



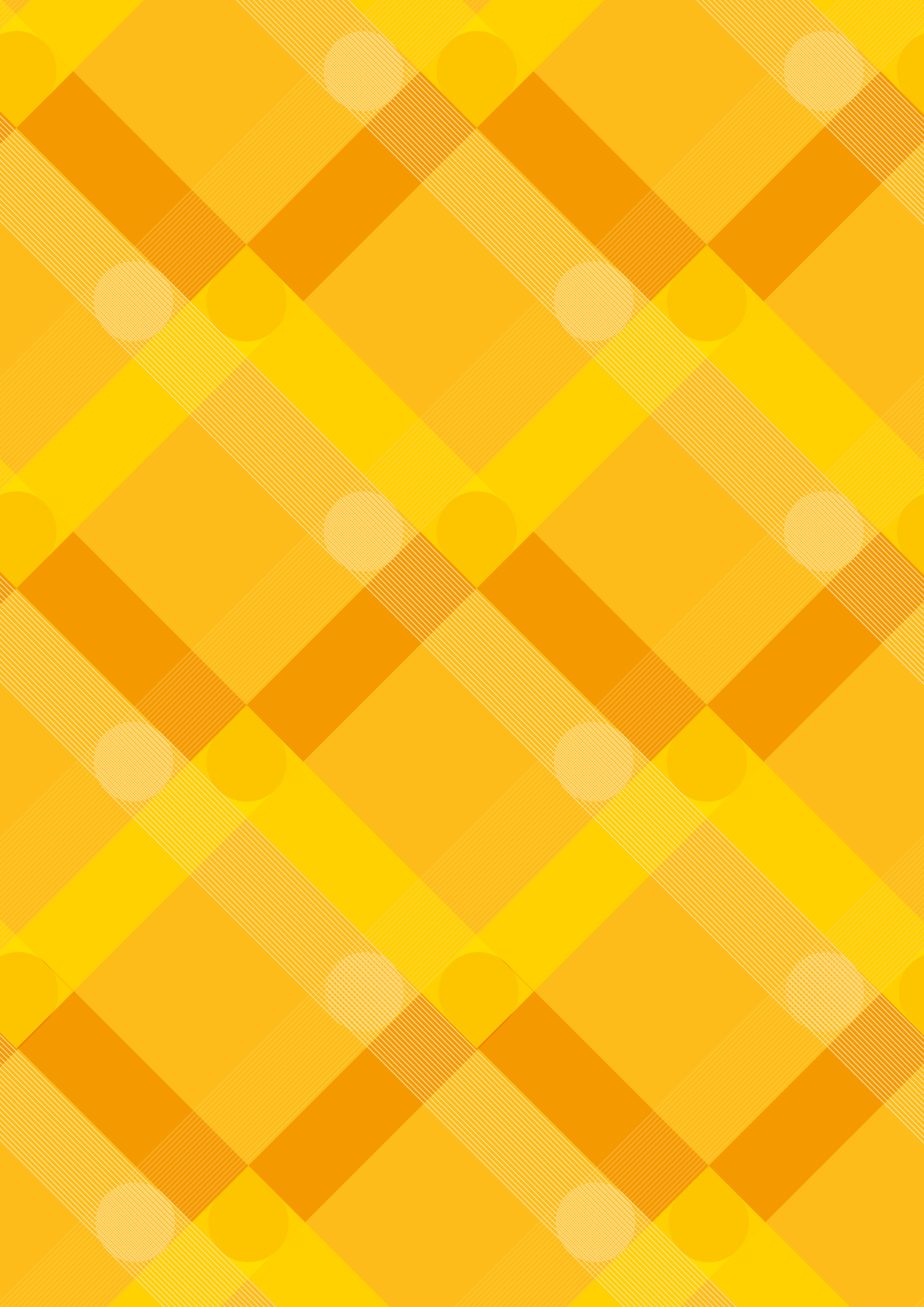
# INSIDE CONSTRUCTION AND INFRA

PERSPECTIVES ON GLOBAL CONSTRUCTION  
AND INFRASTRUCTURE DISPUTES

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# Welcome

Welcome to the second issue of Inside Construction and Infra, Herbert Smith Freehills' magazine for all those involved in designing, procuring, building, owning or operating fixed assets.

Through 2017 we have seen the political agenda drive infrastructure development, perhaps nowhere more obviously than in China's Belt and Road initiative (BRI); previously called One Belt One Road. In May, President Xi Jinping welcomed world leaders including Russia's Vladimir Putin, Pakistani Prime Minister Nawaz Sharif and Myanmar's Aung San Suu Kyi to Beijing for a two-day forum celebrating the initiative, with president Putin saying "it is necessary to eliminate infrastructure restrictions for integration - mainly by creating a system of modern and well-connected transport corridors." In one day alone immediately before the forum, Pakistan signed 3.4 billion yuan (US\$492.95 million) in deals with the PRC to boost the China-Pakistan Economic Corridor, a core component of the BRI. India, however, refused to attend the forum and in October, US Defence Secretary Jim Mattis criticised the initiative and, harking back to its old name, said "In a globalised world, there are many belts and many roads, and no one nation should put itself into a position of dictating 'one belt, one road'". In this issue Monica Sun, Hilary Lau and Jie Li look at the opportunities which the BRI presents, while Nicola Yeomans, Carla Aumann, Neil Joubert and Emilie Soust examine the opportunities and challenges for Australian contractors engaging in BRI projects.

We also turn to the other side of the globe. Governments in South and Central America are increasingly looking at PPPs to deliver much needed infrastructure. In October, the

government of Ecuador released the Guayaquil Port Development Plan that will see more than US\$1 billion in investments in port PPPs and the Regulatory Agency for Transport Public Services of the State of São Paulo, launched a tender process to seek a private partner to develop a 43.86 km-long road project. Juan-Jose Zentner and Edward Dougherty ask whether Latin America yet constitutes a must-watch region for investors and banks.

Away from geopolitics, we turn to contracts. June saw the launch of the fourth edition of the New Engineering Contract, NEC4. Never ones to shy away from a claim, the form's publishers say "The new suite of NEC Contracts enable any project to be delivered on time, within budget and to the highest standards". NEC3 had been the industry's form of choice for UK infrastructure projects for some years. Will NEC4 take its place, and will it deliver on the claims which it makes? David Nitek and Nick Downing examine.

Finally, we take you for a ride. Emma Kratochvilova reports on our 8th Annual Tokyo Construction Conference which had as its theme the growing global focus on high speed rail projects. From the UK to India to the US, new high speed rail projects are dominating much of the global spend on transportation infrastructure. Complex projects with major interface considerations, high speed rail presents both opportunity and risk for the industry.

In amongst the news, we speak to some of those working in our construction and infrastructure practice. After 16 years in our Tokyo office, Peter Godwin has moved to Kuala Lumpur to launch our new Malaysia office. Peter discusses his new home and the opportunities he sees in the Asia region. Richard Wilkinson is a Melbournian, and he shares with us some tips for foreign entrants in securing new deals in Australia.

There is a lot going on in the world of infrastructure, and in the practice at Herbert Smith Freehills. We hope you find the insights which follow interesting.



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"The Belt and Road Initiative aims to connect economies, communities, and people. It holds great potential to bring benefits."

**IMF MANAGING DIRECTOR  
CHRISTINE LAGARDE**



# China's Belt and Road Initiative

Unveiled in 2013, the One Belt One Road, or the Belt and Road Initiative (BRI), has been a major focus for China and many other BRI countries. In this article, Hilary Lau, Monica Sun and Jie Li, from our Greater China offices will provide an overview of the BRI initiative and share their experience in BRI-related energy and infrastructure projects.

## What is the BRI?

The BRI (or "One Belt One Road") consists of two concepts. "One Belt" refers to the Silk Road Economic Belt, and "One Road" refers to the 21st Century Maritime Silk Road. This is a revival of the ancient Silk Road trading routes which were discovered more than 2000 years ago.

The BRI was introduced by the Chinese government as a national vision and strategy for China "going global" and fits with China's broader global strategy in its push for globalisation.

The National Development and Reform Commission (**NDRC**), Ministry of Foreign Affairs (**MFA**), and Ministry of Commerce (**MOFCOM**) published the Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road on 28 March 2015 (**Vision and Actions**), which sets out the BRI's five major goals, being:

- policy co-ordination;
- connectivity of facilities;
- unimpeded trade;
- financial integration; and
- people-to-people bonding.

The concepts in the Vision and Actions are likely to have deliberately been kept broad and vague in order to allow flexibility.

The BRI can be thought of as an "umbrella" that catches outbound investments and development of infrastructure, such as roads, bridges, pipelines, ports, railways and power plants, in countries along the BRI. China and the BRI countries identified in the table below account for 62% of the world's population. In addition, the total infrastructure investment needed in these countries is around US\$5 trillion.<sup>1</sup>

The table below identifies the countries along the BRI. The Chinese government has not maintained a comprehensive list of BRI-related projects or deals.

## Countries along the BRI

<b>Southeast Asia</b>	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste, Vietnam
<b>East Asia</b>	Mongolia
<b>Central Asia</b>	Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan
<b>MENA</b>	Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Palestine, Syria, United Arab Emirates, Yemen
<b>South Asia</b>	Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka
<b>Europe</b>	Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Turkey, Ukraine

## Participants in BRI projects

In the last couple of years, there have been significant levels of Chinese outbound investment led by private Chinese companies. The BRI is a departure from this, as the leading players in the BRI include:

- Chinese policy banks, such as China Development Bank (**CDB**) and Export-Import Bank of China (**CEXIM**);
- state-owned enterprise (**SOE**) banks, such as China Construction Bank and Bank of China;
- Chinese SOEs in the energy and infrastructure sectors; and
- large financial institutions, including Asia Infrastructure Investment Bank, the New Development Bank and Asian Development Bank.

As at the end of 2016, CDB and CEXIM, have provided US\$200 billion in loans to projects in the BRI, and the three biggest state-owned banks, Industrial and Commercial Bank of China, Bank of China and China Construction Bank, provided a total of US\$225.4 billion.

State-owned investment fund Silk Road Fund (**SRF**) was launched at the end of 2014 to foster investment in the BRI. It is funded by China's State Administration of Foreign Exchange, China Investment Corporation, CDB and CEXIM with a total capital of US\$40 billion. SRF has invested US\$6 billion via equity and loans in more than 15 projects, including the Yamal LNG project in Russia.

1. <https://www.pwc.com/gx/en/growth-markets-center/assets/pdf/china-new-silk-route.pdf>



Multilateral institutions led by China, Asian Infrastructure Investment Bank and the New Development Banks are also major financiers of the BRI.

The BRI can be thought of as an “umbrella” that catches outbound investments and development of infrastructure, such as roads, bridges, pipelines, ports, railways and power plants, in countries along the BRI.

Many Chinese SOEs that are the traditional EPC contractors for energy and infrastructure projects are actively involved in BRI projects. They are no longer acting as pure EPC contractors; rather, they are also taking an equity interest in the projects, as project sponsors. The funding for these projects is supported by the Chinese policy banks, SOE banks and other Chinese financial institutions identified above.

Some examples of BRI projects in which Chinese SOEs are involved include:

- China Petroleum Engineering & Construction Corporation's construction

of US\$2.52 billion of the Amur gas processing plant;

- China National Petroleum Corporation's acquisition of an 8 percent stake in Abu Dhabi National Oil Company; and
- China Civil Engineering Construction Corporation's upgrade of the railway system in Belgrade, capital of Serbia.

### The BRI against the trends in China's outbound investment

As the market has witnessed, China has been taking various measures to tighten its control on capital outflow since the end of 2016, in order to address the excessive capital outflow issue and to prevent renminbi (the official currency of China) from further depreciation. These measures (including increased regulatory scrutiny on outbound M&A deals and significant foreign exchange transactions) have created uncertainties and challenges for China's outbound investments.

However, BRI-related projects are not affected by such measures. In August 2017, NDRC, MFA, MOFCOM and People's Bank of China jointly issued a clarification on outbound investment relating to BRI projects. In that clarification, infrastructure investment and construction in countries

along the BRI are expressly specified as “encouraged” projects, which are not subject to the tightened control.

### Issues to note

As with most outbound investments, country and project specific risks are still the major concerns for Chinese investors in BRI projects.

As Chinese construction companies, other SOEs and financial institutions are still in the process of adapting to the role of Chinese SOEs changing from traditional “pure” EPC contractors to project sponsors, country and project specific risks are often underestimated.

The following issues have been observed:

### Commercial drivers

The commercial driver for many of these projects is often the EPC aspect. That is, the ability of Chinese SOEs to provide the EPC to the project, rather than the overall return on investment for the project. Most of the time, the Chinese construction SOE takes a minority equity stake in the project and acts as an EPC contractor. This ensures control over the EPC aspects with minimum capital risk in the project.

### Sufficient planning

As many of these BRI projects are greenfield projects, there will usually be a longer lead time required for legal matters such as due diligence, structuring the project or transaction and government consents. Therefore, it is important to allow for sufficient time to complete these legal matters. Many of the Chinese SOEs have learned this lesson from BRI projects, especially the time needed to deal with local authorities and partners.

### Project finance

Project finance is widely used in international energy and infrastructure projects. For many Chinese banks, this is still a relatively new concept to them and they are more used to simple financing structures rather than complex project financing. BRI projects require financing, which may initially be led by Chinese banks. However, in future there will be more roles for non-Chinese banks to play in these BRI projects (including for project financing). The Chinese banks' appetite for project financing BRI projects remains to be seen.

### Finding BRI projects

As noted, there is no official published list of BRI projects. This makes it hard for investors to find these projects. Also as discussed, these projects are being driven by the participants of BRI projects – especially the Chinese development banks. For investors who are interested in BRI projects, it is suggested to have regular communication with the BRI participants to ensure that investors are kept up to date on potential opportunities to participate in BRI projects.

### Conclusion

It cannot be denied that the BRI is one of the most significant global infrastructure initiatives of recent times. However, many BRI projects are still at an early stage, and so many key questions around precisely how the BRI will work, and which projects are “BRI projects” are currently unanswered. Answers to these questions will come with time.

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# High speed rail projects - risks and opportunities

Herbert Smith Freehills' Tokyo office recently welcomed some 70 clients and industry professionals to its 8th Annual Construction Conference. The theme of this year's conference was the growing global focus on high speed rail projects.

The event was chaired by Emma Kratochvilova, head of construction and infrastructure disputes in Herbert Smith Freehills' Tokyo office. Emma was joined by three of her colleagues from London: Patrick Mitchell, global head of infrastructure, Nicholas Downing, co-lead of non-contentious construction and engineering, and Mark Veitch, a senior associate who specialises in international construction and infrastructure projects.

This article summarises many of the highlights of the topics introduced by the presenters during the conference and the subsequent lively discussion prompted by them.

## Global rail infrastructure opportunities

In a report issued earlier this year, the Japanese Ministry of Land, Infrastructure, Transport and Tourism identified major

infrastructure projects globally, which are suitable for potential Japanese investment and participation in coming years. Almost a third of the projects on the list were rail or metro projects.

Industry predicted that the global transport sector is expected to outperform energy and utilities over the next ten years, and within the transport industry itself, rail is expected to be the fastest growing subsector. Partly as a result of this, but also due to the increasing infrastructure needs of emerging economies in the region, Asia has the largest project pipeline, and this is where the greatest number of opportunities will arise for international contractors. With Japan's long-running success with national and international rail projects, from civil engineering to rolling stock and operation and maintenance, the opportunities for corporate Japan are enormous.

## Procurement models

Governments often choose a form of public private partnership (PPP) in order to offload a proportion of risk and remove the project from the public balance sheet. The flipside is that the shift of risk often makes this model more expensive than conventional models, and PPP arrangements are often not very flexible.

## Interface and coordination risk

A key issue that is common to all major rail projects is interface and coordination risk. Given their multidisciplinary nature, the successful implementation of rail projects inevitably relies on carefully drafted agreements comprehensively dealing with interfaces at every stage, from design and procurement through to construction and operation.

The most successful projects are often those where the parties have addressed interface management and risk allocation, particularly between contractors, at an early stage. That, combined with mutually compatible dispute resolution procedures and careful control of the master programme, is essential to ensuring the smooth management of interface risk.

### Collaborative contracting models

The New Engineering Contract (NEC) form is well known for the emphasis it places on collaboration between employers and contractors, and on reducing risk throughout projects.

One of the unique characteristics of the NEC form is its overarching commitment to collaboration. This is stated in the very first clause of the NEC form, which requires a "spirit of mutual trust and cooperation". The NEC form of contract also has other features designed to avoid risks, including a system of early warning notices and risk reduction meetings, which encourage both parties to deal with issues before they impact on time or costs. NEC's pain and

gain share options also provide an incentive to collaborate effectively and avoid cost overruns.

In addition, from the discussion draft of the FIDIC Yellow Book 2nd edition, it would seem that greater transparency of information is likely to feature in the next edition of the FIDIC forms, which could be seen as a tentative step towards more openness in contract management, in order to assist the parties to manage risk events.

### Resolution of disputes on rail projects

A number of common issues have arisen in rail disputes in recent years, which might be avoided on future projects.

Parties should sensibly allocate risk in relation to site, ground conditions and access, to those able to control it. Uneconomic risk contingencies can be avoided by giving contractors sufficient time and opportunity to identify such risks and notify the employer of the impact on price and completion, after which the risk transfers to the contractor.

Delay liability needs to be carefully considered in situations where there are multiple interfacing contractors on site at any one time – each with the potential to cause delay to one another's work as well as parallel delays to overall project completion. Innovative and effective early identification and compensation procedures exist that allow parties to receive real-time interim relief, pending a more traditional referral to a dispute adjudication board and/or arbitration.

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## Spotlight on: **Peter Godwin** Managing Partner - Kuala Lumpur

Peter Godwin is head of our market leading Asia Disputes practice. He has been based in Asia for 20 years and recently relocated from Tokyo to Kuala Lumpur to launch our new office. He is an arbitration specialist with expertise in construction and infrastructure disputes. Here he gives us an insight into his career in Asia and the opportunities he sees in the Asia region, including in his new home, Malaysia.



### **What brought you to Asia?**

As a trainee solicitor, I was fortunate to have the opportunity to spend six months in Hong Kong. It is difficult not to enjoy such an experience, but when I returned to London, I never dreamed I would return to Asia for the best part of my career. However, a few years later my wife was offered a position in Hong Kong and I needed little encouragement to join her as her trailing spouse. Three years on, as we were debating whether to extend our stay in Hong Kong or return home, HSF opened an office in Tokyo and I was offered the opportunity to relocate to establish our disputes practice.

I guess I like a challenge, as to move as a foreign disputes lawyer to a jurisdiction which was renowned for being dispute averse and whose companies, and their lawyers, barely recognised what an arbitration was, was certainly going to be a challenge. However, the decision to move was made surprisingly straightforward as my wife and I took our then three year old son to have a look at this weird and wonderful place called Tokyo. Having dragged him around apartments, supermarkets, offices, schools, etc, we rewarded him with a day at Tokyo

Disneyland. Over dinner that evening he left us in no doubt that we were moving to Tokyo!

So to Tokyo I went for two years, only to stay for 16 years!

### **Why did you stay so long in Tokyo and, having done so, why the move to Kuala Lumpur?**

Tokyo is a fascinating, and at times baffling, place to live and an extraordinary, very safe, place to bring up one's children, which made it easy to stay. However, what kept me there were some loyal clients, who had the happy habit of investing very large sums of money in very tricky jurisdictions, which gave rise to some big and complex disputes. They entrusted the resolution of these problems to me and my team and this enabled us to succeed (arguably against the odds) where many have tried and failed. Over the years the team grew from one person (me) to become a five partner practice doing high value work as complex as any in our global network. Having grown this from scratch, it was a wrench to leave. I remember describing the feeling sitting on the plane as I had surrendered my visa as akin to having abandoned a teenage child!

However, notwithstanding these thoughts, it was time for a change and, most importantly, a new challenge. So off I went to Kuala Lumpur. With the market only just having opened up to permit foreign law firms to operate there, it is another greenfield site, so not too dissimilar to the situation I had found myself in when I first arrived in Tokyo.

Kuala Lumpur is, of course, very different from Tokyo in many respects, but the challenge of building a practice in a market where many might expect me to fail was familiar. Time will tell - but I don't do failure, so I look forward to reporting on our success in the years ahead. Watch this space.

The office will focus on assisting Malaysian corporations as they invest overseas and inevitably then get into problems overseas too. We will also work alongside local Malaysian lawyers to assist our international network of clients as they seek to invest into Malaysia.

**What are your early observations about the legal landscape in Malaysia, and especially the opportunities in the construction and infrastructure arena?**

I have only been resident in Malaysia for a few months, so my views on the local market are still developing. However, it is clear that the growth and development of South East Asian economies brings with it a huge demand for infrastructure in those economies. The figures are startling. For example, the Asian Development Bank has forecast a need for over US\$60 billion per year in infrastructure expenditure across the region. Private sponsors and investors have a huge role to play in meeting that demand. Japanese and Chinese sponsors, contractors and investors in particular remain keenly interested in South East Asia. But the fact is, governments hold the key to facilitating the necessary input of financial and technical capital into the region. They are, in many cases, and particularly when it comes to the 'mega projects' needed to meet transportation demands in urban centres, the buyers of infrastructure. So, it is up to governments to shape projects with sufficient certainty and sufficiently robust risk profiles to ensure that projects progress. Large scale infrastructure projects in South East Asia are often characterised by a 'stop-start' process, or processes that are driven more by political motives than rational social and economic considerations.

**... it is clear that the growth and development of South East Asian economies brings with it a huge demand for infrastructure in those economies.**

Happily, if governments come to the table and deliver policy and tender frameworks that have the requisite degree of certainty and credibility, private enterprise is very likely to come to the table too. This includes funds, even 'western managed' funds (for example, funds managed out of the U.S., Canada and Australia), who increasingly have a mandate to invest in South East Asian infrastructure. This is driven, in part, by lower margins on infrastructure in OECD economies, and in part by their own investor bases, which are increasingly Asian dominated. Not only do they provide additional sources of capital in the short term, the willingness of large infrastructure funds to invest in South East Asia will create a market for secondary investments that previously did not exist on a material scale. This will give development investors the confidence to commit capital, knowing that there is potential for an exit and the opportunity to recycle their development capital. Coupled with consistent and credible state procurement processes (if they are forthcoming), there is real potential

for South East Asia's infrastructure boom to take off in the near term.

As for construction and infrastructure within the legal sector, this is a thriving part of the local legal scene. A number of contentious lawyers focus exclusively on this field, whilst most seem to do some work in this field. The new adjudication rules have transformed this area of practice, with fewer cases now going to arbitration as the number of adjudications booms (well over 600 adjudications are expected in 2017).

Whilst the means of resolving disputes in the sector may have changed fundamentally, there remains a good deal of work to be done in this sector and no sign of that changing any time soon. With major projects such as the Singapore - KL High Speed Rail project gathering momentum, alongside other major infrastructure projects both in Malaysia and the South East Asia region, as well as the likely impact of China's Belt and Road Initiative, lawyers in this sector appear to be set for a fruitful few years to come.

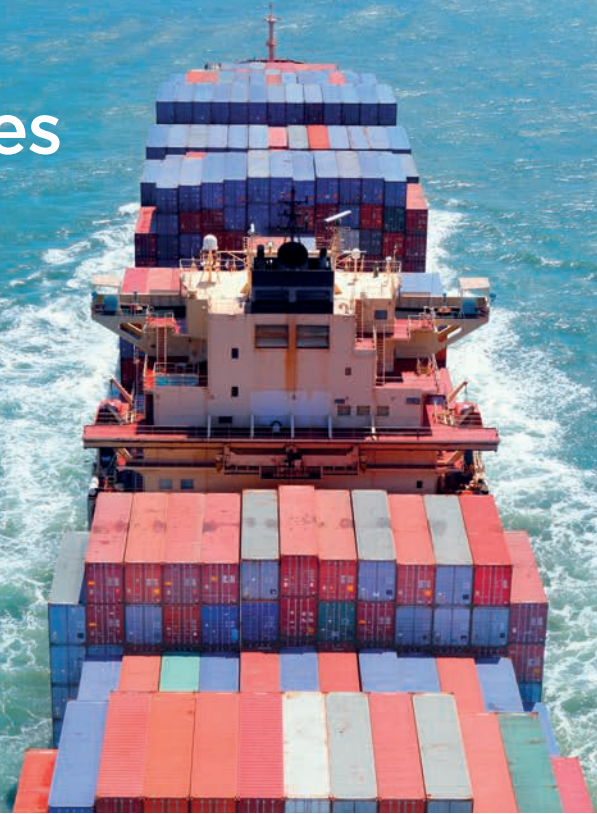
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# China's Belt and Road Initiative – opportunities and challenges for Australian contractors



China's 'Belt and Road Initiative' (BRI) is the world's largest economic development agenda, and is providing the scaffolding for infrastructure projects across countries forming part of either the land-based 'Silk Road Economic Belt' or the sea-based '21st-Century Maritime Silk Road'. The BRI is further explained in the article titled 'China's Belt and Road Initiative' by Monica Sun, Hilary Lau and Jie Li. BRI projects will be many and varied, but will uniformly have an early focus on infrastructure, including ports, railways, airports and utilities.

Through the BRI, China is said to be investing close to US\$1 trillion into planned projects, with BRI host nations similarly expected to significantly boost their infrastructure budgets.

Despite the vast opportunities presented by the BRI, Australian construction and infrastructure firms have, to date, been relatively slow to invest. The Australian Government has also been reticent to endorse the BRI, and as yet has not entered into a memorandum of understanding with China on the BRI (whereas many other nations, including New Zealand, were relatively quick to embrace the prospects the BRI presents). This, coupled with the perception that the legal and regulatory landscapes of BRI nations are difficult to navigate, may also be deterring investment.

Without doubt, the level of legal and regulatory sophistication across BRI nations is varied; which complicates investment decisions. Using South East Asia as an example, Singapore has a very advanced legal system and stable political affairs, which is attractive to foreign investors. By contrast, Myanmar has a developing legal system complicated by both political and social unrest, which is in turn deterring some foreign investors.

This article aims to provide an insight for Australian contractors (with applicability to other international contractors) considering participating in BRI projects into the:

- opportunities presented by the BRI; and
- mechanisms for managing the risks inherent in BRI projects and jurisdictions.

## Competitive advantages for Australian firms

Australian firms are well respected internationally. They are considered to have strong technical expertise in major infrastructure projects and a depth of knowledge in delivering complex projects. Australia's infrastructure investment model of public private partnerships (PPP) is widely applauded as an innovative example of project delivery.

Australian construction firms have skills and expertise which present obvious synergies for BRI host nations, particularly in developing nations where local expertise may be limited. Specifically, BRI nations may look to Australian firms for their expertise, including:

- leveraging their technical and project management skills. Particularly, many BRI projects are long-term infrastructure projects which require sophisticated design and construction expertise;
- familiarity with PPP models. This method of contracting is expected to be increasingly adopted in order to address the anticipated shortfall in government investment for BRI projects; and
- significant experience in sustainable development, which China has announced as a key driver in BRI investment.

Australian firms' reputation for good governance and best practice building and development standards also provides a counterbalance of risk to investors from other nations looking to take advantage of the BRI, as well as local firms wishing to shore up their own credentials when bidding for roles in projects.

### Leveraging local expertise

While Australian contractors have much to offer BRI host nations, partnering with local entities may be the key to successful local investment. Many BRI countries lack capital and construction skills, but can provide a strong labour force and knowledge of the local culture. Local firms understand the local market and its inherent challenges, and can therefore play a valuable role in navigating legal and regulatory requirements. That said, having high level executives or directors "on the ground" in host nations may also be a key competitive advantage.

Establishing a local subsidiary in the host nation or forming joint ventures with local partners allows Australian contractors to access growth opportunities not otherwise available domestically. For example:

- John Holland Pty Ltd, in joint venture with Zhenhua (Singapore) Engineering PL, was awarded the contract to construct the two-level underground Saglap Station along the 43km Thomson-East Coast metro line in Singapore; and
- Lendlease, in joint venture with TRX City Sdn Bhd (a wholly-owned subsidiary of Malaysia's Ministry of Finance), is developing the TRX Quarter in Malaysia. This is Lendlease's largest mixed-use development in Asia.

It should be noted that foreign investment laws across BRI nations vary widely from jurisdiction to jurisdiction. As a result, when it comes to structuring foreign investment, foreign investors should engage with local counsel early in the transaction timeline. It is important that time is spent considering the investment structure to ensure it complies with local law - whether the investment is structured via a special purpose vehicle incorporated in the host jurisdiction, a partnership in the form of a JV, or otherwise.

Certain local government or regulatory approvals may be required before Australian contractors can enter overseas markets, or acquire or invest in certain assets or sectors, or participate in greenfield and brownfield projects, in

foreign jurisdictions. For this reason, investors should engage with local authorities and regulators in the initial stages of any transaction. Failure to obtain the necessary regulatory approvals may cause significant delays to a transaction or, worse, result in the deal falling over.

### Anti-bribery and corruption

The BRI runs through some countries that are perceived as being highly susceptible to corruption, including countries rated as high risk by Transparency International's Corruption Perceptions Index. It is likely that, with the increase in BRI related investments and projects in which Australian firms will engage, Australian authorities will increase their focus on these activities.

The Australian Criminal Code makes it an offence for an Australian person or firm to provide a benefit to a public official with an intention to influence that public official. It is important that Australian firms participating in the BRI have sufficient processes and procedures in place to manage any bribery and corruption risks.

**It is important that Australian firms participating in the BRI have sufficient processes and procedures in place to manage any bribery and corruption risks.**

### Proactive risk mitigation

The BRI presently traverses more than 60 countries, all with vastly differing legal and economic systems. As a result, the risks and rewards on offer to participants in BRI projects are many and varied.

There is currently no single, multi-lateral treaty governing the BRI. Australian investors must therefore take an ad-hoc approach to risk management. Key categories of risk that must be managed include:

- foreign investment restrictions;
- regulatory challenges;
- anti-bribery and corruption;
- political risks (which differ from country-to-country);
- commercial and contractual risks against counterparties;
- litigation in local courts; and
- language and cultural differences.

The above factors will influence all aspects of the transaction, spanning the investment decision itself, across structuring the investment, and to drafting the relevant project documentation. Careful and considered attention must be paid when negotiating project documentation to mitigating the significant risks involved in these projects. This includes how the dispute resolution procedures are crafted in order to minimise uncertainty in relation to the interpretation and enforcement of contractual rights.

Highlighted below are some common provisions within transaction documents that play a key role in managing these risks.

**... the level of legal and regulatory sophistication across BRI nations is varied; which complicates investment decisions.**

### Governing law provisions

All key transaction documents should contain a "governing law" provision, nominating the law under which the agreements are to be construed. Failure to nominate a governing law can give rise to serious uncertainty as to the interpretation and operation of the agreements themselves, as well as how disputes will be resolved.

In the absence of a governing law provision, a court or tribunal will be required to determine which laws apply. As indicated above, the legal systems of BRI countries differ significantly. Again, using South East Asia as an example, Indonesia and the Philippines are civil law jurisdictions, while Singapore and Hong Kong are both common law countries. As such, participants would ideally look to nominate the laws of a country with which they are familiar, and which is unlikely to be biased towards the counterparty. Participants commonly opt for the laws of Singapore, Hong Kong, England and Wales and even New York to govern their contracts.

### Escalation procedures

Parties should consider whether their chosen contractual dispute resolution process should require certain steps to be taken before either party can commence proceedings. Whilst short and simple escalation procedures, such as notices of dispute and negotiation or mediation requirements, can be useful, contracts with complex escalation procedures are not uncommon. More complex escalation



procedures can be appropriate, depending on the circumstances. However, as a general rule, the more complex or proscriptive the procedure, the greater the delay before the dispute can be referred to arbitration. This delay can translate into increased uncertainty and cost to the participants, including the risk of arguments regarding whether or not the escalation procedures have been strictly complied with. Such arguments are generally costly distractions from the substantive dispute.

### Mediation

Mediation is a flexible process and can be a commercially expedient way to resolve a dispute. It can be adopted at any stage of the dispute resolution process and can be managed in any way that the parties choose, including through use of a private mediator agreed by the parties, or being administered by an institution.

Importantly, there are currently no international rules or standards recognising the enforceability of mediated (or negotiated) settlements. Practically, this means that a party is unable to enforce a settlement directly, but must instead sue in a competent jurisdiction or commence arbitration proceedings to obtain judgment in the terms of the settlement agreement. Therefore, if reaching a negotiated or mediated outcome is anticipated, parties should seek legal advice as to how the terms of the mediation clause or agreement can be drafted in order to minimise enforcement risk.

### Arbitration

It will be of primary importance for most BRI projects, in the dispute resolution context, to avoid litigation in the local courts. To avoid that eventuality, the parties should carefully draft their dispute resolution clauses to contain an express and clear agreement between the parties to submit disputes to arbitration and for any arbitral award to be binding.

Depending on the circumstances, arbitration is often the preferred dispute resolution forum for cross-border disputes, due to the relative ease of enforcement of arbitral awards pursuant to the terms of the New York Convention. The majority of countries participating in the BRI are signatories to the convention.

When agreeing an arbitration clause, conscious decisions should be made regarding:

- **The seat of arbitration**, which determines the applicable arbitration law. If parties wish to challenge an award, or in some situations seek interim relief, that must occur in the courts of the jurisdiction of the seat. Choosing a seat within a jurisdiction that is a member of the New York Convention is important.
- Nominating a reputable **arbitral institution and institutional rules**, or if the parties prefer ad-hoc arbitration, setting out detailed procedures to which the parties agree to adhere. Importantly, some institutions (such as the Singapore International Arbitration Centre, Hong Kong International Arbitration Centre and International Chamber of Commerce International Court of Arbitration) allow arbitrators to grant emergency interim relief, whereas others may not. Institutional rules also differ in the way they manage matters such as consolidation of disputes and joinder of additional parties.
- The **language or languages** of arbitration, which will also affect time and cost.

### Investor State Dispute Settlement

Political risk is a feature not all Australian contractors will be experienced in managing, but is an important issue to grapple with in the context of the BRI. In circumstances where bilateral investment treaties (including free trade agreements) exist between Australia and a BRI host nation, Australian firms can rely on the protection of Investor State Dispute Settlement (**ISDS**) provisions.

Under ISDS provisions, a party aggrieved by a host government's breaches of its investment obligations can bring arbitral proceedings directly against the host government. ISDS provisions may apply where the host nation has discriminated against the applicant's economic interests in that country. This may include:

- nationalisation of foreign owned assets without adequate compensation (often referred to as expropriation);
- being treated in a manner that is not fair and equitable; or
- preventing funds of an investor relating to an investment from being transferred freely off-shore.

ISDS provisions are sometimes viewed sceptically by the media and public in host nations. However, they are an important tool for Australian firms to protect their interests and investments. As with commencing any contentious proceedings, the decision to take advantage of ISDS provisions should not be taken lightly.

### In summary

Australian companies are perfectly placed to take advantage of the opportunities presented by the BRI. By realising the opportunities, and being aware of the mechanisms to carefully manage the associated risks, Australian companies stand to gain significantly in this new wave of infrastructure development.

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# Infrastructure trends and opportunities in Latin America – getting the show on the road

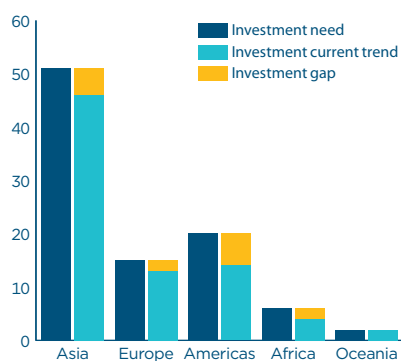
Latin America is a region ripe for increased infrastructure investment. According to a recent report by the G20's Global Infrastructure Hub, the Americas ranks second to Asia as the region with the highest gap in infrastructure spending, being the difference between the current investment trends and actual needs – with much of that gap arising in Latin America. Mexico and Argentina need to approximately double investment to meet forecast infrastructure requirements, with demand most pronounced in the road and electricity sectors.





After a period of economic slowdown, governments in the region are increasingly looking to private sector financing as a way to close this infrastructure gap. However, there continue to be obstacles in attracting sufficient international investment. In this article, Juan-José Zentner of Herbert Smith Freehills' New York office analyses the key infrastructure trends in Latin America and outlines the pipeline for infrastructure investment in the region.

### Total infrastructure investment, need and gap by region 2016-2040 (US\$ trillion)



Global Infrastructure Factsheet 2017, Global Infrastructure Hub, Accessed 16th Nov 2017, <<https://github-webtools.s3.amazonaws.com/umbraco/media/1530/global-infrastructureoutlook-factsheet-24-july-2017.pdf>>

### Innovative structures

Narrowing an infrastructure gap in an emerging market like Latin America necessitates creative solutions and structures. The local banking system has traditionally been relied upon to finance projects, but cannot increase available capital commensurately with infrastructure growth. Hybrid deals between local and international investors and governments (with the latter party providing support in the way of sub-market rate loans, tax-advantaged bond solutions or guarantees) can ease the pressure on domestic banks while providing short and long term funding. This leads to bespoke procurement and financing solutions tailored to individual projects and regions.

The absence of any “cookie-cutter” approach to Latin American projects means that the infrastructure pipeline is slower than in more established markets, while many local contractors, financiers and lawyers embark on a learning curve.

### Growing popularity of PPPs

Latin American markets have been using public private partnerships (PPPs) as a procurement method since the late 1980s, with many countries now having established

a legislative framework to support them and, in some cases, beginning to refine them. Chile and Mexico are considered the most successful programs in the region, especially in the transport sector. Brazil, Colombia and Peru also have an extensive track record of PPP projects, and Argentina introduced PPP legislation in November 2016, with tenders for three new prisons and projects in the health and energy sectors expected to be launched in 2018.

Although PPPs compete with other forms of private sector participation, including privatisations, they are well suited to addressing the region's infrastructure gap in roads, due to the economies of scale afforded and the ability to guarantee investors and financiers a source of revenue through availability payments or tolls.

### In 2016, Colombia's 4G roads initiative was the largest greenfield infrastructure program in the world.

The program includes 40 projects to build 8,000km in road infrastructure with a total investment of US\$25 billion during the course of the next seven years. 96% of Latin American transaction volumes in 2016 (across greenfield projects, refinancings and acquisitions) came from transport projects, with nine of the largest deals closing between 2016 and Q1 in 2017 coming from Colombian roads.

Government announcements for future PPP projects suggest that after transport, the next wave of PPPs will focus on the social infrastructure sector, addressing the region's demand for schools, hospitals, water systems and correctional facilities.

### Regional trends affecting investors

#### Local learning curves

While governments are supportive of PPPs and the pipeline of future projects looks strong, there remain barriers to its success as a procurement model in Latin America. In particular, unless international concession companies are involved, projects can suffer from delays caused by local contractors unfamiliar with PPP delivery, and may lack the credibility required to attract international project finance.

#### Striking a balance between international and local

A consistent theme among new entrants is that when entering new markets in Latin

America, it is invaluable to have the support of a good partner or contractor (local or otherwise) that can leverage its experience in the region to navigate relationships with local communities, governments and financiers. A recent example of this is the collaboration between UK-based investment specialist Ashmore with Andean development bank CAF to set up a debt fund to invest in Colombia infrastructure financing efforts.

### Financing

Despite significant growth since 2009, project finance remains relatively scarce in Latin America, with the exception of Chile and Mexico. Domestic banks are unable to finance the public infrastructure needs of the region alone, and currency risks either deter international financiers from participating altogether or drive up the cost of projects through the inclusion of currency swaps. Consequently, the role of institutional investors remains highly relevant, particularly for long-dated debt.

### Government and multilateral guarantees

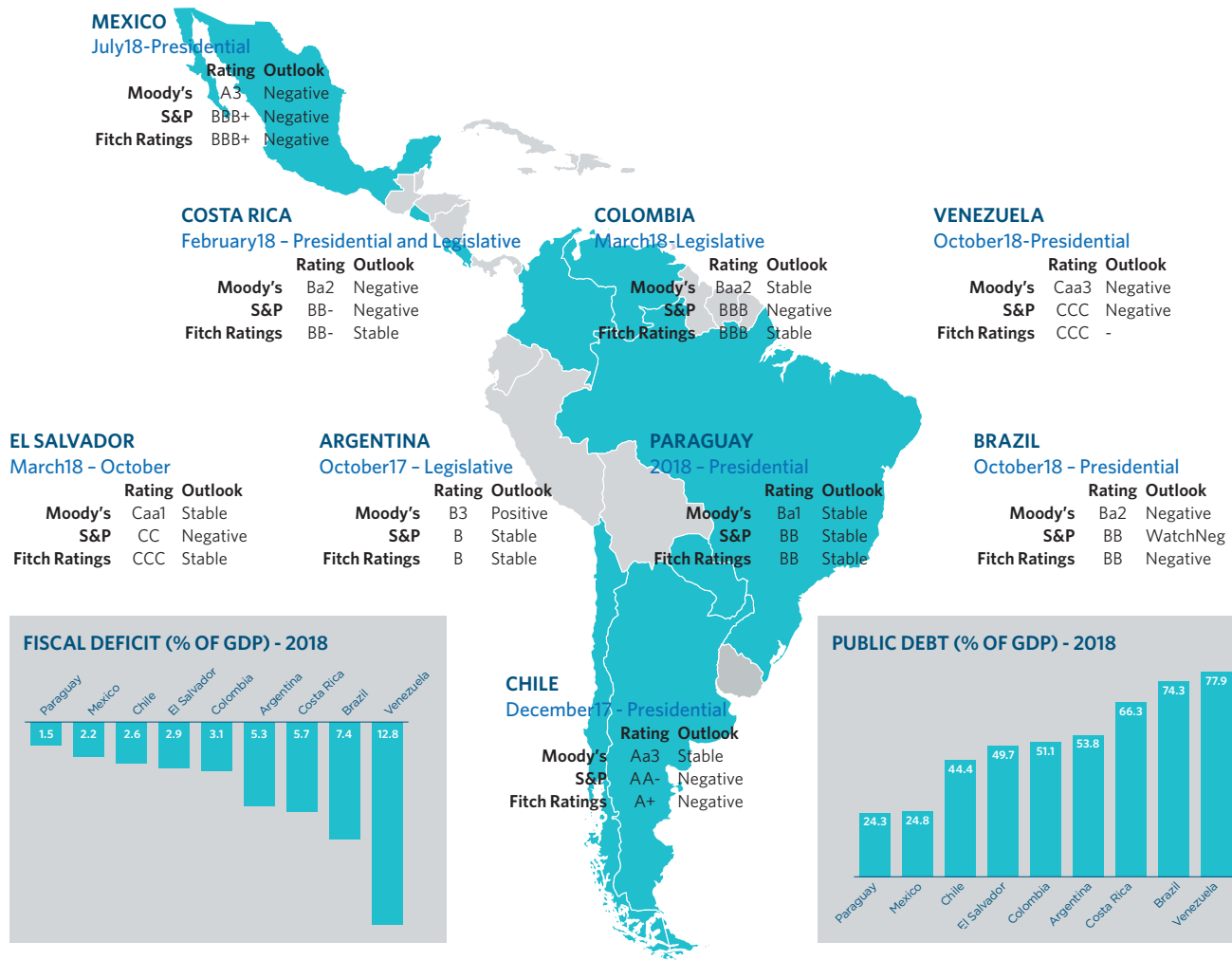
Until more projects are brought to market with a risk-allocation that is bankable by the private sector, governments, multilaterals and development financing institutions will continue to play a key role supporting institutional investors to address the risks and financing gaps in the region. Government decrees from Colombia and Chile have been instrumental in generating international investment in the 4G highway project in Colombia and the Mejillones-Cardones electricity transmission line in Chile. Additionally, the use of innovative government-backed bonds in Peru, coupled with strong macroeconomic performance, have caused a boom in infrastructure projects in recent years. To borrow some words from the Head of the Chilean Association of Concessionaires, Leonardo Daneri, it has never been more relevant for governments to realise that “only what can be financed will get built”.

### Political risk

2017-2018 is a time of political uncertainty in Latin America, with international ratings agencies closely watching the presidential elections scheduled in Brazil, Chile, Colombia, Costa Rica, Mexico, Paraguay and Venezuela. With the exception of Venezuela, all countries will see a new leader taking on the role, paving the way for changes to economic and infrastructure policies which may shape international appetite for investment.

Latin America's new election cycle

The challenge of fiscal consolidation in Latin America



Global Infrastructure Factsheet 2017, Global Infrastructure Hub, Accessed 16th Nov 2017, <<https://github-webtools.s3.amazonaws.com/umbraco/media/1530/global-infrastructureoutlook-factsheet-24-july-2017.pdf>>

Corruption scandals

High-profile corruption scandals have had a pervasive impact across the Latin American infrastructure industry, but it is not all negative. Although the Odebrecht scandal has affected financial closures, caused the cancellation of numerous tenders and prompted the withdrawal of numerous sponsors from brownfield investments, this market turmoil is likely to pave the way for a more level playing field full of opportunities for new market entrants in both greenfield and brownfield investments.

Addressing currency mismatch

Local currency-denominated revenues present an ongoing barrier to international financing due to foreign exchange fluctuations throughout the region, which can be severe. Certain jurisdictions are addressing the issue head on through a variety of strategies. Colombia has used a

hybrid public-private funding agency (National Development Financing Agency - FDN) to foment local currency sources of finance and reduce reliance on foreign finance. In addition, Colombia's 4G program allows concessionaires to opt for up to 50% of availability payments from the government to be made in US\$, and the recent airport privatizations in Brazil have also contemplated the local government assumption of currency risk, at least in part.

The pipeline

**Argentina:** In September, Argentina called for expressions of interest to develop US\$9.5 billion of water projects, many of which are greenfield projects. With regional authorities unable to fund more than a few of these projects, they are likely to become some of the first projects to be procured under the new PPP model introduced in 2016 - although local law is flexible enough

to accommodate O&M (operate and maintain), DBFOM (design, build, finance, operate and maintain) and turnkey models. Argentina's pipeline includes US\$169 billion of investment in infrastructure, including US\$48 billion in roads and US\$34 billion in the energy sector.

**Brazil:** In August, the Brazilian government announced its plan to raise US\$14.10 billion by the inclusion of 57 new projects in its investment partnerships program, of which 32 will be privatised, concessioned or evaluated for privatisation, including airports, highways, ports and state-owned companies. Among the projects to be privatised are the Congonhas airport in São Paulo state, and the government stakes in Cuiabá, Santos Dumont and Recife airports (with the São Paulo terminal accounting for 10% of all Brazil's air traffic).

**Colombia:** As a result of the massive 2016 4G highway program (49% of which was funded by local banks, 22% by international and multilateral banks, and 21% by institutional investors), the local debt market in Colombia is drained, paving the way for increased participation in local infrastructure from international investors and lenders. There is also hope that the international players involved in the 4G highway program will draw on the country-specific experience gained there to take up other opportunities in the market. Colombia is therefore perfectly positioned to see an increase in both supply and demand for upcoming infrastructure projects.

**Chile:** The current pipeline of infrastructure projects, particularly in the water sector, is experiencing delays due to bills regarding a new centralised concessions authority and a US\$9 billion infrastructure fund which are stuck in congress and are unlikely to be approved prior to the November 2017 elections. Encouragingly, several candidates have outlined infrastructure plans and committed to building 150km of new subway lines in Santiago at a cost of approximately US\$15 billion (although some of these lines could be built by Chile's state-owned Metro company itself or through a PPP tender process).

**Mexico:** Mexico has an attractive infrastructure pipeline, with the government announcing 12 new highway and hospital PPPs worth approximately US\$1.1 billion in aggregate. The government has ramped up

its infrastructure spending in the last year of its political term, although this belies a trend toward increased private sector financing. 2017 has seen the tender for Mexico's first privately-financed transmission line projects, forming part of a larger pipeline of investments in transmission projects. In September 2017, the Ministry of Energy announced a new contracting model for transmission projects in which the government will not assume payment obligations, nor provide any credit support.

**Peru:** Peru has continuously updated its PPP laws since their introduction in 1991, and the model of procurement is not only supported on both sides of politics, but also used extensively (76 PPPs were awarded between 2004 and 2016). However, Peru's activity has recently slowed, with investors wary of poor quality projects and recent corruption scandals. The latter affected financing prospects for the 1,025km Southern Gas Pipeline (Gasoducto del Sur Peruano) (with Odebrecht having a 75% interest in the consortium) and ultimately led to its termination.

### Conclusion

Despite the regional challenges, Latin America is a "must-watch" region for investors and banks looking to diversify their portfolios by seizing on the clear opportunities in energy, infrastructure and mining. Although local financing constraints and the need for innovative structuring issues can cause the infrastructure pipeline

to move slowly, those willing to wait to capitalise on the "right" opportunities can de-risk projects and do very well by strategically partnering with experienced contractors, banks and lawyers with knowledge of the market.

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# NEC4 - still at the edge of collaborative contracting

The launch of the new (fourth) edition of the New Engineering Contract (NEC), which occurred in June 2017, has been one of the most eagerly anticipated events of 2017 in the construction and engineering sector. The previous edition, NEC3, has been the contract of choice for public sector projects in the UK for many years, and has been used on many of the biggest projects in recent years, including the 2012 Olympics, Crossrail and High Speed 2.



The influence of NEC is also growing internationally, particularly in Hong Kong, Australasia and Africa. For example, and following the success of a series of NEC3 pilot projects in the region (including the HK \$2 billion community hospital at Tin Shui Wai), the Hong Kong government decided to use NEC3 contracts generally for all government projects tendered in 2015/16.

## NEC and collaborative contracting

NEC was first published by the Institute of Civil Engineers (ICE) in the early 1990s as an alternative to the ICE standard form of contract. It has now taken over from it. NEC is best known for its collaborative nature and the pioneering ways in which it seeks to avoid disputes, including the prospective and binding assessment of claims and the absence of a final account at which claims made during the course of the works can be re-opened.

NEC's stated aim for NEC4 is "evolution not revolution". The phrase is apt since there are no fundamental changes, however:

- the contract has been clarified in certain respects (for example, the programme to be used for assessing extensions of time is now defined);
- certain provisions have been enhanced (for example, through provision for a quality management system); and

- the overall approach is more international (for example, through the option to refer disputes to a standing dispute board).

NEC4 builds on the success of its predecessors, and there is little doubt that it remains at the forefront of collaborative contracting. Some of the key features of the new NEC4 contract are:

- **Early Warning Procedure:** The early warning procedure in clause 15 has long been a key component of NEC. Early warning of any matter which could increase the prices, delay completion, delay a key date or impair the performance of the works in use must be given by either the Contractor or Project Manager as soon as they become aware of such matter. Failure to give such notice will be prejudicial to the Contractor by reason of the provisions of clauses 61.5 and 63.7, which provide that a compensation event is assessed as if the Contractor had given the early warning.

At clause 15.2 there is a new requirement in NEC4 for the Project Manager to prepare a first Early Warning (formerly Risk) Register and issue it to the Contractor within one week of the starting date. A First Early Warning meeting must be instructed by the Project Manager within two weeks of the starting date. The emphasis is very much on flushing out problems at an early stage so that the parties have the fullest possible opportunity to deal with them.

- **Value Engineering:** New clause 16 makes provision for the Contractor to propose to the Project Manager changes in the Client's Scope in order to reduce the amount paid by the Client to the Contractor for providing the works. The Project Manager must respond within four weeks of the proposals either by: accepting them and issuing an instruction changing the Scope, requesting a quotation, or informing the Contractor that the proposal is not accepted. This is intended to facilitate an exchange on value engineering initiatives, such as revised methods of working or the use of different types of materials. There is, though, no compulsion on the Client to accept a value engineering proposal – unacceptable proposals can be rejected by the Project Manager for any reason.
- **Quality Management:** Under new clause 40, a quality management system is to be operated by the Contractor pursuant to a policy statement and plan which it provides to the Project Manager for acceptance. Making quality management part of the core terms, rather than leaving it to be addressed in the technical appendices, is a welcome and positive step forward.
- **Assignment:** NEC4 contains a new clause 28, which provides that the Client cannot assign the contract to a party who "does not intend to act in a spirit of mutual trust and co-operation". It is unclear what effect this provision will have in practice, as any party to whom the contract is



assigned would, in any event, be bound by clause 10, which requires the parties to act in a spirit of mutual trust and co-operation.

- **Defined Cost:** In the cost reimbursable versions of NEC3 (Options C to F), a new clause 50.9 is inserted which requires the Contractor to make available for inspection records necessary to demonstrate that a part of Defined Cost has been correctly assessed. The intention behind this clause is stated by NEC to be the finalisation of Defined Cost in a proactive and timely manner.
- **Final Assessment:** The concept of a “final assessment” is new to the NEC Suite. One of the basic principles of NEC to date has been that payments are assessed as the project proceeds and there is no provision for a retrospective final account process. NEC has stated that new clause 53 is not intended to be a traditional final account, but rather to ensure that the final amount due is properly calculated in the light of what has gone before. Therefore, it may only be an arithmetical check on earlier payments.
- **Compensation Events:** Compensation events, which are the mechanism by which the Contractor recovers additional money and extensions of time, are addressed in clauses 60 to 66. Unlike certain other standard form contracts which draw a distinction between the events which provide for time relief only and other events which provide for time and cost

adjustment, under NEC all compensation events carry with them an entitlement in principle to an extension of time and additional cost – subject, of course, to establishing that delay will result or that additional costs will be incurred. Additional clarity has been provided in NEC4. There was scope for debate under NEC3 as to which Accepted Programme should be used for the purpose of assessing delay – the various choices included the Accepted Programme current when the event arose, when a quotation was submitted or when the Project Manager made an assessment. NEC4 confirms that delay is assessed by reference to the “Accepted Programme current at the dividing date” (see clause 63.5), with the dividing date being either: (1) for compensation events arising from an instruction or notification from the Project Manager, the date of the communication, or (2) for other compensation events, the date of the notification

- **Revisiting Compensation Events:** Clause 65.2 of NEC3, which prevented the assessment of a compensation event from being revised “if a forecast upon which it is based is shown by later recorded information to have been wrong”, has been replaced by clause 66.3 in NEC4. Clause 66.3 is of broader application and provides that “the assessment of an implemented compensation event is not revised except as stated in these conditions of contract”. As such, an assessment cannot be

revisited, for any reason, unless there is an express entitlement under the contract (for example, by an adjudicator under clause W2.3(4)).

- **Dispute Resolution:** There are now three options, of which Option W3 is new:
  1. Option W1 is adopted when the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 (**UK Construction Act**) does not apply. In Option W1, there is now provision for disputes to be referred to Senior Representatives as a precursor to referral to, and decision by, an adjudicator.
  2. Option W2 is adopted where the UK Construction Act does apply. It follows a similar pattern to Option W1. However, in this Option the parties may only refer a matter to Senior Representatives if they agree. In accordance with statutory requirements in the UK, a party may refer a dispute to adjudication whether or not it has been referred to Senior Representatives.
  3. Option W3 introduces, for the first time in the NEC suite of contracts, a Dispute Avoidance Board as an alternative to either Options W1 or W2. The function of the Board is not to resolve disputes between the parties but, rather, to make recommendations for resolving them. The Board is a standing body whose



members are identified in the Contract Data. It is intended that the Board should familiarise itself with the project by regular site visits. Potential disputes can be referred to the Board by either party, and it can review potential disputes with a view to helping the parties to settle them without the need for disputes to be formally referred. In the UK, Option W3 can only be used where the UK Construction Act does not apply. That said, some UK projects have (by bespoke amendments to the NEC standard form) provided for a form of dispute board in parallel to adjudication – the idea being to give the parties recourse to a non-binding and less adversarial alternative to adjudication.

### Collaborative contracting in other standard forms

There has been a gradual move across the industry generally towards more effective project management and the promotion of a more collaborative environment in standard form contracts.

For example, the JCT's Constructing Excellence form 2016 provides at clause 2.1 that "[t]he Overriding Principle...in the operation of this Contract is that of collaboration" and the IChemE Red Book (2013) provides at clause 2.1 that "[t]he parties and the Project Manager shall co-operate with each other in the discharge of their respective obligations under the Contract with the aim of satisfactorily completing the Plant and the Works in accordance with the Contract" and at clause

2.2 that "[t]he parties shall deal fairly, openly and in good faith with each other."

Common features of a collaborative environment include enhanced provisions for passing of information and a shared approach to risk management.

It is interesting to note that the current draft of FIDIC's Yellow Book suggests that FIDIC is moving towards a more collaborative approach, albeit cautiously. Some of the latest proposals are:

- the requirement for the engineer to consult with the parties when a determination is sought from it;
- the programme must now contain more detail and record-keeping requirements are enhanced;
- advance warning provisions are now included, but without a sanction;
- both contractor and employer are now subject to time bars in respect of their claims; and
- the Dispute Adjudication Board can now waive the time bar provision for notice of claims, although applications to it are themselves subject to a time bar.

### Conclusions

NEC has for some time been at the forefront of a trend in the construction industry towards more collaborative contracting, with a particular focus on mutual trust and co-operation, the early identification of risk and the resolution of claims on a "look forward" basis.

While NEC4 is not, by its own admission, revolutionary, it continues this trend. It has introduced new provisions to reflect current market practice and has helpfully clarified certain matters.

NEC4 is likely to be adopted over time by the public sector in the UK as a natural evolution of NEC3. It will be interesting to see how widely it is adopted outside the UK, in particular in jurisdictions that have not experimented with NEC to date. The UK experience certainly shows that, adopted and properly implemented, it is capable of successfully delivering even the most substantial projects.

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## Spotlight on: **Richard Wilkinson** Partner, Projects, Melbourne

Richard Wilkinson is a highly sought after front end construction and infrastructure specialist, based in Melbourne, Australia. Richard advises clients on the procurement of infrastructure and other economic assets. Richard shares with us an insight into his practice, the Australian market and some tips for foreign entrants in securing new deals in Australia.



### **Can you tell us about the sectors you operate across and the type of work you do with your clients?**

One of the great things about my work is my varied practice across a number of industry sectors. My practice spans across four key sectors, being Roads and Transport, Commercial Developments, Defence Projects and Industrial Projects.

Typically, I spend around 60% of my time working with developers of infrastructure and other economic assets and around 40% working with companies seeking to tender to win the right to build that infrastructure and other economic assets.

My work involves advising clients on all aspects of the procurement of large scale developments, including drafting tender procedures and contractual project documentation, advising on how best to structure project and contractual arrangements and the impacts of legislation on those arrangements. On the flip side, I also advise clients on risks within tender documentation, and how to bid competitively and secure a deal.

### **You mentioned that you specialise in the Roads and Transport sector. Can you share with us a little about the status of that sector in Australia?**

There is a lot happening right now in Australia across the Roads and Transport sector. Governments are keenly aware of the rapidly increasing population in capital cities, the forecast growth for the future and the economic issues associated with congestion on our roads and transport networks. The response by governments has been exciting. They are developing multi-faceted programs for future capacity and to alleviate congestion across our networks. We are seeing new roads planned and being built, and existing roads upgraded. This approach is combined with a focus on heavy rail, light rail and bus improvements across networks. The vast majority of the projects also have private sector involvement.

Another key issue facing government is the planned uptake of electric vehicles and the consequential hit to government revenue in the form of fuel excise. Governments are beginning to consider different models of road pricing - effectively considering the

introduction of a "user pays" system, which will not only assist to replace fuel excise revenue, but will also play a role in alleviating congestion. However, any "user pays" system needs to be backed up by first class alternative transport options, which explains the continued focus on improving transport across our capital cities. This means that there are plenty of future opportunities for private industry to be involved in this sector for many years to come.

### **Can you share with us what is happening in the Defence space in Australia?**

We are seeing a huge investment by the Federal Government in defence assets and capability, driven by an aging war-time asset fleet and the continuously growing need to ensure homeland security.

The 2017 defence portfolio budget has listed 20 projects that the Federal Government will consider for first pass approval and 37 for second pass approval in the 2017-18 financial year. Key projects in which the private sector is involved include the SEA 5000 Future Frigates procurement (9 new warships), Land 4000 (multiple armoured vehicle replacement) and the



SEA 1000 Future Submarine procurement (12 new future submarines).

Interestingly, the sector is dominated by international contractors who are either tendering for projects in their own right or teaming with local contractors to boost their offerings. Thus, there are ample opportunities for international contractors with defence capability to expand their business in the Australian Defence sector. International contractors who commit to Australian local participation and growing a local skilled workforce within Australia over the course of a project often have a competitive advantage over those that do not.

### **What are the predominant procurement models in Australia and are standard form contracts widely used?**

There is no easy answer to this question, as the procurement models that are typically used depend upon the sector and the value of the project.

On large government road and transport projects, we are still seeing “public private partnerships” (PPPs) as the predominant model. PPPs are a hybrid of “design and construct” and “operate and maintain” models in the one contract – essentially a “BOOT” (build, own, operate, transfer) model. There has also been a return to the “Early Contractor Involvement” and alliance models across some states for heavy rail projects. Whilst PPPs are common, we still don’t have a standard form suite of contracts that are in use. We do however have standard form alliancing agreements used by government – although these are still amended and negotiated, which removes some of the benefits of standard forms.

In the greenfield or industrial sectors, developers are most often using bespoke EPC (engineer, procure, construct) or D&C (design and construct) type arrangements. FIDIC is not widely used in the Australian market.

Within the commercial development sector, developers are most often using one of the standard form construction contracts published by Standards Australia, however it is rare that these are issued for tender without significant alteration.

The defence sectors also use their own forms of standard project documentation and the terms heavily favour the Department of Defence. Defence looks unfavourably on tenderers who seek to bid departures to standard form documentation. A key issue we are seeing with private Defence bidders is how to competitively bid on these documents whilst maintaining alignment with their standard corporate policies around contracting.

### **A lot of our readers are international. Have you got any tips for new entrants into the Australian market in terms of developing a winning bid on infrastructure projects?**

The Australian market is ripe for new entrants. In fact, it is refreshing to see international consortiums becoming more prominent in our market and competing with Australian Tier 1 contractors and suppliers.

Probably the most important tip is to team up with a specialist law firm with a solid reputation in the relevant field, and which will assist bidders to balance their legal risk profile with their commercial offering.

One of two things tends to happen with foreign entrants:

1. They will compete aggressively on price, but heavily bid departures to project documentation to align with their corporate policies (from another market). This practice impacts on the developer’s perception of being able to swiftly strike a deal with that tenderer regardless of how competitive the tendered price. My tip is that the bidder should discuss with its Australian lawyer where the market is at on key risks and how best those risks can be managed without, in all cases, pushing them back to the developer.

2. The alternative is that they will compete aggressively on price and go extremely light on departures to project documentation. This may sound great in practice, but it also raises some suspicion. Developers put together contracts with a sense of where and on what issues they are prepared to bargain. They expect this process to occur. A clean bid tends to raise some suspicion as to whether the tenderer actually understands the risks it is accepting and whether they would be a suitable partner in the project.

The key, therefore, is to balance design, price and commercial terms. New entrants are best served by seeking expert advice from local lawyers in addition to relying on their corporate in-house counsel from foreign jurisdictions.

### **Can you share with us your passions in life?**

I have a few of these.

Besides my passion for a good pizza on Friday nights, I have a wonderful family with two young children and I love to spend time with them.

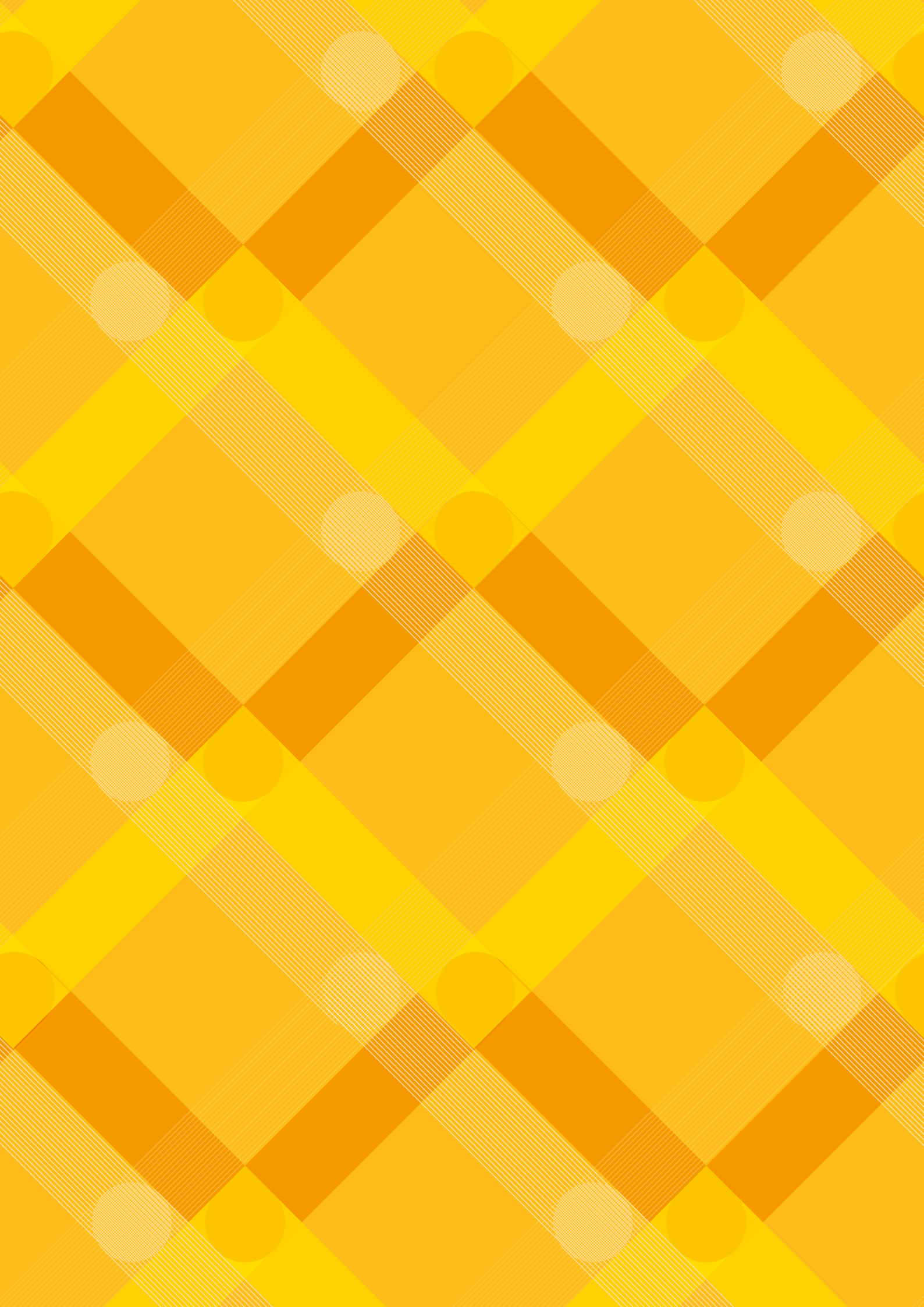
Secondly, I love surfing. Time spent on the water is time to focus on nothing else but the waves and technique. It is a refreshing place to be – somewhat akin to a state of meditation.

Last but not least, I love my work, the nature of the projects I get involved with and the energy and enthusiasm from my clients. My passion is to drive my career into the future, where I am involved with the merger of infrastructure projects and technological advancements.

## **Get in touch**

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