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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.

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Welcome to Issue 24

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Welcome to the latest issue of International Quarterly.

At the beginning of March, I was lucky enough to attend the FIDIC European Regional Infrastructure Conference in Tbilisi, Georgia, jointly organised with the Association of Consulting Engineers of Georgia (ACEG). As always, with a wide variety of speakers from many countries and disciplines, there was a lot to learn. The conference provided a valuable reminder that whilst people tend to compare the common and civil law approaches, it should not be forgotten that there can be a wide difference in approach within both the common law and civil law themselves depending on the particular jurisdiction you are operating in.

It was interesting that most of those present thought that FIDIC's approach to the Second Edition of the Rainbow Suite, namely the increased use of step by step processes and deeming provisions, was helpful in that everyone should know exactly where they stand. We have included with this IQ a short paper, I prepared for use at the conference, about Clause 8 and the new FIDIC approach to time.

IQ also features two articles from Nicholas Gould and Ahmed Ibrahim with a Dubai theme. Nicholas discusses calling on a Bond or Performance Guarantee in the UAE whilst Ahmed takes a look at the new Dubai International Arbitration Centre (DIAC) arbitration rules. In keeping with the arbitration theme Sana Mahmud reviews the release by the LCIA of 32 anonymised excerpts of "challenge decisions" to the appointment of an arbitrator by a party. The decisions provides useful guidance as to how institutions like the LCIA apply their rules and it will be interesting to watch whether other arbitral institutions follow suit.

Finally, in IQ 23, we discussed the importance of serving your notice on the right person. By way of a follow-up, Marc Wilkins reviews the case of *Sino Channel Asia Ltd v Dana Shipping and Trading PTE Singapore & Anr*, a case which raised questions in relation to the implied actual and/or ostensible authority of a third party to receive the arbitration notice.

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. Ahmed Ibrahim, Partner in our Dubai office contributes as a trainer to the Dubai International Arbitration Centre's practical and interative training workshop; most recently conducting a workshop focusing on 'claims and disputes'.

FIDIC experts Nicholas Gould, Partner and Jeremy Glover, Partner, both regularly speak and deliver training at events around the world in relation to the FIDIC suite of contracts.

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

Publications

Jeremy Glover features in the latest International Construction Law Review. The paper, *"Understanding and Managing Design Risk under Common Law Jurisdictions"*, was originally given at the International Construction Law Association (ICLA) Conference on Managing Legal Risk to Minimise Disputes held in Dubai last year. For more info click here.

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.

Some thoughts on how the 2017 FIDIC contract deals with time

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In December 2017, FIDIC finally unveiled the Second Edition of the 1999 Rainbow Suite, Red, Yellow and Silver Books. This short paper looks at how the FIDIC form deals with time, the primary clause which deals with time or "Commencement, Delays and Suspension" from the original 1999 contact.

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. In the introductory Notes to the Second Edition of the Rainbow Suite, FIDIC state that the new contracts continue *"FIDIC's fundamental principles of balanced risk sharing while seeking to build on the substantial experience gained from its use over the past 18 years"*. Unsurprisingly, the update also reflects current international best practice.

This is no doubt why a key theme of the Second Edition is the increased emphasis on dispute avoidance. One 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. This helps to explain why (again) in the introductory Notes to the Second Edition of the Rainbow Suite, FIDIC go on to explain that the contracts also provide *"greater detail and clarity on the requirements for notices and other communications"*. If everyone understands precisely what is expected of them, then the theory goes that this lessens the potential scope of and possibility for disputes.

The Programme: a key management tool

The changes to how the updated Rainbow Suite deals with time, primarily to be found within clause 8, provide a good example of how FIDIC have set about trying to achieve this. One of the key project management tools, whatever your contract, is the contract programme and the most obvious change to FIDIC's approach to time within clause 8 can be found in the development or significant expansion of the programme requirements.

The 1999 edition of the Rainbow Suite required that the Contractor submit a "detailed programme". However, it left the Contractor to decide how to achieve this, assuming that the Employer did not set out in the Employer's Requirements what the Contractor was to do.

Now the Second Edition of the FIDIC form, following the approach of the 2011 Red Book subcontract, not only mandates the software to be used but also sets out that the contract programme must include all (logically linked) activities, and set out the sequence and timing of inspections and tests. In addition, all key dates must be identified, and all activities are to be logically linked, also identifying float, rest days and holidays as well as the delivery of materials. A supporting method statement is also required.

FIDIC's emphasis here is very much on a more effective approach to project management, including not just the activities on site but those activities that lead up to the effective construction work at the site; in other words, everything not only in relation to the contract but also in relation to the effective running of the project. This all helps explain why one of the final paragraphs of the new sub-clause 8.3 notes that:

"The Contractor shall proceed in accordance with the Programme, subject to the Contractor's other obligations under the Contract. The Employer's Personnel shall be entitled to rely on the Programme when planning their activities."

The programme is there to benefit the whole project. For example, sub-clause 2.1 notes that the Contractor is not given exclusive access to the site. Accordingly, the Employer and Engineer may well rely on the Contractor's programme information to plan the requirements of other parties who may need access to the site.

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-clause 8.4.

The importance of dispute avoidance

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 advise" under the 2017 Second Edition. If the Parties can contemporaneously identify significant changes, either through a programme which is regularly updated or an early warning system, then this should help prompt solutions to overcome delays which should in itself assist in the timely completion of projects.

That said, there is no apparent sanction for failure to follow the clause. This is in contrast to the NEC approach which provides that a Contractor will only be compensated on the basis that an early warning had been given. Further, the relevant date of the warning will be based upon the date on which an experienced Contractor would have, or ought to have, recognised the need to give a warning. Contractors are therefore encouraged to play their part in the early warning procedures, in order to avoid inadequate cost recovery for those problems which may materialise later on.

FIDIC have adopted a more collaborative approach in recognising that for many this is a very new concept and change in the way Parties traditionally work. By encouraging (or in fact requiring) the Parties to give "early warnings", 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 and maybe avoid delay. Alternatively it gives the Employer the chance to have second thoughts about an issue that threatens to delay the project. This again is all part of FIDIC's decision to adopt enhanced project management procedures to promote more effective communication and reduce disputes.

Some contracts set up early warning registers and require regular early warning meetings. FIDIC do not provide for this, but sub-clause 3.8 now provides for management meetings. These meetings could easily include a section on early warning meetings. Equally, a Contractor may consider it prudent to make reference to early warnings that have been given under sub-clause 8.3 in the sub-clause 4.20 Progress Reports.

Whilst there is no express requirement to do this in sub-clause 4.20, Contractors are required to include descriptions of progress (sub-clause 4.20(a)), comparisons of actual and planned progress and any measures being taken to overcome delays (sub-clause 4.20(h)) in their Progress Reports. This makes the provision of up-to-date programming and progress information a precondition to payment, as sub-clause 14.3 applications for interim payment must be supported by the relevant report on progress.

Making claims for an extension of time

If the Contractor fails to complete his Works within the agreed time for completion then he will be in breach of contract. Sub-clause 8.5 provides the mechanism by which the time for completion can be extended, but only in certain clearly defined circumstances and only if the Contractor takes certain steps to give Notice of his considered entitlement.

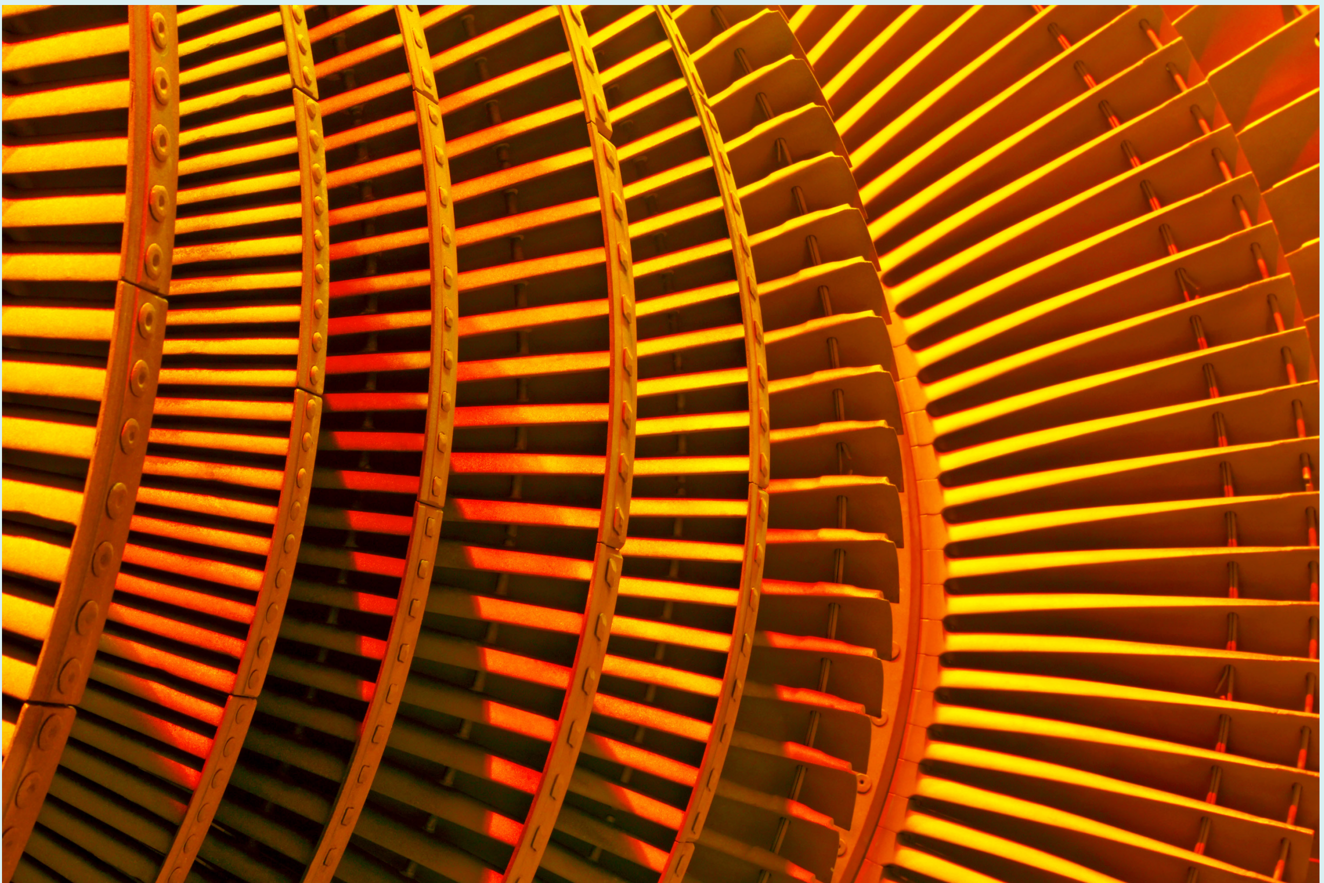
As noted above, clause 20 of the Second Edition of the FIDIC form has a much more detailed claims procedure, although there is no requirement for the Contractor to follow the claims procedure in respect of the entitlement to extension of time for Variations. FIDIC have made it clear that a notice given 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. Sub-clauses 4.20 and 8.3 specifically note that neither a programme nor progress report can be used as a substitute for a formal Notice. That said, the new sub-clause 20.2.5 does provide the Engineer with the power to waive a failure to follow a time bar requirement. 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.

Prior knowledge might be found in the regular programme updates.

So initially, a Notice of Claim, whether by a Contractor for time, or an Employer for the right to deduct delay damages as a result of delayed completion, must be issued as a condition precedent to entitlement. The Engineer will then proceed to determine the claim, in accordance with sub-clause 3.7.

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. When it comes to the Determination itself, when acting to seek to reach an



Agreement or to make a Determination under new sub-clause 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 that undoubtedly will be the subject of much further debate.

Assessing an entitlement to an extension of time

FIDIC has not set a mechanism for assessing the extension of time. Therefore it is up to the Engineer, at first instance, who by sub-clause 3.7 must make a "fair determination" in accordance with the terms of the contract and taking due regard of all relevant circumstances. A good example of what might be an appropriate approach for the Engineer was set out by Mr Recorder Toulson QC, who in the English case of John Barker Construction Ltd v London Portman Hotel Ltd (1996) 83 BLR 31 set out the following criteria which should be considered in order to calculate a "fair and reasonable" extension of time:

- Apply the rules of the contract;
- Recognise the effects of constructive change;
- Make a logical analysis, in a methodical way, of the effect of relevant events on the contractor's programme; and
- Calculate objectively, rather than make an impressionist assessment of the time taken up by the relevant events.

Of course, the Contractor must remember to demonstrate an entitlement. A simple narrative explaining what has happened on the project, complaining about the various ways in which it has been delayed, will never be enough, unless the Contractor can link specific complaints to specific periods of delay. To take another English example, HHJ LLoyd QC in *Balfour Beatty Construction Ltd v The Mayor and Burgess of the London Borough of Lambeth* [2002] BLR 288, para 30 said this in terms of a party establishing a right to an extension of time:

"By now one would have thought that it was well understood that, ... the foundation must be the [1] original programme (if capable of justification and substantiation to show its validity and reliability as a contractual starting point) [2] and its success will similarly depend on the soundness of its revisions on the occurrence of every event, so as to be able to provide a satisfactory and convincing demonstration of cause and effect. [3] A valid critical path (or paths) has to be established both initially and at every later material point since it (or they) will almost certainly change."

This warning applies to Contractors

operating under the FIDIC form. When preparing or determining a claim for an extension of time, it is important to bear the following in mind:

- The precise express terms of the contract;
- What records are available to substantiate the claim?
- What the Applicable Law says and requires;
- What is the factual and chronological sequence of events? By this we mean not just what happened at the point of delay and beyond but in the lead-up to the delay;
- What is the status of the project programmes? Have they been properly and regularly updated?
- Has a delay to the Completion Date been established?

Sub-clause 8.5 of the FIDIC Second Edition also makes a reference to concurrency, 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. Unsurprisingly, different jurisdictions deal with concurrency in different ways. In England, following *Walter Lilly & Co Ltd v Mackay & Anr* [2012] EWHC 1773 (TCC), if there is a Relevant Event (under FIDIC a sub-clause 8.5 event), the Contractor is entitled to an extension of time regardless of any concurrent delay that might be his own fault (although it does not follow that it will recover associated loss and expense). Across the border in Scotland, the preferred approach is known as the "apportionment" approach. This follows the case of *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68 where Lord Osborne said that:

"Where a situation exists in which two causes are operative, one being a relevant event and the other some event for which the contractor is to be taken to be responsible, and neither of which could be described as the dominant cause, the claim for extension of time will not necessarily fail. In such a situation, it will be open to the decision-maker, approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event."

Civil law codes tend not to make express provision for concepts such as concurrency. As a general consideration, if the contract does not provide the answer, then it is quite possible, bearing in mind the general requirements of good faith and fairness, that the civil law approach might tend to favour apportionment. The variety of approaches is probably why FIDIC have chosen not to make a definitive statement on this topic.

Delay damages

It is sometimes thought that extension of time provisions are solely for the benefit of the Contractor. This is, in reality, the opposite of the true intent. The primary purpose of an extension of time provision is to preserve a Contractor's obligation to complete within a specified time. The ability to extend the completion date, provided primarily by sub-clause 8.5, therefore preserves the Employer's right to Liquidated or Delay Damages under the FIDIC contract, even when, by prevention or breach of contract, the Employer has delayed the Contractor and is responsible in part for late completion.

The FIDIC Guide to the 1999 Edition notes that the purpose of Delay Damages is to compensate the Employers for losses they suffer as a consequence of delayed completion. Where the amount of Delay Damages is pre-agreed, the intention is that the Employer does not have to prove actual loss and damage. Whether that is entirely correct may depend on the Applicable Law.

The appropriate rates must be set out in the Contract Data. The Contract Data provides for the levying of Delay Damages on a daily basis until the date set out in the Taking-over Certificate. The Delay Damages are expressed in the Contract Data as a percentage of the final Contract Price which is calculated according to sub-clause 14.15(b). These damages can also be capped at a maximum percentage of the final Contract Price. From a Contractor's point of view, often the key question is whether or not (sub-clause 8.8) the Delay Damages clause will be enforceable.

Under English law, in the case of *Cavendish Square Holdings BV (Appellant) v Tatal El Makdessi (Respondent)* [2015] UKSC 67, the Supreme Court held that the correct approach in commercial cases was to have regard to the nature and extent of the innocent party's (e.g. the Employer's) interest in the performance of the obligation that was breached as a matter of construction of the contract. The test was whether the clause in question was:

"a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach … compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations."

If the rate of Delay Damages imposes a "detriment out of all proportion to any legitimate interest of" the Employer, it will not be enforceable and the Employer will have to prove its actual loss. In South Africa under the Conventional Penalties Act 15 of 1962, the court can reduce the amount of Delay Damages that might be applicable if the Contractor can show that the Employer will be unjustly enriched if he receives the Delay Damages as specified in the Contract; in other words if the Employer is not suffering any loss due to the Contractor's delay. The onus, of course, is on the Contractor to show that the penalty is out of proportion to the loss suffered by the Employer.

In the UAE, Article 390(2) entitles the judge to vary the parties' agreement to reflect the actual loss. For example, the UAE High Federal Court in Abu Dhabi, case 25/24 – 1 June 2004 (Civil), stated that:

"delay fines clauses contained in construction contracts are, in substance, no more than an agreed estimate of compensation that would become due in case of the contractor's failure or delay to perform its contractual obligations. According to Article 390 of the Civil Code, it is not sufficient – for the agreed compensation to become due – to establish the element of fault alone. It should be established, in addition, the element of loss which is suffered by the other party. If the contractor succeeds in establishing the absence of loss, the agreed compensation should be repudiated."

Accordingly, the court may set aside entirely the Delay Damages, award lesser damages reflecting the actual loss, or award damages to the Employer of greater value than the Delay Damages figure. Here the burden of proof shifts according to where the potential benefit lies. That said, in practice, courts tend to attempt to respect the parties' agreement and would be reluctant to overturn the original clause unless it was evident that the Delay Damages bore little resemblance to the actual loss. In this, courts around the globe take a similar view. Therefore whatever the jurisdiction, it is always sensible to keep a record and explanation of the reasons (perhaps including details of any negotiations) why the amount of the liquidated damages was set at the level it was, and why it represents a reasonable and proportionate protection of a legitimate commercial interest.

Conclusion

Whilst it was probably not drafted with the time provisions of clause 8 particularly in mind, the guidance given under the Introduction of Particular Conditions Part 2 - Special Provisions, published with each of FIDIC's 2017 contract updates, is a useful reminder of FIDIC's essential approach to time:

"Golden Principle 4: All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration …

Each time period stated in the General Conditions is what FIDIC believes is reasonable, realistic and achievable in the context of the obligation to which it refers, and reflects the appropriate balance between the interests of the Party required to perform the obligation, and the interests of the other Party whose rights are dependent on the performance of that obligation. If consideration is given to changing any such stated time period in the Special Provisions (Particular Conditions – Part B), care should be taken to ensure that the amended time period remains reasonable, realistic and achievable in the particular circumstances."

UAE Bonds: calling on a Bond or Perfomance Guarantee in the UAE

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An increase in the demands made or rather the "calls" made for payment of bonds and guarantees can sometimes be a reflection of the economic situation within the construction industry. A tightening of expenditure or perhaps problems with resourcing can lead to a delayed or distressed project and ultimately a position where a call is made on the bonds or guarantees of the contractor or others in the supply chain. There are some important factors to consider when deciding whether to call on these security documents.

The first is to identify whether the security document is an on-demand bond, or a performance guarantee. The construction industry uses terms interchangeably, as does the banking world. It is not possible to rely upon the label on the document, and so a review of the terms of the security document is required. A classic on-demand bond is as good as cash. It is unconditional in that the beneficiary can make a written demand for payment with very few or any obstacles. The typical wording of an on-demand bond is:

"The bank undertakes to pay the beneficiary on receipt of its first written demand in writing on the bank stating that the Contractor is in breach of its obligations under the contract the sum not exceeding XXX. Such written demand being conclusive evidence of the Contractor's breach."

An on-demand bond therefore comprises two basic elements. First of all the beneficiary can make the written demand claiming an amount of money up to the cap of the bond, and secondly that written demand is conclusive evidence of the contractor's breach.

It is the beneficiary themselves who decides whether the contractor is in breach and so makes the demand. The bank is in no position to know whether the contractor is really in breach, and so the on-demand bond wording allows the bank to rely upon the beneficiary's notice as being conclusive evidence of that breach. From the bank's perspective a written demand that simply meets the requirements of the on-demand bond can be safely paid.

It is extremely difficult for a contractor to stop that payment from being made by the bank. Typically, a court order is required, and a contractor would need to persuade a court that the beneficiary's demand was not valid, or that the bank should not pay by treating the beneficiary's demand as invalid. Many courts around the world have made it clear that the hurdle is extremely high. Fraud is often the only exception, and that is extremely difficult to prove. Attempts to argue that the call for payment must have been mistakenly made because the underlying contract has been entirely concluded such that there can be no breach have had some success, but cannot always be relied upon.

Performance guarantees are an entirely different species of security. They are based in the law of contract, and specifically on the principle that there are three parties and two contracts. The primary contract is the building contract between the employer and the contractor, whilst the secondary contract is a triparty contract between the beneficiary employer, the contractor and the bank (the contractor's bank or provider of the guarantee). They are fundamentally different from an on-demand bond. The guarantor is primarily liable to step in and complete the contract, or pay damages instead. Most banks simply pay the damages.

However, the important point is that the damages need to be fully identifiable and ascertained under the primary contract. This means that a call for payment under a guarantee might mean it takes much longer for the payment to materialise than with an on-demand bond. An on-demand bond is often paid out within a week or two. However, it may take years in order to ascertain and establish the loss under the building contract to the point where it is possible to make a full and proper call on the guarantee of the amount that is properly due.

This distinction is not as clear in the Middle East. For example, the UAE Federal Commercial Transactions Law

No. 18/1993 (the Commercial Code) deals with letters of guarantee, and Article 414 describes them as:

"an undertaking issued by the guaranteeing bank on the request of his client to pay unconditionally and without restrictions, a certain specified or determinable sum to another person (the beneficiary), unless the letter of guarantee is made depending on a condition where payment is requested within the time limit set in the letter; the letter of guarantee shall state the object for which it has been issued."

Article 414 of the Commercial Code therefore recognises that a guarantee could be conditional or unconditional. If the document is an on-demand unconditional bond then the bank is obliged to pay. Article 417(1) states:

"The bank shall not be entitled to refuse payment to the beneficiary for reasons relating to the bank's relation with the client or the client's relation with the beneficiary."

This is usually taken to mean that the bank can ignore any dispute between the contractor and the employer or any other relationship issues that they might have. If the contractor considers that the employer's call on the bond is fraudulent or perhaps unjustifiable then recourse is limited by Article 417(2) of the Commercial Code, which provides:

"In exceptional circumstances, the court may on application of the client place an attachment on the amount of the guarantee with the bank provided that the client has serious and certain reasons for its request."

In practice it is very difficult in the Middle East to persuade a court to place an attachment order on the amount. The preference is simply to order the bank to make payment. This of course follows the approach of many courts around the world.

Notably, the action that the court might take, if persuaded, is to place an "attachment". This term has a particular meaning under the UAE legal system, whereby one of the parties can seek to attach the assets owned by the other party. This, on the one hand, means that Article 417(2) recognises that the amount of the bond is an asset of the beneficiary, which is consistent with the concept that a bond is equivalent to cash. On the other hand, a contractor seeking to attach the amount of the bond may file its action before the summary judge, i.e. a fast track application on ex parte basis, and the decision is usually made on the same day of the application.

A further example is the Qatari Trade Law No. 27 of 2006, Banking Operations Chapter, Sub-Chapter VIII, No. Article 406 which provides:

"A letter of guarantee is an irrevocable written pledge issued by the bank at the request of its client, known as the applicant, to pay a certain amount or amounts to be specified to another person, known as the beneficiary if the beneficiary so requests within the period specified in the letter and without regard to any rejections. The purpose for which the letter of guarantee is issued shall be explained therein."

While the English translation is slightly different from the UAE Commercial Code, the intent is certainly the same. Once again the bank cannot refuse payment under Article 406, based on the same principle as the UAE's Commercial Code. However, unlike the UAE law, Article 410 of the Qatari Trade Law expressly prevents the court from placing an attachment over the amount of the guarantee. This is a distinctive feature of the status of guarantees under Qatari law. Securing the amount of a guarantee

would therefore require either a substantive order or an interim measure on grounds other than those that can usually be relied upon to place an attachment; the threshold is higher and the court will likely request the applicant to provide security for damages.

The problem, therefore, for contractors is the ability to resist calls on their on-demand bonds in the Middle East in general. It is extremely difficult, if not impossible. Disputes in relation to extensions of time, money claims, failures to pay, the cost of variations, disputes in relation to engineer's decisions, etc. are substantive disputes that need to be dealt with under the building contract. They are not sufficient grounds to stop a call being made against on-demand bonds. In reality, contractors are left with little choice but to pursue their claims under the building contract and then seek proper payment, taking into account any call made in relation to an on-demand bond.

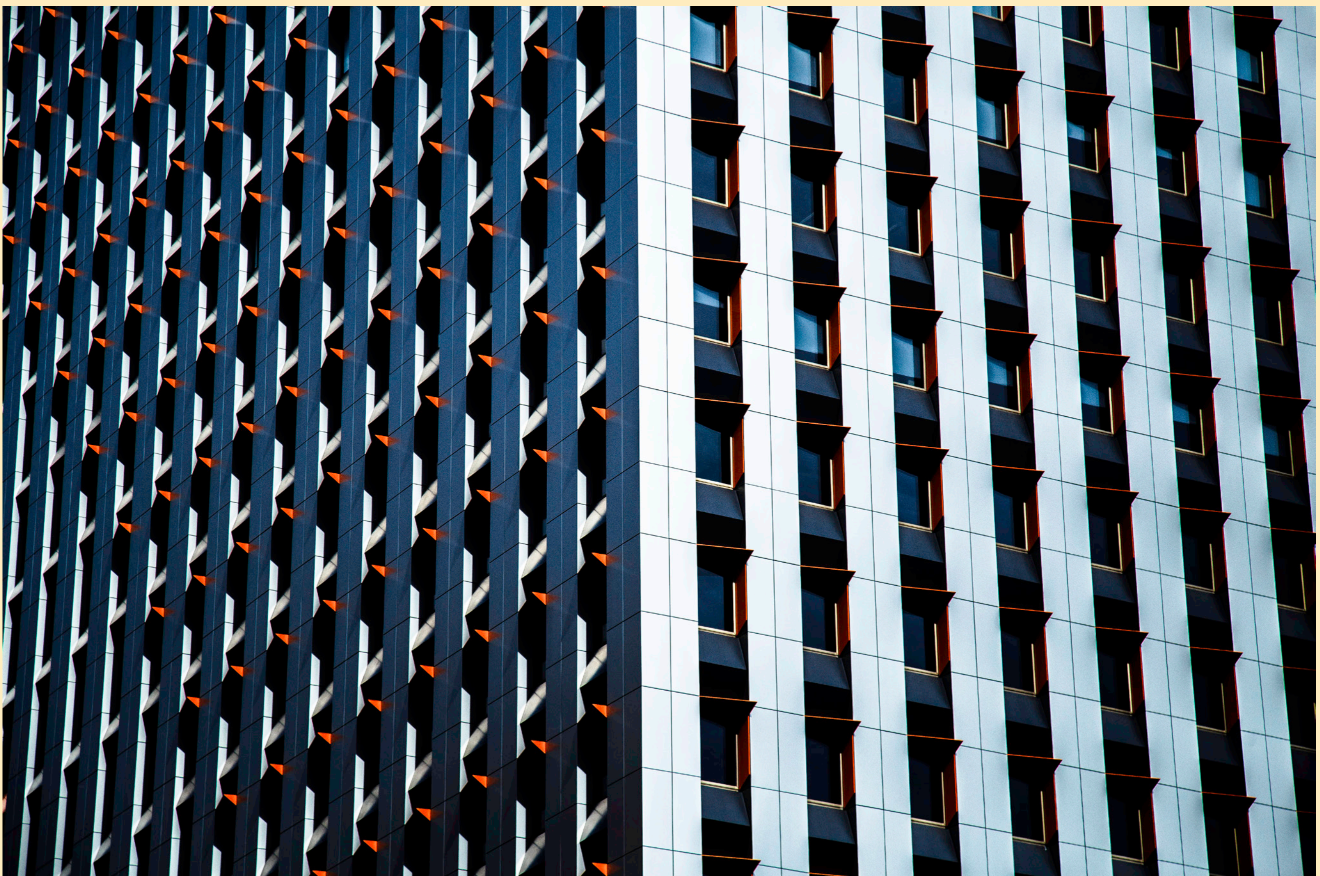
Taking into account payment made by a bank between the employer and contactor under the building contract is not without difficulty either, because the on-demand bond is a separate document in its own right. A guarantee is a secondary contract linked to the primary building contract. That is not the case with an on-demand bond. On the positive side, a contractor might be entitled to further compensation for an incorrect call on a bond, although those claims are not entirely straightforward either.

There is a noticeable difference between the UAE and other parts of the world and that is the almost exclusive use of unconditional on-demand bonds. Domestic projects in many common law countries rely upon performance guarantees in relation to the work. On-demand bonds are common throughout the Middle East.

Whilst not necessarily the normal practice in the UAE or other parts of the Middle East, it is however extremely important for contractors to serve their notices under the building contracts, request extensions of time and progress those requests for time and money in order to protect their cash flow, financial position and ultimately their bonds. However, that does not lead to an automatic defence to a call on an on-demand bond.

Footnotes

[1] The helpful assistance and comments of Ahmed Ibrahim, Partner, Fenwick Elliott LLP, are gratefully acknowledged.



Service of Arbitration Notices

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Serving notices — getting it right

In issue 23 of *International Quarterly, we looked at the decision in Glencore Agriculture BV (formerly Glencore Grain BV) v Conqueror Holdings Ltd*[1] which highlighted the importance of ensuring arbitration notices are served on individuals within an organisation who have authority to accept service.

The case of *Sino Channel Asia Ltd v Dana Shipping and Trading PTE Singapore & Another*[2] also highlights the importance of getting it right when it comes to the important step of serving a notice of arbitration. This case raised questions in relation to the implied actual and/or ostensible authority of a third party to receive originating process.

Background

This case concerns arbitration proceedings commenced by Dana against Sino in relation to disputes which had arisen under a contract of affreightment (COA) entered into between Dana as owner and Sino as charterer. Whilst the COA addressed procedural matters regarding disputes such as in relation to the appointment of arbitrators (clause 55), and contained various provisions for the giving of (strictly) operational notices (clause 56), there were no provisions setting out any express requirements relating to the service of originating process (e.g. a notice of arbitration). Therefore, the service of notices was governed by section 76 of the Arbitration Act 1996.

The question of whether service of the arbitration notice by Dana had been effectively given did not arise until after the arbitral tribunal had issued its award in favour of Dana, which it sent directly to Sino's registered office in Hong Kong. Sino's challenge to the jurisdiction of the arbitral tribunal arose by virtue of the fact that its receipt of the award was the first time Sino had been made aware of the arbitration proceedings or the award. This was because the notice of arbitration had not been served upon Sino, but instead was served by email on a third party, a man named Daniel Cai who was an employee of a company called Beijing XCty Trading Ltd (BX). So what was BX's involvement in the COA and why was BX and not Sino the recipient of the arbitration notice?

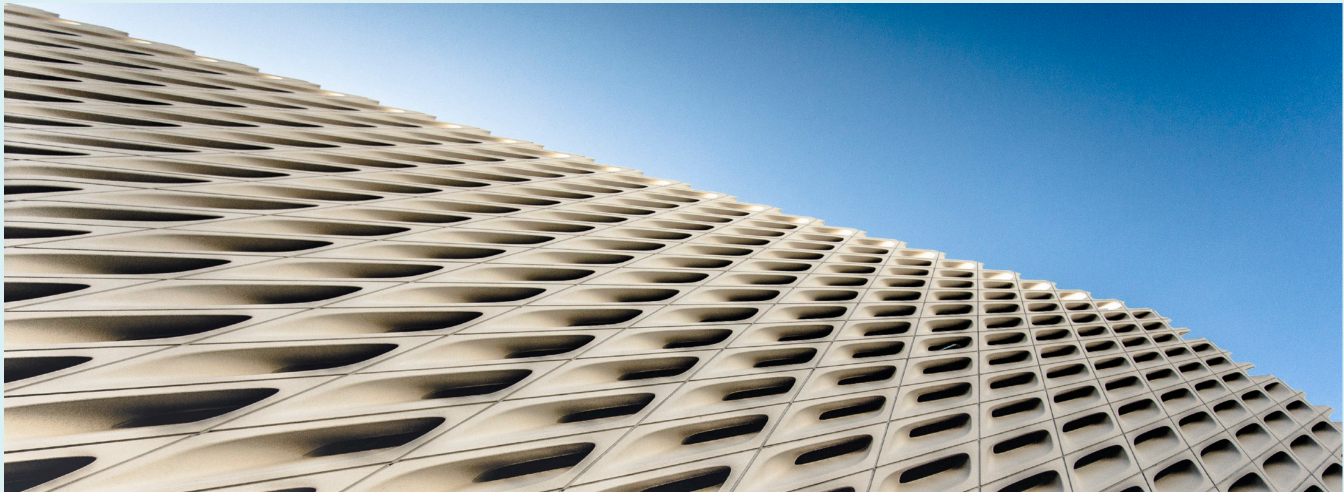
Essentially, Sino and BX had an arrangement whereby Sino agreed to sign the COA and front the transaction, with the operation of the COA being left to BX. Sino had not intended to (nor did it) play any part in the negotiations or performance under the COA. Therefore, following execution of the COA, all communications were between Dana and BX. Apparently, Dana knew nothing of this "fronting" arrangement or that Mr Cai was an employee of BX rather than an employee or representative of Sino. In fact, Mr Cai presented himself as *"Daniel of Sino Channel Asia"* and was referred to by Sino's brokers as *"Charterers guy"*. Therefore, following failed attempts (by Dana and Mr Cai) to resolve disputes which had arisen under the COA, Dana commenced arbitration proceedings by emailing a notice of arbitration to Mr Cai.

Save for three emails which were sent by Mr Cai to Dana and the arbitrator appointed by Dana following receipt of the notice, neither Mr Cai nor anyone else from BX was engaged in the arbitration process. An award was made in favour of Dana and sent to Sino at its registered address in Hong Kong. When the award was not honoured, Dana sought to enforce it through the Hong Kong court. Those proceedings were subsequently stalled pending the decision of the UK court.

The court proceedings

In summary, Sino applied to the High Court in London for a declaration that the award was made without jurisdiction and was of no effect, and for an order setting aside the award accordingly, pursuant to section 72(1) of the Arbitration Act 1996. Dana defended the proceedings on the basis that Mr Cai of BX had implied actual authority and/or ostensible authority to receive the arbitration notice on behalf of Sino.

At first instance, the judge found in favour of Sino, holding that whilst BX had a general authority to act on behalf of Sino in connection with the COA, it did not have implied actual authority or ostensible authority to accept the arbitration notice on behalf of Sino. Accordingly, the judge



concluded (1) that Sino was entitled to a declaration that the arbitral tribunal was not properly constituted and accordingly that the award was made without jurisdiction, and (2) that Sino was entitled to an order setting aside the award.

However, the Court of Appeal took an entirely different view. Overturning the judgment, they held that BX had both implied actual authority and ostensible authority to accept service of Dana's arbitration notice on behalf of Sino, and that the arbitral tribunal was therefore properly constituted and the award was made with jurisdiction.

In relation to its consideration of whether BX had implied actual authority, the Court of Appeal said that the starting point must be the arrangements between Sino and BX, which they said were *"remarkable"*. The Court noted that Sino took no part in and had no interest in the negotiation or the performance of the COA, and that Sino *"was apparently content with complete passivity — a situation, aptly described as complete delegation, where it might be faced with unanswerable and substantial liability by reason of BX's breach/es of contract"*. The Court said the inescapable inference from Sino's evidence was that Sino hoped or expected that BX would protect it from losses incurred by way of its (Sino's) fronting of the COA, and concluded that *"Against this background of disinterest and passivity, we regard it as unreal to suggest that Sino at the time required the notice to be served on it, rather than on BX, who Sino (however imprudently) had regarded as the party concerned with the COA"*. The Court went on to say that *"It was BX's business to deal with it as with every other aspect of the COA, not Sino's and BX thus had implied actual authority to receive the notice"*.

As to the second question, i.e. whether BX had ostensible authority, the Court of Appeal said of the *"most unusual"* relationship between Sino and BX that it *"formed the foundation of how BX/Mr Cai's authority appeared to others"* and that *"[t]he appearance given to Dana was that BX were to be dealt with for all purposes, extending to the receipt of the arbitration notice"*. The Court noted that the holding out was not simply on the part of BX, but *"manifested itself in Sino's conduct of its relationship with BX"*. Finally, it noted that Sino had been responsible for putting BX in the position it held with regard to the COA. Accordingly, the Court of Appeal held that BX had ostensible authority to receive the arbitration notice.

Comment

Whilst, ultimately, Dana was successful in defending Sino's challenge to the jurisdiction of the tribunal and the validity of its award, a great deal of time and cost was no doubt incurred in the process. One cannot help thinking it could have been avoided had the parties ensured the COA contained clear provisions in relation to the giving of notice in the event of a dispute, or if Dana had simply served the arbitration notice on Sino's registered office as well (Dana had details for one of Sino's two directors, and Sino's registered and trading address in Hong Kong).

It should also be borne in mind that the Court considered this to be a most unusual case, and the decision reflected what the Court considered to be *"remarkable"* arrangements between Sino and BX. Had the circumstances of this case not been quite so unusual, the Court of Appeal may have arrived at a different conclusion, leaving Dana in the very unsatisfactory position of having an arbitrator's award that it was not able to enforce against Sino.

This case therefore serves as another useful reminder of the importance for contracting parties to be clear on which entities and/or individuals involved in a contract have authority to accept service of originating process, and in circumstances where there may be some doubt, to adopt an appropriate *"belt and braces"* approach, such as ensuring that whatever else is done, the notice is also served by the methods set out in section 76(4) of the Arbitration Act 1996, which are deemed to constitute effective service. Doing so may help to avoid questions being raised as to the validity of notices. It may also prevent situations where otherwise legitimate claims become time-barred due to the significant period of time that may elapse between first issuing notice and the final outcome of any jurisdictional challenge.

Footnotes

[1] [2017] EWHC 2893 (Comm).

[2] [2017] EWCA Civ 1703.

The New DIAC Rules - one more positive step forward!

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Introduction

The United Arab Emirates seems to be very close to putting in the last piece of the puzzle for the region's most genuine arbitration-friendly jurisdiction. It was recently announced, finally, that the Federal National Council has approved a draft arbitration law. This has been a long-awaited step towards a developed arbitration framework.

At the time of writing this article, there is no standalone arbitration law. Chapter 3 of the Civil Procedures Code (articles 203–218) contains the applicable procedural rules for arbitrations seated in the United Arab Emirates. These provisions can perhaps be seen as not meeting fully the requirements of arbitration practice in the country. Thus, approval of the new law, which is reportedly a modern arbitration law, is welcomed by practitioners.

With this in mind, from a procedural law point of view, the development at the arbitral institutions level is even brighter. The new Rules of the Dubai International Arbitration (DIAC) seem to be timely and complete the bigger picture!

DIAC has been playing a significant role over the past decade in developing arbitration practice and spreading awareness of arbitration in the region. Statistically speaking, DIAC is, undoubtedly, the largest arbitration institution in the Middle East. This is understandably consistent with Dubai being a regional business hub and an attractive destination for cross-border transactions and complex industries such as construction and energy.

During the Dubai Arbitration Week in November 2017, DIAC announced its new Rules which are expected to come into force in the near future upon the issuance of a decree by His Highness the Ruler of Dubai enacting the Rules. That is quite an important distinguishing feature of the DIAC Rules; they are enacted by way of a decree, which means the Rules form part of the UAE law. This is particularly important in resolving any conflict with specific non-mandatory legal provisions on the grounds that the later Rules displace the earlier ones, and the particular displaces the general.

In its new version, the DIAC Rules respond to the market needs and deal with specific concerns of arbitration practitioners. The following paragraphs outline the main areas of development.

The DIFC is the default seat

Article 20.1 of the current Rules states that absent the parties' agreement, the seat of arbitration is Dubai. The new article 25.1 provides that the Dubai International Financial Centre (DIFC) is the default seat of arbitration. This is a major change that should also be seen in conjunction with the DIAC's opening of an office in the DIFC last year. It can thus be said that DIAC has established a proper presence in the DIFC.

The legal implications of the DIFC being the default seat are: first, the DIFC arbitration law no. 1 of 2008 (a developed arbitration law) will apply; secondly, the DIFC Court will provide supervision and assistance during the course of the arbitration proceedings; and thirdly, the DIFC Court – which is known to be an arbitration-friendly court – will have jurisdiction to deal with the recognition and enforcement of arbitration awards rendered under the DIAC Rules.

Multiple contracts

Article 18 of the new Rules states that claims arising out of or in connection with more than one contract may be made in a single arbitration. This can either be by the parties' consent to a single arbitration to be conducted in accordance with the Rules, or the contracts should contain arbitration agreements referring such disputes to arbitration to be conducted under DIAC Rules, the arbitration agreements are compatible, and:

i. the disputes arise out of the same legal relationship(s); or

ii. such contracts consist of a principal contract and its ancillary contract(s); or

iii. the disputes arise out of the same transaction or series of related transactions.

This new provision seems to be useful in construction disputes, particularly if the arbitration clauses in the main contract and subcontracts are compatible, and the dispute involves overlapping issues or back-to-back liabilities for delay or damages for

example. It is also relevant to disputes that arise out of off-plan real estate contracts. It is not uncommon in Dubai that one investor purchases a number of properties from the same developer in the same project. If a dispute arises in relation to the project itself, rather than to a particular purchased unit, the filing of an arbitration case for each individual unit would certainly be detriment to the claimant who will have to pay an advance on cost that can be significantly reduced if the multiple contracts are to be considered in a single arbitration.

The tribunal's power to suspend the proceedings

A helpful provision is introduced by the new article 6.2 which states:

"Upon application of a party, the Tribunal may suspend the proceedings to allow one or more requirements of the arbitration agreement to be satisfied."

This new provision is of particular importance in construction cases where multitiered dispute resolution clauses are commonly used. It is not uncommon for a party to file a request for arbitration straightaway, disregarding any contractual pre-arbitration requirement. For example, failure to refer the matter in dispute to the Engineer if the contract is based on the general conditions of FIDIC 1987, or failure to refer the dispute to the Dispute Adjudication Board in the first place if the contract is based on the general conditions of FIDIC 1999. This action might in a certain set of circumstances trigger a jurisdictional issue. Respondents frequently raise jurisdictional objections in these cases on the grounds that the arbitration is filed prematurely.

To address this, an emerging trend is for arbitrators to order the suspension of the proceedings pending the fulfilment of any pre-arbitration steps, rather than dismissing the claim outright. This has the advantage of time and cost savings to the parties, as the tribunal would still be "in place". However, arbitrators should consider carefully whether they have the power to do so under the applicable curial law and/or relevant institutional rules.

In the author's view, DIAC should also consider giving this power to the tribunal on its own motion. A suggested revised draft would thus read: "upon application of a party, or on its own motion, the Tribunal may suspend …". With this addition, arbitrators will draw comfort from ordering suspension in circumstances where the claimant fails to request the suspension of the proceedings in response to the jurisdictional objection.

Emergency arbitrator

More often than not, a party may need to seek an interim relief from state courts before pursing their substantive claims in arbitration. It may, however, be more convenient for the parties to seek such interim relief from an emergency arbitrator to avoid engaging in judicial formalities. Provisions for an emergency arbitrator are introduced for the first time in the new DIAC Rules.

A party may seek an emergency interim relief provided that the tribunal is not yet constituted. The emergency arbitrator will be appointed in three working days.

The emergency arbitrator shall, as soon as possible but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceedings by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the powers vested in the tribunal pursuant to the Rules, including the authority to rule on her/his own jurisdiction.

The emergency arbitrator will have to be impartial and independent. Any challenge to his or her appointment must be made in one business day. The emergency arbitrator will allow the parties an opportunity to present their views, and may order an interim relief. The ordered relief will then be reconsidered by the tribunal once constituted. In any event the ordered interim relief will cease to be binding

after ninety days from the date of the order whether or not a tribunal was constituted. The emergency arbitrator cannot act as arbitrator in the same dispute unless by the parties' consent.

Expedited proceedings

The new Article 18 allows a party to apply for expedited proceedings if the claim value is less than two million dirhams (approximately US$ 550,000) exclusive of interest and arbitration cost. The application must be made before the constitution of the tribunal.

The appointment of a sole arbitrator will be made in seven days after the advance on costs is fully paid. The arbitrator will have to issue the final award in three months. In addition to the request for arbitration and answer to the request for arbitration, the parties are to submit their statement of claim and statement of defence simultaneously in fifteen days, and the award is to be rendered based on the documents alone.

Expedited proceedings will be an ideal route for straightforward small claims, especially those related to real estate disputes, if the amount in dispute is less than two million dirhams.

Awarding legal cost

The new Rules also deal with the issue of awarding legal cost. Under Article 4.2 of the Appendix – Cost of arbitration of the current Rules – the tribunal is empowered to award arbitration costs. However, the definition of the arbitration costs as provided for under Article 2.1 of the same Appendix does not include the parties' legal fees, party-appointed expert fees and expenses. This led to a decision by the Dubai court of cassation number 282 of 2012 ruling that arbitral tribunals under the DIAC Rules do not have jurisdiction to award legal representation fees.

The parties may of course agree in the terms of reference or any other agreed procedural documents to empower the arbitrators to award legal costs. However, in practice respondents who have no or little chance in succeeding in their defence tend not to agree.

Article 2 of the New Rules overcomes the issue as it reads: *"The arbitration costs shall include inter alia the Centre's registration fee, the advance on costs, the fees and expenses of any Tribunal or party-appointed expert, the legal representation fees and other party costs, to the extent reasonably incurred."*

This change seems to have an impact on strategic decisions as to the timing of filing the arbitration. A claimant party may opt to wait until the new Rules come into force to ensure the applicability of the new Rules to its arbitration so as to benefit from the recoverability of legal costs.

Singing the award abroad

The requirement to sign the award in the United Arab Emirates has been creating an unsatisfactory situation for arbitrators based in foreign jurisdictions. These arbitrators are required to travel to Dubai just to sign the award.

Article 42.2 of the New Rules states: "All awards shall be deemed to have been signed and issued at the seat of arbitration, without the physical presence of the Tribunal at the seat of arbitration."

The use of the word "deemed" is apparently a key solution to satisfying the requirement.

Power to sanction counsel conduct

In a jurisdiction such as that of Dubai, practitioners come from different legal backgrounds with a wide variety of professional conduct codes or guidelines. As such, it comes as no surprise to experience working with counsel whose main objective is to obstruct or frustrate the proceedings.

The new Article 50 sets out a helpful provision as follows:

"In order to promote the good and equal conduct of the parties and their representatives during arbitral proceedings conducted under the Rules, the Tribunal is vested with the authority to impose sanctions when there is an attempt to unfairly obstruct the arbitration or jeopardize the award; when knowingly they make any false statements, procure or assist in the preparation of, or rely upon, any false evidence; or when they conceal or assist in the concealment of any document."

Notably, although the Article authorises arbitrators to impose sanctions, there is no guidance as to what these sanctions might be. However, it has always been recommended in international arbitration that arbitrators must consider using decisions on cost as an efficient tool to encourage parties to deal fairly and efficiently with the proceedings.

Conclusions

The above are the most important features of change in the new DIAC Rules. They represent a fundamental change rather than simply a revised version of the current Rules. It is worth noting that the draft new Rules has also proposed a new provision for Islamic sharia compliance as an option by mutual consent of the parties. In addition, the Rules contain a scrutiny process to review draft awards before they are rendered to ensure that no procedural issue might impact the enforceability of the award.

With these developments, one should recognise the positive step forward towards state-of-the-art arbitral procedures that address any concerns that might currently exist.

The LCIA's publication of its arbitrator challenge decisions

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On 12 February 2018, in line with its stated commitment to increased transparency, the LCIA published on its website[1] , 32 anonymised excerpts of decisions made following challenges to the proposed appointment of arbitrators. The release of the decisions follows the LCIA's earlier publication in 2011 of 28 challenge decision summaries from between 1996 and 2010. The 32 recent excerpts range from 28 October 2010 to July 2017. The LCIA's intention is to update its online database periodically when new decisions are issued.

According to LCIA figures, during the period covered by the decisions, 1,600 cases were registered and challenges were heard in under 2% of those cases. Of the 32 challenges listed on the LCIA's website, six were upheld and a further one was partially upheld. The success rate is low – about 22%, or one in four or five.

Following a challenge to the appointment of an arbitrator by a party, the other parties and the arbitrator concerned are given an opportunity to respond by way of submissions. The LCIA then appoints one or three members of the Court, depending on the complexity of the challenge, to provide a "robust and closely-reasoned decision".

Under Article 10 of the LCIA Arbitration Rules (2014), a party may challenge the appointment of an arbitrator on the following grounds:

- The arbitrator becomes unfit to act because he or she (i) acts in deliberate violation of the Arbitration Agreement; (ii) does not act fairly or impartially as between the parties; or (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry; or
- Circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.

Most of the 32 challenges on the database are concerned with the second ground where one party claimed that circumstances exist giving rise to justifiable doubts as to an arbitrator's impartiality or independence, either because of a perception of bias or a perceived conflict of interest. It is evident from the published excerpts that the test applied by the LCIA Court is an objective one and dependent on the particular facts and circumstances specific to each case. In many cases, the challenging party, who was more often a respondent in the proceedings, presented a procedural decision contrary to its interests as evidence of bias. The subject of the challenge was often a sole arbitrator.

Challenges based on deliberate violations of the arbitration agreement or allegations that the arbitrator or tribunal failed to conduct the proceedings fairly or with reasonable efficiency, diligence and industry were much less common.

The fact that challenges to arbitrators under the LCIA are rarely brought, and rarely successful is perhaps unsurprising. Raising a challenge to the appointment of an arbitrator is an inherently risky course of action for any party, particularly in circumstances where the allegation relates to the arbitrator's independence or impartiality. If a party does choose to raise a challenge it needs to ensure that its allegations are well founded to avoid any suggestion that it is using the process to gain tactical advantage. Opportunistic or ill-founded challenges are therefore not recommended and it is clear from the excerpts of the LCIA's decisions that they are unlikely to be successful. A careful and measured approach should also be adopted by any party raising a challenge because in the event that it is dismissed – and at least statistically, that is a real possibility – the arbitrator concerned will remain in place. In those circumstances there is a real risk of lasting damage to a party's credibility in the eyes of the tribunal that could affect other aspects of a party's case.

Recent years have seen the rise of large law firms with global reach, making it more difficult for lawyers associated with those firms to sit as arbitrators. The current IBA Guidelines on Conflicts of Interest in International Arbitration prohibit the appointment of an arbitrator in circumstances where his or her firm regularly advises a party to the proceedings and derives significant financial income as a result. A more recent report by the IBA Arbitration Guidelines and Rules Subcommittee[2] noted that further guidance on the meaning and scope of the term "law firm" may be of assistance to arbitration practitioners, for example, in relation to potential conflicts arising out of relationships between members of the same barristers' chambers in England and Wales. In this wider context, the publication of the LCIA's challenge decisions provides valuable insight into how the rules surrounding alleged bias and conflict are applied.

The LCIA's publication of its challenge decisions is a welcome step towards increased transparency in international arbitration and is a useful resource for clients and arbitration practitioners who may be considering the merits of a potential challenge to an arbitrator. The decisions provide useful guidance as to how institutions like the LCIA apply their rules without affecting the fundamental privacy and confidentiality of international arbitration proceedings. The initial decision of the LCIA some years ago to make excerpts of its challenge decisions public prompted the ICC to issue reasons for it decisions to parties where it previously had not done so. It will be interesting to watch whether other arbitral institutions such as the ICC now follow suit.

Footnotes

[1]http://www.lcia.org/challenge-decision-database.aspx

[2]Report on the reception of the IBA arbitration soft law products by the IBA Arbitration Guidelines and Rules Subcommittee, September 2016

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