FENWICK ELLIOTT

The construction & energy law specialists

Issue 20 - December 2016

International Quarterly

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

Inside this issue

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Contract Corner:
A review of typical contracts and clauses

Proposed New Changes to the FIDIC Form of Contract

At the International Contract Users Conference held in London on 6—7 December 2016, FIDIC finally unveiled its proposed revisions to the 1999 Rainbow Suite. More specifically, FIDIC issued a pre-release version of the Yellow Book, the Contract for Plant & Design Build. The contract was said to be "for viewing only".

FIDIC said that the Yellow Book second edition would be formally published by them during 2017. The date of that release is not yet known. FIDIC also said that they intended to issue second editions of all three contracts that form part of the original 1999 Rainbow Suite, namely the Red, Yellow and Silver Books, together in 2017. Whilst it is our intention to provide a special FIDIC issue of IQ early in 2017, which will examine the proposed changes in more detail, we thought it might be helpful as a starting point to provide a summary of the key themes and issues arising out of the new draft contract.

Why are the Contracts being Amended?

FIDIC have explained that the underlying philosophy behind the update is as follows:

- To enhance project management tools and mechanisms;
- To reinforce the role of the Engineer;
- To achieve a balanced risk allocation. This is being achieved through more reciprocity between the Parties;
- To achieve clarity, transparency and certainty;
- To reflect current international best practice;
- To address issues raised by users over the past 17 years arising out of use of the 1999 Suite; and
- To incorporate most recent development in FIDIC contracts, in particular the 2008 Gold Book.
- This is why a key theme of the revised Yellow Book is the increased emphasis on dispute avoidance.

Dispute Avoidance

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

(a) Splitting Clause 20

As FIDIC had made clear during 2016, they have split clause 20 in two.

The reason for this is to try and make clear that making a Claim is not the same as a Dispute. To put forward a Claim is to make a request for an entitlement under the Contract. A Dispute arises if that Claim is rejected (in whole or in part) or ignored.

- Clause 20 is now entitled:
  "Employer's and Contractor's Claims"
- Clause 21 is now entitled:
  "Disputes and Arbitration"

(b) Changes to the role of the Engineer

The Engineer will continue to have a pivotal role in administration of the project. Clause 3 now has eight sub-clauses. Indeed it is a feature of the new Yellow Book that it is longer than its predecessor. FIDIC said at the London Conference that the word count had increased by approximately 50%. The reason for this was to achieve a contract that was more structured, with clear processes and procedures. If this can be achieved, then the contract as a whole can be better understood by everyone.

Under the new Yellow Book:

- The Engineer shall continue to be deemed to act for the Employer, save that new sub-clause 3.2 says that the Engineer is not required to obtain the Employer's consent before making a Determination under new sub-clause 3.7.
- There is a new role for an "Engineer's Representative" – who is based on site for the whole time of the Project.
- 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. The Engineer must also provide the Parties with a record of any consultation that takes place when trying to reach such agreement.

- If the Engineer fails to make a Determination within the stated time limits, then they are deemed to have rejected the claim. This means that it can be referred to the Dispute Avoidance Board.
- When acting to seek to reach an Agreement or to make a Determination under new sub-cause 3.7, the Engineer is said not to be acting for the Employer but to be acting "neutrally" between the Parties.

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

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

The change in name alone is a clear reference to the new role of DABs.

In new clause 21, all DABs will be standing DABs, although the Guidance Notes will include an option for the use of an ad hoc DAB, as and when a dispute arises. The primary purpose of Dispute Boards, preventing claims from becoming disputes, is easier to achieve if there is a standing board which can act as a sounding board to guide the project.

By new sub-clause 20.3, the Parties may if they so agree:

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

The DAB also has the power to invite the Parties to make such a referral if it becomes aware of any such issue or disagreement. This positive obligation might become a very useful dispute avoidance tool indeed.

(d) Early warning

Another feature of dispute avoidance is the concept of advance warning, giving early notice of a potential problem. By encouraging the Parties to do this, it is hoped 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.

The new sub-clause 8.4 follows the Gold Book, by providing that each Party (and the Engineer) shall endeavour to advise the other Party in advance of any known or probable future events or circumstances which may adversely affect the work.

The Claims Procedure and the FIDIC Time Bar

The FIDIC Form currently requires both the Employer and Contractor to submit claims. This has continued as part of new clause 20 which is clearly headed "Employer's and Contractor's Claims". This closer alignment of Parties' claims is a key part of FIDIC's attempts to achieve balance and reciprocity between the Parties.

FIDIC's intention is that if there is a clearly defined process, then that can help maintain relationships as both Parties will know exactly where they stand and why the other is taking the steps they are to submit their claim. That said, new clause 20.2, which sets out the claims process, is one of the longest clauses in the Contract and sets out a detailed procedure. We will analyse this in detail in our 2017 IQ FIDIC Review, but the length of the new sub-clause is a signal that the process may not be a simple and straightforward one to follow.

This will undoubtedly place an increased burden on both the Employer and Contractor to follow the new administrative requirements. This is especially the case as the 28-day time bar has been retained. In fact, as a whole, there are more specified time limits within the revised Contract, the failure to follow which will lead to sanctions. As a result this may actually lead to an increased number of claims, as both Parties will need to try and ensure that they do not lose the right to make a claim.

This was certainly the view of the London Conference. Together with Nicholas Gould we led a session entitled *"Managing Claims and Avoiding Disputes"*. As part of that session we asked the audience for their views on the likely impact of the revisions to the number of claims in the new Yellow Book. Their reply was revealing:

- Less claims? 24%
- No change? 26%
- More claims? 50%

Of course more claims do not necessarily mean more disputes, one reason no doubt for the increased emphasis on dispute avoidance.

Notices

FIDIC have made it clear that a notice given under the new contract must clearly state that it is a notice and make reference to the sub-clause under which it is issued. This is to try and reduce disputes about what is a notice where Parties try and argue that references in a programme or progress report actually constitute notice of a claim.

That said, new sub-clause 20.3 does provide the DAB with the power to waive a failure to follow a time bar requirement, albeit there is a 14-day time limit on a party seeking relief for the refusal of an Engineer to consider a claim because it is said to be time barred. The DAB can take the following into account:

- Whether the other Party would be prejudiced by acceptance of the late submission;
- Whether the other Party had prior knowledge of the event in question or basis of claim; and
- The extent to which, if at all, the Engineer may already have proceeded to make a determination, or more likely sought to negotiate an agreement.

The Programme and Extension of Time Claims

In keeping with the trend in international contracts, and in line with the Red Book subcontract, there are increased programming obligations (16 are listed) within new sub-clause 8.3.

Although FIDIC have retained their position that the programme does not become a contract document, the Engineer is required to review the programme and say if it does not comply with the contract. If the Engineer does not do this within 21 days, then the programme is deemed to comply. There is also a positive obligation on the Contractor to update the programme whenever it ceases to reflect actual progress.

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

> *"in accordance with the rules and procedures stated in the Particular Conditions".*

This rather neutral comment may well 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.

BIM

There is no specific mention of BIM. It is perhaps the case that the adoption and use of BIM is something that is more likely to be dealt with in either the Particular Conditions or as additional contract documents, through, for example, the adoption of a BIM Protocol and Execution plan.

Force majeure and Exceptional Risks

As was flagged in advance, here FIDIC has followed the Gold Book which is considered to represent a more collaborative, risk-sharing approach than the 1999 suite of contracts. The new Yellow Book does not follow the 1999 clause 19 *force majeure* provisions. Instead, it drops clause 19 completely in favour of a new clause 18 that is headed "Exceptional Risks", and clause 17 (which was formerly risk and responsibility) has been renamed "Risk Allocation". The definition of exceptional risks is very similar to the *force majeure* definition previously to be found in clause 19.

However, new clause 17 is rather different, setting out the risks that the Employer and Contractor are to bear in a very detailed manner, with the Contractor being entitled to an extension of time and its costs if there are any exceptional risks or Employer risks during the design/build period.

Conclusions

It is, of course, too early to make any definitive conclusions on the new revisions. The devil, as they say, is in the detail. However, the increased emphasis on dispute avoidance, which as we have said is perhaps the most striking change within the revised contract, is to be welcomed.

Will the contract change again before it is issued in final form for use? A good question: the impression we gleaned from the London Conference was that the intention of FIDIC was certainly not to make any major changes, but we shall see.

This is just a short summary of some of the most important features of the new Yellow Book. Look out for our more detailed review in the first IQ of 2017.

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Universal view:
International issues around the globe

Modifications to ICC Practice Note on Conduct of Arbitration and Update to the ICC Rules of Arbitration

Alexis Mourre became president of the ICC International Court of Arbitration on 1 July 2015 and very soon after commencing his role it became apparent that he intended to address some of the problems with arbitration; most notably, the common perception that there is lack of transparency in the arbitration procedure and concerns about the length of arbitration proceedings, including the considerable time it often takes for arbitrators to provide their award.

Changes to the Practice Note on the Conduct of Arbitration that followed soon after Mr Mourre's appointment were:

- Improved transparency of arbitrator details to assist parties when considering the availability and suitability of that arbitrator for the appointment. This was implemented for all arbitration proceedings registered as of January 2016 and involves the ICC Court now publishing on its website details of the arbitrator's name, their nationality, date the Terms of Reference were established, whether the arbitrator is the chairperson, a co-arbitrator or a sole arbitrator, whether the appointment was made by the Court or the parties, and whether the arbitration is pending or closed.
- Further guidance to prospective arbitrators on the possibility of a conflict of interest and the requirement to disclose circumstances which may, but do not necessarily, lead to a challenge. The ICC has made clear that the conflict of interest obligation rests firmly with the arbitrator when considering his/her impartiality and independence.

Changes to the arbitration procedure have continued in the later part of this year with additional modifications to the Practice Note on the Conduct of Arbitration provided in September 2016 and now an update to the ICC Rules of Arbitration announced in November 2016.

Modifications to the Practice Note on Conduct of Arbitration (September 2016)

The modifications announced on 22 September 2016 relate to the day-to-day administration of cases and the increase in services offered by the Secretariat.

Additional Services Offered by the Secretariat

The Practice Note includes a new section setting out additional services offered by the Secretariat to parties and arbitrators. These services include acting as a depository of documents, providing precedents of documents such as Terms of Reference and timetables, providing information on hearing facilities, assisting in the proposal of and appointment of experts, providing information on court reporting and simultaneous interpretation, facilitating the obtaining of visas for individuals required to attend the hearings, and post-award services such as reminding parties of their obligation to comply with the award. Parties may also request a service whereby the ICC acts as a depository for VAT due on arbitrators' fees, the expenses of a Tribunal appointed expert or for escrow purposes. These changes demonstrate the efforts the ICC is going to in order to improve the services it provides to its users.

Signature of Terms of Reference and Awards

The previous requirement was for the signature of a number of originals of the Terms of Reference and Awards. Originals had to be couriered sequentially to each party and the members of the Tribunal until each original (one for each party and the Tribunal) had been signed by everyone. However, the Practice Note now provides that, on the condition that the parties agree, the Terms of Reference and Awards can be signed by the parties and the Tribunal members in counterpart and sent to the Secretariat by email. The purpose of this change is to reduce the time to finalise the Terms of Reference.

Submission of Draft Awards

The ICC may decrease the arbitrator's fees based on the length of time it takes the arbitrator to produce his/her award. Pursuant to Article 30(1) of the ICC Rules of Arbitration, the time limit in which the Tribunal has had to produce its final award has been six months (although on occasions it takes over a year for a decision). However, under the new policy, three-member Tribunals are expected to submit their draft awards for scrutiny within three months of the hearing or the final written submissions.

Sole arbitrators are required to submit their draft awards within two months. If these timeframes are missed, the ICC Court has the discretion to lower the fees of the arbitrator(s). In the case of a three-member Tribunal, the reduction could be 5—10% for failure to reduce a draft award within 7 months, 10—20% for failure to produce the draft award within 7 to 10 months, and 20% or more if the delay exceeds 10 months. Cleary, the aim is to speed up the ICC arbitration proceedings.

Timing for Scrutiny of Draft Awards by the ICC Court

Time limits have also been placed on the ICC Court for its scrutiny of awards. Again, this is with the intention of speeding up proceedings. Pursuant to the revised Practice Note, all draft awards are to be scrutinised at a Committee Session of the Court within three to four weeks of receipt of the draft award by the Secretariat. Unjustifiable delays will result in a reduction of the Court's administrative expenses by up to 20%.

Update to the ICC Rules of Arbitration (November 2016)

In addition to modifications to the Practice Note on Conduct of Arbitrations, the ICC Commission on Arbitration and Alternative Dispute Resolution announced on 4 November 2016 the revision of the ICC Rules of Arbitration. These amendments are to come into force on 1 March 2017. The new Rules will be applicable to all ICC arbitrations following that date.

Reasons for Decisions on Procedural Issues (Article 11)

Under Article 11(4) the Court is currently prevented from giving reasons for its decisions on the appointment, confirmation, challenge or replacement of arbitrators. This provision is to be deleted, meaning that the Court will be able to communicate its reasons which to date has only been possible with the agreement of the parties. This change is aimed at increasing transparency.

Terms of Reference (Article 23)

The time limit required for establishing the Terms of Reference will be reduced from two months to one month (Article 23(2)). The objective is to shorten the period by which the arbitral Tribunal can commence its work of getting on and convening a case management conference and, in doing so, be in a position to consult the parties on procedural matters. Again, the aim is to speed up the arbitration process.

Expedited (Fast Track) Procedure (Article 30)

The most significant update to the ICC Rules is the introduction of an expedited procedure for cases where the sum in dispute does not exceed US$2m (Article 30). The aim is to ensure that cases of a relatively low value are run in a more cost-efficient manner both for the parties and the ICC Court. The fast track procedure involves several important procedural modifications including: all cases to be heard by a single arbitrator, there will be no requirement for Terms of Reference, there will be the possibility of cases being decided on documents alone — therefore without the need of a hearing unless the Tribunal decides otherwise — and the final award will have to be provided within six months of the case management conference. It should be noted that parties do have the opportunity of opting out and it is open to the ICC Court to determine whether the expedited procedure is inappropriate for a particular case.

Conclusions

These changes demonstrate the efforts that are being made to provide ICC arbitration users with the best possible service. By addressing the perceived lack of transparency, by addressing concerns over the length of arbitration proceedings, and by increasing the range of services provided by the Secretariat so as to exceed traditional case management services offered by other institutions, they are steps in the right direction to fulfilling Alexis Mourre's vision of making ICC arbitration a more efficient method of dispute resolution.

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Commentary:
International dispute resolution & adjudication

When good security is paramount and the courts are hands off

The law on letters of credit has been upheld in two cases; banks cannot refuse to pay a demand meeting the requirements of a letter of credit unless it would involve fraud

Letters of credit are used internationally as performance securities for major construction contracts and the law on demands made in respect of them is essentially the same as for on-demand bonds.

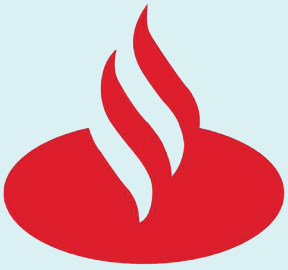
The strict approach of English law in enforcing payment under standby letters of credit has been reinforced in two judgments *(National Infrastructure Development Company Limited (NIDCO) vs BNP Paribas* [2016] EWHC 2508 (Comm) and *NIDCO vs Banco Santander SA)*. Once a demand has been made in accordance with the requirements of a letter of credit, a bank can only refuse to pay is if it is on notice of fraud at the time of the call or where payment would be fraudulent.

In both cases, Fenwick Elliott acted for NIDCO, a company set up by the government in Trinidad and Tobago to deliver infrastructure projects. BNP Paribas (BNP) and Santander both provided securities at the request of a Brazilian contractor (Construtora) for the construction of a highway project. The letters of credit were subject to English law and the jurisdiction of the English courts.

Disputes arose, and a termination notice was served in June 2016. By then, Construtora had gone into the Brazilian equivalent of administration. A London Court of International Arbitration process was started and is ongoing. NIDCO served demands in respect of the letters of credit. The letters of credit had been provided by banks in Europe. However, their Brazilian subsidiaries (which had given counter-guarantees to their European counterparts) were injuncted by the Brazilian courts from paying NIDCO and these courts extended the injunction to cover the European banks. Both banks declined to pay, noting that a substantial fine would be payable if they did.

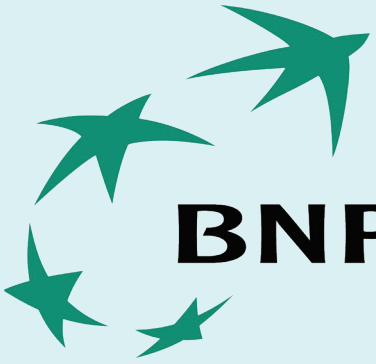
NIDCO applied for summary judgment over about $58m (£47m) against BNP and $38m (£31m) against Santander. The BNP case came before the Commercial Court on 26 September, and the Santander hearing in November.

At the BNP hearing, the issue was whether the Brazilian injunction gave BNP Paribas any grounds not to pay under English law. Judge Foxton QC emphasised that letters of credit have a status equivalent to cash and should be paid out unless very limited exceptions apply.



Banco Santander

NIDCO
National Infrastructure Development Company Limited



BNP PARIBAS

The judge noted:

> *"Whilst it is said that the facts of the present case are extraordinary, I suspect they would become commonplace if a party who had opened a letter of credit could defeat the bank's payment obligation to pay byobtaining an injunction against the bank in its home jurisdiction."*

The judge granted summary judgment and added it would be

> *"wrong in principle to use a stay of execution to subvert the principles of substantive law which provide very limited defences indeed to claims to enforce letters of credit"*

Santander argued the fraud exception applied. This was mainly because the amounts due had not been determined by the arbitration, so NIDCO could not have an honest belief in its demands. It also argued that English law should be extended to include a doctrine of "unconscionability", as in other jurisdictions. Santander said that, given the Brazilian injunction and NIDCO's alleged financial status, it would be unconscionable to order payment.

Making an employer wait until a claim is determined before calling on on-demand securities after a termination would undermine the purpose of on-demand securities

Its arguments were rejected. Mr Justice Knowles noted the case of *J Murphy and Sons vs Beckton Energy Ltd* [2016] EWHC 607 (TCC) in which Mrs Justice Carr held:

> *"The trigger for a performance bond is a belief on the part of the drawing party in its entitlement, not such entitlement having been subject to a final determination."*

There was no serious case that NIDCO did not believe its demands were valid so payment had to be made. The parties had chosen English law, which did not recognise unconscionability.

Permission was denied for a stay pending the release of the Brazilian injunction, the arbitral decision or any application to appeal; letters of credit must work within their terms, including those on time.

While Santander may appeal, the decision protects the securities system. Making an employer wait until a claim is determined before calling on on-demand securities after a termination would undermine the purpose of on-demand securities. To start with, the security may have expired by the time a dispute is resolved.

If an employer is facing a hefty bill to complete works, on-demand securities provide the monies to do so pending resolution. If the parties expressly say they cannot be called until a determination has been made, that is different.

The courts have upheld one of the greatest achievements of uniformity in international law relating to letters of credit and the importance of treating them like cash unless there is fraud.

This article was co-written with Claire King, Partner, Fenwick Elliott and first appeared in Building Magazine 2 December 2016.

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Commentary:
International dispute resolution & adjudication

The DIFC-LCIA Arbitration Centre introduces 2016 Arbitration Rules

On 1 October 2016 the DIFC-LCIA Arbitration Centre (the "Centre") released its new Arbitration Rules (the "2016 Rules"), which apply to all DIFC-LCIA arbitrations commenced on or after that date.

The New Rules

A number of substantive changes have been introduced by the 2016 Rules, with the emphasis being on ensuring that DIFC-LCIA arbitrations proceed as expeditiously and cost-effectively as possible. The most important of these changes are discussed below:

Access to an Emergency Arbitrator (Article 9B)

Under the 2016 Rules, either the Claimant or Respondent may, at any time prior to the formation of the arbitral tribunal, apply for the *"immediate appointment of a temporary sole arbitrator"* (the Emergency Arbitrator) to conduct *"emergency proceedings"* to determine urgent matters or deal with applications for emergency relief, including injunction orders and orders for specific performance.

Once an application for an Emergency Arbitrator is made by a party, the LCIA Court must determine the application as soon as possible in the circumstances, and if the application is granted the LCIA Court must appoint an Emergency Arbitrator within three days of receipt of the application. The Emergency Arbitrator must then decide the claim for emergency relief as soon as possible, and in any event no later than 14 days following his/her appointment.

Any order or award by the Emergency Arbitrator *"may be confirmed, varied, discharged or revoked, in whole or in part"* by the arbitral tribunal once formed.

The availability of an Emergency Arbitrator offers the parties a remedy for resolving urgent matters that would otherwise only be available via the courts; notably, however, the availability of this emergency procedure does not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the arbitral tribunal, and it is not to be treated as an alternative to or substitute for the exercise of that right.

Multi-Party Arbitration

By Articles 1.5 and 2.5, the 2016 Rules recognise in express terms that there may be one or more Claimants and/or one or more Respondents, each of whom may be jointly or separately represented. Further, Article 15.6 provides the arbitral tribunal with the power to *"provide additional directions as to any part of the written stage of the arbitration (including witness statements, submissions and evidence), particularly where there are multiple claimants, multiple respondents or any cross-claim between two or more respondents or between two or more claimants"*.

Consolidation

Under Article 22.1(ix) and (x) of the 2016 Rules — the 2008 Rules were silent on consolidation — the arbitral tribunal has the power (upon application by the parties) to order, with the approval of the LCIA Court, the consolidation of separate arbitration proceedings. Importantly, there are restrictions on this power:

1. all the parties to the arbitrations to be consolidated must agree to consolidation;
2. the arbitrations must be between the same disputing parties and be subject to the DIFC-LCIA Rules, and must have been commenced under the same arbitration agreement; and
3. the arbitral tribunal must not yet have been formed in the other arbitration(s), or, where it has already been formed, it is composed of the same arbitrators.

Further, Article 22.6 provides that the LCIA Court itself may determine that two or more arbitrations should be consolidated:

> *"the LCIA Court may determine, after giving the parties a reasonable opportunity to state their views, that two or more arbitrations, subject to the DIFC-LCIA Rules and commenced under the same arbitration agreement between the same disputing parties, shall be consolidated to form one single arbitration subject to the DIFC-LCIA Rules, provided that no arbitral tribunal has yet been formed by the LCIA Court for any of the arbitrations to be consolidated."*

DIFC | LCIA Arbitration Centre

The introduction of these provisions in respect of multiple parties and consolidation is certainly welcome; these new rules address the procedural difficulties that can arise in circumstances where there are multiple parties to the same dispute (and/or multiple contracts), and as such afford a measure of certainty to parties in multi-party and multi-contract scenarios.

Sanctions for Poor Conduct of Legal Representatives

Under the 2016 Rules, the arbitral tribunal has the power to sanction legal counsel in the event of poor conduct: appended to the Rules as an Annex is a set of "General Guidelines for the Parties' Legal Representatives". These guidelines — which are identical to those annexed to the LCIA's 2014 Arbitration Rules — are "intended to promote the good and equal conduct of the parties' legal representatives", and Article 18.6 of the Rules gives the arbitral tribunal the power to deal with violations of the guidelines.

Where a party to the arbitration, or the arbitral tribunal itself, makes a complaint against another party's legal representative, the tribunal may decide — after giving that legal representative the opportunity to answer any complaint made against him/her — whether or not he/she has violated the guidelines.

If the arbitral tribunal determines that the legal representative in question has violated the guidelines, the tribunal may order "any or all of the following sanctions against the legal representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.5(i) and (ii)".

Measures to Increase Efficiency and Avoid Delays in Proceedings

The 2016 Rules include a number of measures designed to provide a more efficient process for the formation of the arbitral tribunal, with Article 5.1 expressly providing *that the formation of the tribunal by the LCIA Court "shall not be impeded by any controversy between the parties relating to the sufficiency of the Request or the Response"* and that the LCIA Court *"may also proceed with the arbitration notwithstanding that the Request is incomplete of the Response is missing, late or incomplete"*.

Further measures introduced by the Rules with the purpose of increasing the speed and efficiency of proceedings include the following:

Article 9C provides for the expedited appointment of a replacement arbitrator, with any of the parties having the right to apply for such an appointment. The LCIA Court "shall determine [any such] application as expeditiously as possible in the circumstances".

Article 10 provides the LCIA Court with the power to revoke an arbitrator's appointment; previously, this was only available on application from the other members of the arbitral tribunal or any of the parties to the proceedings. Article 10 also provides the parties to the proceedings with the right to challenge the appointment of an arbitrator, including — only for reasons of which the challenging party becomes aware after the appointment — an arbitrator whom the challenging party itself nominated.

By Article 11, where the LCIA Court "determines that justifiable doubts exist as to any arbitral candidate's suitability, independence or impartiality, or if a nominee declines appointment as arbitrator, or if an arbitrator is to be replaced for any reason", the Court has the power to determine "whether or not to follow the original nominating process for such arbitral appointment". Further, where any opportunity given by the Court to a party to make any re-nomination is not exercised within 14 days, the LCIA Court may determine that the opportunity has been waived, and "shall appoint the replacement arbitrator without such re-nomination".

Parties to arbitration proceedings may also make use of the new online filing system, by which Requests, Responses and various forms of application may be filed, and filing forms paid online.

Conclusion

The introduction of the 2016 Rules marks the first time revisions have been made to the Centre's arbitration rules since its launch in 2008. By bringing the Centre's arbitration rules into line with the LCIA Arbitration Rules 2014, and in reflecting international best practice, the 2016 Rules demonstrate the Centre's commitment to being a leading body for international dispute resolution, and are sure to enhance its global appeal as a forum for international arbitration.

News and events

Trends, topics and news from Fenwick Elliott

This edition

Our international arbitration credentials

With thirty years of expertise, Fenwick Elliott has a well-deserved reputation for handling large, complex, high value construction and energy related international arbitrations. Our international arbitration practice is truly global and we have advised on major projects located in the UK, Africa, Asia, India, CIS, Caribbean, Europe, the Middle East, South Africa and Turkey. Our lawyers are known as specialists in their field, for example Ahmed Ibrahim, Partner in our Dubai office has selected by the Dubai International Arbitration Centre ("DIAC") to help with their arbitration training and practical workshop programmes.

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

Fenwick Elliott LLP recommended as a leading firm by The Legal 500 United Kingdom 2016

Fenwick Elliott has been recommended as a Tier 1 firm in construction by The Legal 500 United Kingdom 2016. The Legal 500 Series, now in its 29th year, is widely acknowledged as the world's largest legal referral guide. More than 250,000 corporate counsel are surveyed and interviewed globally each year. Fenwick Elliott has been recommended in the following practice areas:

- Real estate, construction, contentious and non contentious
- Dispute resolution - International arbitration
- Dispute resolution - Mediators
- Infrastructure (including PFI and PPP)
- Power (including electricity, nuclear and renewables)
- Public sector - Education: institutions

Dispute Resolution Board
Foundation conference, Sofia

Nicholas Gould and Jeremy Glover also recently attended the Dispute Resolution Board Foundation ("DRBF") latest regional conference titled, Dispute Boards as Lifeboats to the Project Ship, in Sofia, Bulgaria. As the title suggested and as Ms. Ekaterina Zaharieva, the Minister of Justice highlighted in her keynote address, one of the main reasons for the conference was to help promote dispute avoidance and quick and cost effective dispute resolution.

In our experience, the use and purpose of Dispute Boards on projects are often frustrated and the DRBF Conferences are a good way of helping to spread the message that Dispute Boards can help resolve disputes at an early stage or even prevent disputes arising. This was something highlighted by Nicholas in his paper, "Avoiding the Rough Seas" when he explained how to make the most of the DAB. Amongst his reasons for having a standing DAB were the following:

- To resolve disputes – to avoid them.
- To rationalise behaviour.
- To instil (gradually but firmly) professionalism.
- As a sounding board.
- A shield and a sword.
- Accountability.
- To guide the project

Fenwick Elliott has a long-standing relationship with the DRBF, Nicholas Gould being a past President of Region 2 of the DRBF, which we are proud to maintain. We look forward to the next conference.

Dispute Boards and FIDIC

We have highlighted in this issue of IQ, the proposed new changes to the FIDIC Form of Contract. We did not mention the new Dispute Board Rules. This was because the new rules are not currently included as part of the revised Yellow Book.

We understand that although FIDIC did give serious consideration to adopting the updated ICC Dispute Board Rules, they have decided to retain their own form of rules. Again, these are likely to follow the Rules to be found in the FIDIC Gold Book, albeit with added focus on dispute avoidance.

FIDIC announced on 14 December 2016, that the rules will also once again be included as a part of the Contract. They will therefore continue to be an integral part of the contractual arrangements.

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
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International Quarterly is produced quarterly 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. International Quarterly is a newsletter and does not provide legal advice.

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