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The construction & energy law specialists

International Quarterly

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

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Enforcement of DAB decisions: "the Singapore case"

By Matthew Simson
Fenwick Elliott

The disputes between PT Perhusahaan and Negara have been running for a number of years. There have been proceedings before Dispute Boards, arbitration tribunals and in the Singapore courts. The case has all along been an interesting one, (and the first part of the summary below is based on an article from the very first IQ) as it has raised a number of interesting issues about the enforcement of Dispute Board decisions. In 2014, the case came before the Singapore courts for a second time.

The contract; dispute; and DAB decision

In February 2006, PGN, an Indonesian state-owned company, entered into a contract with CRW for the construction by CRW of a pipeline and optical fibre cable in Indonesia. The contract incorporated the General Conditions of the FIDIC Conditions of Contract for Construction (First Edition, 1999) ("the 1999 Red Book"), with some amendments (together "the Conditions of Contract"). The law governing the contract was that of Indonesia.

A dispute arose between the parties over certain variation order proposals and requests for payments submitted by CRW. Following a referral of that dispute to the DAB, the DAB issued several decisions, all of which were accepted by PGN except for one, dated 25 November 2008, ordering PGN to pay CRW a sum in excess of US$17 million ("the DAB Decision"). In accordance with Sub-Clause 20.4 of the Conditions of Contract, PGN submitted a Notice of Dissatisfaction ("NOD") in respect of that decision.

Arbitration proceedings - 2009

PGN subsequently refused to comply with the DAB decision. This led CRW to file a request for arbitration with the ICC International Court of Arbitration on 13 February 2009. Importantly, the dispute referred to arbitration was however not the underlying dispute which was the subject of the DAB decision, but was in fact a new dispute, namely, whether CRW was entitled to immediate payment by PGN of the sum awarded by the DAB in its decision of 25 November 2008 ("the dispute").

CRW's case was that, notwithstanding PGN's notice of dissatisfaction, PGN still remained bound by the DAB decision and was required to "promptly give effect" to that decision in accordance with Sub-Clause 20.4 of the Conditions of Contract. In its defence, PGN argued that the DAB decision was not "final and binding" as it had served a notice of dissatisfaction and that a binding but not final DAB decision could not be converted into a final arbitral award without first determining whether the DAB decision was correct (or ought to be revised) on the merits. PGN in particular sought to argue that the powers of the arbitral tribunal set out in sub-clause 20.6 did not include the power to direct a party to make immediate payment of the sum awarded by the DAB without a review confirming the correctness of the DAB decision.

The arbitral tribunal found in CRW's favour and held by majority in a final award ("the Final Award") that the DAB decision was binding and that PGN had an obligation to make immediate payment to CRW of the US$17,298,834.57 awarded by the DAB. The Tribunal also dismissed in its award PGN's interpretation of Sub-Clause 20.6 and its argument that the arbitral tribunal should open up and review the DAB decision. It however noted that PGN had still the right to commence a separate arbitration to open up, review and revise the DAB decision.

Proceedings in the High Court of Singapore

CRW then proceeded to apply to the High Court of Singapore to register the Final Award as a judgment in Singapore. In response, PGN applied to set aside the registration order and also sought an order from the court to set aside the Final Award pursuant to section 24 of the Singapore International Arbitration Act and Article 34 (2) of the UNCITRAL Model Law. The primary argument put forward by PGN in support of its application to set aside the Final Award was that the arbitral tribunal had exceeded its jurisdiction by converting the DAB decision into a final award without determining first whether the DAB was correct on the merits. The High Court agreed with PGN.

The High Court held that the Arbitral Tribunal had acted outside its jurisdiction in two respects:

(i) The Dispute that CRW referred to

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arbitration (namely PGN's non-payment of the sum set out in the DAB Decision) had not been first referred to the DAB and was therefore "plainly outside the scope of sub-clause 20.6 of the Conditions of Contract"; and

(ii) The arbitration proceedings commenced by CRW were made pursuant to Sub-Clause 20.6 of the Conditions of Contract, which, according to the Singapore court, requires "a review of the correctness of the DAB decision" and must be distinguished from proceedings brought under Sub-Clause 20.7 which do not require the arbitral tribunal to consider the merits of the DAB decision. That distinction meant, according to the Singapore court, that the arbitral tribunal had acted outside its jurisdiction by making final a binding DAB decision without first hearing the merits of that DAB decision.

CRW's appeal to the Court of Appeal of Singapore

Dissatisfied with the High Court decision, CRW filed an appeal, which was dismissed by the Court of Appeal of Singapore in its judgment dated 13 July 2011 ("the Court of Appeal decision"), although the basis on which it reached its decision was quite different. The Court of Appeal made no reference to the fact that the Dispute that CRW referred to arbitration had not been first referred to the DAB and was therefore outside the arbitral tribunal's jurisdiction as the High Court had decided. Instead, the Court of Appeal found that the Arbitral Tribunal had exceeded its jurisdiction in making the Final Award solely on the basis that the Tribunal issued the Final Award without opening up, reviewing and revising the DAB decision.

Arbitration proceedings - 2011

The result of the Court of Appeal's above mentioned decision was that CRW's attempts through the 2009 arbitration to compel PGN to comply with the DAB decision failed. CRW therefore commenced a second arbitration in 2011, but changed its approach to meet PGN's earlier (above mentioned) argument. It did so by placing before the arbitral tribunal both components of the parties' dispute: the primary underlying dispute which formed the subject matter of the original DAB decision, and the secondary dispute arising from PGN's failure to pay CRW pursuant to the DAB decision.

The arbitral tribunal held unanimously that PGN's obligation to give prompt effect to the DAB decision was entirely unaffected by the fact that PGN gave notice of its dissatisfaction with that DAB decision. The tribunal therefore found in CRW's favour, and issued an interim award compelling PGN to give prompt effect to the DAB decision pending the tribunal's final resolution of the parties' underlying dispute. CRW subsequently obtained leave to enforce that award against PGN as though it were a judgment of the High Court.

PGN's 2013 Application to the High Court of Singapore

In October 2013, PGN applied to the High Court to set aside the 2011 tribunal's interim or partial award and with it the order permitting CRW to enforce that award. The central issue to be decided on here was whether CRW was entitled to enforce the DAB decision by way of a final and binding interim award without the arbitral tribunal having first determined the underlying merits of the DAB decision.

PGN's arguments on this were as follows:

(i) The majority in the 2011 arbitration issued an award which they described as an interim or partial award but which was in truth a provisional award. It was provisional because the majority intended their interim award to have finality only up until the time the 2011 arbitral tribunal had heard and determined the primary dispute on the merits and with finality.

(ii) Singapore's International Arbitration Act (the "IAA") does not permit a tribunal to issue a provisional award. As a matter of form, s.2 of the IAA refers only to interim, interlocutory or partial awards and makes no mention of provisional awards. As a matter of substance, and more importantly, s.19B(1) of the IAA deems every award which a Singapore-seated arbitral tribunal issues – however it may be described – to be final and binding. Finally, the legislative history of s.19B shows an intent not to permit provisional awards.

(iii) The 2011 tribunal therefore had no power to award CRW provisional relief as it attempted to do: as an award that PGN "shall promptly pay the sum of US$17,298,834.57 as set out in the DAB Decision" to CRW "pending the final resolution of the Parties' dispute raised in these proceedings".

(iv) Section 19B(1) of the IAA deems the majority's award to be a final and binding award. That overrides the majority's intent that its award should have only provisional effect. Further, under s.19B(2) of the IAA, no future award can vary the majority's award. The majority therefore converted a DAB decision which had only interim finality under the parties' contract into an award which, under s.19B of the IAA, is final and unalterable. The majority therefore determined with finality the existence and extent of

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PGN's obligation to pay CRW. Further, they did so without determining or even considering the primary dispute between the parties on the merits.

(v) The primary dispute is founded on the same question as the majority determined in their award: the existence and extent of PGN's obligation to pay CRW. The majority's award therefore inadvertently rendered the primary dispute res judicata. This was contrary to the parties' arbitration agreement. That agreement requires an arbitral tribunal to hear and determine the parties' primary dispute on the merits before determining that dispute with finality and making it res judicata.

(vi) Further, having inadvertently rendered the primary dispute res judicata, the 2011 tribunal also rendered itself functus officio on the issue of how much PGN must actually pay CRW. The tribunal has no power to inquire any further into the primary dispute to ascertain that amount on the merits. This is despite the 2011 tribunal's express intention to go on to hear and determine the primary dispute on the merits and with finality in the 2011 arbitration.

In response, CRW argued as follows:

(i) That it was correct to place both the primary and the secondary dispute before the tribunal in the 2011 arbitration and to seek an interim award on the secondary dispute. It argued that this approach was consistent with the parties' agreement as interpreted by the Court of Appeal when it upheld the decision to set aside the final award in the 2009 arbitration.

(ii) The 2011 tribunal's interim award is not a provisional award. It is a final and binding award as mandated by s.19B(1) and will not be varied by the final award in the 2011 arbitration contrary to s.19B(2). It is final and binding on the secondary dispute pending the final resolution of the primary dispute. And the final award in the arbitration need not and will not vary the interim award because it will determine with finality a different dispute: the primary dispute.

(iii) The 2011 tribunal is not functus officio because it has determined with finality only one of the disputes placed before it – the secondary dispute – expressly leaving the primary dispute to be heard and determined in a future decision, on the merits and with finality.

(iv) The arguments put forward by PGN are inconsistent with: (i) the approach which PGN itself suggested that CRW should have taken when PGN made its submissions in the litigation arising out of the 2009 arbitration; and (ii) the way forward for CRW which the High Court and the Court of Appeal endorsed in that litigation.

2014: The decision of the High Court

Having heard the above arguments, the view of the High Court was as follows:

(i) Nothing in s.19B of the IAA prohibits a tribunal from issuing a provisional award – that is, an award granting relief which is intended to be effective for a limited period of time – but even if s.19B does contain such a prohibition, it was not breached by the tribunal here, as the tribunal's interim award was not provisional.

(ii) The tribunal's interim award was final and binding, and therefore complied with s.19B(1), because the subject matter of the award was CRW's undisputed substantive provisional right to be paid now and PGN's substantive obligation to argue only later. In other words, the subject-matter of the interim award was the secondary dispute, and therefore the award determined with finality CRW's substantive but provisional right to be paid promptly without having to wait for all remaining aspects of the parties' one dispute to be resolved with finality. Further, the tribunal is perfectly able to dispose of the primary dispute without needing to vary the interim award, and so s.19B(2) of the IAA will not be breached.

(iii) The tribunal's award has no preclusive effect on the primary dispute. PGN asserted that as the IAA prohibits provisional awards, and the tribunal's interim award was one such provisional award, s.19B of the IAA makes the award final and binding on the issue of how much PGN must pay CRW and therefore rendered the 2011 tribunal functus officio. However, this argument conflates the primary dispute with the secondary dispute. It is the secondary dispute which is the interim award's subject matter, and nothing about the interim award's finality with regard to the secondary dispute affects the tribunal's ability to determine the primary dispute.

(iv) The parties' primary dispute is not res judicata. The tribunal's final award will not revisit the subject-matter of the interim award.

As such, the High Court dismissed both of PGN's applications. PGN has appealed to the Court of Appeal of Singapore and we will continue to monitor what happens next!

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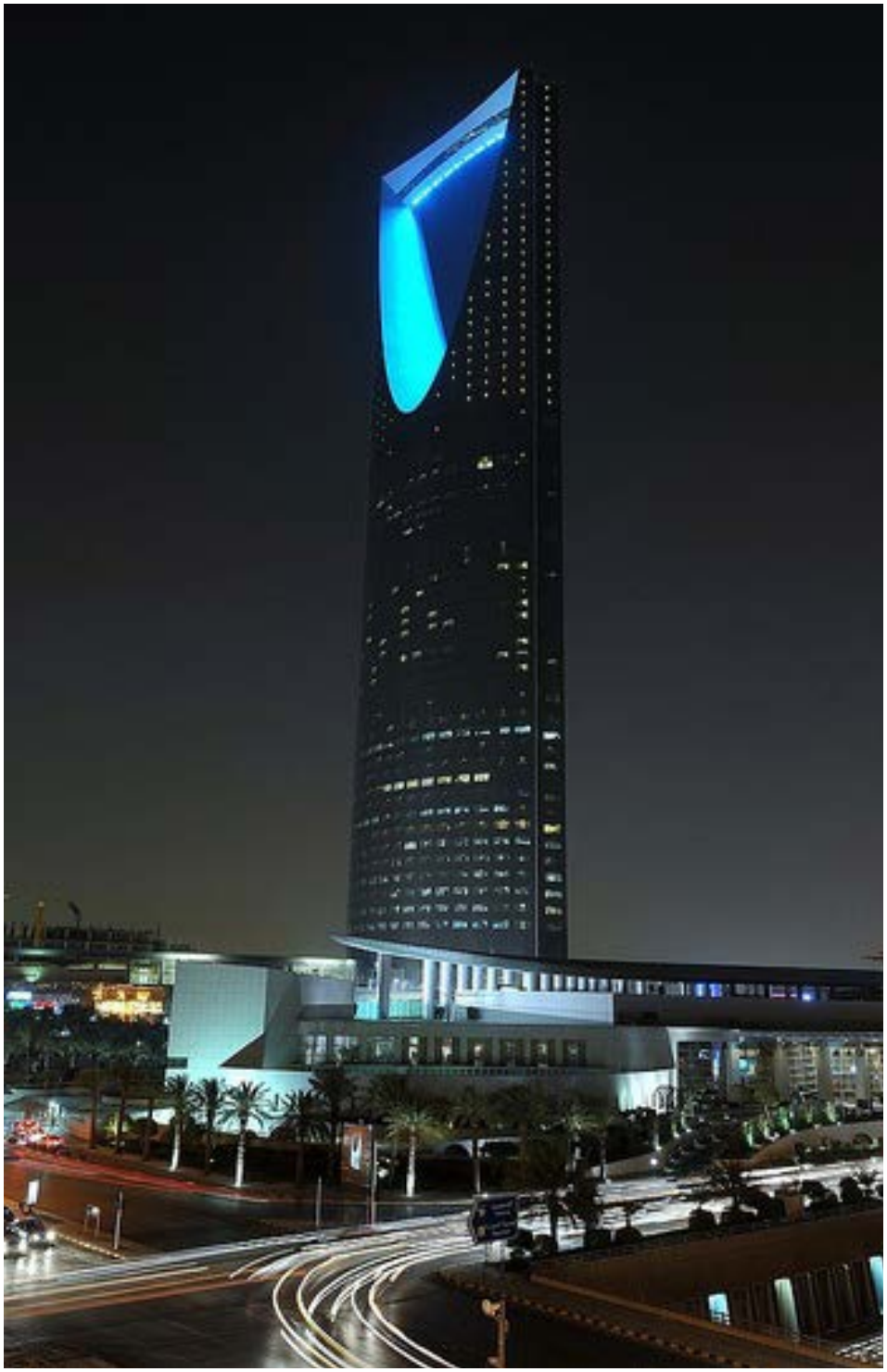
The Saudi Board of Grievances

By Nicholas Gould
Fenwick Elliott



The Saudi Board of Grievances (the "Grievance Board"), known in Arabic as *Diwan Al Mazalem*, was established pursuant to Royal Decree No. M/51, 17 Rajab 1402 [10 May 1982] (the "1982 Decree") as an independent administrative judicial committee responsible directly to the King of Saudi Arabia. From its creation, the Grievances Board was an enormous success, being both professional and efficient. Originally it only had jurisdiction over claims against the Saudi government but over the years it has inherited substantially broader jurisdiction and dealt with most types of commercial disputes.

Reforms

Since 2000, Saudi Arabia has embarked on a legislative reform programme and hence the 1982 Decree was abolished and superseded by Royal Decree No. M/78 dated 19/9/1428 H [1 October 2007] (the "Royal Decree 2007"). Amongst other things, the Royal Decree 2007 restructured the Grievance Board, returning it to its roots as an administrative tribunal, with jurisdiction over commercial disputes to be transferred to a new Commercial Division of the General Islamic Court. While to date very little has changed, in practice as the infrastructure necessary to implement this restricting is not yet in place, it is worth noting that the restricting should eventually occur.

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Structure

The courts of the Grievance Board consist of the following:

- the High Administrative Court, which is the highest court of the Grievance Board and has powers equivalent to those of a Cassation Court;
- the Administrative Courts of Appeal; and
- the Administrative Courts, which is the lowest court and has powers equivalent to those of a First Instance Court.

As in traditional courts, the decisions of the highest court bind the lower courts.

The Grievance Board itself consists of a president of the rank of a minister, one or more vice-presidents and a sufficient number of judges, in addition to the necessary number of researchers, specialists, administrators and the like.

Jurisdiction

Under Article 13 of the Royal Decree 2007, Administrative Courts of the Grievance Board have the jurisdiction to decide:

- disputes involving the Saudi Arabian government and government agencies;
- cases for revocation of final administrative decisions;
- tort cases initiated against the administrative authority's decisions or actions;
- cases related to contracts to which the administrative authority is party;
- disciplinary cases filed by the competent authority;
- other administrative disputes;
- requests for execution of foreign judgments and arbitral awards.

Main procedural features

In late 2013, a new Procedural Law of the Grievances Board was issued (the "Procedural Law"). Article 1 of this law emphasises that the Courts of the Grievance Board apply Islamic shariah law to disputes before them and are bound by the provisions of the Procedural Law.

The process for bringing a case before the Administrative Courts of the Grievance Board is as follows:

- There are no pre-trial procedures, nor is there any statutory or shariah law time limit for bringing commercial claims (though the parties can contractually agree to set time limits).
- The claimant files a complaint and supporting documents, all in Arabic.
- The court prepares a summons and serves it together with the claim documents on the defendant (as well as to the Ministry of Finance and Ministry of Financial Audit).
- Preliminary issues such as applications regarding the court's jurisdiction will be decided at the first hearing.
- A series of short hearings take place where parties file written submissions, oral argument is heard and evidence is produced.
- Judgments are issued by a majority in writing. If there is a dissenting opinion, then this opinion must be recorded in the deliberation reports. These reports are confidential and can only be seen by the court considering the judgment appeal.
- Judgments of the Administrative Court can be appealed before the Administrative Court of Appeal within 30 days of the issuance of the judgment (or receipt thereof). If no appeal was made the judgment becomes final, binding and enforceable.

Disclosure and evidence

Disclosure of evidence is based on shariah law principles which provide that each party should adduce the evidence upon which it relies and which is relevant to the case (even if unfavourable). There is no legal obligation on a party to preserve evidence for litigation purposes.

Saudi courts typically appoint experts to assist with technical or specialist issues. Party appointed experts do not feature in Saudi court proceedings.

Remedies and costs

The most common remedy available is monetary damages. Generally, injunctions are not available. However, attachment orders (similar to a freezing injunction) to preserve the defendant's asset while the proceedings are ongoing are available.

The court has discretion to award costs to the successful party but generally does not do so unless the claim is deemed vexatious. A successful claimant may recover its legal costs, travel expenses and any expert fees.

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International arbitration update

By Nicholas Gould
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The London Court of International Arbitration (LCIA)

The Drafting Committee of the LCIA circulated a "final draft" of new Arbitration Rules (New LCIA Rules) for consideration by the LCIA at its Tylney Hall symposium on 9 May 2014. These Rules were approved and came into effect on 1 October 2014. This is a particularly exciting development for the LCIA as the existing rules have been in effect since 1998.

The New LCIA Rules have introduced some key changes relating to speed, formation of the arbitral tribunal, emergency relief, consolidation and the conduct of legal representatives, some of which are similar to the changes seen in the 2012 ICC Rules.

Speed

Generally speaking, the New LCIA Rules have slightly shortened the time limits, with periods of time which previously ran for 30 days now running to 28 days instead. This is a practical change as the time limits are now 4 clean weeks, rather than the potentially unhelpful 30-day limit where the last day could often fall on a weekend.

Whilst saying that, the LCIA will notably have 35 days to constitute the tribunal as opposed to the current 30-day limit, so this period has been extended. However, the New LCIA Rules also prevent parties from delaying the formation of the tribunal, stating at Article 5.1 that any deficiencies in the Request or Response will not impede the formation of the tribunal by the LCIA.

On top of this, declarations must be provided by the arbitral candidates, which include a statement that the candidate is "ready, willing and able to devote time, diligence and industry to ensure the expeditious conduct of the arbitration". This is found under Article 5.4 and demonstrates that efficiency and speed are at the core of the New LCIA Rules. Similar to the 2012 ICC Rules, a new time parameter for the delivery of the final award has also been added under Article 15.10, which states that the final award should be delivered "as soon as reasonably possible". The arbitral tribunal is also required to set and notify the parties and the Registrar of a timetable for this purpose.

Formation of the arbitral tribunal and procedures

The LCIA can now, in exceptional circumstances, appoint a tribunal of more than three arbitrators but no party can nominate a sole arbitrator or a chairman unilaterally unless the parties have agreed otherwise.

The tribunal and the parties are also now required under Article 14.1 of the New LCIA Rules to meet to discuss the conduct of the proceedings no later than 21 days following notification that the tribunal has been constituted. This is similar to the case management conference required by the 2012 ICC Rules.

If a party wishes to challenge an arbitrator it must do so within 14 days of the formation of the tribunal, or at the time at which the party becomes aware of the ground giving rise to the challenge.

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Furthermore, under the New LCIA Rules, unless the parties agree otherwise, the default seat (which remains London) will apply up to and until the formation of the arbitral tribunal. Once the arbitral tribunal has been constituted, the tribunal (and not the LCIA) may order that a different seat of arbitration is more appropriate. This can be done after seeking written comments from the parties on the matter.

Emergency relief

Following the lead of the SCC, SIAC and the 2012 ICC Rules, the LCIA has introduced emergency relief procedures. Under Article 9B, parties may apply to the LCIA for the urgent appointment of an arbitrator (the Emergency Arbitrator) in exceptional circumstances prior to the formation of the arbitral tribunal.

The Emergency Arbitrator, who will always be a sole arbitrator, will be appointed within 3 days of a party's request and has 14 days following his appointment to formulate a decision. No hearing is required and the Emergency Arbitrator may decide the claim for emergency relief based on any available documentation.

Once the arbitral tribunal has been constituted, interim measures may only be available from a court and only sought in "exceptional cases" with the tribunal's authorisation.

The arbitration agreement

The arbitration agreement is now a defined term that incorporates both the agreement itself as well as the LCIA Rules; this is seen in the preamble to the New LCIA Rules.

Unless the parties provide otherwise, the law of the arbitration agreement, and the law of the arbitration, shall be that of the seat of arbitration. This clarification is significant as the law of the arbitration agreement continues to be a matter of debate in recent case law. The New LCIA Rules also clarify that where part of the arbitration agreement is deemed invalid, ineffective or unenforceable by a court or tribunal, this does not automatically adversely affect the award, appointment of the arbitrator or any other part of the arbitration agreement.

Conduct of the legal representatives and the parties

Parties must now, under Article 18.3 of the New LCIA Rules, notify all the other parties, the arbitral tribunal and the Registrar if there are any changes or additions to the parties' legal representatives. Such changes are conditional on the tribunal's approval, which may be withheld if the change or addition compromises the composition of the tribunal or the finality of the award.

There is also an Annex to the New LCIA Rules which contains general conduct guidelines that apply to all legal representatives appearing by name before the tribunal. For instance, the legal representatives should refrain from mounting unmeritorious and unfounded challenges. The parties must ensure that their legal representatives have agreed to comply with the Annex and that the tribunal has the power to rule on whether or not the guidelines have been violated. The New LCIA Rules also have a number of sanctions which may be imposed directly on the legal representative for any such violation.

Unilateral communications with the arbitral tribunal are prohibited unless such contact has been disclosed in writing and the New LCIA Rules also give the arbitral tribunal express power to take the parties' conduct into account when awarding costs.

New LCIA Rules: Overview

Along with the Emergency Arbitrator the similarities between the New LCIA Rules and the 2012 ICC Rules extend also to consolidation. The tribunal may, under the New LCIA Rules, order consolidation where the parties agree to it in writing and with the approval of the LCIA. Where there are multiple arbitrations involving the same parties and only one tribunal has been appointed, the tribunal can also order consolidations. In the latter circumstances the parties' agreement is not required, though LCIA approval is.

It may be that the LCIA is simply jumping on the bandwagon with the New LCIA Rules but that does not render the changes any less necessary. A number of things have changed since 1998 when the existing rules came into effect, and while these changes are not radical, they will certainly be welcomed when they come into force on 1 October 2014.

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The increasing importance of mediation in the UK

By Christina Lockwood
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CEDR Mediation Audit 2014 and Commercial Mediation Rules and Model Documents

The marketplace

The results of the Sixth CEDR Mediation Audit show that the UK mediation market has grown by 9% in the last year. The current size of the civil and commercial mediation market is estimated as being in the order of 9,500 cases per annum. This does neither include community or family mediation nor the statutory ACAS service or the HMCS Small Claims Mediation Service, which are not included in the CEDR Mediation Audit.

In order to assess the overall economic impact of the commercial mediation field as a whole, CEDR combined the results of the six Mediation Audit surveys with detailed operational statistics taken from CEDR's own caseload and came to the following conclusion:

- The total value of cases mediated each year is approximately £9 billion. (Since the impact of "mega-cases" can significantly influence this total value of cases mediated, the effect of such mega-cases has been excluded.)
- Since 1990 the total value of mediated cases is approaching £65 billion.
- Currently the commercial mediation profession saves business around £2.4 billion a year by achieving earlier resolution of cases that would otherwise have proceeded through litigation.
- The results of CEDR's Sixth Mediation Audit suggest that the aggregate value of the mediation profession's total fee income is around £22.5 million per year.

The survey of commercial mediator attitudes and experience shows that clients and advisers refer 66% of ad hoc cases directly to their chosen mediator rather than working through providers. As might be expected, direct referrals are particularly prevalent amongst the most experienced mediator group.

The market is still dominated by a small group, although it is slightly bigger than in previous years; around 130 individuals are appointed for 85% of all non-scheme commercial cases. In 2012 just 100 individuals held 85% of the market.

The mediators and their practices

The overall profile of respondents is very similar to previous audits. 56% Advanced mediators - who described themselves as "reasonably" or "very" experienced; 22% Intermediates – who categorised their lead mediator experience as "some" or "limited"; and 22% Novices – who were accredited but had no experience as a lead mediator.

The survey finds that the average female mediator is 50 years old, and the average male mediator is 57. The Advanced mediator group are only about a year older than the average.

With regard to issues of diversity, things remain largely unchanged. 96% of mediators categorise themselves as being white. 26% of respondents are women (2012: 22%; 2010: 19%). However, women already in the mediator profession seem to

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progress more quickly and now represent 25% of the Advanced group of mediators (2012: 18%).

There are signs that more non-lawyer mediators are emerging. Only 52% of the respondents were legally qualified (2012: 62%). The non-lawyer mediators emphasise their profession when promoting themselves much more frequently than the lawyer mediators, but this does not seem to be working for them as well as it does for the lawyers.

The number of full-time mediators is increasing. 47% now describe themselves as full-time mediators (2012: 39%; 2010: 37%).

For the first time the CEDR Audit reports a decrease in fee levels. The increased competition has had an impact on billing rates and overall income levels. Average fees of the less experienced mediator group for a one-day mediation have fallen to £1,422 (a decrease of 6.3%). Average fees of the more experienced mediators for a one-day mediation have fallen to £3,820 (a decrease of 10.7%).

A significant proportion of mediator time continues to be unremunerated, either because the mediator did not charge for all of the hours incurred or because the mediation was arranged on a fixed-fee basis. On average less experienced mediators wrote off over 6 hours, whereas amongst experienced mediators an average of around 4 hours was unpaid.

Factors for appointing a mediator

CEDR asked both mediators and lawyers to assess the relative significance of a number of factors in determining why individuals secured commercial mediation appointments. "Professional reputation – experience/status" has long been the clear winner with both mediators and lawyers, but this year lawyers place more emphasis on "professional reputation – mediation style". This might reflect an increasing sophistication of lawyer use of the mediation process and lawyers getting better at selecting the right mediator for each particular set of circumstances.

Settlement rates

Mediators report that about 75% of their cases settled on the day, with another 11% settling shortly thereafter so as to give an aggregate settlement rate of around 86%. The settlement rates reported in previous surveys are very similar.

Promotion and regulation of mediation

Mediators now feel even stronger that the civil justice system should be taking a more directive approach towards the promotion of mediation: 76% compared to 66% two years ago. 15% of mediators would support a fully mandatory system. Lawyers seem more inclined to favour the status quo and only 57% would like to see a toughening up of the regime.

Most mediators regard the market conditions as the biggest challenge for the development of their mediation practice, particularly the combination of an insufficient level of demand for mediation services and an over-supply of aspiring mediators seeking to break into a marketplace that remains dominated by a limited number of established players.

With regard to questions about the Jackson reforms and their impact on the mediation market, most mediators (over 70%) believe that it is too early to tell and that on the assessment of Jackson's impact the jury is still out.

CEDR's Commercial Mediation Rules and Model Documents

On 23 June 2014 CEDR launched its revised and updated Commercial Mediation Rules and Model Documents, including ADR Contract Clauses. These can all be downloaded free of charge from the CEDR website and user comments are welcome in view of future editions.

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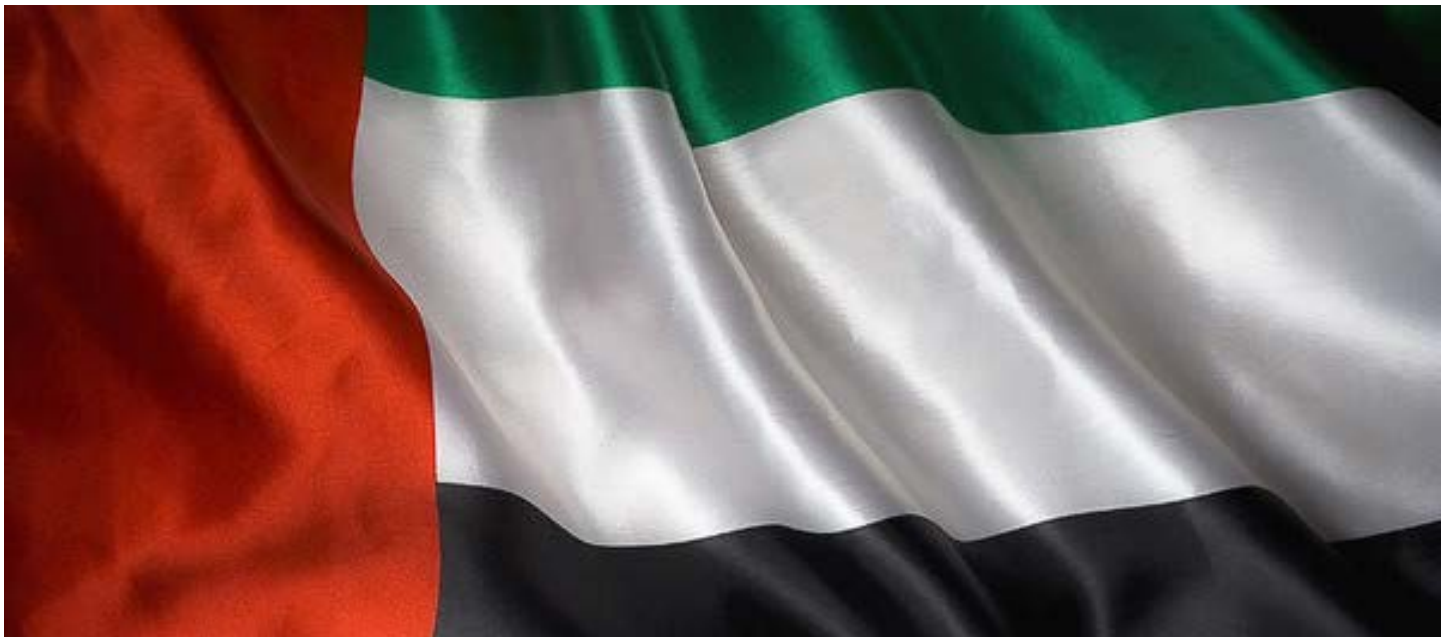
Performance Bonds - UAE perspective



By Heba Osman
Ibrahim law firm

Most, if not all, construction contracts, whether standard forms or bespoke contracts, require the Contractor to provide the Employer with a performance bond guaranteeing the Contractor's performance under the contract. The purpose of such performance bonds is to provide the Employer with an efficient and fast remedy should the Contractor default in carrying out its obligations under the construction contract.

The Employer's right to liquidate this performance bond is triggered upon the occurrence of a certain default on the part of the Contractor. It is not an absolute right to the Employer and the decision to liquidate a performance bond has to be exercised with caution.

It is accepted that an Employer has the right to liquidate the performance bond if the Contractor has clearly defaulted on its obligations, such as in the event of abandoning the works or refusing to proceed with the works for no reason.

However, when the relationship turns sour between the Employer and the Contractor, there appears to be a tendency by employers to liquidate the performance bond even without sufficient causation. In instances where the Contractor is not in default or its default is not sufficiently grave to warrant the liquidation of its performance bond, the Employer has no right to liquidate the performance bond.

During the Dubai financial crisis that started towards the end of 2008, many employers have relied on performance bonds as a quick method of receiving liquidity. These practices have caused great harm to many contractors who as well as not being paid at the time, were also being subjected to the liquidation of their bonds. This has also caused difficulty for many contractors to later obtain performance bonds from banks.

Performance bonds are essentially letters of guarantee issued by a bank on the request of the Contractor, by which that bank undertakes to make a payment to the Employer upon the Employer's demand.

The UAE Federal Commercial Law No. 18/1993 (the Commercial Code) regulates, inter alia, the issuance and use of letters of guarantee and defines them in Article 414 thereof as:

"an undertaking issued by the guaranteeing bank on the request of his client to pay a certain amount (or an amount that can be ascertained) to another person (the beneficiary) without restriction or condition, unless the letter of guarantee is conditional, if [the bank] is requested to do so within the

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period specified in the letter of guarantee. The letter of guarantee shall state the reason for which it is issued."

This means that a performance bond may be conditional or unconditional. However, the trend is that performance bonds issued by the Contractor are payable to the Employer "on demand" without any condition.

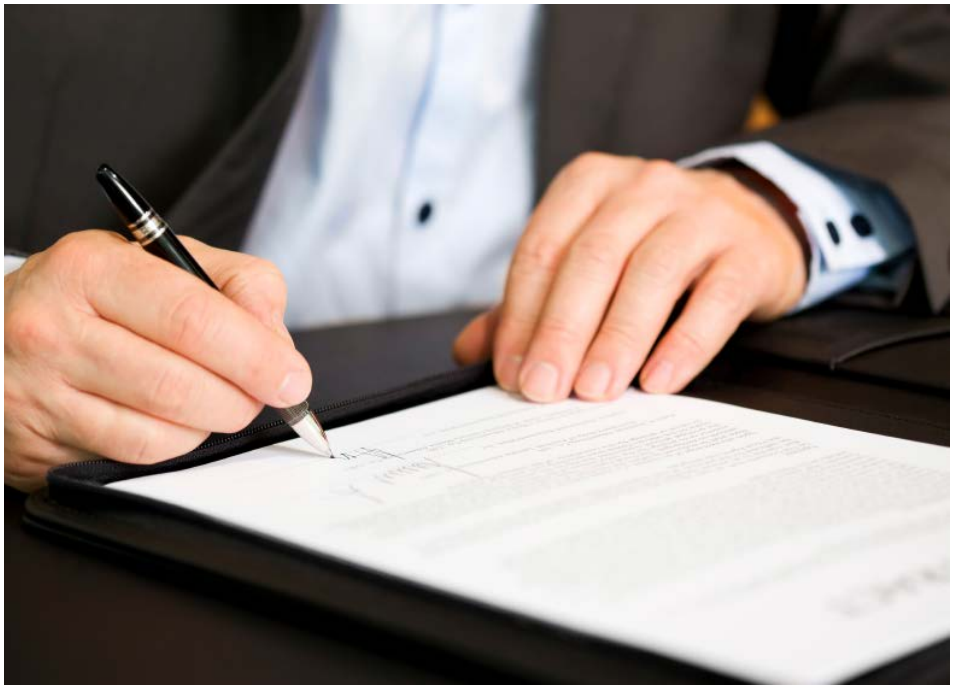
If the performance bond is unconditional and on-demand, the bank is obliged to make the payment in accordance with Article 417 (1) of the Commercial Code, which provides:

"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 means that the bank cannot refuse liquidating the performance bond on the basis that there is a dispute between the Contractor and the Employer for example. The bank is obliged to make the payment to the Employer in accordance with the terms of the performance bond itself and has no interest in, and should not consider, the terms of the construction contract between the parties.

A Contractor who feels that the Employer intends to liquidate the performance bond on unjustifiable or fraudulent grounds can have recourse to the summary court seeking an order to stop the liquidation of the performance bond. This is also provided for in Article 417(2) of the Commercial Code:

"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."



It is an established principle with the Dubai Court of Cassation that even though the issuing bank is obliged to liquidate the letter of guarantee upon the beneficiary's first demand without the need to obtain the permission of the client, the law still allows the client – who has a dispute with the beneficiary and fears that the latter may demand the bank to liquidate the letter of guarantee – to have recourse to the court to place an attachment order on the amount of the guarantee whenever this client has serious and certain reasons for doing so. The court would only order the bank not to liquidate the letter of guarantee in exceptional circumstances and provided that grounds for such stopping of liquidation are present and are clear and evident from the documents of the case.

Serious and certain grounds can include the fact that the project was completed and handed over, large pending payments are due to the Contractor, there are letters or documents showing that the Employer has no right to liquidate, etc.

In the event that the performance bond is liquidated, the remedy available to the Contractor is to file a case (or file for arbitration if the contract provides for arbitration) and seek the repayment of the amount of the performance bond, along with interest or damages, as the case may be.

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Fenwick Elliott
The construction & energy law specialists

International Quarterly

News and events

Trends, topics and news from Fenwick Elliott

Issue 11, 2014

This edition

Seminars and conferences

FIDIC International Contract Users' Conference

We continue to speak at a wide range of seminars and conferences. Nicholas Gould and Jeremy Glover will both be speaking at the FIDIC event which is being held as usual in London in December 2014.

Click here for a copy of the conference brochure. Together with Vincent LeLoup of EC Harris we will be discussing sub-clause 20.1 and the application of time bars from a civil law and common law perspective in the morning on the second day.

We are able to offer you a 30% saving should you wish to attend this conference. To receive the saving please include the VIP Code FKW82487FWE on the booking form. You can book by filling in the discounted form on the conference brochure, by emailing professionalcustserv@informa.com.

Society of Construction Law (SCL) UK and the American University in Cairo

On 22 October 2014, the American University in Cairo in conjunction with the Society of Construction Law (SCL) UK will be holding a one day conference on 22 October 2014 in Cairo, Egypt. Fenwick Elliott partner Toby Randle will speak at this event which will introduce the SCL to Egypt and provide an opportunity to discuss the contractual and legal challenges in construction projects and dispute in the North African region.

New CIArb Dispute Board Rules

The official launch of the CIArb Dispute Board Rules takes place at the 2nd DAS Convention on 14 November 2014. Nicholas Gould will talk about the new Rules. Applications will also be taken on this day for a limited number of places on the CIArb Dispute Board Panel.

Revised FIDIC form

It is of course, not just the speaking but the taking part and listening to what others have to say that counts! Whilst Jeremy Glover was talking about the diferences and similarities between the NEC3 and FIDIC forms, at the annual Construction Law Summer School seminar in Cambridge in September, 2014, we learned a little more about some of the likely changes that will be made to the revised FIDIC form of contract which should come out next year. For example, they are likely to contain 21 not 20 clauses as FIDIC intend to introduce a clear distinction between the claims process and dispute resolution. Making a claim under the FIDIC form is meant to be something entirely different to raising and resolving disputes.

Other potential developments in the pipeline include a focus on project management and the early warning process. Unsurprisingly the handling of risk is likely to follow the form set out in the DBO contract or Gold book. There is also likely to be a subcontract to go with the Yellow Book and a new conditions of contract for Tunnel Works.

Fenwick Elliott advises on the 8th tallest building in the world

The Lotte Group's 550m, 123 floors, Lotte World Tower is scheduled to be completed in 2016. However, the shopping mall, which is now the largest in Korea, and lower floors are completed and open to the public from 14 October 2014.

The project is on time although there are still public concerns regarding the traffic and safety issues.

Fenwick Elliott advise the Lotte Group in relation to specialist sub-contracts for key trade contractors for the project. For more information about this or other high rise projects, contact Nicholas Gould ngould@fenwickelliott.com

About the editor, Jeremy Glover

Jeremy has specialised in construction energy and engineering law and related matters for most of his career. He advises on all aspects of projects both in the UK and abroad, from initial procurement to where necessary dispute avoidance and resolution.

Jeremy organises and regularly addresses Fenwick Elliott hosted seminars and provides bespoke in-house training to clients. He also edits Fenwick Elliott's monthly legal bulletin, *Dispatch*.

***International Quarterly* is produced quartely by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.**

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