

David Nitek

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Biography

David specialises in the resolution of construction and engineering disputes through litigation, arbitration, mediation and other forms of alternative dispute resolution. His principal focus is on disputes arising out of substantial and complex projects, and he has extensive experience in a number of sectors, with a particular emphasis on transport and infrastructure. David has advised on projects across Europe, Asia, Africa and the Middle East, where he was based from 2008 to 2010.

Lawyers



What inspired you to pursue a legal career?

It was probably television legal dramas in the first instance, but I then did work experience with barristers' chambers and law firms and found that, while the profession is quite different in practice, a legal career can be hugely rewarding.

What do you enjoy most about working in the construction space?

There is something physical about construction disputes – you can visit the site, walk around and see the project first hand. When working on live projects, you can see them change over time as the works near completion. It is fascinating to watch. More generally, construction and infrastructure is transformative – it has the power to improve our built environment and enhance our lives.

What are the main challenges in helping clients establish processes to resolve claims and avoid formal proceedings?

Parties often wait too long before implementing dispute avoidance procedures. Claim avoidance procedures are at their most effective if they are implemented at the outset and administered rigorously throughout the project. Trying to unpick disputes months or years after the event is a significant challenge – recollections fade; it is more difficult to find contemporaneous records and the parties' positions have often become entrenched.

On major projects, I think that parties should give serious consideration to the use of a standing dispute board – that is, a dispute board that is appointed at the outset of the project, visits the site periodically and is on standby, and up to speed, if problems arise. Parties are often put off by the cost, but the benefit of having a fit-for-purpose and responsive dispute resolution regime is significant.

How effective are collaborative construction contracts in encouraging collaboration among the parties involved?

There is a trend towards contracts that require a greater flow of information between the parties and seek to incentivise compliance, often through the use of time bars – for example, a contractor may lose its entitlement to an extension of time if it fails to notify the delay event within a particular period. This is the case with, for example, the NEC form of contract. Of course, drafting a collaborative contract is only part of the story. The parties need to embrace the concept of collaborative contracting and implement the contract in accordance with its spirit. This can place an additional administrative burden on the parties, because notice must be given when risks

are encountered for example, and so may require additional contract management resource. Parties therefore need to ensure that they have a sufficiently large and experienced team properly to implement the contract.

What are the benefits of interim forms of dispute resolution such as adjudication and dispute boards?

The principal benefit is that they may avoid the need for litigation or arbitration, which, given the complexity of many construction disputes, can take a long time and be very expensive. They have this effect because, more often than not, the parties will accept the decision of the dispute board or adjudicator – having an answer from an independent tribunal is generally sufficient even though the process is less exhaustive than litigation or arbitration.

Similarly, they are important from a cash flow perspective – a contracting party can secure a binding decision that a payment is due without the need for lengthy legal proceedings, although the enforceability of that decision will vary from case to case.

How do you see the construction market developing in the Middle East in the future?

There are a few things to watch out for. We are anticipating an increase in front end work in Saudi Arabia in the oil and gas, power, water, and infrastructure sectors. Renewables will also be a focus in both Saudi Arabia and the UAE, although perhaps less so elsewhere.

As ever, much will depend on the oil price – it is not expected to increase dramatically over the next few years, but, if that changes, it could introduce additional liquidity into the market. The current situation – with relatively low liquidity – has the potential to manifest itself in delayed projects, and when projects are delayed, the likelihood of disputes increases.

How does Herbert Smith Freehills distinguish itself from the competition?

For construction disputes, it is the combination of our specialist expertise in construction, our global reach and our pre-eminence in disputes in the markets in which we operate. Our lawyers are out and out construction specialists – they are immersed in, and are passionate about, the sector, and this translates into the results we achieve.

What has been your greatest achievement to date?

Joining the partnership at Herbert Smith Freehills, and so becoming part of the team that will take our construction practice forward.

WWL says: *David Nitek is "an excellent disputes lawyer" who is held in high esteem by peers thanks to his "keen mind for complicated technical cases".*