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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 32

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Welcome to our latest edition of IQ which highlights issues important to International Arbitration and projects.

As the adage goes "the only thing certain in business is uncertainty" but even so the last few years have thrown up more curve balls than most. In the wake of substantially increased costs in the construction industry Lucinda Robinson opens our latest IQ by looking at the tools available to parties to construction contracts for managing the impact of escalating prices.

We then turn to the world of investor state disputes. Sam Thyne reviews the recent proposed reforms to the Draft Code of Conduct for Adjudicators in investment disputes. Investor state disputes have been criticised in the past for a perceived lack of transparency, perhaps these reforms will help increase confidence in the regime?

In 2020 "force majeure" perhaps to everyone's surprise became part of common vernacular. Today, in light of the invasion of Ukraine, "sanctions" have come to the fore. Olivia Liang and Oliver Weisemann look at a recent case that covers both. *MUR Shipping BV v RTI Ltd* concerns the limits of the exercise of "reasonable endeavours" in overcoming a force majeure event, an issue which may be relevant in any legal disputes arising as a result of the recent sanctions imposed against Russian companies and nationals.

In March 2022, the newly enacted DIAC Arbitration Rules came into force. Gilbert Hakim and Jake Wright explain some of the changes, which will hopefully increase the efficiency and cost-effectiveness of DIAC arbitrations as well as further enhance Dubai's profile as a global arbitration centre.

Finally, I discuss the latest offering in the FIDIC suite of contracts, the second edition of the FIDIC Green Book (or Short Form of Contract). The new Green Book aligns itself with the 2017 suite, bringing consistency to the terminology and processes used. It will be interesting to see whether the changes will be enough to encourage further use, and whether some of the new ideas will find themselves being adopted more widely.

If there are any areas you would like us to feature in our next edition, please let me know.

Jeremy

News and Events

Our international arbitration credentials

With over 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.

Fenwick Elliott lawyers are widely acknowledged as specialists in their field. 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. Whilst, in Dubai our office is headed up by Patrick Stone, Partner.

Events

Fenwick Elliott Partners, Nicholas Gould, Jeremy Glover and Claire King are all part of the *King's College 2022 London FIDIC Summer School* which runs from 30 June to 3 July 2022.

Partners James Cameron and Edward Foyle will be speaking at the Informa *Construction Contracts & Law Conference* in London on 5 & 6 July 2022. *Click here* for more information and to book your place.

Partners Nicholas Gould and Stacy Sinclair are part of FIDIC's *Global Infrastructure Conference (Building a better tomorrow, by investing today: Sustainable infrastructure development to improve community wellbeing)* in Geneva on 11 - 13 September 2022. *Click here* for more information.

On 26 - 28 October 2022, Partners Jeremy Glover and Nicholas Gould will be speaking at the *DRBF Central & Eastern Europe Regional Conference* in Cluj, Romania.

Webinars

Fenwick Elliott host regular webinars that address key issues and topics affecting the construction industry. To find out details of upcoming webinars please *click here* and select the 'webinar' drop down. To watch our previous webinars on demand, *click here.*

As well as our hosted webinar series, many of our specialist lawyers also contribute to webinars and events organised by leading industry organisations, where they are asked to share their knowledge and expertise of construction and energy law and provide updates on a wide range of topical legal issues.

We also are happy to organise webinars, events and workshops elsewhere. We are regularly invited to speak to external audiences about industry specific topics including FIDIC, dispute avoidance, BIM, digitial design and technology.

If you would like to enquire about organising a webinar or event with some of our team of specialist lawyers, please contact Stacy Sinclair (*ssinclair@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.*

Managing Cost Increases in Construction Contracts

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The consequences of Russia's invasion of Ukraine have joined forces with a surge in demand for construction products, Ofgem's permitted energy price hikes, the ramifications of Brexit and fall-out from Covid-19 to strip the construction industry of resources and increase prices.

Ukraine and Russia export raw materials include copper, aluminium, oil, bitumen, neon (used in semi-conductors for micro-chips), timber and iron ore used for steel. Reduced supplies from both countries to the UK (or Europe where the UK then sources the materials) caused by the war, or sanctions imposed in response to it, will trigger shortages and delay. The impact will be felt at almost every stage of construction, from the erection of steel frames to installation of aluminium windows and timber cladding, from M&E works to roofing.

According to the Construction Leadership Council's Construction Product Availability Statement (8 March 2022), price inflation is an even greater concern than material shortages. It cites increases of 5 to 10%, and even up to 20% for energy intensive products. Coupled with the soaring energy prices as Europe and the UK seek to reduce reliance on Russia, the cost of construction will rocket.

With parties set for disputes over inflated prices and delays, what can they do to defend their positions under existing contracts and prepare themselves for future conflict in contracts being negotiated now?

Existing Contracts

Price Inflation Clauses

Parties should check their contract to see if it provides for price inflation for all or specified materials. Subject to bespoke amendments:

JCT DB 2016 includes a standard fluctuations clause, provided it is selected in the Contract Particulars. Otherwise, the risk sits with the Contractor.

NEC4's main options A and B place the risk on the Contractor, with options C and D splitting the risk between the Parties. Option X1 allows for price increase before the Completion Date under these 4 options (if selected), subject to details being included. Cost reimbursable options E and F place the risk with the Employer.

FIDIC's Yellow Book 2017 provides that, in some circumstances, adjustments can be made to the Contract Price to account for changes in law (clause 13.6) or for rises or falls in the cost of labour, Goods and other inputs to the Works (clause 13.7).

Substitute Materials

Working with the supply chain to communicate requirements early will help keep ahead of further price increases and shortages. Diversifying the supply chain might also help to secure access to materials. However, if materials cannot be supplied at all, consider if others that are easier to obtain can be substituted. Clause 2.2.1 of JCT DB 2016, for example, permits alternatives to be procured if those specified cannot be purchased and the Employer agrees. Even if there is no similar clause, parties can agree to use alternatives.

Changes involving a cost saving might be most attractive to Employers and, if instructed, the change could entitle the Contractor to time and money too.

Time and Money

Contractors will need an extension of time to defeat the levy of liquidated damages for delay caused by material shortages.

JCT DB 2016

The Contractor must prove the delay was caused by a Relevant Event. The word "war" does not appear in the list of Relevant Events, but the Contractor may be able to rely on one or more of the following (assuming they have not been deleted by amendment).

- Force majeure (2.26.14) is not defined in standard JCT forms but is understood to include war (*Lebeupin v Crispin*), so may be more helpful to Contractors. The Contractor will need to prove the war caused the delay, but if it did, then this may be its strongest argument on time. There is no equivalent Relevant Matter, so the Contractor cannot rely on this to recover its associated losses.

- Civil commotion, terrorism and/or the activities of relevant authorities in dealing with it (2.26.10) sounds relevant, but it is not clear if this Relevant Event would apply. Civil commotion has been interpreted to mean something between a riot and civil war in an insurance context, which is not what is occurring in Ukraine. Whilst the Russian advances are terrifying, it is not clear if it is "terrorism" for the purposes of this clause. If the clause was supposed to cover war, then why was the term "war" not included? A Contractor seeking to rely on this clause may want to hedge its bets and rely on at least one more as well. There is no related Relevant Matter.

- If the impact of the war presents as the Employer preventing the Contractor from proceeding, then the Contractor may rely on the applicable Relevant Event (2.26.6), which also constitutes a Relevant Matter.

- If the Employer instructs a change to the Works because of material shortages, price inflation or agreed solutions to address them, then the Contractor could rely on this Relevant Event (2.26.1) and Relevant Matter. Employers may be careful not to do this, or at least not without agreeing the time and cost implications upfront.

- The exercise after the Base Date by the UK Government of any statutory power directly affecting the execution of the Works may come into play if it is the sanctions applied to Russia by the UK that causes the delay. There is not a related Relevant Matter.

NEC4

All potentially applicable compensation events enable the Contractor to claim time and money, provided they have been incurred because of the event in question. These include:

- NEC's equivalent of force majeure is clause 60.1(19), which is a four-part test. If the event (1) stops or delays works, (2) could not be prevented by either party, (3) is not one of the other compensation events, and (4) at the Contract Date would have been judged by an experienced Contractor to have such a small chance of occurring it was unreasonable to provide for it, then the Contractor can recover. War and sanctions would be covered provided they commenced after the Contract Date.

- Instructed changes (60.1(1)) constitute a compensation event and the same comments apply to this as to the JCT equivalent.

- Late provision of information (60.1(3)), works instructions (60.1(4)), performance (60.1(5)) or materials for testing (60.1(16) by the Employer also constitute compensation events, which could be claimed if such events are prompted by the war.

FIDIC Yellow Book 2017

The FIDIC Yellow Book lists circumstances including war, hostilities (whether war be declared or not), invasion and act of foreign enemies, which may qualify as an "Exceptional Event" if the event:

"(i) is beyond a Party's control;
(ii) the Party could not reasonably have provided against before entering into the Contract;
(iii) having arisen, such Party could not reasonably have avoided or overcome; and
(iv) is not substantially attributable to the other Party."

Provided contractual notice provisions are met, a Contractor suffering delay and/or incurring costs because of the Exceptional Event will be entitled to an extension of time and potentially costs. The challenge is to prove the delay and increase in costs directly resulted from the war in Ukraine.

Other circumstances entitling the Contractor to an extension of time, including variations, are set out in sub-clause 8.5. Notably, if the Contractor can prove that delay was caused by unforeseeable shortages of personnel or Goods because of an epidemic or governmental action (8.5(d)), it may be entitled to an extension of time.

All Contracts

If the Contractor is to succeed on any such grounds under any contract, it will need to submit valid notices timely, meet any other conditions precedent, and provide records to substantiate its allegations about the cause and extent of delay and loss.

Termination

Termination is a drastic remedy and not to be undertaken lightly, but if the grounds can be made out, and the process followed correctly, it could offer a way out of an unprofitable arrangement.

Construction contracts will usually prescribe permitted grounds for termination. Force majeure is a valid reason for termination by the Employer in NEC4 (clause 91.7), but that will not help Contractors. JCT DB 2016 allows either party to terminate if the works are suspended for a specified period due to force majeure, civil commotion or exercise of a statutory power by the UK Government (mirroring the Relevant Events noted above) (clause 8.11). The requirement for works to be suspended could be too high a threshold for the Contractor to meet, as a shortage of some materials will not prevent all progress in many cases. The FIDIC Yellow Book 2017, also allows for termination by either party if the execution of substantially all the Works is prevented for 84 days (or multiple periods totalling 140) due to an Exceptional Event (clause 18.5), or where it becomes impossible or unlawful for either, or both, parties to fulfil their contractual obligations (clause 18.6). In many cases, material shortages or increases in price will not substantially prevent the execution of substantially all the Works or make performance impossible.

From an Employer's perspective, termination is unlikely to solve the fundamental problem. If the incumbent Contractor cannot source materials, the likelihood is that most other Contractors could not either, so the time and cost involved of terminating one Contractor and engaging another would not be justified.

Renegotiate the deal

The construction industry may become rife with claims as the enforcement of fixed prices and levying of delay damages ripples down the contractual chain. However, forcing risk upon those ill-equipped to bear it will result in their collapse, and insolvency is rarely in anyone's interest.

A more conciliatory approach to risk sharing may be preferable. For example, a reset of the price and programme reflecting the reality of inflated prices and scarcity of materials, plus a consideration of alternative products and a more diversified supply chain.

Records

Records should be kept of the fact of any shortages or increased prices, the cause of them and the impact on time and money. Notes of what decisions were made, why and when, together with supporting documents, should all be maintained. Whatever claims are made, or negotiations take place, records will be needed to support them.

New Contracts

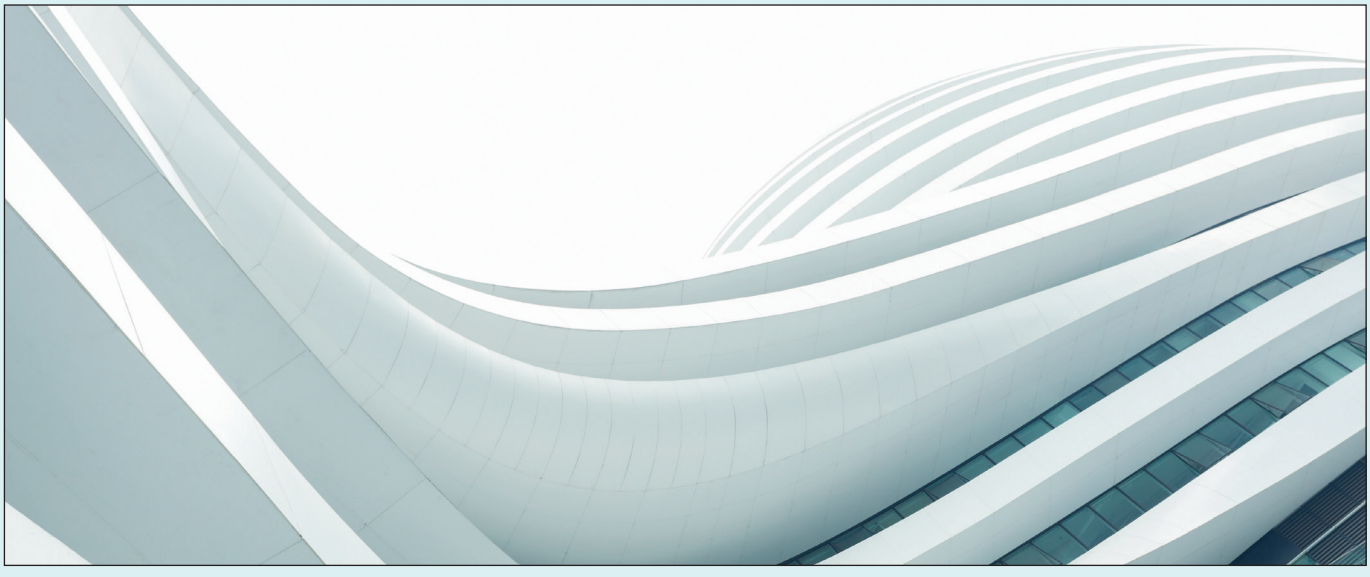
Those entering new contracts need to protect their position on prices and material shortages, recognising that they will not be able to argue later that the war was unforeseeable. Whilst Employers may try to resist, Contractors should try to include:

1. Price increases for material in their tenders.
2. Price fluctuation clauses and an appropriate indexation measure.
3. A right to use alternative materials and, if the Employer's consent is required, a caveat that it should not be unreasonably withheld or delayed.
4. Realistic lead times for materials and some float in the programme.
5. A cap on delay damages and/or a grace period before they are applied.
6. A right to an extension of time for delays caused by war-related Government action, plus associated loss and expense, or an expansion of the force majeure provisions to ensure this is covered, perhaps even so wide as to cover all events beyond the Contractor's reasonable control.

Whilst it is tempting for Employers and Contractors to pass their risk downstream, they should be conscious of the insolvency risk and what subcontractors and suppliers can feasibly withstand.

Conclusion

History does not let us say these are unprecedented times. Wars and pandemics have happened before. Force majeure clauses are a product of experience. Nevertheless, it has been many years since such events have conspired to cause costs to spiral and stocks to plummet so dramatically. Claims are likely and parties will need to rely on their contracts to protect their position so far as they can. It is hoped that the industry will take a pragmatic, conciliatory approach, so that parties can reach compromises based on realistic expectations as to time, cost and risk management.



UNCITRAL and ICSID release third iteration of Draft Code of Conduct for Adjudicators in investment disputes

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The United Nations Commission on International Trade Law ("**UNCITRAL**") and the International Centre for Settlement of Investment Disputes ("**ICSID**") released, in September 2021, their third iteration of a Draft Code of Conduct for Adjudicators in International Investment Disputes (the "**Code**").

For the uninitiated, investor state dispute settlement ("**ISDS**") is a system whereby investors that provide foreign direct investment into a country can sue that country if practices that are discriminatory to said foreign direct investment are introduced.

A very simple and crude example, relevant for construction, would be if an international contractor invests significantly in a country (that is party to an applicable investment treaty) with the intention of carrying out construction work in that country for the next decade. However, after mobilising in the country, laws are introduced which apply an additional tax on foreign companies carrying out construction works. Such laws could severely impact the contractor's investment, making them uncompetitive in the market and, ultimately, costing them. Under the ISDS scheme, the contractor could attempt to recover losses from the country. The rationale behind the system is that it benefits both the country and investors, and the protection given to investors encourages them to make foreign direct investment in countries where they might otherwise not.

ISDS is not without its share of controversy and critics. Detractors argue that ISDS threatens democracy and the rule of law as it may prevent countries passing legislation that addresses public concerns, such as health and environmental issues. Also, the lack of transparency (with decisions rendered being confidential) is counter to the staples of a regular judicial process. Concerns around the lack of impartiality of arbitrators are also levelled at ISDS, with critics pointing to a systemic bias whereby arbitrators benefit from an increase in claims, which can only be made by investors and not states.

UNCITRAL, and ICSID are both arbitration institutes whose function includes facilitating the resolution of investor state disputes. UNCITRAL is part of the United Nations, and ICSID is part of the World Bank Group. The Code has been jointly prepared by the Secretariats of UNCITRAL and ICSID, and has emerged out of an initiative for ISDS reform dating back several years.

The Code was developed with the benefit of a comparative review of the standards found in codes of conduct in investment treaties, arbitration rules applicable to ISDS, and codes of conduct of international courts. The goal of the Code was to provide a uniform approach to requirements applicable to adjudicators handling international investment disputes and at giving more concrete content to broad ethical notions and standards found in the applicable instruments. ICSID and UNCITRAL have also stated that commentators have requested that the Code be "balanced, realistic, and workable."

The Code

The Code establishes an obligation that Adjudicators (defined as Arbitrators and Judges) shall be independent and impartial. This encompasses an obligation not to:

- Be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamour;
- Be influenced by loyalty to a Treaty Party;
- Be influenced by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the International Investment Dispute ("**IID**");
- Take instruction from any organisation, government or individual regarding the matters addressed in the IID;
- Allow any past or present financial, business, professional or personal relationship to influence their conduct or judgement;
- Use their position to advance any personal or private interest; or

- Assume an obligation or accept a benefit during the proceeding that could interfere with the performance of their duties.

In the previous iterations of the Code, the obligation to act impartially read:

"Adjudicators shall be independent and impartial and shall take reasonable steps to avoid bias, conflict of interest, impropriety, or appearance of bias." (Emphasis added)

Commentators on previous versions of the Code had suggested deletion of the underlined text aboave as it raised questions about whether they are additional, and stand-alone, ethical obligations of Adjudicators or whether they are simply examples of the general requirement to be independent and impartial. The drafters of the Code note that these criteria are not intended to be independent or stand-alone obligations and, accordingly, made the deletion noted to make it clear that there is one core obligation of independence and impartiality. The removal of the requirement to "*take reasonable steps to avoid*" also assists in makes the obligation clearer – i.e. they must be independent and impartial; simply taking reasonable steps to avoid partisanship is not sufficient.

The Code also includes further requirements that are apposite to all Adjudicator functions in terms of good conduct. In particular, the Code:

- Imposes an obligation to perform duties diligently and not delegate their decision making to assistants;
- Requires the application of a high standard of integrity, fairness and competence and the treatment of participants with civility;
- Prohibits ex parte communication (i.e. discussing the case with the representatives of one party of the dispute without the knowledge of the other), except for in limited circumstances;
- Imposes confidentiality obligations; and
- Imposes ongoing disclosure obligations.

The explanation of changes that accompany version three of the Code tells the story of the drafters' attempts to take account of submitters' views on the details of each article. While a position has been reached on many of the articles, there remains several significant issues that remain outstanding.

For instance, following submissions, three separate options have been proposed for dealing with whether an Adjudicator can act in multiple roles (called "double hatting"), i.e. an IID arbitrator on one case, and a legal representative or expert witness in another case relating to the application or interpretation of the same (or any) investment treaty. The options to deal with this issue run the gambit from restrictive in approach to more laissez-faire. They are:

- **Option 1** – a full prohibition on an Adjudicator acting in another capacity on an IID under the same investment treaty (unless the disputing parties agree otherwise);
- **Option 2** – modified prohibition preventing them acting in another IID involving the same measures, substantially the same legal issues, one of the same disputing parties (or related entity), and/or the same treaty; and
- **Option 3** – the ability to act but with the requirement that full disclosure be given, and the option for parties to challenge.

Another outstanding issue where options have been provided is the application of the Code where the treaty upon which the consent to adjudicate is based contains a Code of Conduct for IID pursuant to that treaty. The options provided are:

- **Option 1** – the Code shall not apply if the treaty upon which consent to adjudicate is based contains a Code of Conduct for IID pursuant to that treaty, unless and to the extent that the Treaty Parties or the disputing parties agree otherwise; or
- **Option 2** – the Code shall apply unless otherwise modified by provisions in a Code of Conduct for IID or other ethical obligations for Adjudicators included in the treaty upon which consent to adjudicate is based.

There are likely to be strong opinions on these issues, in particular regarding the double hatting options. ICSID and UNCITRAL have invited comment on the latest version so the text as it currently stands, along with the proposed versions, which can be further reviewed.

The Code is a laudable step, as any reform that increases confidence in ISDS decision makers' impartiality and clarifies their other obligations will assist in addressing criticisms of the system. The devil is, of course, always in the detail, and the drafters still have a fair amount of detail to iron out. The full text of the Code can be reviewed here, and details about submitting comment on the current version can be found here.

Force Majeure and the limits of reasonableness in MUR Shipping BV v RTI Ltd[1]

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In March 2022, in allowing an appeal under section 69 of the Arbitration Act 1996, the Commercial Court held that a shipowner was entitled to rely on a force majeure clause in a shipping contract where the Charterers' Russian parent company became subject to sanctions imposed by the United States in 2018.

In doing so, the Commercial Court (Jacobs J) considered that a contractual requirement to exercise "reasonable endeavours" to overcome the impact of a force majeure event did not require the shipowners to accept anything other than contractual performance – being, in this case, their right under the contract to receive payment in USD.

Background

MUR Shipping BV (the "Owners") entered into a Contract of Affreightment ("COA") with RTI Ltd (the "Charterers") in June 2016 to carry Bauxite in an amount of 280,000 metric tons per month from Guinea to Ukraine. The COA contained a force majeure clause which provided that neither the Owners nor the Charterers would be liable to one another for loss, damage, delay or failure in performance caused by a force majeure event.

A "force majeure event" was defined in the COA as an event or state of affairs satisfying each of the following criteria:

"a) It is outside the immediate control of he Party giving the Force Majeure Notice;

b) It prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port;

c) It is caused by one or more of acts of God, extreme weather conditions ... any rules or regulations of governments or any interference or acts or directions of governments, the restraint of princes, restrictions on monetary transfers and exchanges;

d) It cannot be overcome by reasonable endeavours from the Party affected." (emphasis added)

On 6 April 2018, the US applied sanctions to the Charterers' parent company, United Company Rusal plc.

On 10 April 2018 the Owners sent a force majeure notice stating that it would be a breach of sanctions for the Owners to continue with the performance of the COA, and that the sanctions would prevent payments in USD, the currency stipulated for payment under the COA.

In response, the Charterers raised several arguments: firstly, the sanctions would not interfere with cargo operations; secondly, payment

could be made in Euros; and, thirdly, that, the Owners were a Dutch company and, accordingly, not a "US person" caught by sanctions.

The Owners remained adamant that there was a force majeure event that limited payment in US dollars. The Owners stated that this limited their ability to load and discharge cargo as they could be expected to do so without payment. The Owners declined to nominate ships under the COA on the basis of force majeure.

The Charterers subsequently obtained alternative tonnage and brought a claim in arbitration for the additional costs incurred as a result.

The Arbitral Award

The arbitral tribunal found in favour of the Charterers, on the basis that the event could have been *"overcome by reasonable endeavours from the Party affected"*. In this instance, the "reasonable endeavours" took the form of the Charterers' proposal to pay in Euros and to bear any extra costs or losses arising from the currency change. The tribunal stated that this was a *"completely realistic alternative that [the Owners] could have adopted with no detriment to them"*.

The tribunal did, however, find that the Owners' case on force majeure would have succeeded in all other respects as a matter of law (save for the requirement to use reasonable endeavours to overcome the event). The tribunal noted that, even though there was only the minimal risk of sanctions being applied to the (Dutch) Owners, the sanctions might still, in practice, have impeded timely payment in USD – payments to the Owners would have been made through an intermediary bank in the United States and would likely have been initially blocked by the bank pending investigations and due diligence.

The Appeal

In May 20221, the Owners were granted leave to appeal on a question of law under section 69 of the Arbitration Act 1996 – being whether reasonable endeavours extended to accepting payment in Euros, in departure from provisions in the contract requiring payment in US dollars.

The Decision

Reasonable endeavours and acceptance of non-contractual performance

The Commercial Court allowed the Owners' appeal, concluding that the Owners' obligation to use "reasonable endeavours" to overcome the event did not require them to accept the Charterers' proposal to effect payment in Euros.

In doing so, Jacobs J rejected the Charterers' argument that the contractual obligations of a party are simply one of several factors to be weighed in the balance of deciding the overall question of reasonableness in a force majeure context.

Jacobs J stated that there is *"no authority which supports this broad proposition"* and that, to the contrary, the Charterers' position went against the principles laid down in *Bulman v Fenwick*[2] and *Vancouver Strikes*.[3]

In *Bulman*, the court found that, at first instance, the Charterers of a vessel were entitled to rely on a strike clause similar to force majeure in circumstances where they had allowed the vessel to continue to the Regent's Canal, knowing that there was a strike of coal porters at that location (rather than rerouting the vessel to another discharge location). The jury had expressly found that it was not reasonable for the Charterers' representatives to allow the vessel to continue to the Regent's Canal after they knew of the strike. However, the court considered the central question was not the reasonableness of the Charterers' conduct, but what the contract entitled them to do. The Charterers were entitled to rely on the contractual strike clause and there was nothing which, after the order was given to proceed to Regent's Canal, obliged the Charterers to change that order. The court's decision was subsequently affirmed by the Court of Appeal.

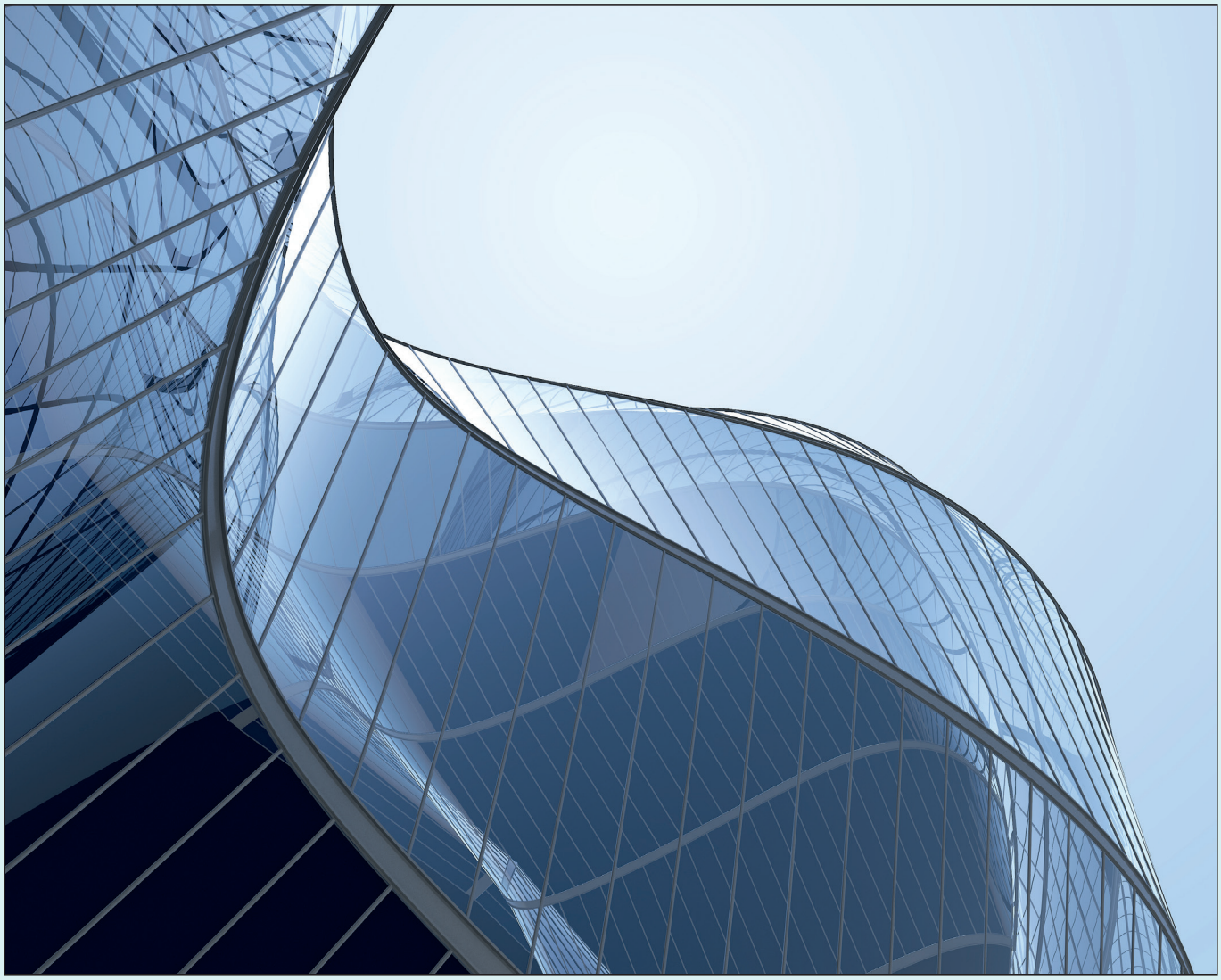
Jacobs J held that, in *Bulman*, the parties' contractual obligations were not simply one factor to be weighed in the balance but were, rather, to be *"regarded as paramount and determinative"*.

Jacobs J also considered the decision of the House of Lords in the *Vancouver Strikes*[4] case, which considered whether a Charterer would be required to ship an alternative cargo to that stipulated in the contract in order to avoid a Force Majeure event. Jacobs J found that (similarly to *Bulman*) *Vancouver Strikes* supports the proposition that the nature of a contractual obligation is determinative and not just one factor to be considered in an assessment of reasonableness.

The "causation argument"

The Charterers also advanced what Jacobs J termed the "causation argument". The core argument was that the Owner's failure to load the cargo was self-induced, on the basis that it was caused by the Owner's own decision not to receive payment following the sanctions, rather than the sanctions themselves or any resulting payment difficulty. The Charterers relied on a clause which only required payment to be made 5 days after completion of loading, in the course of arguing that it was extremely difficult to see how difficulty in paying freight could, even theoretically, prevent or delay loading.

Jacobs J rejected each of these arguments, finding that it was not possible to discern any error of law in the tribunal's conclusion that (aside from the finding on reasonable endeavours) the Owners' case on force majeure succeeded in all other respects.



The tribunal's construction of the force majeure clause was correct, as the tribunal found that it was highly likely that an intermediary bank in the US would initially stop a transaction of a sanctioned party to carry out investigations. The Charterers' reading of the force majeure provision as only concerning events that *physically* prevented or delayed loading or discharge was overly narrow. Nor was the force majeure event "self-induced". The restriction imposed by the United States sanctions was causative of prevention or delay in loading or discharge.

Conclusions

Although it relates to US sanctions imposed on Russian entities in 2018, the case may provide useful guidance to parties who are considering invoking force majeure clauses in response to recent sanctions imposed on Russia and Belarus following the invasion of Ukraine.

Jacobs J's decision includes discussion of the practical difficulties faced by parties who have contracted with sanctioned parties in the context of payment obligations.

The case makes it clear that a party's right to invoke force majeure is not constrained by any obligations to accept non-contractual performance. In this regard, the case may give some reassurance to parties in contracts with a sanctioned party, although their right to rely on any force majeure provisions will depend in each case on the specific wording of the force majeure clause.

Footnotes

1. *MUR Shipping BV v. RTI Ltd* [2022] EWHC 467 (Comm)
2. *Bulman & Dickson v Fenwick & Co* [1894] 1 Q.B. 179
3. *Reardon Smith Line Ltd v Ministry of Agriculture, et al.* [1963] AC 691
4. *Reardon Smith Line v Ministry of Agriculture*

The new DIAC Arbitration Rules 2022: what's changed and what does it all mean?

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Introduction

March saw the long-awaited introduction of the new Dubai International Arbitration Centre (the "**DIAC**") Arbitration Rules 2022 (the "**New Rules**")[1] replacing the prior DIAC Arbitration Rules 2007 (the "**Old Rules**").[2] Even before the New Rules came into force on 21 March 2022, in anticipation of the change, we recently experienced an emphasis by tribunals constituted under the Old Rules on trying to do things quicker. As of this date, all new requests for arbitration submitted to DIAC will be governed by the New Rules. Notably, the New Rules closely resemble some of the key provisions in both the London Court of International Arbitration (the "**LCIA**")[3] and International Chamber of Commerce ("the **ICC**") Rules.[4] We anticipate that the implementation of the New Rules will boost the efficiency and cost-effectiveness of arbitration and further enhance Dubai's profile as a leading global centre for arbitration.

What are the key changes?

The Arbitration Court

Under the New Rules, the Arbitration Court has replaced the Executive Committee. The Arbitration Court is like the LCIA Court, and was established by Decree No. 34 of 2021 under Articles 10 and 11.[5] The Arbitration Court's function includes:

(a) the review of arbitral awards;

(b) deciding on the issues regarding the appointment of arbitrators;

(c) considering initial jurisdictional objections; and

(d) considering applications for joinder and consolidation.

Seat of Arbitration

In keeping with the aim of efficiency and cost-effectiveness of arbitration, if the parties have not agreed the seat or a location or venue, the New Rules provide that Dubai International Financial Centre ("**DIFC**") will be considered the default or "initial" seat. This establishes DIFC Arbitration Law as the law of the arbitration, as opposed to UAE Arbitration Law. The aim of which is to resolve any conflict between onshore and offshore discrepancies. The New Rules also provide that the Tribunal will finally determine the seat taking into consideration the parties' submissions and other relevant circumstances. This is a positive development for international parties because proceedings in the DIFC Courts are conducted in English and the enforcement and ratification process tends to be straightforward and predictable.

Appointing an alternative Tribunal

A notable and well received change is the inclusion of an alternative appointment process where the parties have not agreed upon the sole arbitrator, or the co-arbitrators have not agreed on a chairperson. The New Rules set out a new procedure whereby DIAC can nominate candidates. Under Article 13, a list is prepared by DIAC and ranked by the parties or co-arbitrators in order of preference. The candidates will be contacted in accordance with the indicated order until one accepts the appointment. By contrast, Article 12 of the ICC Rules, requires that the ICC Court makes the appointment. However, it is noted that the New Rules are silent as to the timeframe and publication of the list between the Parties. Parties will need to be aware that if they fail to complete their list then only the DIAC's nominees will be considered.[6] This simple solution of ranking will add clarity and certainty when resolving the usual issues faced at this stage of the process.

Representation

Article 7 of the Old Rules, which deals with the parties' representation in the arbitration, has been greatly expanded upon.

Article 7.3 of the New Rules requires that the parties provide proof of authority to DIAC before the constitution of the Tribunal. Under the old regime the Tribunal would request proof of authority to act during the first procedural meeting. Proof of authority in this context usually takes the form of a Power of Attorney ("**POA**"). Obtaining a POA can be a time-consuming process for some entities, therefore, parties should be alive to this change in the rules as they may need to start the POA process earlier than before.

Provided the applying party informs the Tribunal, the other parties and DIAC, Article 7.5 now enables parties to change their representatives following the constitution of the Tribunal in the same fashion as Article 17 of the ICC Rules. When approving the decision to change representation, the Tribunal will take into consideration, among other things, any potential conflicts of interest and impact on time and cost-effectiveness of the proceedings. It is hoped that these changes will enable the arbitration to proceed efficiently and expeditiously and will be of great benefit to the parties because including such a provision adds clarity and certainty which should reduce the risk of delays.

Extension of Time

A further notable change is the reduced extension of time available to the Respondent to submit an Answer to the Request for Arbitration. Under Article 5.7 of the Old Rules, this was 14 days. This period has now been reduced to 10 days under Article 5.7 of the New Rules. This change looks set to continue the objective of expediting proceedings.

Consolidation and Joinder

The introduction of consolidation and joinder of proceedings are entirely new concepts to the DIAC Rules. The New Rules set out these new provisions under Article 8 and 9 and bear similarities to relevant Articles 7, 8, 9 and 10 of the ICC Rules.

Consolidation

The New Rules provide for the consolidation of claims which, subject to certain criteria in Article 8, allow a party to combine multiple claims into one arbitration. This provision brings the New Rules broadly in line with the Article 9 of the ICC Rules.

The application for consolidation is initially made to the Arbitration Court before the tribunal is constituted. The consolidation will be permitted where: (1) all parties agree to such consolidation; or (2) the Arbitration Court is satisfied on a prima facie basis that all claims are made under the same agreement to arbitrate.

If the claims are not made under the same arbitration agreement, the court will permit the consolidation of the claims in circumstances where:

- the disputes arise out of the same legal relationship; or
- the underlying contracts consist of a principal contract and its ancillary contract(s); or
- the claims arise out of the same series of related transactions.

Joinder

Of particular use to construction disputes involving numerous parties, is the new feature adopted by the New Rules for third parties to join the proceedings both before and after the appointment of the Tribunal. Like Article 7 of the ICC Rules, Article 9.1 of the New Rules now allows third parties to be joined before the constitution of the Tribunal subject to: (a) all parties' (including the third party) consent; or (b), that the Arbitration Court is *prima facie* satisfied that the third party may be a party to the agreement to arbitrate. Under Article 9.4, the third party may also be joined after the constitution of the Tribunal if all parties agree to the joinder or the Tribunal determines that the third party is a party to the arbitration agreement referred to in the Request for Arbitration. This feature is extended further by Article 9, which enables a new party to join as claimant or respondent to the arbitration upon an application.

All of the above will have significant cost saving implications for parties wanting to have multiple claims heard and should positively impact the efficiency of DIAC arbitrations.

Virtual Meetings and Hearings

In keeping with the modern practices adopted by other rules, such as Appendix IV (f) of the ICC Rules, DIAC proceedings have also had a modern overhaul under the New Rules. Most notably the Tribunal can now decide whether to hold virtual meetings and hearings.[7] This approach demonstrates DIAC's desire to modernise and offer flexibility in light of the changes brought on by the COVID-19 pandemic.

Expedited proceedings

Another new change is the introduction of expedited proceedings under the New Rules. Under Article 32 of the New Rules, the proceedings will be dealt with on an expedited basis provided that: (a) the parties did not agree otherwise in writing, and the total amount of the claims and counterclaims is below or equal to AED 1 million (exclusive of interest and legal representation costs); or (b) if, the parties agree in writing; or (c) following an application from a party, the Arbitration Court decides that the case is one of exceptional urgency that requires expedited proceedings. Clients should note that disputes that exceed the quantum limit can also be heard on an expedited basis subject to the provisions set out under Article 32. Either way, expedited proceedings will continue to be an ideal route for straightforward small claims, especially those related to real estate disputes.

The proceedings will be handled by a sole arbitrator with a final award rendered within 3 months, compared to 6 months under the ordinary proceedings. The ICC Rules contain a similar provision at Article 30. As seen under ICC expedited proceedings, this change will be of great benefit to clients with smaller value claims and should result in the reduction in time for an award being rendered. This will be crucial in allowing the supply chain of the construction industry to protect their cash flow.

Emergency Arbitrator

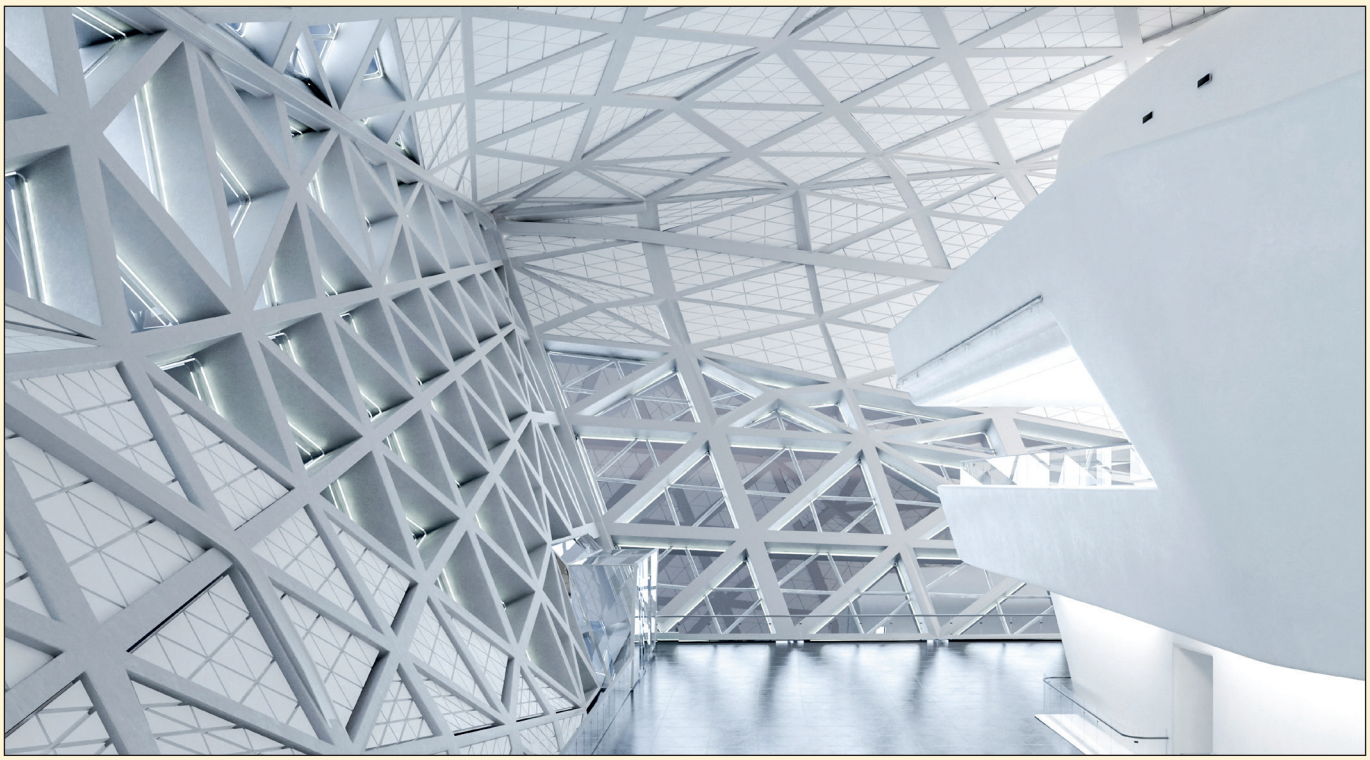
It is a positive step to see the emergency arbitrator process embraced under the New Rules. Article 29 of the ICC Rules contains a similar process. Specifically, the New Rules,[8] enable parties to apply for emergency interim relief *"concurrently with or following the filing of a Request"*. This should allow parties to obtain interim relief at the start of the proceedings before a Tribunal has been formally constituted.

Awards and Costs

One of the key changes that we have noted relates to the jurisdiction to award *inter partes* legal costs (e.g. legal and expert fees). Under the Old Rules the Tribunal did not have jurisdiction to award such costs in the absence of express agreement of the parties in the arbitration agreement or the Terms of Reference.

This was problematic because, without the risk of an adverse costs award, some parties felt less inclined to settle disputes that may have reached a settlement if the tribunal had authority to award costs. The position under the Old Rules also dissuaded some claimants from pursuing low value claims in arbitration.

Article 36 of the New Rules has addressed this issue and *inter partes* costs can now be awarded by the tribunal. This brings the New Rules in line with the ICC Rules, Article 38(1).



This change will be of particular benefit to those in the construction industry as it will encourage more parties to bring forward their valid claims before a Tribunal.

A final change worth mentioning in regards to awards under the New Rules Article 34.1 is the clarity afforded to the Tribunal issuing *"preliminary, interim, partial, final additional, supplemental or other awards".* Previously there was risk in whether the Tribunal could issue other awards in addition to the Final Award. As mentioned above, many parties were further dissuaded to claim these because they risked the Final Award becoming unenforceable.

Third Party Funding

In line with Article 11(7) of the ICC Rules, Article 22 of the New Rules now permits third party funding. The Old Rules were silent on this issue which created uncertainty. Third party funding is becoming more prominent in the UAE and the New Rules provide welcome clarity on this.

Parties seeking funding must be alive to when they will be required to disclose the funding arrangement to the other parties and to DIAC. Under Article 22.1 of the New Rules, a party using third-party funding must disclose the identity of the funder, as well as whether the funder has committed to any adverse cost liability prior to the constitution of the Tribunal. Furthermore, Article 22.2 of the New Rules requires that parties are not permitted to enter such arrangements if it will or may give rise to a conflict of interest between the funder and a member of the Tribunal after the constitution of the Tribunal.

In our view, the New Rules provide greater transparency and some protection to the financial interests of the parties.

Conciliation

The New Rules provide parties with an amicable dispute resolution method under Article 3 of Appendix II (Exceptional Procedures). Subject to the other party agreeing, this allows any party to commence conciliation by submitting an application. Embracing the principle of efficiency, Article 3 (11) of Appendix II sets out that the procedure shall be concluded within two months, unless extended by the parties. The New Rules may, therefore, provide a benefit to construction contractors, for example in situations where there may be a continuing relationship between the parties that they wish to maintain, such as with EPC turnkey contracts. Such conciliation proceedings may allow for the swift resolution of disagreements, allowing the focus of the parties to return to the overarching objectives of the contract.

If the parties can settle, a formal settlement agreement will be executed between them, facilitated by the conciliator under Article 3 (12) of Appendix II of the New Rules. If the conciliation fails, under Article 3 (13) of Appendix II of the New Rules, the conciliation proceedings will be terminated by the conciliator without prejudice to the merits of the dispute.

Conclusion

Overall, the New Rules are a revitalising update to the Old Rules in bringing them into line with rules of other international arbitration institutions, such as the ICC and LCIA. We anticipate that the New Rules will encourage many in the construction industry to include, or retain, DIAC arbitration clauses in their contracts. As these rules are drawn from other international arbitration institutions, these changes will enable DIAC to retain its position as a leading global centre for arbitration both internationally and within the MENA region.

If you are currently in the process of negotiating new contracts and considering DIAC arbitration as your means of dispute resolution, you should ensure that the arbitration agreement is properly drafted in consideration of the New Rules. Clauses in existing terms and conditions may also need to be reviewed and, if necessary, amended.

<u>Footnotes</u>

1. DIAC New Rules 2020 - *http://www.diac.ae/idias/resource/Rules2022.pdf*
2. DIAC Old Rules 2007 - *http://www.arbiter.com.sg/pdf/rules/DIAC%20Arbitration%20Rules%202007.pdf*
3. LCIA Rules 2020 - *https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx*
4. ICC Rules 2021 - *https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/*
5. *https://dlp.dubai.gov.ae/Legislation%20Reference/2021/Decree%20No.%20(34)%20of%202021.pdf*
6. Articles 13.4 and 13.5
7. Articles 20.2, 23.2, 26 and 27.6
8. Article 2 of Appendix II (Exceptional Procedures)

FIDIC gives green light on new edition

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The second edition of the FIDIC Green Book (or Short Form of Contract) was formally released at the FIDIC International Contract Users' Conference on 7-9 December 2021. Originally a part of the 1999 Rainbow Suite, the Green Book was intended for use on relatively small projects, with a value of $500k or less, with a duration of six months or less.

It turned out that the contract was used on slightly larger projects. As discussed at the 2021 Users' Conference, FIDIC carried out research in 2018 which indicated that the contract was being used mostly on contracts with a value of under $1milllion (although 18% were used where the value was under $10million) and on 70% of contracts, the project was due to last less than a year, but the duration of some 11% was over two years.

Why have FIDIC updated the Green Book?

The most obvious reason why the second release was produced was to ensure that the terminology and approach of the contract, mirror the updates made to the rest of the Rainbow Suite in 2017. It achieves this, for example by introducing a split between claims and disputes, here to be found in clauses 13 and 14. There are also new grounds for termination, including the failure to comply with an Engineer's or Adjudicator's determination.

At the Users' Conference FIDIC said that they wanted the new edition of the Green Book to:

"Serve as alternative to the 2017 FIDIC Red & Yellow Book Contracts for projects where the perceived level of risk is low and/or Parties wish to use a form which does not require significant contract administration management resources."

What are the key changes/ updates in the 2021 version from the previous 1999 version?

Length of contract

The 1999 Green Book had 15 clauses which ran to 10 pages. The 2021 has 14 clauses but is now 26 pages long. Taking into account Appendices, Notes and Guidance, the overall contract document has increased from 44 pages to 155, so it is no longer as short as it was. It still is, of course, considerably shorter than the 2017 Forms with the Yellow Book running to 109 pages plus Appendices, Particular Conditions and other details.

Time bar

One of the headline changes is the removal of the FIDIC time bar for claims, or at least the substitution of a less prescriptive alternative. Clause 13 which treats the Employer and Contractor in the same way again as per the 2017 Rainbow Suite, requires the giving of a claims notice, within 28 days describing the event or circumstances, and a fully detailed claim within 56 days, of the date the claiming party become aware or should have become aware of the event. This is in line with the traditional FIDIC approach.

However, if a party fails to comply with this condition, the result is not the loss of the right to make the claim as it is with the 2017 Contracts. Instead, any entitlement shall take account of the extent to which that failure has prejudiced proper investigation of the claim or a mitigation of the effects of the claim. The reasons for the change in approach is to reflect the lower level of management resources likely to be used on these smaller scale projects.

In fact, the wording of this new subclause 13.2.2, notes that a failure to comply with any subclause shall be taken onto account, not just the 28-day deadline. This is not something that can be found in the 2017 suite. This might affect, for example the new requirement at subclause 13.2.2 to use reasonable endeavours to mitigate the effects of claim events or the advance warning requirements to be found at subclause 6.3.

Subclause 7.2.1 expressly makes clear that any entitlements flowing from the variation procedures are not subject to the claims procedures and timelines set out in Clause 13.

The contract also provides a sample of the notice that the parties might give. This is one of 40 such sample forms which are included in an Annex to the Guidance Notes, one reason of course for the length of the overall contract book. These samples are not compulsory but are stated be there *"to assist and guide the Parties in the performance of their Contract administration duties."*

Risk and Responsibility

There are other innovations which are designed to assist the Parties. For example, clause 11, which deals with Risk and Responsibility, contains a Table setting out in one place (rather than scattered throughout the contract), details the Contractor's potential entitlement, whether it is to an extension of time only or time plus cost. This Table includes reference to Prolongation Costs. Not only is this a defined term, but there is also a set formula in the Contract Data detailing how to calculate the compensation for on Site and off-Site overheads per day of compensable extension of time. FIDIC within the Guidance Notes, describe the approach as acting *"as a liquidated damages provision, for ease of use by the Parties".*

The Contract Data (and Clause 8) also makes provision for alternative Options A-E (from Lump Sum A to Cost Plus E) again with specific comment on how the value of the Works is to be calculated.

This is all in line with FIDIC's philosophy of trying to make their contracts clearer, so that everyone knows where they stand – and so help avoid disputes.

Another example of this is expanded use of liquidated damages (expressed in percentages) to calculate payments to be made in the event the Employer omits works which are executed by another contractor or termination.

The 1999 Form did not contain a limitation of liability provision or seek to exclude consequential loss. The Contractor's total liability is now capped at the sum stated in the Contract Data and neither Party will be liable for indirect or consequential loss except as expressly stated.

Dispute avoidance and Resolution

The 1999 Form had an Employer's Representative who has been replaced by the Engineer, bringing the contract into line with the Red and Yellow Books. Many of the Engineer's duties are taken from the 2017 Suite, including an increased role in dispute avoidance and the requirement to act neutrally when seeking to agree, or failing that when determining any matter.

The 2021 Form, in line with the 2017 approach, provides for the mobilisation of an Adjudicator (given the likely capital value of the projects, this is Adjudicator in the singular, not a full three-person Dispute Avoidance Adjudication Board) at an early stage, within 28 days of the Contract coming into effect. FIDIC recognise that practise suggests that it is easier to make such an appointment at an early stage on the project.

FIDIC also recognise the value of early access to informal assistance. However, the Green Book 2021 leaves it up to the Parties to decide, they want to make use of the Adjudicator, setting out three options:

Option 1:	Only for binding decisions;
Option 2:	Time to time informal decisions and binding decisions;
Option 3:	Regular informal assistance, including site visits and binding decisions.

Where a binding decision is required, the Adjudicator must make a decision within 56 days if there is no hearing or 84 days where there is a hearing.

The Adjudicator's rules contain a nod to Covid-19 and recent virtual practice by stating that the Adjudicator's activities can be carried out online or in person - as the Adjudicator decides, following discussion with the Parties. The DRBF has prepared guidance for Adjudicators to assist in the carrying out of virtual site visits or hearings.[1]

Finally, in line with FIDIC's approach to adjudicators, any dispute that is referred to arbitration, is to be settled by one arbitrator, using the ICC expedited rules and procedures.

Is it likely that practitioners and clients will start using the new 2021 version in the short-medium term, or stick with the older 1999 version for the time being?

This is always a difficult question to answer. Will parties stick with what they know or move on? FIDIC had done their research into how the 1999 Green Form was being used and this will have influenced the changes seen in the 2021 edition. FIDIC has further come to a number of arrangements with the development banks over the use of their 2017 contract forms and the new Green Book will no doubt fall within those agreements. Parties may also appreciate the enhanced dispute avoidance provisions. This would suggest in at least the medium term, we will start to see, the take-up of the new Green Book.

Footnotes:

1. These can be accessed here: *Best-Practice-Guidelines-for-Virtual-Dispute-Board-Proceedings-5-August-2020.pdf (disputeboard.org)*

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