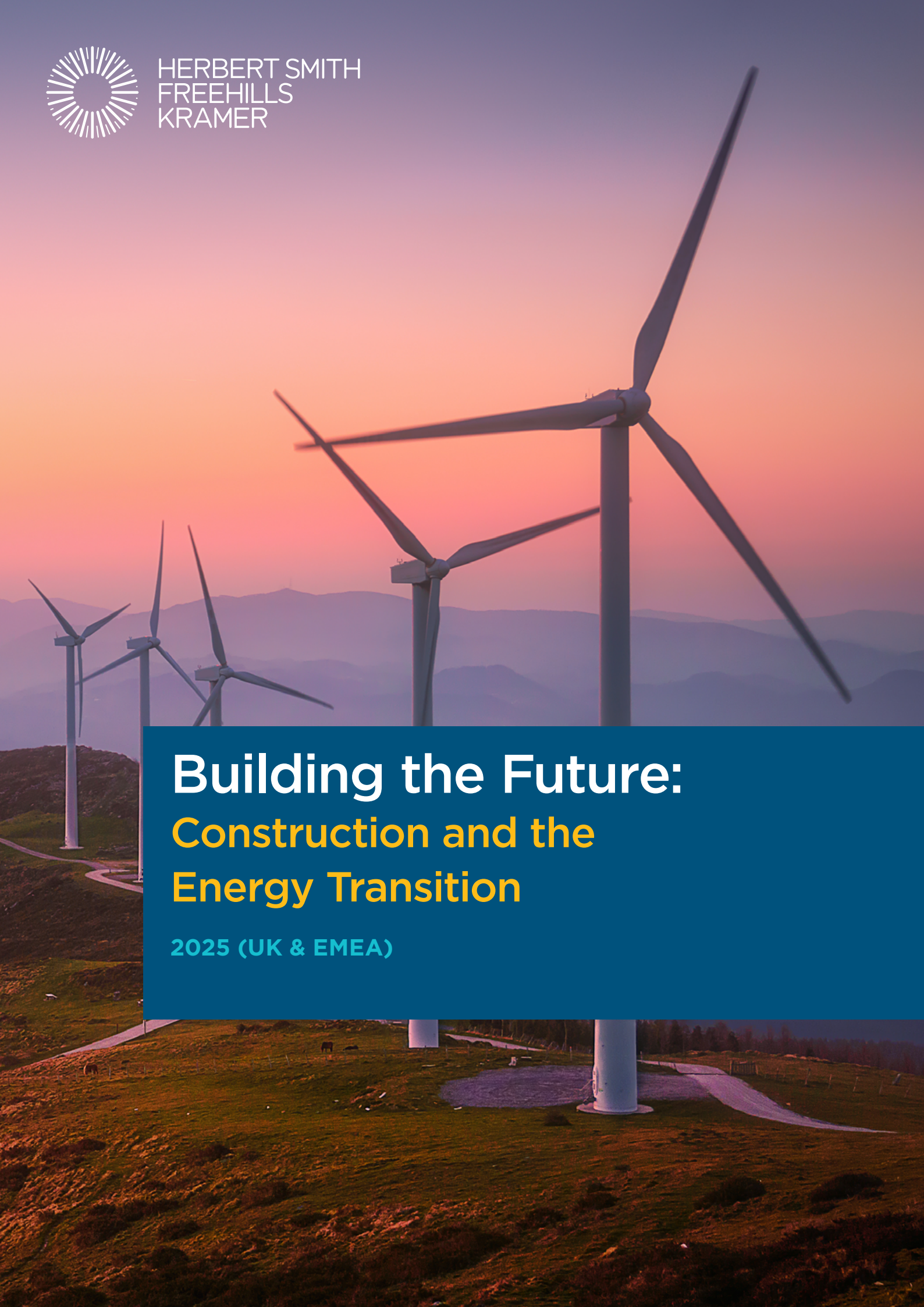

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Building the Future:
Construction and the Energy Transition

2025 (UK & EMEA)

Introduction

Building the Future: Construction and the Energy Transition 2025 (UK & EMEA) addresses the evolving legal landscape in the UK and EMEA, as the regions' construction industries continue to adapt to the challenges and opportunities presented by the energy transition.

In this publication, we highlight key contracting and procurement trends, recognising the complexity introduced by emerging technologies and novel project structures. Notable cases such as *Southern Electricity Power Distribution PLC v OCU Modus Limited* and the German Federal Court of Justice ruling of March 12, 2025 (Case number XII ZR 76/24) provide valuable insights into the reasonableness of remedial solutions as well as developments in land use agreements in this dynamic sector.

We also explore significant developments in standard form construction contracts and other model forms impacting construction projects in the energy transition sector, including the introduction of the NEC4 Conflict Avoidance Panel. These developments underscore the importance of robust risk and claims management in maintaining project viability and stakeholder confidence.

We trust this publication will serve as a practical resource for practitioners navigating the complexities of construction law in the context of the energy transition.

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Key contracting and procurement trends

The market continues to present challenges to those procuring construction projects across all sectors. Macroeconomic impacts including inflation, trade uncertainty, supply chain constraints and skills shortages have resulted in parties throughout supply chains reassessing their contracting arrangements. Against this global backdrop, renewable energy projects also present their own particular challenges.

Energy transition projects sweep-in a whole range of assets classes, with the potential for some of them to be more complex than those in other more established sectors. Complexity arises in part from the use of rapidly advancing technologies and new processes and systems, as well as potentially challenging environments (for example marine project such as offshore wind). Even if the core processes, systems or execution methodologies used in an energy transition project are not entirely new, their combination, integration or deployment with new products, or significant scaling-up, could in itself be first-of a-kind. Clients moving into energy transition projects from other sectors may also find themselves dealing with a new or unfamiliar supply chain that has different expectations and ways of doing business (and vice versa).

We have seen increased effort in carefully structuring the terms of engagement with OEMs, technology providers and contractors in these schemes (and we expect to see this continue). There is no 'one size fits all' solution, but smart structuring and efficient contracting arrangements are likely to be essential.

Various approaches to contracting are seen across the spectrum of energy transition projects, including:

- a division of projects into specialist packages (for example direct engagement of OEMs rather than contracting consortia or subcontracting through EPC structures) or simply into more manageable portions (for example dividing the largest scopes amongst several suppliers to avoid over-exposure);
- for new products or in capacity-constrained areas, exploring co-investment strategies with key suppliers to seek to align interests in successful performance or increase manufacturing capabilities;
- for similar reasons, securing capacity at the earliest stage or commissioning dedicated specialist equipment for those with the largest pipelines (such as specialist installation or maintenance vessels); and
- being more sophisticated with pricing strategies (particularly for modules of work where scopes or risks cannot be priced efficiently on conventional bases).

Closing out contracts now requires an adaptable approach which helps the supply chain without jeopardising project appraisals and the need to secure contracts which meet the expectations of stakeholders, as well as ensuring the right balance is struck between risk and value for money. The most successful energy transition projects, particularly, in the renewable energy sector going forward are likely to be those in which clients focus on developing strong relationships with the supply chain, and onboarding advisors with extensive experience in dealing with OEMs, sophisticated contracting strategies complex infrastructure and a strong grasp of design and construction risks, technology and performance issues, and the complexities of the energy value chain.

Notable cases from UK & EMEA

Reasonableness of adopting a more expensive remedial solution

Southern Electricity Power Distribution PLC v OCU Modus Limited [2025] EWHC 723 (TCC)

The central issue in this case was whether the claimant should be compensated for implementing a more expensive remedial solution where other cheaper options were available.

The claimant (**SEPD**) entered into an agreement with the defendant (**Modus**) for the design, supply, installation, commissioning and adoption of electricity and distribution equipment for a solar farm. Defects were discovered in relation to cables installed by Modus, and a disagreement arose as to the appropriate remedial solution to be adopted. The options discussed by the parties ranged from cheaper options requiring significant power outages during repair to more expensive options that would avoid such outages altogether. SEPD ultimately adopted one of the more expensive options.

In determining the reasonableness of the adopted solution, the court considered several factors beyond mere cost – these included the significant loss in revenue that the solar farm owner would incur due to remedial works requiring significant downtime, as well as SEPD's business and reputational interest and the public interest in maintaining generation. Applying these considerations, the court held that SEPD's choice to adopt a more expensive remedial scheme was reasonable, awarding SEPD full repair costs.

Practical takeaways:

- The reasonableness of a particular remedial scheme will typically turn on the facts of each case. In general, however, when assessing reasonableness, cost alone is not determinative and the courts will consider a range of factors, including a party's business and reputational interests.
- In the case of "large public interest projects" such as power projects, the public interest in maintaining electricity generation can be a legitimate consideration in determining reasonableness.

Was an instruction to postpone works a breach of contract?

Grain Communications Limited v Shepherd Groundworks Limited [2024] EWHC 3067 (TCC)

The main questions addressed by the court in this case were: (i) whether an employer's instruction to postpone the commencement of works amounted to a breach of contract; and (ii) if so, was the contractor entitled to claim loss of profit and mobilisation/demobilisation costs.

This case concerned a framework agreement for the provision of specialist groundworks entered into between Grain Communications Limited (**Employer**) and Shepherd Groundworks Limited (**Contractor**). Pursuant to the framework agreement, the Employer issued a work order for certain works to be performed by the Contractor. However, the Employer subsequently instructed the Contractor to postpone the commencement of such works and eventually terminated the work order altogether. The Contractor claimed that the Employer's postponement instruction amounted to a cancellation of the work order, in breach of contract, entitling it to damages for loss of profit and mobilisation/demobilisation costs. The Employer claimed its instruction was a variation and the Contractor's entitlement should be valued according to the contractual variation mechanism. In an earlier adjudication, the adjudicator determined that the postponement constituted a breach of contract, entitling the Contractor to damages at common law. The Employer challenged the adjudicator's decision in Part 8 proceedings to which this decision relates.

The court held that the Employer's instruction to postpone was not a breach of contract, but a valid variation under the contract. Further, even if the instruction had been a breach of contract, the contract explicitly precluded the recovery of loss of profit and mobilisation/demobilisation costs. The court also found that the exclusion of liability was reasonable under the Unfair Contract Terms Act 1977, given the parties' bargaining positions. Therefore, the Employer was not liable for the Contractor's claims.

Practical takeaways:

- The case serves as a reminder that the English courts generally adopt a broad, rather than a strict or pedantic, approach to the interpretation of variation instructions. As noted in the judgment, the effect of a variation instruction depends on the substance of what is said in the instruction.
- Depending on the wording of the contract, an instruction to postpone the commencement of works may not amount to a cancellation, even where the relevant contract (in this instance, a work order) is ultimately terminated before the relevant instruction to postpone is lifted.

Notable cases from UK & EMEA

Cancellation charges following termination for convenience

Water and Sewerage Authority of Trinidad and Tobago (Respondent) v Waterworks Ltd (Appellant) (Trinidad and Tobago) [2025] UKPC 9

This was a Privy Council case involving a dispute between Waterworks Ltd (**Contractor**) and the Water and Sewerage Authority of Trinidad and Tobago (**Authority**) in relation to two design and build contracts for water treatment plants (**main contracts**). Both contracts were based on the 1999 FIDIC Yellow Book. While the projects were still in the preliminary design phase, the Contractor entered into equipment supply agreements with a third party, MAAK Technologies (**MAAK contracts**). Among other things, each of the MAAK contracts provided for a 30% cancellation fee. Following delays due to various site and other issues, the Authority terminated the main contracts for convenience. The Contractor subsequently brought financial claims, which included cancellation charges under the MAAK contracts.

Central to this case was whether the cancellation charges fell within the scope of Sub-Clause 19.6 of the main contracts, which allowed for the recovery of "*any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works*".

Whilst the High Court initially found that the cancellation charges had been reasonably incurred, the Court of Appeal overturned this decision, finding that the MAAK contracts had been entered into prematurely and therefore unreasonably. The Privy Council upheld the Court of Appeal's ruling, further highlighting the Contractor's failure to provide adequate evidence or justification for entering into the MAAK contracts prior to final approval of designs and for undertaking obligations to pay such cancellation charges. The cancellation charges did not, therefore, fall within Sub-Clause 19.6 and the Contractor's appeal was dismissed.

Practical takeaways:

- This case helpfully demonstrates how the courts assess the reasonableness of termination costs in practice. Whilst the circumstances were specific to the case, the Privy Council's reasoning is likely to have broader application given that Sub-Clause 19.6 of the main contracts was unamended from the 1999 FIDIC Yellow Book.
- The Privy Council acknowledged that, as a general rule, under a contract of this kind the contractor is entitled to proceed and to incur costs and liabilities on the assumption that the contract will be performed. However, fatal to the Contractor's case in this instance was the lack of evidence and justification for entering into the relevant contracts at the particular time and incurring significant liabilities in doing so. In this regard, necessity and normal business practice were not considered to be acceptable justification by the Privy Council.

Land use agreements subject to conditions precedent in the renewable energy sector

German Federal Court of Justice ruling of March 12, 2025 (Case number XII ZR 76/24)

In practice, developers of wind and photovoltaic installations frequently structure their land use agreements with landowners so that the fixed term begins only upon commissioning. However, the interim period between contract execution and the triggering event has long posed legal uncertainties, especially regarding the application of the statutory right of termination without cause, which is available to parties to indefinite lease agreements under German law.

The German Federal Court of Justice has issued a landmark ruling that clarifies the legal framework for land use agreements in the renewable energy sector. The effect of the decision is to significantly reduce the risk of termination during such interim period.

The case at hand concerned the termination without cause of a land use agreement by the landowner during the interim period between contract execution and commissioning. The Court first defined the relevant land use agreement in dispute as an indefinite lease agreement during the interim period. On this basis, it ruled that the right of termination without cause can, in principle, also be contractually excluded for the interim period, both expressly and implicitly. The Court further ruled that such an exclusion is valid even when included in standard form contracts or general terms and conditions, as it does not unreasonably disadvantage the landowner during the early phase of the agreement.

Practical takeaways:

- When drafting land use agreements, suspensive clauses should be clearly defined, and the exclusion of ordinary termination rights during any interim period should be expressly agreed where possible.
- Landowners should carefully assess the legal and commercial implications of termination rights that may be exercised during the pre-commissioning phase and incorporate appropriate safeguards into the relevant contracts.

Recent developments in standard form construction contracts and model forms

Conflict Avoidance Panels under NEC4 Contracts

In March 2025, a new NEC practice note introduced NEC4 conflict avoidance clauses, providing a mechanism for resolving disagreements through a conflict avoidance panel (**CAP**). A CAP can be used as an alternative to a Dispute Avoidance Board (**DAB**). The new NEC clauses are suitable for use with any of the main NEC contract forms and versions of the clauses are available for use with either Option W1 or W2. The CAP process outlines clear steps with defined timelines, while also allowing parties the flexibility to amend certain stages by mutual agreement once the panel is formed.

In contrast to DABs, which must be appointed at the start of a contract and require ongoing involvement throughout its duration, CAPs are convened only when disputes arise, potentially offering a more cost-effective and focused approach. The recommendations of a CAP are legally binding when implemented – a key distinction from the advisory nature of DAB recommendations.

IBA site visit model protocol for international arbitration

In September 2024, the International Bar Association published a new Model Protocol for site visits in international arbitration. The Model Protocol aims to address common issues arising from site visits, providing a comprehensive set of default clauses based on international best practices, with a view to reducing the risk of "disputes within disputes". It includes guidelines on the purpose, scope, and itinerary of visits, as well as the use of technology. The drafting notes also include specific "additional" tasks which may be appropriate for construction and engineering arbitrations. The protocol is designed to be flexible and tailored to the specific needs of each arbitration.

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