FENWICK ELLIOTT

The construction & energy law specialists

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International Quarterly

International Quarterly provides informative and practical information regarding legal and commercial developments in construction and energy sectors around the world.

Inside this issue:

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Welcome to Issue 23

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Welcome to the latest issue of International Quarterly.

As you cannot fail to have noticed at the beginning of December, FIDIC released the Second Edition of their Rainbow Suite of Contracts. We have included in this edition, our initial thoughts on those changes. A more detailed review will follow during 2018. Indeed, it will be interesting to see how the new form is adopted.

The current edition of IQ features a wide range of issues. Dr Stacy Sinclair, who was recently elected to the UK Technology & Construction Solicitors Association ("TeCSA") Committee, recently wrote in our *Annual Review* about the first court case involving BIM-related issues. Here, she turns her attention to Artificial intelligence ("AI") and the technological advances that are reshaping the landscape of the UK construction and legal industry. These are changes which are being replicated in different ways across the globe.

Robbie McCrea and Jatinder Garcha attended the recent European International Contractors ("EIC") Conference in Paris. One of the main topics of conversation was the *"Infrastructure Funding Gap"*, which as Robbie explains in his report on the conference, is the shortfall between the funding deemed to be required to maintain and build infrastructure, and the funding that is actually available.

Finally, we look at a couple of International Arbitration cases. Lyndon Smith, who we welcomed to the partnership in October, looks at one of the many issues arising out of the project to widen the Panama Canal. Here the court had to look at the distinction between on-demand bonds and guarantees. The second case, a more modest charter party dispute, provides a valuable reminder of the importance of serving any notice (whether a contractual claim or a formal notice to commence proceedings) in the correct way.

With best wishes for the festive season and a happy and successful new year!

Regards

Jeremy

News and events

Trends, topics and news from Fenwick Elliott

Our international arbitration credentials

With thirty years of expertise, Fenwick Elliott has a well-deserved reputation for handling large, complex, high value construction and energy related international arbitrations. Our international arbitration practice is truly global and we have advised on major projects located in the UK, Africa, Asia, India, CIS, Caribbean, Europe, the Middle East, South Africa and Turkey.

Our lawyers are known as specialists in their field, for example Ahmed Ibrahim, Partner in our Dubai office was selected by the Dubai International Arbitration centre to prepare the programme for the practical training interactive workshops "How to conduct an arbitration under the DIAC Arbitration rules". Nicholas Gould and Jeremy Glover were asked to review drafts of the new FIDIC Contract.

For more information on our arbitration practice please contact Nicholas Gould ngould@fenwickelliott.com or Richard Smellie rsmellie@fenwickelliott.com.

Publications

Our Annual Review 2017/2018 is out now. To download your copy click here.

Team

Lyndon Smith has recently been promoted to Partner. Lyndon has been with Fenwick Elliott since August 2012, having joined us from Simmons & Simmons. He was admitted as a solicitor in 1999 and like all of us, focuses on construction, engineering and energy law. We very much look forward to Lyndon's contribution as a Partner and wish him every success in his continued practice with the firm.

Events

Throughout the year Fenwick Elliott host a range of construction law focused seminars and conferences in London and Dubai.

We also are happy to organise events and internal workshops elsewhere. A number of our expert lawyers are also regularly invited to speak to external audiences about industry specific topics including FIDIC and BIM. If you would like to enquire about organising a seminar with some of our team of specialist lawyers, please contact nshaw@fenwickelliott.com. We are always happy to tailor an event to suit your needs.

This publication

We aim to provide you with articles that are informative and useful to your daily role.

We are always interested to hear your feedback and would welcome suggestions regarding any aspects of construction, energy or engineering sector that you would like us to cover. Please contact Jeremy Glover with any suggestions jglover@fenwickelliott.com.

Glencore Agriculture BV v Conqueror Holdings Ltd

The Importance of Serving your Notice on the right person

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The case of Glencore Agriculture BV (formerly Glencore Grain BV) v Conqueror Holdings Ltd[1] provides a helpful illustration of the importance of reviewing the Notice requirements of the Contract strictly. Quite often, Notices (with a capital "N") must be served on individuals who are different from the people who deal with projects on a daily basis and at addresses different from the site office.

Background

Here, Glencore brought proceedings to set aside a final arbitration award of a sole arbitrator in the sum of just over US$40k. Glencore had not taken any part in the arbitration and was unaware of the proceedings until it received the award by post on 28 October 2016. The notice of arbitration and other documents had been sent to the email address of an employee of Glencore called Florian Oosterman, who had left Glencore's employment in September 2016. The Commercial Court had to consider whether or not the notice of arbitration and notice of the appointment of the sole arbitrator had been served effectively.

Mr Oosterman had been the initial point of contact during a dispute in relation to delays at a loading port. Once the dispute became more formal, communications passed through the broking channel, although the judgment notes that those communications did not reveal the identity of the person or persons at Glencore who were giving instructions to the brokers. However, presumably because of Mr Oosterman's initial involvement, Conqueror sent to him, by email, correspondence including, in September 2015, a letter identifying the sum Conqueror said was due and inviting Glencore to agree to the appointment of a sole arbitrator. There was no reply and Conqueror continued to send email updates on the progress of the case, to the same personal email address. There was again no response to any of the letters and other communications sent to the email address. The arbitration continued and the arbitrator gave his final award.

Glencore said that Mr Oosterman was a junior back office employee who was not authorised to accept service of any legal document. Glencore further confirmed that Mr Oosterman had not passed on any of the letters sent by Conqueror or indeed the arbitrator to Glencore's legal department. Conqueror said that they had served the notice of arbitration properly, as Mr Oosterman was the individual who had dealt with the issues which had given rise to the dispute.

Which address to use?

Mr Justice Popplewell said that there was a distinction to be drawn between sending an email to an email address which is the personal business address of an individual, and to one which is generic. Where a generic email address is used, for example info@glencore.com, the sender will probably not know the identity of the person who will open and read the email. However, if that generic address is, for example, on a company's website, then the sender can reasonably expect the person who opens the email to be authorised internally to deal with its contents. The generic email address is therefore similar to post that is often simply sent to a company address. The company can be expected to ensure that the letter or email is opened by someone with internal responsibility for putting it in the hands of whoever needs to deal with it on behalf of the company.

In the case of *Bernuth Lines v High Seas Shipping*[2] arbitration proceedings had been served at an email address which appeared in the Lloyd's Maritime Directory and on the company's website. The email was received, but then ignored by the clerical staff. The Judge held that the service was valid and the failings of the internal administration were the responsibility of the company concerned.

However, where an individual email address is used, the sender will reasonably expect the email to be opened and read by the named individual, and if he or she fails to do so, that risk falls on the company. The question here was whether an email sent to a personal business email address was good service. The answer

would be the same as if the document had been physically handed to that person. Therefore the answer would depend upon the particular role which the named individual played or was held out as playing within the organisation. Service on Mr Oosterman at Glencore could only be effective if he was the company's agent with authority to accept service. The Judge said that:

> *"Whether it constitutes good service if directed to an individual's email address must depend upon the particular role which the named individual plays or is held out as playing within the organisation".*

Here, there was no basis for finding that Mr Oosterman was expressly authorised to accept the service of arbitral proceedings and all the available evidence suggested the opposite. Further, there was nothing to suggest he had any implied authority. At most, Mr Oosterman was a representative of the operational department who had sent operational communications in relation to the performance of the charter party and the events giving rise to the dispute. That was not sufficient to give rise to the inference that he was cloaked with authority to assume the serious and distinct responsibility for accepting the service of a legal process. It could not therefore be said that he thereby impliedly had authority to handle any legal dispute arising out of the voyage, still less to accept the service of a legal or arbitral process and deal with it.

This meant that service was not valid. One issue not apparently addressed by the case was why Mr Oosterman had not passed on the legal documents. The case therefore highlights a number of important issues when it comes to company processes and procedures. Most companies should and do have in place procedures which would require any individual to pass any legal documents on to the legal department or officer as a matter of course.

Practical Steps

Care must also be taken to ensure that proper procedures are in place to monitor fax machines and computers, and also to make sure that you use the correct fax number or email address. In *Lehman Brothers International (Europe) (In Administration) v Exxonmobil Financial Services BV*[5] the wrong fax number was used. Mr Justice Blair held that where a party has made every effort to serve a Notice by the method specified, but cannot, a different method may be used. The decision here might have been influenced by the fact that the wrong fax number was used and this was not picked up at the time - the point only being taken in pleadings some six years after the event.

Whilst the Glencore case was about the formal service of an arbitration notice, and of course special rules are often in place for the service of court documents, it is important that all parties are aware of the correct address to which project

communications should be sent. Care must be taken to ensure that those to whom communications are sent actually work at the place that needs to receive them. For example there is little point in giving a formal registered office address if that registered office is not used on a regular basis, as this may mean that Notices and the like are not dealt with within either the contractually required or a reasonable time.

With this in mind, it is worth noting the new Notice requirements to be found in sub-clause 1.3 of the second edition of the FIDIC form. Notices must be:

- in writing;

- a paper-original signed or an electronic original "generated from any of the systems of electronic transmission stated in the Contract Data" sent from the "electronic address uniquely assigned to each of such authorised representatives". In other words, an email must be from a personal address set out in the Contract Data;

- identified as a Notice; and

- sent to the address for the recipient's communications as stated in the Contract Data.

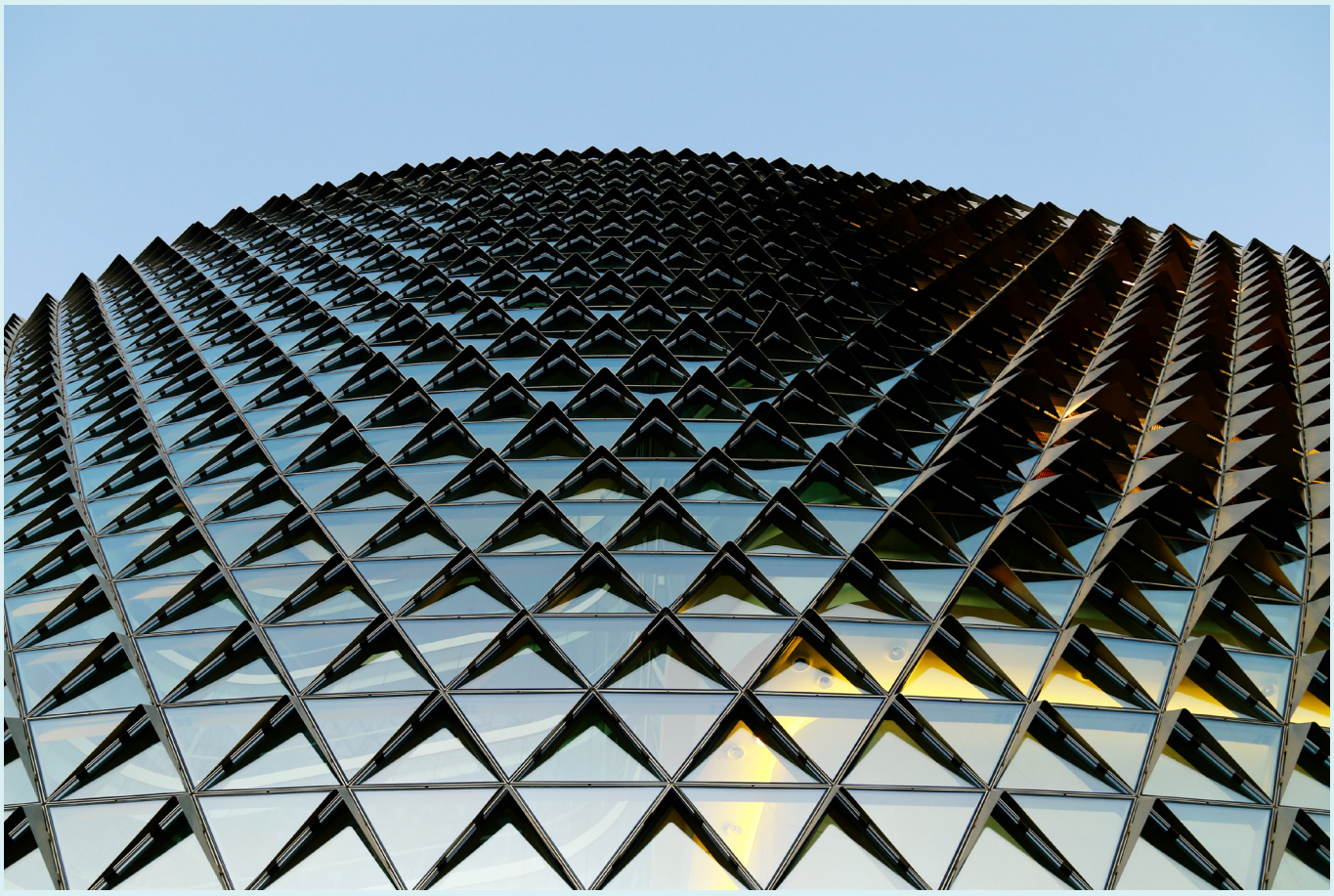
So whilst the facts of this case are very unusual, it provides a useful reminder to check carefully the address and means you are using to serve Notices of any kind, perhaps especially when they are being sent by email.

Footnotes

[1][2017] EWHC 2893 (Comm)

[2]CILL May 2006 2343

[3][2016] EWHC 2699 (Comm)



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Artificial Intelligence and Construction Law:

It's here, don't be left behind

Artificial intelligence ("AI") and technological advances are already reshaping the landscape of the UK construction industry. Drones are flying over construction sites creating 3D surveys and robots are building brick walls. This is only the beginning. AI is also starting to extend into construction law. It will not be long before AI and machine learning transform the way in which legal services can assist in the successful outcome of construction projects. The efficiencies and innovations which new technologies can bring to design and construction must now be harnessed by the legal services that support these projects.

There is a lot of talk in the media these days about legal AI and how robots or technology will transform the legal industry and the role of the lawyer. Given the jargon used and the apparent complexities of the technology, it is often difficult to understand what this hype is all about. Indeed, how relevant is it to construction and construction law?

This article looks generally at some of the technologies already available in the legal sector and considers how they might contribute to the success of a construction project or the swift resolution of a construction dispute.

With the assistance of new technologies and more collaboration between construction professionals and their lawyers, is it possible to generate greater efficiencies in the construction process and minimise the existence of disputes?

AI: the jargon

To start with, what is AI? Perhaps Deloitte's simple definition is most helpful. AI is:

> *"the theory and development of computer systems able to perform tasks that normally require human intelligence".*[1]

As journalist and author Joanna Goodman summarises:

> *"Basically, artificial intelligence is about machines (computer software) doing things that are normally done by people."*[2]

That sounds relatively straightforward. So what about all of the other terms out there? First, it is useful to know that people often use the term AI generally, when in fact they mean only a small subset of AI or perhaps even a technology that does not employ AI at all. Michael Mills, co-founder and chief strategy officer of Neota Logic, defines the field of AI as having seven branches: machine learning, natural language processing, expert systems, vision, speech, planning, and robotics.[3]

Others consider that much of the discussion about AI is actually a discussion about pattern recognition within text and the automation of extracting this text. Therefore it is not necessarily pure AI. So terminology and discussions you come across simply may be a particular subset or indeed not AI whatsoever.

In any event, rather than focusing on the specific AI process or technology employed, we first need to consider what the industry needs or wants. What do you want your technology to do? In order to obtain greater efficiencies in each of our disciplines, we need to identify the issue, work stream or "use case" and focus on the outcome or product of AI. Only once we identify the outcome required or the problem to be solved, can we then harness the various platforms/technologies to realise these objectives.

Legal AI

Mills suggests there are five categories of "legal AI": legal research, expert automation, prediction, contract analytics and e-discovery.[4] In other words, in law we see AI used in e-disclosure, contract analysis, case prediction and document automation. The various branches of AI are utilised to do so and the various technologies or platforms are employed for each of these categories.

In terms of contract analytics, "Luminance" and "Kira" are examples of machine learning, contract analysis platforms which can assist with contract review. These platforms intelligently search documents/contracts, extract text and graphically summarise the information. These tools are not a replacement for human analysis, but they can certainly speed up the

process and allow for a greater penetration into larger document sets, whilst minimising the risk of human error. Another example is "RAVN", which was bought by iManage in May 2017. This is also a platform that organises and summarises relevant information from large volumes of unstructured data and documents.

An example of the use of AI in case prediction is the recent challenge between CaseCrunch,[5] a UK-based legal tech start-up, and the lawyers of Kennedys, an insurance law firm. CaseCrunch challenged Kennedys' lawyers to see who could predict with greater accuracy the outcome of a number of financial product mis-selling claims: CaseCrunch or Kennedys. CaseCrunch won. Using predictive algorithms and the modelling of legal issues, CaseCrunch had an accuracy of 87% in predicting the success or failure of a claim. The human lawyers at Kennedys had an accuracy rate of 62%.

Other examples of technology used in law include:

- *Robot Lawyer LISA*, a "Legal Intelligence Support Assistant" which generates free non-disclosure agreements (NDAs) for business owners and consumers.

- *Termi*, Helm360's voice-activated AI assistant for lawyers which interrogates the Thomson Reuters Elite legal practice management system to request billing and other management information.

- *Do Not Pay*, a free, online bot created by a Stanford University student in 2016 which helps people appeal parking fines.

- *Billy Bot*, a virtual AI bot programmed to help people find the right barrister or mediator for their legal problem.

- *RentersUnion*, a chatbot that provides housing advice for Londoners.

The above are but a few examples. There are countless platforms, chatbots and technologies in the legal sector which assist with document analysis, automation and extraction, prediction, research, etc.

AI and construction law

As an industry, we need to consider the possibilities and use cases for AI (to use the term generally). Whilst lawyers use technology internally to automate their own processes and to assist with legal research and document review, what perhaps is most exciting are the possibilities in lawyer/client collaboration.

Given the technology that already exists, answers to the following questions are just around the corner:

- How can we get a quicker and better understanding of our contract obligations, and not just on one project, but across all of our projects?

- Can we manage and automate notifications within our contracts so that obligations can be met successfully and on time, thereby minimising the risk of disputes?

- Can technology assist in the legal review of my contract?

- Can you predict the outcome of my dispute?

- To what extent can I generate legal documents automatically?

To address these issues, good collaboration is needed. You should also remember that every project is different and may have its own unique characteristics. The following are perhaps three possible examples that could be achieved now.

Managing contract obligations: If you enter into hundreds or thousands of contracts per year, managing and maintaining awareness of your contract obligations is paramount. Would a succinct dashboard of the

key contract obligations assist in risk management? Where your contracts or subcontracts are agreed largely on your own terms and conditions, with some amendments unique to each contract, are you able to track efficiently the differences between these contracts? The technology available now, if implemented appropriately, can automate the extraction and scheduling of data from large volumes of contracts. With further development, automating notifications for those obligations with time implications may even be possible.

Automating the creation of your contracts: Following on from the above example, if you are the party generating contracts, using your own standard terms and conditions, do you automate this task? Provided the key contract data is inserted, perhaps through a portal bespoke for your company, automating this process may create efficiencies and minimise risks throughout your projects. Amendments to these contracts could be tracked and any proposed amendments could be automatically emailed to your legal team to review quickly.

A legal review of your contracts: How often do you require a legal review of a contract before entering into it? Would you have more contracts reviewed if the process was quicker and cheaper, highlighting only those risks/obligations that are essential to consider? Would a high-level review of the contract be more helpful than no review at all? Lawyers and their clients could work together to develop an automated contract review and extraction process which assists both the lawyers in the legal review and the client in understanding where risks and possible pitfalls may lie. Developing the platform together will allow the client to tailor the process to its needs, whilst benefitting from professional legal services.

The above are but a few examples of possibilities that should be achievable now. The collaboration between lawyers and their clients, with the use of technology and the development of new platforms and processes tailored to each client's needs, should enable greater efficiency and minimise risks/disputes where possible.

Conclusion

Over the past few years we have seen huge advancements and development in legal AI (including automation/machine learning/etc.). No doubt in 2018 and beyond we shall begin to see applications specifically advancing construction law.

Indeed, with greater collaboration between lawyers and their clients and the harnessing of the technologies, more efficient contract and risk management in construction and the prediction of cases is possible, if not already here. Don't be left behind.

Footnotes

[1] David Schatsky, Craig Muraskin and Ragu Gurumurthy (2014), "Demystifying artificial intelligence", https://dupress.deloitte.com/dup-us-en/focus/cognitive-technologies/what-is-cognitive-technology.html

[2] Joanna Goodman (2016), *Robots in Law: How Artificial Intelligence is Transforming Legal Services*, ARK Group.

[3] Michael Mills (2016), "Artificial Intelligence in Law: The State of Play 2016" https://www.neotalogic.com/wp-content/uploads/2016/04/Artificial-Intelligence-in-Law-The-State-of-Play-2016.pdf

[4] Michael Mills, "AI in Law Mindmap", reproduced in J Goodman (2016), *Robots in Law*.

[5] www.case-crunch.com/#challenge

The Global Infrastructure Funding Gap

European International Contractors' Workshop and General Assembly

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Introduction

On 12 - 13 October 2017 the European International Contractors ("EIC") met in Paris to discuss the Global Infrastructure Funding Gap. Jatinder Garcha and Robbie McCrea attended this workshop, we believe as the sole UK legal representatives.

The Infrastructure Funding Gap defined

Infrastructure is the essential physical building blocks of society, defined by the Collins English Dictionary as follows:

> *"The infrastructure of a country, society, or organisation consists of the basic facilities such as transport, communications, power supplies, and buildings, which enable it to function"* [other key infrastructure includes water, energy, and public services generally].

The "*Infrastructure Funding Gap*", put very simply, is the shortfall between the funding deemed to be required to maintain and build infrastructure, and the funding that is actually available. A shortfall in funding for infrastructure is therefore a very serious issue, and the Global Infrastructure Funding Gap is estimated at over US$1 trillion annually, and growing.

The purpose of this workshop was to hear from leading organisations about the scale of the problem and what is being done to address it, and to discuss our own experiences, thoughts on solutions, and opportunities presented by new generations of infrastructure funding.

The issue discussed

The first workshop session focussed on assessing the scale of the issue, globally and within the EU, and discussing potential and current solutions.

Christian Jabre of KPMG and CICA Representative Roberto Morrison each provided their analysis of the scale of the Infrastructure Funding Gap from the global perspective. Mr Jabre highlighted the widening gap particularly in vulnerable regions such as Africa, whereas Mr Morrison focussed in particular on the funding gap in Latin America, which is estimated to increase from a historical underinvestment of 2.3% GDP to 4.3% GDP towards 2030.

The panel also considered the Funding Gap locally, and Salim Bensmail (who heads the French Ministry for Economic and Finance) set out some of the key issues in funding of public infrastructure projects in France, where there is an estimated €10 billion funding gap over the next 5 years for existing commitments in Transport alone.

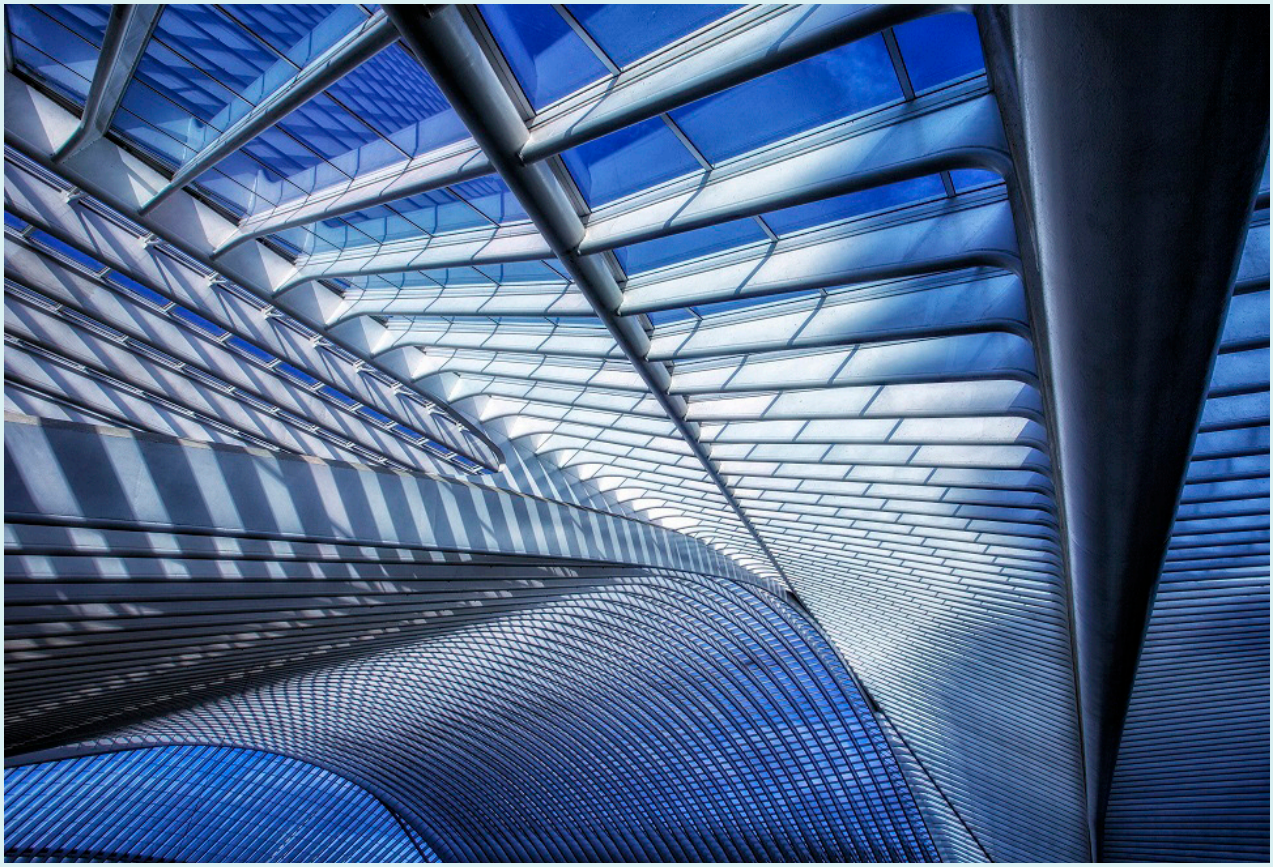
The position in the EU generally was set out by Alessandro Carano (Member of Cabinet of the EU Commissioner for Transport), which has very successfully begun to address its infrastructure funding gap through the EU Investment Plan (otherwise known as the "Juncker Plan"). The Juncker Plan utilises three pillars to stimulate investment in infrastructure within Europe, as follows:

1. Mobilising finance and "*crowding-in*" private investment through the European Fund for Strategic Investments, which has been endowed with €21 billion of EU funds through which it is expected to leverage €315 billion in private investment by the end of 2017.

2. Ensuring finance is targeted and reaches the real economy, and improving the quality of investment projects, chiefly by providing support and expertise to member states and investors, through the European Investment Advisory Hub and the European Investment Portal.

3. Improving the investment environment in the EU, including through regulatory reform within the EU single market (such as the Capital Markets Union and the Single Market Strategy and Energy Union) and structural reforms at national level whereby the framework conditions for investment are assessed.

Although there is still a funding gap in the EU, there is cause for optimism under the Juncker Plan through which infrastructure funding is steadily



increasing, and its investment target was recently increased to half a trillion Euros by 2020.

The second session focussed on the roles of institutional players in addressing the Infrastructure Funding Gap, with a focus on investment in developing countries. The catchphrase of the day was "*crowding-in private investment*", as the new generation of development finance has a strong focus on mobilising the private sector to assist in financing infrastructure and related development projects.

Speakers from the Long-Term Infrastructure Investors Association (Eugène Zhuchenko), the Asian Infrastructure Investment Bank (Ian Nightingale), the French Development Agency (Rima Le Coguic), and the EU's Directorate-General for International Cooperation and Development (Roberto Ridolfi) all discussed the work they are doing to promote and facilitate infrastructure investment in developing regions. These organisations are all implementing a new-generation of development investment strategy, focussed on better investments, sustainable development, and new and hybrid finance instruments.

The EU's External Investment Plan

Of particular note, and an example of this new generation of development strategy, is the EU's new External Investment Plan to promote sustainable development in Africa[1] and EU Neighbourhood countries.[2] This was kick-started on 28 September 2017 with the European Fund for Sustainable Development (the "Fund").

The EIP builds upon the same structure as the Juncker Plan, including three pillars designed to crowd-in private investment. The European Commission expects the EIP to attract €44 billion of private investment by 2020[3], which is a substantial figure notwithstanding its modesty in comparison to the Juncker Plan's new target of half a trillion Euros, which it hopes to achieve through the following three pillars:

4. The European Fund for Sustainable Development has been endowed with €4.1 billion. The Fund will offer a new generation of financial instruments, encompassing guarantees, risk sharing instruments, and blending of grants and loans (building upon the financing being offered under the Juncker Plan).

5. A greater level of technical assistance to help partner countries develop financially viable projects and business ready for investment.

6. Increased dialogue between the EU and partner countries, and structured private sector dialogue, to improve the investment climate and business environment in partner countries.

Key aims of the Plan:

The EIP is underpinned by the EU's commitment to the UN's 2016 Sustainable Development Goals, such as sustainable economic growth, empowerment of women, and ending poverty, the Paris Agreement on Climate Change, as well as the perceived migration crisis of 2016. Consequently projects seeking to obtain funding or guarantees under the EIP will need to contribute to these commitments and migration issues.

This means that whereas more traditional large-scale investments in infrastructure and renewable energy projects are still part of the plan, the EIP will also promote small and medium sized enterprises, both in terms of investors within the EU and enterprises in partner countries, and it will target specific socio-economic sectors and fragile regions of Africa and the Neighbourhood where foreign investment is currently difficult and overlooked.

The nuts and bolts:

Implementation of the EIP will be overseen by the Commission and a "Strategic Board", which met for the first time on 28 September 2017, who will set specific areas for investment called "investment windows". The Commission will then allocate funds and a portfolio of projects to partner financial institutions, such as the European Investment Bank and European Bank for Reconstruction and Development[4], to be administered towards particular policy objectives/investment windows.

EU businesses will be able to apply for funding from a partner financial institution for projects that fit within an allocated investment window, and which also meet the criteria of promoting sustainable development. The primary thrust of the EIP is to allow more direct access for private investment in development infrastructure, and the Commission has stated that it will consider direct partnerships with businesses in EU and Africa, both project-based[5] and with private financial institutions.

The first investment windows are expected to be released at the EU-Africa Summit which will take place on 29 – 30 November 2017, with the aim that the first guarantee agreements with financial institutions will be entered into in the first quarter of 2018. Given the success of the Juncker Plan to date there is also room for optimism about the EU's ambitious EIP.

Conclusion

The workshop presented some serious issues for discussion, and some worrying projections. The global population continues to rapidly increase and if we cannot address the widening Infrastructure Funding Gap the consequences, in particular for vulnerable regions, will be disastrous.

The Juncker Plan provides a strong model for addressing the funding gap, which has been undeniably successful to date at crowding-in private investment in European infrastructure. This new generation of investment funding has been emulated within the financial institutions that presented in the second session, who all appreciate and are adapting to the need for a new strategy for infrastructure funding, albeit in more challenging regions than the EU.

As a construction and energy law firm Fenwick Elliott works on infrastructure projects both front-end and back, and we are well aware of the difficulties involved in infrastructure investment particularly in developing regions. We will continue to monitor and look forward to participating in the advancement of this new generation of infrastructure funding.

Footnotes

[1] Signatories of the ACP-EU Cotonou Agreement.

[2] Included in the European Neighbourhood Policy.

[3] European Commission Press release, *EU kick-starts its new EU External Investment Plan*, 28 September 2017.

[4] There are currently 13 approved partner financial institutions.

[5] European Commission Fact Sheet, *Questions and answers about the European External Investment Plan*, 28 September 2017.

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Guarantees and on demand bonds

The difficulties that conflicting governing law provisions can cause parties to a project when trying to resolve disputes

Arbitration? Court?

The recent case of *Autoridad del Canal de Panamá v Sacyr S.A. and others* [2017] EWHC 2228 (Comm) demonstrates (i) the importance of consistency in the drafting of surety instruments by parties to construction contracts, and (ii) the care that needs to be taken when determining the governing law provisions, jurisdiction and dispute resolution clauses to be used in contract documentation.

Problems were encountered in *Autoridad del Canal de Panamá v Sacyr S.A. and others* as a result of the main contract and a series of financial guarantees being subject to Panamanian law and providing for the resolution of disputes by International Chamber of Commerce (ICC) arbitration, but a number of advance payment guarantees ("APGs"), procured by the contractor, being subject to English law and the exclusive jurisdiction of the English court.

Background

The case arose from a construction project for the widening of the Panama Canal.

Autoridad del Canal de Panamá ("ACP") was the employer and it contracted with a consortium of mainly European construction contractors to carry out the works. The consortium then assigned the contract to a company incorporated in Panama, called Grupo Unidos por el Canal S.A., because Panamanian labour regulations required such an arrangement.

The main contract governing the design and construction was subject to Panamanian law and provided for disputes to be referred to ICC arbitration with its seat in Miami.

As is common with many large-scale construction projects, the performance of the contractor's obligations under the main contract was secured through a series of financial guarantees and these were governed by Panamanian law and subject to ICC arbitration.

During the carrying out of the works the contractor encountered cash flow difficulties and this led them to enter into a number of APGs with the employer.

In contrast to the previous guarantees, the APGs were governed by English law and provided for the exclusive jurisdiction of the English courts.

The disputes

Disputes arose between the parties in relation to the financial guarantees under Panamanian law. The contractor filed a request for arbitration under the main contract in relation to these. They sought a declaration that repayment of the sums that were the subject of the guarantees was not due and/or payable under Panamanian law.

At a similar time, the employer brought proceedings in the English courts seeking the repayment of US$290m, plus interest, which had been paid to the contractor by the employer under the APGs.

The employer argued that the APGs should be construed as on demand bonds and therefore the court could issue a summary judgment without considering defences from the contractor under the main contract. This was in contrast to a "see to it" guarantee.

The distinction between on demand bonds and "see to it" guarantees was of great importance in this case, the reason being that liabilities under "see to it" guarantees are coextensive with the liabilities of the principal debtor, whilst on demand bonds place a primary obligation on the issuer to pay.

With on demand bonds, the beneficiary simply triggers immediate payment by outlining that it is demanding payment. A prompt payment is made provided that the demand is not fraudulent. In contrast, the beneficiary of a "see to it" guarantee must prove the contractor's breach of the underlying contract in order to receive the funds that are the subject of the guarantee.

Due to the simple nature of on demand bonds, they are typically used in international projects and are less prevalent in the UK. For employers, on demand bonds provide high security as the funds are readily accessible. In practice, an on demand bond is autonomous from the underlying contract whereas "see to it" guarantees are attached to the contract.

In *Autoridad del Canal de Panamá v Sacyr S.A. and others*, the court

reviewed the language used in the APGs. In particular, it focused on the clause in which the contractor agreed to perform the obligations "*according to the terms*" of the main contract. The clause also outlined that payment of the guaranteed amount would be made to the employer by the contractor "*as and when due pursuant to the Contract*".

Although the employer argued that it was entitled conclusively to determine the amounts of principal and interest that were due, "*conclusive evidence*" clauses in the guarantees covered only interest and not the principal.

This analysis of the language used in the APGs resulted in the court finding that these were not on demand bonds. Therefore the contractor was not liable under the APGs to make repayment upon demand. Proof was necessary to determine whether the advance payments were overdue which meant that the employer's application for summary judgment was refused.

Stay of court proceedings to allow for arbitration?

The contractor also sought to have the court proceedings stayed on the basis that the APGs were not autonomous but attached to the main contract, meaning that disputes surrounding the APGs should be referred to ICC arbitration.

The contractor relied on section 9(1) of the Arbitration Act 1996 which states:

> *"A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."* (Emphasis added)

The arguments before the court focused on the meaning of "*in respect of a matter*".

It was the contractor's position that the issues raised by the APGs overlapped with those to be determined in the arbitration. The employer, on the other hand, argued that the "*matter*" was whether the contractor was liable to the employer under the APGs and the APGs comprised English law exclusive jurisdiction clauses. Therefore the employer argued that this was not a matter which the parties had agreed to refer to arbitration.

The court agreed with the employer that the English courts had jurisdiction. Therefore the contractor's application to stay proceedings was dismissed.

Conclusion

Autoridad del Canal de Panamá v Sacyr S.A. and others reinforces the importance of the need for parties to draft clear, concise and consistent surety instruments. If it is the intention of a party to create an on demand bond, then they should avoid references to guarantees or the underlying contract.

In addition, parties to construction contracts should always ensure consistency across all contract documents when considering (i) the choice of law and jurisdiction, and (ii) the choice of dispute resolution mechanisms. If it is the parties' intention for disputes to be resolved by arbitration, and this is what is allowed for in the contract documentation at the outset, then all subsequent agreements should be consistent with that so there are no conflicting dispute resolution provisions.

The Second Edition of the FIDIC Rainbow Suite has arrived

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At a packed International Contract Users' Conference held in London on 5-6 December 2017, FIDIC finally unveiled the Second Edition of the 1999 Rainbow Suite, Red, Yellow and Silver Books. Whilst the Second Edition largely follows the 2016 pre-release version of the Yellow Book, FIDIC have taken on board some of the comments made by the friendly reviewers, and made a number of important changes.

Why have the Contracts been amended?

FIDIC have explained that the underlying philosophy and core aim behind the update is to achieve increased clarity, transparency and certainty which should lead to fewer disputes and more successful projects. Unsurprisingly, the update also addresses issues raised by users over the past 18 years arising out of use of the 1999 Form and reflects current international best practice. This is why a key theme of the Second Edition is the increased emphasis on dispute avoidance. And the way that FIDIC have chosen to address this is to make many of the contract provisions more prescriptive, setting out step-by- step what is expected from the Employer, Contractor and Engineer.

Dispute Avoidance

FIDIC is seeking to promote dispute avoidance in a number of ways:

(a) Splitting Clause 20

As FIDIC had previously made clear, they have split Clause 20 in two. The reason for this is to help make clear that making a Claim is not the same as a Dispute. To put forward a Claim is to make a request for an entitlement under the Contract. A Dispute arises if that Claim is rejected (in whole or in part) or ignored. As a result, Clause 20 is now entitled "Employer's and Contractor's Claims", whilst the heading of Clause 21 is "Disputes and Arbitration".

(b) Changes to the role of the Engineer

The Engineer will continue to have a pivotal role in administration of the project. In fact, that role has expanded. Clause 3, which outlines the role of the Engineer, is now longer having eight sub-clauses. Under the Second Edition:

- The Engineer shall continue to be deemed to act for the Employer, save that sub-clause 3.2 says that the Engineer is not required to obtain the Employer's consent before making a Determination under new sub-clause 3.7;
- There is a new role for an "Engineer's Representative" – who, importantly, should be based on site for the whole duration of the Project. By doing this, this should increase the Employer's and Engineer's overall understanding of how the project is progressing;
- The new sub-clause 3.7 is headed "Agreement or Determination" which reflects the fact that the Engineer is under a positive obligation to encourage agreement of claims;
- If the Engineer fails to make a Determination within the stated time limits, then the Engineer will be deemed to have rejected the claim, with the result that the claim can be referred to the Dispute Board; and
- When acting to seek to reach an Agreement or to make a Determination under new sub-cause 3.7, the Engineer is said not to be acting for the Employer but to be acting "neutrally" between the Parties.

The word "neutrally" is new, though it is not defined. FIDIC have said that in choosing the word, it did not mean "independent" or "impartial". A better interpretation might be "non-partisan." The word "neutral" has been chosen to make it clear that when making a Determination the Engineer is not, as noted above, acting on behalf of the Employer. This is something which will undoubtedly be the subject of much further debate.

(c) Dispute Adjudication/Avoidance Boards ("DAABs")

The change in name alone is a clear reference to the new role of Dispute Boards. Under the new contract, all DAABs will be standing DAABs, although the Guidance Notes include an option for the use of an ad hoc DAAB as and when a dispute arises. The primary purpose of Dispute Boards, preventing claims from becoming disputes, is easier to achieve if there is a standing board which can act as a sounding board to guide the project.

By new sub-clause 21.3, the Parties may if they so agree:

> *"jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract".*

The DAAB also has the power to invite the Parties to make such a referral if it becomes aware of any such issue or disagreement. This positive obligation might, in time, become a rather useful dispute avoidance tool.

(d) Early warning

Another feature of dispute avoidance is the concept of advance warning, giving early notice of a potential problem. The new sub-clause 8.4 here is one of the new clauses which follow the lead given by the 2008 Gold Book. However, whilst the 2016 pre-release Yellow Book said that the Employer, Contractor and Engineer should "endeavour to advise" each other in advance of any known or probable future events or circumstances which may adversely affect the work, that obligation has been tightened to simply "shall" under the 2017 Second Edition.

By encouraging (or in fact requiring) the Parties to do this, FIDIC anticipate that they can then work together to resolve the potential difficulty at an early stage when it is relatively minor and thereby prevent it from escalating into something altogether more serious. This is all part of FIDIC's decision to adopt enhanced project management procedures to promote more effective communication and reduce disputes.

The Programme and Extension of Time Claims

In keeping with the trend in international contracts, and in line with the Red Book subcontract, sub-clause 8.3 contains increased programming obligations. Every payment application must include the monthly Progress Report including a detailed description of progress. There is also a positive obligation on the Contractor to update the programme whenever it ceases to reflect actual progress. Further, by sub-clause 8.3(k)(v), the Contractor is required to provide proposals to overcome the effects of any delays to progress, perhaps another example of the movement towards transparency. It is also something that the Contractor may need to do, as part of the consultations following any advance warning given under sub-cause 8.4.

Although FIDIC have retained their position that the programme does not become a contract document, the Engineer (or Employer under the Silver Book) is required to review the programme and say if it does not comply with the contract. If this is not done within 21 days, then the programme is deemed to comply. This is a good example of a notable new feature of the Second Edition, the "deeming provision", which can be found throughout the contract. There are deeming provisions which apply to all parties, but this is something which will primarily affect the Engineer.

There is an interesting reference to concurrent delay, with new sub-clause 8.5 saying that if a delay caused by the Employer is concurrent with a Contractor delay, then the entitlement to an extension of time shall be assessed:

> *"in accordance with the rules and procedures stated in the Special Provisions".*

This rather neutral comment will of course have the effect of raising the issue of concurrency as a matter that needs to be dealt with by the Parties when they negotiate and finalise the contract.

Special Provisions

Whilst the Particular Conditions have been retained, they have now been split into two. Part A consists of the Contract Data, and Part B, which is headed Special Provisions. In part these are the Particular Conditions which one would expect to see as part of the 1999 Form. However, there are a number of additions.

For example, they now include reference to the five FIDIC Golden Principles. There was a lot of discussion at the conference, about the Golden Principles and how, if at all, they can be incorporated into the Contract. At the moment, they are not. Within Part B of the Particular conditions, FIDIC "strongly recommend" that all Parties, when modifying the General Conditions, take "due regard" of the five "FIDIC Golden Principles." In short, the Golden Principles are best viewed as an expression of FIDIC's balanced risk sharing philosophy. They include that the Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions and that time periods for the Parties to perform their obligations must be reasonable. The extent to which this advice is followed will be interesting from a practical, commercial and legal point of view.

BIM

There was no mention of BIM at all in the 2016 pre-relase Yellow Book. In 2017, whilst there is no specific mention of BIM in the General Conditions, there is a now special Advisory Note within the Special Provisions which deals with the use of BIM. FIDIC note that the successful use of BIM is founded on a collaborative team approach, which should start with proper planning at the outset of the project. FIDIC too are intending to publish Technology Guidelines to provide further detailed support for the use of BIM on projects which use the FIDIC form.

Force majeure and Exceptional Risks

It was Clauses 17-19 of the 2016 pre-release Yellow Book that came in for perhaps the most comment. They represented a major change from the 1999 Rainbow Suite. It is clear that in 2017 some changes have been made. Clause 17 is now called "Care of the Work and Indemnities" rather than "Risk Allocation", and sub-clause 17.6 which set out the Limitations of Liability has been moved to become sub-clause 1.15, as part of the Definitions Section. Further, and

more importantly, the requirement that the Contractor's indemnity that the works will be fit for their purpose (where the Contractor undertakes a design obligation) is now subject to the limitation of liability cap contained at sub-clause 1.15. These clauses will need careful consideration and may need to be reviewed with insurance providers.

Notices

FIDIC have made it clear that a notice given under the new contract must clearly state that it is a "Notice". This is to try and reduce disputes about what is a notice where Parties try and argue that references in a programme or progress report actually constitute notice of a claim. That said, new sub-clause 20.2.5 does provide the Engineer with the power to waive a failure to follow a time bar requirement. This was a change from the 2016 pre-release Yellow Book which gave this role to the DAAB. The Engineer can take the following into account:

- Whether the other Party would be prejudiced by acceptance of the late submission; and
- Whether the other Party had prior knowledge of the event in question or basis of claim.

The Claims Procedure and the FIDIC Time Bar

The FIDIC Form requires both the Employer and Contractor to submit claims as part of Clause 20. This closer alignment of Parties' claims is a key part of FIDIC's attempts to achieve balance and reciprocity between the Parties.

The FIDIC approach is that if there is a clearly defined process, then that can help maintain relationships as both Parties will know exactly where they stand and why the other is taking the steps they are to submit their claim. That said, new sub-clause 20.2, which sets out the claims process, is one of the longest clauses in the Contract and sets out a detailed procedure. On one view, the length of the new sub-clause is a signal that the process may not be a simple and straightforward one to follow.

This will undoubtedly place an increased burden on both the Employer and Contractor as they follow these new administrative requirements. This is especially the case as the 28-day time bar has been retained. In fact, as a whole, there are more specified time limits within the revised Contract, the failure to follow which will lead to sanctions. Virtually every speaker on the first morning of the Conference noted that the new contract was more "prescriptive". For example, there is another time bar you have to consider when preparing a fully detailed claim. Under sub-clause 20.2.4, you must provide a statement of the contractual or legal basis of your claim within 84 days.

One result of this approach may be an increased number of claims, as both Parties will need to try and ensure that they do not lose the right to make a claim. That said, this was not the view of the London Conference in 2017, where Nicholas Gould and Jeremy Glover led a session looking at these enhanced claims provisions. As part of that session we asked the audience for their views on the likely impact of the changes made to the Rainbow Suite in terms of the number of claims. Their reply was revealing:

- Less claims? 46%
- No change? 29%
- More claims? 25%

Time will tell. Of course more claims do not necessarily mean more disputes, one reason no doubt for the increased emphasis on dispute avoidance to be found throughout the new contract.

The DAAB and Arbitration

Parties must take note of certain new deadlines. A Party who is dissatisfied with the Engineer's Determination must issue a Notice of Dissatisfaction within 28 days, otherwise that decision becomes final and binding. Following that, the Party must also commence DAAB proceedings within 42 days. Otherwise, again, the decision becomes final and binding.

FIDIC too have taken steps to try and ensure that DAAB decisions can be enforced through separate arbitration proceedings. The wording of new sub-clause 21.7, largely follows, the Guidance issued by FIDIC in April 2013. This is intended to deal with the uncertainty to be found in the 1999 Rainbow Suite. However, this is very much an issue which will only become clearer over time, as parties make use of the new sub-clause.

Conclusions

Whilst, as with any contract revision, it will take time before it comes into general use, it is striking that the Second Edition of the Rainbow Suite is considerably longer than the 1999 version. The General Conditions of the Yellow Book have increased from 63 to 106 pages. One reason behind this change in length is the increased emphasis on dispute avoidance, which is something that is certainly to be welcomed. It was also with this in mind that FIDIC have set out to produce a contract that was more clearly structured, with a number of step-by-step processes and procedures. Parties should take note that the introduction of these processes will in turn increase the importance of maintaining effective project management tools to ensure that the notice (and other) requirements of the contract are followed.

This is, of course, just a short summary of some of the most important features of the new Second Edition of the Rainbow Suite. Look out for a more detailed review of the changes in our first IQ of 2018.

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