/NEC4 – no reference to PS– certainty – risk registers, EWNs, CEs, C's assumptions
- FIDIC – C's quotation, valuation of PS, but not general ground for EOT – often amended

4) Problems with PS – uncertainty as to who takes the risk of time and price, i.e. confusion over allowance for preliminaries, programmes and OHP
5) Practical consideration – clear contract drafting - how PS should be dealt with in clauses relating to instructions, variation, effect of provisional sum work

2. <u>Condition Precedent - Time-Bar</u>

1) What is meant by Condition Precedent – a time bar clause?
   - Construction contract – a 'time bar' provision in relation to time/ money claims and dispute resolution provisions
   - The claiming party's failure to give a particular notice strictly in accordance with a specified period of time (sometimes followed by a further notice and/or more detailed information) will invalidate the claim.

2) Why do we have a time bar clause?
   - *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC) at para [103]
   - A risk management tool

3) Time bars under Standard Forms of Contract?
   Both bespoke and standard form contracts commonly include express procedures for submitting claims for time, money or other relief, which stipulates time limits for:
   - the initial notification of the events,
   - submission of particulars,
   - a response/request for further particulars, and
   - an assessment

4) Both NEC3/4 ECC and FIDIC expressly state that Notice of Claim is a condition precedent.

NEC3/4 ECC (Clause 61.3)
- *Northern Ireland Housing Executive v Healthy Buildings (Ireland)* [2014] NICA 27

FIDIC 2nd edition 2017
- Very prescriptive in terms of detailed procedures and consequences if the parties fail to comply with.
- 5 time bar clauses in relation to Claims and dispute resolution process and 1 time bar in relation to amounts due in the Final Payment Certificate.
- *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC): a notice for occurrence of either retrospective delay or prospective delay.

Key changes in FIDIC 2nd Edition 2017 e.g.
- Time bars apply to both Parties c.f. Clause 20.1, FIDIC 1st edition
- Definition of 'contemporary records' (sub-clause 20.2.3)
- Circumstances that the claiming Party can challenge in justifying late submission of a Notice of Claim (sub-clause 20.2.5) – prejudiced, prior knowledge of the event (or circumstance) or the contractual (or other

	legal basis) of the Claim **<u>Gordon Nardell QC</u>**: • Conditions precedent in bespoke contracts – especially notices. • Distinguish from notices under standard construction contracts (pay less etc – "adequate agenda for adjudication" *Grove Developments v. S&T UK Ltd* [2018] EWCA Civ 2448) • Courts' strict approach – failure to provide required information, or to do so within the stipulated time, is fatal to the claim. Clear international trend of courts favouring certainty over fairness/flexibility. • English law: *Heritage Oil & Gas Ltd v. Tullow Uganda Ltd* [2013] EWCA Civ 1048 and *Teoco Ltd v. Aircom Jersey4 Ltd* and others [2018] EWCA Civ 23. What must a party do where required to state "legal basis" for the claim – must not leave "real scope for doubt" about nature and basis of claim. What is important is not subjective intention of party serving notice, but how a reasonable recipient would understand the notice. • Hong Kong: *Maeda Corporation and China State Construction Engineering (Hong Kong) Limited v. Bauer Hong Kong Limited* [2020] HKCA 830 **- notification clause based on FIDIC 2017 suite** • *Maeda* is a good example of public sector major project – HK to Gunangzhou rail link. Excavation work by Bauer delayed because of unexpected difficulty in removal of rock in certain locations. • Construction sub-contract Clause 21 - required notice of intention to claim within 14 days after the "event, occurrence or matter giving rise to the claim became apparent"; notice must include the "contractual basis" of claim as well as "detailed particulars" and "evaluation of claim". The latter two could be submitted later. But not the "contractual basis". • CA held "the sub-contractor is required to give notice of the contractual basis, not any possible contractual basis which may turn out not to be the correct basis". • Emphasises procedural dilemma for sub-contractor – must formulate correct contractual basis within v short timeframe. • … but CA also held - doesn't preclude the notice "identifying more than one basis in the alternative". So can hedge one's bets, but must do so in a way that leaves the recipient of the notice in no doubt what the various alternative contractual bases for the claim are. • Lawyers are there for a purpose! Sensible to have in place established avenues of communication to ensure early legal input into drafting of notices. Considerably more cost-effective than engaging lawyers to fight a dispute later.

	However, there may be a different approach where governing law is a civil law system: • UAE Civil Code including Articles 106, 246 and 249 - neither expressly prohibits time bars nor enforces them • Court **may** be more willing to relieve party of strict consequences of failing to comply in time with notice provisions. • But best approach is to **expressly agree** consequences of non-compliance. What to cover - A condition precedent clause should cover the following matters: • Deadline for fulfilment. • Consequences of non-fulfilment. • Steps to fulfil condition. • Determining fulfilment. Must also take account of exclusive remedies clause

Claims at the handover/services stage	**Sue Kim:** **1. Claims for late completion of construction stage** 1) Late completion impacts upon revenue generation, debt repayment and profit circulation. 2) As such, the contract may include a clause on substantial liquidated damages to ensure the construction works are completed on time and to specifications, or award the contractor with a bonus for timely completion. Practical Completion may be a defined term in some long-term contracts. 2. **Defective performance of operations/ services** 1) The long term contracts often define a mechanism for dealing with **SPV's failure to operate and maintain the facility** & failure to meet the output specification. E.g. **penalty points** which may result in no payment. 2) Or if all or part of the facility is 'unavailable' to be used in the manner required, the authority is entitled to make **deductions from the Unitary Charge**. The level of the deductions is based on the extent and duration of the unavailability. Once deductions have been made to a particular level, the authority can terminate the Project Agreement. 3) As Cranston J held in *Compass (Compass Group UK and Ireland Ltd v Mid Essex NHS Trust* [2012] EWHC 781 (QB)), the purpose of the clauses permitting **deductions for service failures** is to provide a means by which the public body can ensure proper performance by the provider. Such contract provisions may fall foul of the rule against penalties. **3. Valuation of projects at final handover to the authority** Areas for disagreement between the State and the Concessionaire

	1) Difficulties in valuing projects that have been historically 'problematic' or poorly performed at handover at the end of concession period: • Problematic due to financial issues – cashflow, loss of profit. • Problematic due to patent or latent defects which impact on the future lifecycle of the asset. • Problems with the service provided during operation stage. • All have different impacts on the value of the project. • The Authority's unrealistic expectations as to what will be handed back. 2) Importance of expert valuation! • Quantity surveying quantum expert? • Accounting quantum expert? • Engineering experts? **<u>Gordon Nardell QC</u>:** **Claims at the services stage: Deductions and the rule against penalties** The Project Contract will contain parallel mechanisms for: - Computation of price for services – will include complex web of rates, targets, bonuses and clawbacks - Dealing with breach of obligation by SPV's -- failure to operate and maintain the facility & failure to meet the output specification, as Sue Kim has mentioned Rule against penalties: – *Cavendish Square Holding BV v. Al Makdessi* [2015] UKSC 67 – term dealing with consequences of breach is unenforceable if consequence is out of all proportion to the legitimate commercial interest it's designed to protect – Much ink spilled about how the rule applies to Liquidated Damages, but deductions and clawbacks are even trickier: the rule only applies to "secondary" obligations, ie those flowing from breach of a primary obligation – does not entitle the court to review the parties' agreed primary obligations. Problem where the term said to infringe the penalty rule is part of a complex set of provisions that provide a formula for computing consideration payable for the service. Non-compliance with the term may also be a breach of contract. Howe does the penalty rule apply? I've advised on/arbitrated this: courts haven't really engaged, but my view is the contractor can't "cherry pick" the negative elements of the pricing formula, even if the event that triggers a clawback/deduction is also a breach. The court/arbitrator must look at the substance and reality of the role the term plays in the contractual scheme. This is a bigger problem in Indian/Malaysian law. The Indian Contract Act 1872 s. 74 and Malaysian Contract Act 1950 s. 75 codify the penalty rule and do not expressly distinguish between primary and secondary obligations (though recent case-law in Malaysia has attempted to mitigate the problem).
<u>Termination issues</u>	**Risks associated with termination** **<u>Gordon Nardell QC:</u>**

- Convenience v contractor default. The problem of repudiatory breach if a party wrongfully terminates.
- Complex topic – possibility of termination under a range of interacting terms
- But fundamentally – Authority can terminate for convenience or contractor default

The big difference – termination for convenience is effectively **buying out the contract** for a value based on the unexpired term. Either market value (if a liquid market) or a DCF-based valuation formula. Extremely expensive.

Contractor default is much cheaper (though not free – will often be an adjustment for market value).

If Authority purports to terminate for contractor default where not entitled to, likely to be in **repudiatory breach** entitling contractor to treat the contract as discharged and claim damages – equivalent or comparable to price payable on termination for convenience!

The battleground areas:

- Proving contractor default – e.g. cumulation of deductions for underperformance (the issue in the *Compass* case)
- Can a Contractor defend itself on the basis that Authority has acted arbitrarily or in breach of obligation of good faith?
- How do you **avoid** termination, especially later in life of contract? This is addressed below

Sue Kim:

Proving contractor default

Terminating a long-term contract is far from straightforward, especially proving contractor's default is very difficult given the risk of allegation as to repudiatory breach (as Gordon Nardell QC explained).

In long term contracts contractor default can be triggered:

- by a failure to meet **certain objective performance thresholds;**
- by reaching particular levels of deductions made for **unavailability or service default;** or
- **a catch-all 'material breach' provision**, whereby a sufficiently serious breach by SPV can give rise to a right to terminate.

At the construction stage, FIDIC Silver Book 2017, Clause 15.2, details the 6 circumstances which gives the Employer the right to terminate the Contract for contractor default. The most contentious ones are in the slides.

Difficulty in proving: "without reasonable excuse fails to proceed with the Works"

Akin to failure to proceed regularly and diligently/with due diligence:

1) *West Faulkner Associates v London Borough of Newham* 71 BLR 1;
2) *SABIC UK Petrochemicals Ltd v Punj Lloyd Ltd* [2013] EWHC 2916 (TCC)
    - Delay is not always conclusive evidence of a lack of diligent progress;
3) *Hill v London Borough of Camden* (1980) 18 B.L.R. 31, CA:
    - Time is **not** of essence - delay on the part of the contractor does not amount to a repudiation;

	4) *Rickards v Oppenheim* [1950] 1 K.B. 616 at 628, CA: • Time is of essence - the employer is entitled to treat the contract as at an end and to dismiss the contractor from the site. It is not enough to simply point to a ground of termination. Authority should prove contractor default by identifying factual evidence which supports the grounds for termination. The consequences of wrongly terminating a contract can lead to substantial claims for damages.
Dispute resolution methods	What methods are appropriate to long-term contracts? How to resolve problems without a collapse in mutual trust: **Sue Kim:** **Avoiding Termination** Sometimes a long-term contract cannot be terminated, even where there are sound reasons for doing so (e.g. strong political support). Termination may not offer the best value for money to the authority. So, if an authority can't terminate its contract, what else can it do to better its position? Examples: • reducing the scope of the works or services (e.g. soft FM services), • exercising contractual rights more stringently, eg better service delivery by SPV, • refinancing the project which can lead to lower debt repayments for SPV; and • Putting in place stronger performance monitoring and enforcement mechanisms to incentivise improved performance. **Avoiding Termination - funder step-in right or novation** Funders' step-in rights may be either permanent (novation) or temporary (step-in/out) under the direct agreement with the authority: • To step-in to rectify the problems which give rise to the authority's termination right; and/or • Novate the Project Agreement to a suitable substitute contractor **Strength of funders' position** 1) SPV's rights to take any steps towards terminating the project are likely to be contingent on funders' consent. 2) Funders may have the ability to prevent the Authority from exercising its own termination rights: e.g. the giving of a prior notice of termination to funders was a condition precedent to terminating a private finance initiative (PFI) project agreement - *Tees Esk and Wear Valleys NHS Foundation Trust v Three Valleys Healthcare Ltd* [2018] EWHC 1659 (TCC). *3)* On receipt of such termination notice, the funders may be able to 'step-in' and take over SPV's. If the breach is not remedied by the funders/their designated novatees, then the authority will be likely to continue with the termination **Gordon Nardell QC:** "Good faith" principles?

	- Express provisions in typical Project Contracts - requiring parties to deal with other in good faith, and to discuss/negotiate in good faith in certain specific situations. - Common law has grudgingly developed an implied term of "good faith" in "relational" contracts – not to exercise a contractual power arbitrarily, capriciously, irrationally or for an improper purpose. BUT still relatively limited: *Compass Group UK and Ireland Ltd v Mid Essex NHS Trust* 2013] EWCA Civ 200: - CA confined express good faith clause in project agreement to the specific situation it addressed. Did not cover making deductions and awarding Service Failure Points for underperformance, even where cumulation of SPFs gave rise to right to terminate - Implied duty of good faith inapplicable to exercise of "absolute" contractual right (triggered by a simple, objectively ascertainable condition), as opposed to a where "assessment" required. - Contractor's only remedy against allegedly wrongful termination for cumulated SPFs wrongful is under express provisions of performance provisions. In fact, the Trust had persisted in awarding "excessive" SPFs – so it did not meet the express requirements of the clause governing its entitlement to terminate. - However, nor was the contractor entitled to terminate for either the excessive SPFs or the wrongful assertion of a right to terminate because, on a proper construction of the contract (and perhaps a little surprisingly), that wasn't a "material breach". Some practical dispute points arising from those principles: - laying the audit trail: demonstrate that SPV is willing to be flexible even if convinced it's "in the right". Intransigence plays poorly with court/adjudicator: *Compass*, and see also *Essex County Council v. UBB Waste (Essex) Ltd* [2020] EWHC 2387 (TCC). - For an authority that seeks to rid itself of what it sees as an onerous contract, intensive exercise of contractor default remedies in an attempt to force the project into insolvency (the subtext of *Compass*) is a high-risk strategy. - e.g. propose renegotiation; additional works/reconfiguration at Project Co's expense? May be possible to recoup cost under chain of contractual obligations. Lenders might be willing to underwrite cost to preserve their interest – alternatively may underwrite cost of litigating the issue.
	<u>Sue Kim:</u> **<u>Tiered dispute resolution clauses</u>** Many long-term contracts contain a tiered dispute resolution procedure: ▪ Usually start with Negotiation "in good faith" between senior personnel ▪ if this fails then, move to adjudication, mediation or Expert Determination depending on the nature of the dispute, or DAB or DAAB (e.g. FIDIC) ▪ If a party remains dissatisfied then, the dispute can be referred to either to arbitration or litigation as a last resort. Expert Determination:

	• A snap, contentious determination or one where the parties had agreed what should be decided and how. • The parties may later decide to put that Determination within an overall mediation or negotiation structure to resolve all the issues between them. **Thoughts…** 1) These structured procedures encourage the parties to avoid escalation of their disputes. . 2) Plan dispute resolution methods in advance and work together, with all involved – funders, stakeholders and advisors – on both sides, to identify the critical issues that may arise and the best means of resolving them. Each method can be tailored to the Concession Agreement, the project and the issues to avoid the waste of cost and time. 3) I find **negotiation, mediation and standing DB** can be very effective at resolving disputes relating to the day-to-day operation of various infrastructure projects that I have worked on in the UK and overseas, rather than resorting to more formal means of adversarial dispute resolution approaches – **a win-win for all parties**. **Gordon Nardell QC:** ▪ Adjudication – usual for construction phase (though UK PFI contracts are technically exempt from the Construction etc. Act 1996). Often replicated voluntarily for the operational phase. But does it work? ▪ Personal view: Adjudication under the 1996 Act was initially conceived as part of a package of reforms for preventing disputes from hampering cash flow. ▪ It works effectively where the dispute is really about cash or unsticking a similar specific or short term problem. ▪ Less well suited to existential questions about persistent default, termination, etc.
Moving the goalposts – Potential BIT claims?	**Gordon Nardell QC:** - What happens where the authority's behaviour (or that of the government standing behind it) is really an abuse of sovereign power to alter the contractual position in its favour? - A bilateral investment treaty (BIT) may be useful as backup or alternative to the contractual dispute resolution machinery. - A BIT is an international agreement under which (a) each State agrees to minimum standards of protection of investments made on its territory by nationals or corporates of the other State – eg non-expropriation, guarantee of fair and equitable treatment; and (b) (usually) makes a standing offer to investors to submit to arbitration of claims of breach – generally known as Investor-State Dispute Settlement (ISDS).

	- International construction projects plus energy, extractives, utilities and infrastructure form a large share of the disputes considered by ISDS tribunals, - Often lengthier, costlier and more speculative than a commercial claim under the underlying contract. But where necessary, can be effective. Enforcement against overseas assets held by the respondent State even if its domestic courts are unable or unwilling to assist. Awards can be very substantial. - Energy Charter Treaty is a multilateral treaty to similar effect – relevant to construction projects in the upstream energy and power sectors. - Recent example in the news: *Business Daily Africa* has reported a claim commenced under the Italy-Kenya BIT by two Italian construction companies arising out of two dam projects with the State-owned Kerio Valley Development Authority. The report has been picked up by *Global Arbitration Review*. The projects proved controversial, generating allegations of corrupt contract awards, inflated pricing and excessive payments against work done, and were cancelled. The Kenyan authorities have brought criminal charges against the Italian companies and are attempting to extradite the CEO of one of them. - The contracts reportedly provide for DAB resolution with ICC arbitration if that fails – so an interesting example of a strategic decision to sidestep the contractual mechanism and move straight to ISDS.