

# Infrastructure: Disputes







## Introduction

The Debevoise Infrastructure practice is a multi-disciplinary practice skilled in assisting our clients to manage their infrastructure construction and operating contracts. Our practice covers projects across the sector.

Our strong contentious and non-contentious experience makes us ideally placed to advise on contract management issues on live projects. We do some of our best work behind the scenes, helping parties who want to keep their project on track to stay on good terms. With effective early case management, it is often possible to secure performance while avoiding the cost and disruption of formal disputes altogether.

At the same time, we are adept at ensuring that, if matters cannot be resolved amicably, our clients are in an optimal position for formal proceedings. Our experience is that securing a good outcome depends upon the ability to pursue a contract management strategy that is underpinned (but not distracted) by a well-developed and executed litigation strategy.

**“They are outstanding. You can expect them to do the highest quality work and they do.” — *Chambers Global***

If formal proceedings prove necessary, we are leaders in enforcing our clients’ rights without losing sight of the bigger picture. We are known for our vigorous and effective advocacy. We fight to win, and we take every step available to protect our clients’ interests, formulating and executing multi-jurisdictional strategies for interim and substantive actions in support of a core set of arbitral or court proceedings. But at each stage, we act with sensitivity to the long-term relationships of our clients and the treatment of assets of strategic importance.

Individually and collectively we are routinely ranked highly in the *Chambers* and *Legal 500* guides for our arbitration and litigation expertise. Our ability to offer solid and reliable advice throughout the life of a project is regularly noted and commended.

In the pages that follow, we provide summaries of the key branches of our practice. If you would like to know more, any of the contacts listed in this publication would be delighted to hear from you.

## Contract Management

Our infrastructure group draws upon a range of disciplines across the firm to provide advice throughout the whole life of the project. We are engaged to offer our clients strategic advice on all aspects of construction law and risk management, from negotiating and drafting project contracts, whether based on standard forms or entirely bespoke, through handling M&A, financing and regulatory issues, to assisting in the management and performance of existing contracts.

**“Great firm, great people. They are very smart and they get things done right, no cutting corners or hiding the ball.” — *Chambers USA: Projects***

Our objective is to help clients address claims and avoid, manage and resolve disputes effectively and efficiently. Achieving that objective starts in the project delivery phase with reviewing and advising on contract management, claims management and record keeping. Ensuring that well-structured contract management systems are in place to identify, manage and respond to project risks properly and in accordance with the contract pays large dividends when those risks do occur.

Our team also provides on-going contract management, legal advice and claims support. We offer our clients legal support to project delivery; provide education and training to project teams; prepare or advise on correspondence; advise on issues of contract interpretation and potential claims and liabilities; and give tactical assistance in negotiations with counterparties so as to resolve issues at the earliest possible opportunity. We work closely with project teams and liaise with other parties to prevent complications from deteriorating into disputes. We can take the lead or provide backstage support to our clients in handling issues as they arise, for example by negotiating variations or claims if required, and taking any other necessary steps to protect our clients' positions.

Examples of our team members' contract management experience include:

- Advising and representing the owner of a ship yard with respect to issues arising out of contracts worth \$4.6 billion for the construction of several ship-shape drilling platforms for use in deep water exploration.



We advised our client from an early stage on strategies for protecting the ship yard's rights under its contracts, on steps to ensure continued performance of the works and on potential avenues for re-negotiation. After a change in the circumstances of the counterparty, we advised on strategies for exiting from the contracts, establishing claims against the counterparty in excess of \$1 billion and preparing for potential formal arbitration proceedings.

- Advising Hong Kong and China Gas on contract management and contractual interpretation issues arising out of the Guangdong LNG project; the construction of a twin gas submarine pipeline; and the construction of the permanent aircraft fuel facility (PAFF) serving Hong Kong International Airport.
- Advising and representing Transport for London as owner on the contracts for the extension and upgrade of the East London Line and North London Line. The matter began with assisting in negotiating the contracts when they were first executed. It subsequently saw two years of advising on contract management issues, including conducting five adjudications, two mediations and one English High Court litigation of various claims. Ultimately all of the claims were settled satisfactorily and the project was completed successfully.

Ranked as a leading international firm for Projects and Energy. — *Legal 500 Latin America*

## Early Resolution of Construction Disputes

If a dispute does arise, we will advise our clients on the best way to frame their case and the most appropriate forum for its resolution. Debevoise lawyers have broad experience in all methods of early dispute resolution and attach importance to the reductions in costs and time achieved when such procedures are effective. Our team has successfully represented and advised clients in dispute adjudication or advisory board procedures, adjudications, mediations, and expert determinations.

A determination or opinion from a single adjudicator, Dispute Adjudication or Advisory Board is often the first tier in a dispute resolution process once a claim has been rejected and crystallised



into a formal dispute. Typically it will involve rounds of written submissions accompanied by evidence in the form of project documents, witness statements and technical reports. It may entail a site visit. Occasionally an oral hearing may be necessary or useful. There is now substantial evidence from many projects that Dispute Boards can resolve the majority of disputes without further escalation to a potentially costly and time intensive arbitration.

Adjudication aims to resolve disputes on an interim basis by a decision that is binding on the parties until the dispute is finally resolved by either settlement or arbitration or litigation. Adjudicators can grant effective relief to an aggrieved party by ordering payment of sums due and provide swift resolution of issues that could otherwise paralyze the project.

**“These are brilliant lawyers — extraordinarily articulate, with the rare ability to illuminate the most complicated issues and arguments. It’s very easy to work with them and you can be confident that they will do the best thing for the client.” — *Chambers Global***

Mediation is a highly effective method of achieving a negotiated settlement of construction disputes. It enables the parties to understand the strengths and weaknesses of each other’s case without descending into the level of detail (and therefore incurring the expense) required for arbitration. An experienced mediator can persuade intransigent parties to make a more realistic assessment of their case, and can help to break the common deadlock in negotiations which can occur when parties fear that trading offers may indicate weakness. We have successfully mediated many disputes which at the outset seemed impossible to settle.







## **Our World-Beating Arbitration and Litigation Practice**

Debevoise's disputes practice has long been at the forefront of firms involved in litigation and international arbitration work. We are regularly and repeatedly recognised by legal directories and clients for our exceptionally strong track record advising and representing our clients in the most complicated and strategically significant disputes.

### **International Arbitration**

For over four decades, Debevoise has maintained one of the world's foremost practices in international arbitration. We act as counsel to both claimants and defendants before every major arbitration institution and under every set of rules in the world. Our lawyers have won three of the largest awards ever made public. In 2014, we handled more than 65 international matters involving parties from over 30 countries with a total value in excess of \$214 billion.

Our practice has formidable pedigree, tracing its roots back to the pioneering *Topco v. Libya* energy arbitrations of the early 1970s. Since then, we have been at the forefront of every significant development in the field of arbitration and international law. Rooted in our proud and distinguished history, yet embracing innovative ideas and practices, Debevoise continuously endeavours to establish the benchmark for international arbitration. We have been consistently ranked by the Legal Directories for our world class arbitration practice in the US and in Europe.

Our infrastructure arbitration practice covers a wide range of projects, including buildings, airports, ports, railway lines, roads, bridges, oil & gas facilities and pipelines, mining facilities, power projects, water projects and social infrastructure. We have acted in cases for owners and for contractors, involving State parties on either side, complex technical issues, difficult points of local and international law, Treaty disputes, joint venture participations and sub-claims among groups of contractors.

Our experience includes routinely pursuing or resisting applications for interim measures and injunctions in support of our clients' position as part of an overall litigation strategy. We regularly act for and advise clients seeking to enforce final awards in their favor before local courts,

or in seeking to annul, challenge or resist awards. Recently, we successfully represented Daewoo in the Paris Court of Appeal in resisting a challenge to an arbitration award it had obtained, and we have previously advised and represented clients in a number of proceedings to challenge or uphold awards before the English courts.

We have an excellent track record on disputes that have ultimately been resolved through active arbitration or litigation. As reflected in the comments made about us in the directories, we have a very high degree of credibility within the international arbitration community and among arbitrators who typically are called upon to decide large, complex international disputes.

“Standout firm for international arbitration, with a leading reputation in both Europe and the Americas. An outstanding bench of arbitration experts are regularly instructed on the most high-value, high-profile disputes across the globe. Strong focus on oil, gas and mining disputes and boasts a number of formidable advocates with considerable experience appearing in front of prestigious tribunals.” — *Chambers Global: Arbitration - International*

### **Court Litigation**

Debevoise boasts one of the leading national and international litigation teams. We advise clients on significant and complex cases, representing them in courts at all levels in England, New York and Paris. We also work closely with local co-counsel to direct and co-ordinate proceedings across a range of other jurisdictions.

Our construction practitioners have particular experience in:

- Enforcing or resisting calls on bonds and on-demand guarantees.
- Recognising and safeguarding our clients' property security rights in the face of competing claims. We have recently advised a ship yard on disposing of project assets to discharge its claims under a series of terminated contracts, in the face of competing claims to the property by the Owner and the ship yard's own suppliers.



- Actions seeking to freeze or enjoin adverse parties, often alongside or in support of arbitration proceedings. We acted for Ust-Kamenogorsk Hydropower Plant, a subsidiary of Samruk Energy, as advocates to the appellant in the UK Supreme Court on a landmark arbitration appeal to determine whether the English Court has jurisdiction to grant an anti-suit injunction in circumstances where no arbitration is intended or in prospect.
- Pursuing collateral action against affiliates. We have advised a ship yard on securing recourse against European affiliates and parent companies, or their directors, in local jurisdictions (in this case, requiring Dutch and Austrian law advice).
- Conducting short and dispositive applications before national courts to enforce domestic adjudication awards, strike out part or all of a claim, or determine a preliminary issue.

Our English construction litigators have experience in the full range of construction hearings, from domestic adjudication enforcement to applications and trials in international construction cases, and also have rights of audience to represent our clients in the English courts as required. In addition, no other firm can draw on the unique experience of a former UK Attorney General, who is currently one of the leading QCs and advocates in the country.





## Selected Experience

### Arbitration

**Hyundai Heavy Industries** (HHI), winning a complete victory for our client, in an ICC arbitration. The award, which was named the 2010 Global Arbitration Review (GAR) Win of the Year, has an estimated value of \$750 million.



**Petrolera Ameriven** (a joint venture owned by PdVSA of Venezuela, Phillips Conoco and Chevron Texaco) in five ICC arbitrations involving a petrochemical “upgrader” facility in Venezuela, with over \$900 million at stake.

**Occidental Petroleum Company** and **Occidental Exploration and Production Company** in an ICSID arbitration, winning one of the largest ever BIT awards, \$1.1 billion (\$1.4 billion including interest). The filing of the claim was made two days after Ecuador terminated all of Occidental’s exploration and production rights and seized all of its assets in the country. Global Arbitration Review (GAR) named the Occidental award “The Most Important Published Decision of 2012.”

**Occidental Exploration and Petroleum Company** against the Republic of Ecuador in an ad hoc arbitration brought under the provisions of the US-Ecuador Bilateral Investment Treaty (BIT) using UNCITRAL Rules, involving a dispute over Ecuador’s refusal to refund value-added tax (VAT) paid by Occidental on its Ecuadorian investments. The Tribunal issued a unanimous decision awarding Occidental approximately \$130 million. The award has been fully paid.

**Holcim** in an ICSID arbitration against the Bolivarian Republic of Venezuela. Debevoise negotiated a settlement under which Venezuela agreed to pay Holcim \$650 million in compensation.

**An international contractor consortium** in LCIA arbitration proceedings involving claims and counterclaims in excess of \$100 million concerning imminent hillside collapse at an Indonesian power plant.

**A Japanese company** in LCIA proceedings involving claims totalling \$40 million, arising from the alleged poor design of a power plant in Peru following an earthquake.



**Claimant Tethyan Copper Company** (jointly owned by Barrick Gold and Antofagasta Minerals) in an ICSID arbitration against the Islamic Republic of Pakistan and an ICC arbitration against the Pakistani Province Balochistan in disputes regarding a copper and gold mining project in the west of Pakistan.



**Perenco Ecuador** on novel jurisdictional and merits issues in an ICSID arbitration arising out of the Republic of Ecuador's unilateral increase of its participation to 99% of all revenues from oil sales above a fixed "reference price" and its declaration that Perenco's contracts had come to an end. In September 2014, the ICSID tribunal ruled that Ecuador breached its contracts with Perenco and violated its obligations under the applicable bilateral investment treaty to provide fair and equitable treatment, not to impede the investment, and against unlawful expropriation.



**The owner of a ship yard** in its claims for more than \$1 billion against a project finance vehicle formed by a consortium of a national oil company, commercial and development banks and other financial institutions.

**A construction company** in an ICC arbitration with a major oil company relating to an EPC Contract for the construction of the lower hull of a semi-submersible drilling platform for use in deep water exploration.

**ExxonMobil** in a NAFTA claim against the Government of Canada arising from requirements imposed by the Province of Newfoundland and Labrador. The Tribunal handed down its Decision on Liability and on Principles of Quantum ruling in favor of our clients that Newfoundland's regulations violated NAFTA.

**NML Capital Limited** in a request by Argentina to the International Tribunal for the Law of the Sea for provisional measures against Ghana arising from the arrest in Ghana on NML's application of an Argentine frigate.

**The operator of a ship yard** in a \$600 million ICC arbitration with a major oil company relating to an EPC Contract for a FPSO.





**A joint venture between major oil and gas companies** in an ICC arbitration against a national contractor under an EPC Contract for the construction of a major oil pipeline.



**MTR Corp** in ad-hoc arbitration in London arising out of the construction of the Airport Express Railway in Hong Kong.

**An international contractor** in LCIA arbitration in London arising out of a coal-fired power project in Eastern Europe.

**A member of a consortium of international contractors** in an ICC arbitration in Switzerland against the employer under a FIDIC Silver Book based contract in respect of the early termination of an €800 million construction contract for a high profile international rail project.

## Litigation

Successfully obtaining an injunction on behalf of a **Japanese conglomerate** against a Government and bank preventing them from making a call upon or paying out under an on-demand bond in support of an ICC arbitration concerning the early termination of an €800 million construction contract for a high profile international rail project.

With Lord Goldsmith QC appearing as lead advocate, successfully representing **Dart Realty** in averting a judicial review which could have had a significant impact on a major redevelopment project planned for a stretch of the Cayman coast. The request for a judicial review of the redevelopment was filed by a local activist group, but Debevoise argued that the request was without merit and out of time.



**BAT Industries** in one of the longest-running and widest-ranging series of litigations in its history. The matters involve multiple proceedings to determine who will bear ultimate liability for the costs (estimated to be over \$1 billion) of cleaning up the Fox River in Wisconsin and the Kalamazoo River in Michigan, which have been contaminated with polychlorinated biphenyls. We coordinate a team of co-counsel in a range of jurisdictions, and provide English, French and US law advice.



**Corbiere and Raleigh**, wholly-owned subsidiaries of Russian miner Norilsk Nickel, in a dispute between Rusal and the Interros Group over the buyback of Norilsk shares worth \$3.5 billion. These complex, inter-related proceedings involved parallel litigation in England, the Caribbean, the United States and Russia. Amongst the interrelated proceedings was the successful defence of a Norwich Pharmacal application, in which Rusal sought to obtain documents relating to Debevoise's representation of Norilsk, Corbiere and Interros.

ownership of \$7.5 billion business sale proceeds; claims in the Canadian CCAA proceedings worth \$3.5 billion against the Canadian parent company; the negotiation of a \$75 million settlement of the claims against the US Nortel Entities; the defence of claims by the UK Pension Regulator in respect of an alleged £2.1 billion pension scheme deficit; and the successful appeal to the Supreme Court of the UK. The decision has wide ranging implications for financial institutions and more broadly for insolvency litigation in England and Wales.



court, and commenced a €1.2 billion derivative action in the Royal Court of Jersey against Atrium, alleging that the defendants acted in concert to enrich others at the expense of Atrium. Defamation proceedings were also issued in England, and Meinel Bank commenced an indemnification claim in Israel against Atrium's chairman, Chaim Katzman, and its parent company. Debevoise secured a successful settlement.

**A consortium of international contractors led by KBR** in claims heard in the London Commercial Court that were brought by a consortium of subcontractors, led by Chicago Bridge & Iron, concerning the Bonny Island LNG project in Nigeria.



Ernst & Young as joint administrators of **Nortel Networks (UK)** and various other **Nortel EMEA** companies in all litigious aspects of the worldwide Nortel insolvency, including claims against the Canadian and US Nortel entities in respect of the

**Julius Meinel V and others** in their successful defence of a €2 billion claim brought against them in the English High Court by Atrium European Real Estate Limited (Atrium). Debevoise successfully challenged the jurisdiction of the English





## **About Debevoise**

Debevoise & Plimpton LLP is a premier law firm with market-leading practices, a global perspective and strong New York roots. Our clients look to us to bring a distinctively high degree of quality, intensity and creativity to resolve legal challenges effectively and cost efficiently.

Deep partner commitment, industry expertise and a strategic approach enable us to bring clear commercial judgment to every matter. We draw on the strength of our culture and structure to deliver the best of our firm to every client through true collaboration.

**“Debevoise & Plimpton LLP’s illustrious traditions in Latin America are centred primarily on major infrastructure projects, especially big transportation developments such as toll roads.” — *Legal 500 Latin America***

By any measure, Debevoise is among the leading law firms in the world. Nearly 85% of our partners are recognized by *Chambers*, *The Legal 500* or *IFLR1000*.

Approximately 650 lawyers work in eight offices across three continents, within integrated global practices, serving clients around the world.

### **Languages and Qualifications**

Debevoise can field legal teams that, collectively, include lawyers qualified in more than a dozen jurisdictions and fluent in more than 20 languages, including Spanish, Portuguese, French, German, Russian, Chinese and Japanese.

Additional general background information about Debevoise can be found on the firm’s website at [www.debevoise.com](http://www.debevoise.com).

## Our Global Presence

The firm's international presence gives Debevoise exceptional cross-border capabilities, as well as local law capacity in key markets.

### United States

New York is the largest of Debevoise's offices. The office is home to more than 475 lawyers concentrating in litigation, corporate, and tax law.

Our Washington, D.C. office has approximately 30 lawyers, who concentrate on securities regulation and enforcement, white collar crime and commercial litigation, regulatory and transactional work for industrial and financial institutions, cybersecurity and data privacy and international telecommunications and intellectual property matters.

### Latin America

Debevoise has been active in Latin America for nearly 50 years and over the past decade has worked on hundreds of cases and completed transactions in the region, including some of the largest and most

challenging projects. The firm is a recognized leader among international law firms active in Latin America. The firm's client base includes many of the most prominent companies and families in Latin America as well as multinational corporations and private equity funds investing in the region.

### Europe

Debevoise's London office has approximately 100 lawyers. Its corporate practice focuses on mergers and acquisitions, capital markets, financings and private equity, as well as transactional and tax matters. It has a strong international arbitration and litigation team.

Our Paris office has a practice which includes domestic and cross-border mergers and acquisitions, capital markets transactions, financings and private equity, as well as

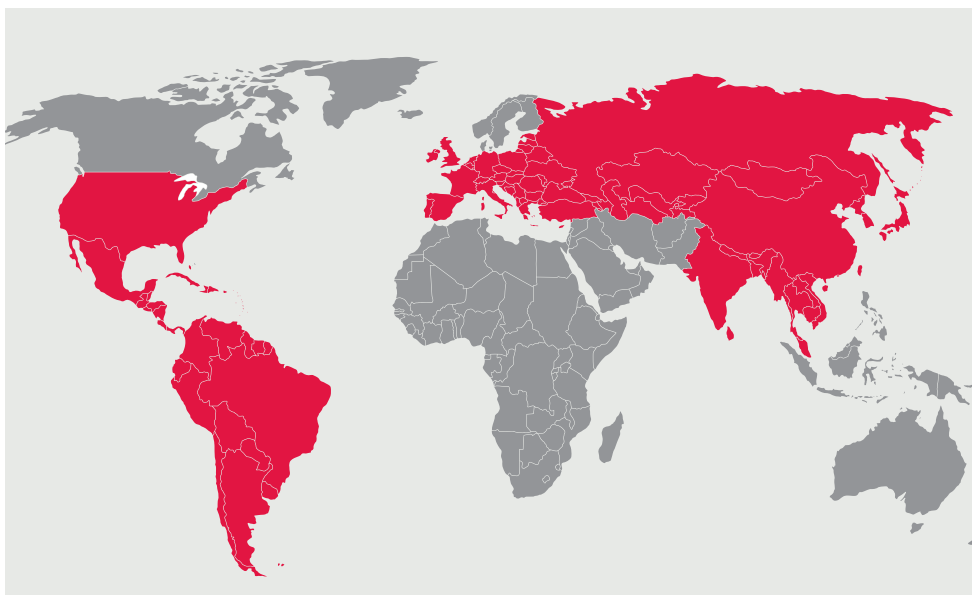
EU competition law, general corporate and tax matters and international arbitration.

Our Frankfurt office focuses on mergers and acquisitions, corporate governance, capital markets transactions, financings, private equity, and competition, as well as general corporate and disputes matters.

Our Moscow office has approximately 25 lawyers, who focus on capital markets transactions, mergers and acquisitions, natural resource projects and financings, as well as general corporate and tax matters.

### Asia

Our Hong Kong, Shanghai and Tokyo offices, with over 20 lawyers, are active throughout China and the Asia-Pacific region on corporate and litigation matters.





## Key Contacts



**Tony Dymond**

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Tony Dymond is a member of the International Dispute Resolution Group. His practice focuses on complex, multi-jurisdictional construction and engineering disputes, in both litigation and arbitration. He has advised clients in a wide range of jurisdictions, having spent the last 20 years in London, Hong Kong and Seoul. He is widely acknowledged as a leading lawyer in high value construction and engineering disputes arising from large scale projects, particularly in the energy, transport and building sectors.



**Chris Tahbaz**

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Christopher Tahbaz is a litigation partner in the firm's Hong Kong and New York offices and currently serves as Debevoise's Co-Chair of Asian Litigation. A litigator with a broad range of U.S. and international experience, Mr. Tahbaz has served as counsel in some of the firm's largest court actions and international arbitrations. Mr. Tahbaz also has been appointed to serve as arbitrator in arbitrations conducted under ICDR/AAA, ICC, HKIAC and UNCITRAL rules, and he is included in the Hong Kong International Arbitration Centre's List of Arbitrators and the ICDR Roster of Neutrals. Mr. Tahbaz is registered as a Foreign Lawyer with The Law Society of Hong Kong.



**Dietmar Prager**

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Dietmar W. Prager is a litigation partner in the firm's New York office who focuses his practice on international arbitration and litigation with a particular emphasis on Latin America. Dr. Prager has represented parties in numerous arbitrations throughout the world under the auspices of ICSID, the ICC, the AAA and ICDR, and the PCA as well as in ad hoc arbitration proceedings. Dr. Prager's recent representations include disputes involving bilateral investment treaties, complex construction projects, mining ventures, oil & gas, the retail sector, the finance sector, sovereign debt, and distribution agreements. Dr. Prager also regularly sits as arbitrator.



**Mark Friedman**

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Mark Friedman is a litigation partner. He has broad experience in civil and criminal matters, with a concentration on international arbitration and litigation. Mr. Friedman has represented clients in a wide variety of disputes, including those concerning energy, mining, construction, shareholder relationships, joint ventures, telecommunications, and investments. Many of his cases have involved complex technical matters, including infrastructure design and engineering, environmental issues, real options and other topics. He has acted as counsel or arbitrator in disputes under the rules of the LCIA, ICC, AAA, ICDR, CPR, UNCITRAL and ICSID.



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David W. Rivkin is Co-Chair of Debevoise's International Dispute Resolution Group and President of the International Bar Association (IBA). A litigation partner in the firm's New York and London offices, Mr. Rivkin has broad experience in the areas of international litigation and arbitration. He has handled international arbitrations throughout the world and before virtually every major arbitration institution. Subjects of these arbitrations have included long-term energy concessions, investment treaties, joint venture agreements, complex construction contracts, insurance coverage, distribution agreements and intellectual property, among others and they have involved common law, civil law, Islamic law and other systems.







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