

International Quarterly

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

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Welcome to the latest issue of International Quarterly.

IQ starts with an article by Sana Mahmud about the Singapore Mediation Convention, which was signed by 46 countries in August of this year. As Sana notes, mediation is arguably becoming a preferred method of dispute resolution in Asia and it will be interesting to see whether in 2020 the UK and the (for now) other EU countries join.

Sana's article can also be found in this year's Annual Review, which features a bumper 18 articles about a wide

variety of construction issues. If you would like to read more, please click [here](#).

One issue that never changes is the importance of notices. As Robbie McCrea explains, notices are a huge source of contention in construction disputes. All claims begin by serving notice on the other party, and many claims are lost entirely by failing to do so properly. Robbie looks at cases from Northern Ireland, Hong Kong and England before providing some best practice tips and takeaways.

IQ regularly features articles on the changes to the way we all work arising from the advances in AI and digital technology. This time round, I consider the application of BIM under the FIDIC Form of Contract. BIM is a process for managing and delivering information on a project across its entire lifecycle from conception to completion and it is important that everyone recognises exactly what they are being asked to do.

Turning to International Arbitration, it is now a year since the Prague Rules were launched. Rebecca Ardagh asks

whether they represent an alternative way of proceeding to that provided by the IBA Rules and also whether they will result in a more time and cost-effective form of arbitration.

Finally, in October 2019, we launched an alliance with Hammad & Al-Medhar in Saudi Arabia, focusing on construction and energy matters. Whilst we have been working in the Kingdom for many years, the creation of this alliance allows us to provide the wider Saudi market with expert knowledge of local laws and procedures, as well as renowned international expertise in construction and energy law. With this in mind, IQ features an article by Toby Randle and Rebecca Penney which provides a snapshot of some of the legal issues you typically come across in the Kingdom. If you want more information on the alliance, please email [Toby Randle](mailto:Toby.Randle).

With best wishes for 2020

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 Partners, Ahmed Ibrahim and Patrick Stone.

Events

Jeremy Glover and Nicholas Gould delivered workshops at the 'Dispute Boards in the Nordics DRBF

Conference' in Sweden on 2-4 October. The theme focused on 'Successfully managing project cost, schedule and performance risks'.

On 7 November, Nicholas Gould was in Lisbon for the 2nd Annual EPC Contract & Project Management Summit, where he presented on 'Successful Management of EPC Contracts and Dispute Resolution Strategies'.

Ahmed Ibrahim was a panellist at the International Bar Association's 7th Biennial Conference on Construction Projects from Conception to Completion in Berlin on 1-2 November. Ahmed was also one of four expert judges at the Global Arbitration Review's live debate in Dubai on 21 November; the debate focused on civil vs common law.

Throughout the year Fenwick Elliott host a range of construction law focused seminars and conferences in London and Dubai. We also are happy to organise events and internal workshops elsewhere. A number of our expert lawyers are also regularly invited to speak to external audiences about industry specific topics including FIDIC, dispute avoidance, and BIM.

If you would like to enquire about organising a seminar with some of our team of specialist lawyers, please contact nshaw@fenwickelliott.com. We are always happy to tailor an event to suit your needs.

KSA law alliance

Our plans for growth across the Middle East have taken a significant leap forward with the signing of a new alliance with one of the Kingdom of Saudi Arabia's leading law firms, Hammad & Al-Medhar. The collaboration between Hammad & Al-Mehdar and Fenwick Elliott ("HMFE") will allow clients access to a higher level of local and focused construction, engineering and energy law advice, to meet the increasingly complex nature of projects across the Kingdom

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.



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The Singapore Mediation Convention: raising the profile of mediation in cross-border disputes

Introduction

On 7 August 2019, 46 countries signed the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation. It is hoped that the Convention will raise the profile of mediation globally as an additional dispute resolution choice to litigation and arbitration for settling cross-border disputes. Countries including the US, China, India, South Korea, Saudi Arabia and Qatar are now signatories. The United Kingdom and other EU countries, however, are yet to sign because the EU has not determined internally whether it should join as a bloc, or whether it is a matter for individual countries.

The application of the Convention, once ratified by the signatories, should be of interest to international contractors, particularly those looking to carry out works on infrastructure contracts under China's Belt and Road Initiative ("BRI").

Key features of the Convention

The Convention provides parties who have agreed a mediated settlement with a uniform and efficient mechanism to enforce the terms of that agreement in other jurisdictions, in the way that the New York Convention does for

international arbitral awards. Without this mechanism, a party wanting to enforce the terms of a mediated settlement must bring an action for breach of contract and then seek to have the subsequent judgment enforced, potentially in a different jurisdiction.

Where a country has signed and ratified the Convention, a mediated settlement agreement can be enforced in that state, provided the settlement falls within the scope of the Convention. It can also be invoked as a defence to a claim that concerns a matter already decided by the agreement. Arbitration awards, court judgments and settlement agreements under which one party acts as a consumer, or where the subject matter concerns family, inheritance or employment law, are specifically excluded from the Convention's scope.

The Convention applies to international settlement agreements resulting from mediation that have been concluded in writing and which resolve a commercial dispute. A settlement agreement will be classed as "international" under the Convention if the parties are based in different states or the dispute relates to works performed in a different country from where the parties are based.

A party seeking to enforce a settlement agreement under the Convention will have to show that it resulted from mediation. The Convention sets out a number of ways parties can do this, including having the mediator sign the agreement, providing a document signed by the mediator indicating a mediation was carried out, or an attestation by the institution that administered the mediation. In the absence of this, parties can provide any other evidence acceptable to the court or other competent authority enforcing the agreement.

If a party can show that the settlement agreement falls within the scope set out above, a relevant court or other competent authority in a signatory country has limited grounds for refusing enforcement.

Mediation and BRI disputes

Mediation is arguably becoming a preferred method of dispute resolution in Asia, driven primarily by China and the BRI. The vast scale of China's infrastructure programme, which extends from the southern pacific to Europe, Africa and South America, means that disputes are likely to be cross-border and must be settled as efficiently as possible. A combination of mediation and arbitration provides an approach that in the first instance is less

adversarial, reflecting a preference in China for consensus-based methods of resolving disputes that preserve the commercial relationship as far as possible.

Prior to the signing of the Convention, in January 2019, the Singapore International Mediation Centre and the China Council for the Promotion of International Trade entered into a memorandum of understanding which established an international panel of mediators to resolve disputes arising out of BRI projects. The ultimate aim of these two bodies is to develop a set of rules for case management and the enforcement of mediation settlement agreements arising out of BRI disputes. Other dispute resolution service providers have also recognised this trend and encouraged the use of mediation in BRI disputes with reference to their own rules and services. For example, the ICC recently published guidance which suggests adopting a tiered approach of mediation followed by arbitration in BRI contracts.¹ The Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre have also set up initiatives specifically focused on resolving BRI disputes.

Given the geographical reach of the BRI, which the World Bank estimates at over 70 countries,² the use of mediation to settle complex commercial cross-border disputes is likely to increase significantly. International construction contracts on BRI projects will likely contain dispute resolution clauses that in the first instance call for mediation, followed by arbitration. A contractor will be able to enforce any resulting mediated settlement agreement in the same way it could an arbitral award, provided of course that the country in which it wants to enforce the award has signed and ratified the Convention.

Mediation in an English context

Mediation is widely used in construction disputes in England and

the law surrounding it is relatively well established. Whilst a court cannot compel parties to resolve their disputes through mediation,³ the process is actively encouraged by the Civil Procedure Rules, Technology and Construction Court Guide and Pre-Action Protocol for Construction and Engineering Disputes. The overriding objective also states that the courts must deal with cases justly and at proportionate cost. Parties that refuse to participate in mediation or other forms of ADR unreasonably risk serious cost sanctions that can be imposed by the court.

Where a contract includes a dispute resolution clause containing an escalation and mediation procedure that acts as a condition precedent to litigation, the English courts may stay the proceedings pending referral of the dispute to mediation. This was confirmed in the recent case of *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*,⁴ where the court used its discretion to order a stay to proceedings until the parties had followed the steps set out in their contract's ADR clause. Regarding the use of the court's discretion, Mrs Justice O'Farrell stated in her judgment that:

"There is a clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of such agreement.

The Court must consider the interests of justice in enforcing the agreed machinery under the Agreement. However, it must also take into account the overriding objective in the Civil Procedure Rules when considering the appropriate order to make."⁵

In a European context, currently the UK has the benefit of the

Mediation Directive⁶ which allows the enforcement of cross-border mediated settlement agreements through the national courts of other Member States. If the UK leaves the EU, it may lose access to this regime.

As mentioned above, the UK has not signed the Convention yet because it is still part of the EU; however, this does not mean that mediated settlement agreements signed in the UK will escape its scope. The Convention is not reciprocal, so it is possible to have a scenario where a settlement agreement signed in the UK can be enforced in another jurisdiction, if that state is a signatory and the project or a party's assets are based there.

Criticisms of the Convention regime

Is it necessary?

One of the main criticisms of the Convention is that it is unnecessary because parties to a mediation arrive at a negotiated commercial settlement by mutual consensus. The process itself is voluntary, and the terms of any settlement agreement are agreed between the parties. Where parties have chosen to go through this process and have come to an agreement, it is unlikely that one party would not hold up its side of the bargain. The argument many commentators have made is that in practice, there is rarely a need for enforcement.

Reservations under Article 8

Additionally, the Convention contains reservation provisions that signatories can choose to apply, which would have the effect of significantly diluting the effectiveness of any cross-border enforcement regime.

The first reservation allows a signatory state to declare that the Convention will not apply to settlement agreements that it is party to, or that its government agencies are a party to. In the context of the BRI, and international infrastructure contracts generally,

such a declaration may be problematic. In many large infrastructure contract disputes at least one party is often a government or public entity. In BRI cases involving Chinese state-owned contractors there may be a government entity on both sides. In a situation where one party must enforce the terms of a settlement agreement in a state that is also party to the settlement agreement, such a declaration by that state would prevent enforcement under the Convention. The use of this reservation by states party to international infrastructure contracts poses significant risks to the potential enforceability of any mediated settlement.

The second reservation allows a state to declare that it will only apply the Convention if all parties to the settlement agreement have agreed that it should apply. Again, this is potentially another obstacle to enforcement in jurisdictions that mandate an opt-in requirement. In order to avoid a situation where a party is unable to enforce an agreement, all parties must agree that the Convention will apply in advance of a dispute or the mediation process.

Declarations can be made at any time, so it remains to be seen if any of the current signatories apply the reservations in Article 8.

Other practical considerations

Another potential issue is the uncertainty that may arise if there is no administering institution and a mediator refuses to sign the settlement agreement or other document certifying that the mediation took place.

A recent English case provides an example of what can happen if a mediator is called to give evidence in litigation proceedings. In *The Serpentine Trust Limited v HMRC*,⁷ a mediator provided a witness statement in a tax dispute and was cross-examined on a note that he produced at the end of the day of

the mediation. In this case, questions about the note were raised and the judge found the mediator's evidence to be unreliable. Many mediators want to avoid the risk of being forced to give witness evidence in court in this way and, consequently, often refuse to sign agreements or documents. Another reason frequently cited is confidentiality.

In the absence of an administering institution or a signed document from the mediator, the party seeking to enforce the agreement must provide evidence acceptable to the relevant court or authority. These requirements could vary depending on the applicable law or procedure of the country in which enforcement is sought. It is therefore important to know prior to a mediation process whether a mediator appointed by the parties is willing to sign a settlement agreement or other document confirming that a mediation took place.

Conclusions

The issues identified above are potentially challenging. Whilst there are currently 46 signatories to the Convention, it remains to be seen how many will go on to ratify it. Those that do may also make declarations under Article 8 that could hinder enforcement of mediated settlement agreements to which governments or government agencies are party.

That said, one of the primary objectives of the Convention is to give parties confidence in the mediation process. This is particularly so in relation to parties from jurisdictions where mediation is not currently a widely accepted method of resolving disputes and where relevant national laws are less developed. There are obvious benefits of having parties adopt mediation as their preferred dispute resolution mechanism in cross-border disputes. A successful mediation can be more time and cost efficient than arbitration or court proceedings, and its non-adversarial approach is more likely to preserve the parties' commercial relationship.

It is hoped that the Singapore Convention will do for mediation what the New York Convention has done for international arbitration. The adoption of mediation as the preferred method of dispute resolution in BRI contracts means that its use will undoubtedly proliferate globally as China's vast infrastructure programme takes hold. If the countries that have so far signed the Convention go on to ratify it, international contractors should think seriously about including dispute resolution clauses in their contracts which include mandatory mediation provisions.

Footnotes

1. ICC, "Guidance Notes on Resolving Belt and Road Disputes using Mediation and Arbitration", <https://iccwbo.org/content/uploads/sites/3/2019/02/icc-guidance-notes-belt-and-road-disputes-pdf.pdf>
2. "Belt and Road Economics: Opportunities and Risks of Transport Corridors", 2019, found at: <https://openknowledge.worldbank.org/bitstream/handle/10986/31878/9781464813924.pdf>
3. *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.
4. [2019] EWHC 2246 (TCC).
5. *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC), Paragraphs 58-59.
6. Directive 2008/52/EC.
7. [2018] UKFTT 535 (TC).



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Notices of claim and time bars: don't be another "sympathy" statistic

Notices are a huge source of contention in construction disputes. All claims begin by serving notice on the other party, and many claims are lost entirely by failing to do so properly.

In construction contracts around the world there are often, and increasingly, strict requirements for how and when notices of claim are to be issued, and serious consequences for failing to comply. In this article I briefly explain the notice issue, recent trends in the main forms of construction contracts, how the issue is being dealt with in practice, and provide some practical advice for avoiding notice pitfalls.

The notice issue

The principal reason notices are so contentious is time bars. Time bars are where a contract provides a time limit to fulfil a mandatory requirement (for instance to issue a notice), failing which a certain right (for instance to make a claim) will be lost. Time bars are common place in the major forms of contract, for instance:

- The FIDIC contracts (1999 and 2017 editions) provide that if the claiming party¹ does not give a notice of claim within 28 days of becoming aware of the event or circumstances giving rise to the claim...; and

- The NEC contracts (2013 [NEC3] and 2017 [NEC4] editions) provide that if the contractor does not give a notice of claim within eight weeks of becoming aware of the event...

...they shall lose all entitlement (and relief) in respect of that claim.

Given the serious consequences of these time bars, an issue frequently arises over whether a valid notice of claim has been served on time, that is, "the notice issue".

The notice issue has been particularly prevalent under the 1999 FIDIC contracts.² Under these contracts, sub-clause 20.1 provides that claims must:

- be notified within 28 days of the event or circumstance giving rise to it;
- describe the event or circumstance; and
- be issued to the Engineer.

However, these contracts do not provide any definition of "notice", nor other specification as to the form or content required.

The question of how the notice issue should be dealt with in these

circumstances was addressed in the UK Technology and Construction Court in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*,³ where Mr Justice Akenhead found:

- "no reason why this clause [20.1] should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer"; and
- although sub-clause 20.1 did not require a notice of claim to be in any particular form, it "must [nonetheless] be recognisable as a 'claim'" under the contract.

Mr Justice Akenhead's finding provides, as a matter of common sense, a useful further requirement that notices of claim be identifiable as such. However, it also leaves the door open, and perhaps even encourages, argument as to what exactly might be accepted as a notice.⁴

In the UK and around the world we have seen a leniency from courts and tribunals, and perhaps a tendency to complacency by contractors, as to how the FIDIC sub-clause 20.1 notice requirements are complied with. We have seen all kinds of arguments run,



and won, on the grounds that notices of claim were issued through progress reports, project correspondence, meeting minutes, informal agreements, or a combination of them all.

These types of arguments will not work in the new generation of contracts.

Recent developments: “Notice” with a capital N

The main forms of contract have taken steps to remove ambiguity over notices of claim, and notices are now defined and subject to a much more prescriptive set of requirements as to form and content.

The 2017 FIDIC contracts require notices of claim to describe the event or circumstances giving rise to the claim in the same way as under the 1999 Conditions, but further provide that:

- “Notices” must be in writing, signed by the authorised representative of the party named in the contract, identified as a Notice, and delivered to the address stated in the Contract Data (formerly the Particular Conditions);⁵ and
- nothing stated in any progress report, programme, or supporting report shall constitute a Notice or relieve the Contractor of any obligation to give a Notice.⁶

The NEC4 contract has taken a similar direction, and now requires notices of claim to be “communicated separately from other communications”.⁷

The message for users of these new contracts is clear; when it comes to making claims, it is no longer good enough to say that the other party knew about the event or claim, or

was alerted to it. A distinct, compliant Notice of claim is required.

The issue in practice

The notices issue has been dealt with recently in a series of separate judgments, in several jurisdictions, with courts increasingly showing a desire to enforce time bars against a claiming party where clear notice requirements have not been strictly met.

Northern Ireland:

The High Court of Justice of Northern Ireland recently considered this issue in *Glen Water Ltd v Northern Ireland Water Ltd*.⁸ That case involved a PFI project to upgrade sludge treatment services, and the contract required claims for compensation to be submitted by the contractor within 21 days of the occurrence of an event that had caused or was likely to cause delay and additional cost.

There was no dispute that the relevant clause was a time bar.

In that case, Glen Water initially issued a letter to Northern Ireland Water (“NIW”) in 2009 alleging that it was not properly maintaining the facility. Subsequently, in 2014, Glen Water commenced an adjudication claiming that NIW had failed to properly maintain a pressure steam system within the facility. It was determined that the events giving rise to the claim had occurred in 2009, and so the issue arose as to whether Glen Water had issued a notice of claim within the 21 days required by the contract.

Glen Water claimed that its 2009 letter was a valid notice. It argued that the 2009 letter could have been clearer, but that when viewed in all the circumstances and background, it was sufficient to satisfy the contractual notice requirement. Glen Water’s counsel submitted that in accordance with Obrascon the background must be taken into account.

The court rejected this argument and held that Glen Water’s claim was time-barred. Justice Keegan, for the court, noted that while she had some sympathy for Glen Water’s position, the 2009 letter was not marked to be a claim, and although she accepted that there were discussions between the parties about the issue subject to the claim during the relevant time period, and internal correspondence that showed a general awareness of the risks, none of this equated to contractual notice of the specific compensation event. Justice Keegan concluded that:

“The contractual terms are clear and commercial certainty is an overarching consideration. The evidence as to the commercial context and surrounding circumstances has not remedied the defect in the letter. It seems to me

likely that the notification requirement was overlooked amid a mass of claims and in the midst of an ongoing process of discussions ...

... A notification should be clear and unambiguous.”

Notably, Justice Keegan did not consider that the facts warranted a broad interpretation as set out in *Obrascon*, but preferred instead a more strict approach to give effect to the terms of the parties’ agreement.⁹

Hong Kong:

In the case *Maeda Corporation & China State v Bauer Hong Kong*,¹⁰ the Hong Kong High Court faced a similar issue and delivered its judgment in April this year.

The case involved a construction contract with a time bar on similar terms to the 2017 FIDIC contracts, whereby any notice of claim must be issued within 28 days of the event, and the notice must include “the contractual basis together with full and detailed particulars”.

The project involved the construction of tunnels for the Hong Kong to Guangzhou Express Rail Link. Maeda Corporation (in a JV with China State) was the main contractor, and they employed Bauer as subcontractor to carry out the diaphragm wall works. During the works, Bauer submitted a notice of claim seeking additional costs arising from the discovery of unforeseen ground conditions, and it stated the contractual basis to be a Variation.

The problem for Bauer was that it was later decided that this claim should not have been made as a Variation, because the contractual entitlement actually arose under a specific provision for unforeseen ground conditions. Bauer subsequently pursued this claim in

arbitration under both the Variation and unforeseen ground condition provisions.

The arbitrator decided that the notice of claim was valid and, in particular, held that the notice given at the time for a Variation was also equally valid to cover the revised claim under the ground condition provision. This discrete issue was appealed to the Hong Kong High Court, who took a different view.

Justice Mimmie Chan on behalf of the High Court, as with *Glen Water*, expressed sympathy with Bauer’s position, but concluded that no valid notice had been issued for a claim of unforeseen ground conditions, and therefore that claim was time-barred. She reasoned:

“In any event, however much sympathy the contractor may deserve, Clause 21 employs clear and mandatory language for the service and contents of the notices to be served, with no qualifying language such as ‘if practicable’, or ‘in so far as the sub-contractor is able’ ...

there can be no dispute, and no ambiguity, from the plain and clear language used in Clause 21, that the service of notices of claim in writing referred to in Clauses 21.1 and 21.2 are conditions precedent, must be ‘strictly’ complied with, and failure to comply with these conditions will have the effect that the Defendant will have ‘no entitlement’ and ‘no right’ to any additional or extra payment, loss and expense.”

This might be viewed as a harsh finding. Bauer had a valid contractual entitlement to be paid for the additional work, and it identified the issue and served a notice on time. However, the notice was not compliant in one clear and important respect, and this was strictly applied by the court.



England:

In line with the more broad interpretation set down in *Obrascon*, the English courts have recently applied the test of the “reasonable recipient” when assessing whether a valid notice of claim was issued. Under this test some leniency can be given in assessing compliance with strict contractual requirements.

In the case *Grove Developments Ltd v S&T (UK) Ltd*,¹¹ the TCC was asked to consider a dispute concerning the construction of a hotel. The contract was the JCT Design and Build Contract 2011, which required that a pay less notice must specify how the proposed reduced sum had been calculated and be provided within 18 days¹² of receipt of the contractor’s interim payment application.

In fact, the employer submitted a pay less notice that did not include a calculation of the reduced sum, but

instead referred to a separate document that it had issued five days earlier, and which provided this calculation.

The court found that the notice was valid, reasoning that:

“A pay less notice will be construed by reference to its background, in order to see how a reasonable recipient would have understood it. The court will be unimpressed by nice points of textual analysis, or arguments which seek to condemn the notice on an artificial or contrived basis. One way of testing to see whether the contents of the notice are adequate is to see if the notice provides an adequate agenda for a dispute about valuation and/or any cross-claims available to the employer.”

While this approach might allow some leniency with notices, the limits of the reasonable recipient test are shown in a judgment issued in the

TCC one year earlier, in *Systems Pipework Ltd v Rotary Building Services Ltd*.¹³

In *Systems Pipework* a contractor purported to issue a pay less notice to a subcontractor, which in fact did not comply with the contract requirements because, first, it did not expressly state the amount said to be due for payment (rather it included an “assessed amount”), and secondly, it did not state that it was a notice under the relevant clause.

Mr Justice Coulson found that:

- A reasonable recipient would not have regarded the documents as notification of the sum due as there was no reference to the clause, nor was the actual sum due referred to.
- The fact that the recipient might have been able to work the sum

out has no relevance to the matter, as that was the purpose of clause 28.6.

- Consequently, the employer’s pay less notice was held to be invalid, resulting in the contractor’s payment application amount becoming binding upon it.

On its face, the broad approach taken by the English courts’ “reasonable recipient” authorities and in *Obrascon* is at odds with the strict approach of the Hong Kong High Court in *Maeda Corp*, and the line of UK authority preferred in *Glen Water*. In practice, the difference is unlikely to be significant in anything but the marginal cases. In *Maeda Corp* and *Glen Water* the judges both remarked that they had sympathy for the claimant, but had no choice but to find against them where clear contract terms had not been complied with. The reasonable recipient test provides that when assessing compliance, a common sense perspective should be preferred to an overly technical or artificial one; however, it does not permit the assessor to validate a clear failure to comply, as shown in *Systems Pipework*.

Conclusions and takeaways

How the notice issue is dealt with will depend on the facts and the jurisdiction governing the contract, and, as shown by the UK authorities, the judge. However, generally, where a contract includes clear, mandatory requirements, these should be expected to be applied strictly. Reasonableness¹⁴ and good faith¹⁵ should not be relied on to cure a failure to comply.

In light of the increasingly prescriptive notice requirements in construction contracts, and courts’ willingness to apply those terms strictly, parties should be taking proactive steps to ensure they understand what has

been agreed and that they can comply.

At the outset of any project parties would do well to consider the following:

1. When is a notice of claim required? Review and document all condition precedents / time-barring clauses at the outset of a project.
2. Have template notices ready:
 - a) Who has to give notices?
 - b) To whom should notice be given (and check the correct method of service and address)?
 - c) In what form must the notice be given?
 - d) Make the notice clear: quote the contract and relevant clause as closely as possible.
3. What information must be provided with the notice?
4. What are the response times?
5. Are there any continuing notice obligations?
6. Is there an agreement in place not to serve notices? Be careful of “gentlemen’s agreements” not to serve, particularly oral agreements.
7. What happens if you fail to serve a notice?

Footnotes

1. Under the 1999 Conditions the time bar applied only to the contractor; under the 2017 Conditions it applies to both contractor and employer.
2. The predominant form of contract for international construction projects, namely the Red and Yellow Books.
3. [2015] EWCA Civ 712.
4. Mr Justice Akenhead’s finding in *Obrascon* was consistent with his view in the case *Walter Lilly & Company Ltd v Mackay and Another* [2012] EWHC 1773 (TCC).
5. Sub-clause 1.3.
6. Sub-clauses 4.20 and 8.3.
7. Sub-clause 13.7.
8. [2017] NIQB 20.
9. In doing so, Justice Keegan endorsed the position in *Education 4 Ayrshire v South Ayrshire Council* [2009] CSOH 146: “Where parties have laid down in clear terms what has to be done by one of them if he is to claim certain relief, the court should be slow to seek to relieve that party from the consequence of failure.”
10. [2019] HKCFI 918.
11. [2018] EWHC 123 (TCC).
12. Up from the default 10 day period provided in the Housing Grants, Construction and Regeneration Act 1996.
13. [2017] EWHC 3235 (TCC).
14. Namely the broad interpretation preferred in *Obrascon*.
15. Namely the implied duty of good faith in civil law countries.



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The application of BIM under the FIDIC Form of Contract

I was recently asked by BIM4Legal¹ to contribute to the discussion at their recent evening seminar on the interpretation and application of BIM in international contracts.

The topic I was asked to consider was the application of BIM in the FIDIC Form of Contract. When FIDIC introduced its second edition of the Rainbow Suite, there was no specific mention of BIM in the General Conditions. Instead there is a special Advisory Note within the Special Provisions which deals with the use of BIM. This was the approach in the Emerald Book for Tunnelling Contracts which was released in May 2019. If you would like to read more, please click [here](#).

Instead of setting out a particular approach, FIDIC has chosen to highlight the issues that those working with BIM need to consider when using the FIDIC contract. For example, although it notes that many projects use a BIM Protocol, FIDIC has not prepared its own Protocol or recommended the use of any particular one. Instead, FIDIC has indicated that it is currently preparing two documents – a “Technology Guideline” and a “Definition of Scope Guideline Specific to BIM”. These are intended to provide further detailed support for the use of BIM on projects that use the FIDIC form.

The particular difficulty for FIDIC is the fact that the contract is used so widely globally. A BIM Use Survey Report carried out in September 2017² by the FIDIC Young Professionals Forum Steering Committee highlighted that 49% of respondents did use BIM in their work but 44% did not. Whilst that figure will have changed, it does demonstrate the wide gulf of knowledge the FIDIC needs to embrace in its guidelines.

Indeed, the Advisory Note acknowledges that there is a wide range of understanding and usage of what FIDIC terms the “varying degrees of complexity” associated with BIM. This is something FIDIC needs to address, and probably explains, in large part, the time FIDIC is taking to finalise its position. As FIDIC notes, BIM is:

“founded on a team approach and successful projects utilising BIM encourage collaboration”.

FIDIC also recognises the value of the early proactive engagement of all parties to a project. Here, one potential problem with BIM is managing expectations. This is recognised by FIDIC, which notes that any Request for Proposal should outline what an employer is anticipating in terms of goals and benefits.

So what issues might you have to consider on a BIM-enabled FIDIC project? FIDIC has identified the following key risk areas on any BIM-enabled project:

- misunderstanding of scope of services;
- use of data for an inappropriate purpose and reliance on inappropriate data;
- ineffective information, document or data management;
- cyber security and responsibility for “holding” the models or data; and
- definition of deliverables, approval and delivery.

In other words, everyone must understand exactly what they are being asked to do. The reference to the importance of clear definitions is particularly relevant on international projects where you often find companies from a number of countries working together. Indeed, FIDIC is well placed in this regard. Golden Principle 2 calls for “Clear and unambiguous drafting”. Therefore it is likely that any “BIM definitions” that are adopted by FIDIC will be based on international standards, preferably ISO 19650. As Jøns Sjøgren, Chair of the ISO technical subcommittee, said:³

“Taking this to an international level not only means more effective collaboration on global projects, but allows designers and contractors working on all kinds of building works to have clearer and more efficient information management.”

Looking at other clauses in the Rainbow Suite, FIDIC already considers the priority of documents in sub-clause 1.5. In the UK, the CIC Protocol 2nd Edition essentially states that the Protocol will only take precedence over the main contract where there is a conflict in respect of those clauses in the protocol which deal with employer and contractor obligations. This could be something that FIDIC adopts.

When it comes to questions of copyright and the use of the Employer’s and Contractor’s documents, there may be a number of issues to consider in addition to the basic FIDIC position as outlined at sub-clause 1.10. For example, does the Contractor have the right to license to the Employer all of the data in the design documents? As things stand, no, only the Contractor’s documents. Remember that the model may well be a collection of elements and/or objects from a number of parties. Have all of those parties given consent?

There may be a need for an expanded confidentiality clause which will of course also require contributors to identify confidential data as and

when it is incorporated into the model. Are there restrictions on access, copying and transmission of data? It may well be essential that the Employer’s Requirements set out what is required for the model. Another issue you increasingly need to consider on any project is how data is collected and used on the project. To whom does it belong? Who has the right to use drone footage or other progress data?

When it comes to design obligations, you may want to check to see if they are aligned. Is everyone who contributes to the model under the same obligation? Is it fitness for purpose, the standard FIDIC default for contractors, or reasonable skill and care?



Similarly with insurance, clause 19 does not currently consider parties other than the contractor and employer. Thought may need to be given to the role of funders and, more particularly, subcontractors, suppliers and those with a design responsibility. You should do so if clause 19 covers all elements to the design. On site yes, but remember that often works under one FIDIC contract are part of a greater project whole. Remember, too, to consider cyber security and/or data corruption. If you want to adopt integrated project insurance then a greater amendment will be required.

What about programme? A key feature of BIM-enabled projects is a need for a BIM Execution Plan ("BEP"). It's good practice for this to be ready as early as possible. The demands of the BEP need to tie in with the sub-clause 8.3 programming obligations. The BEP is best viewed as being in addition to but aligned with the construction and design programmes. That said, under sub-clause 4.20, Progress Reports are a precondition to payment. Perhaps this should include the BEP too.

FIDIC too is encouraging a more collaborative way of working, a key element of BIM-enabled projects. There is a noticeably increased emphasis given to early warning and real-time dispute avoidance and resolution in the 2017 Second Edition.

Further, FIDIC in the Advisory Notes to BIM Users, says that BIM is "a process, has varying degrees of complexity", and "is a mechanism to provide an environment where all parties have access to information relevant to their role in the design and construction of a project". This means that it is important that parties' roles and responsibilities are clearly defined. The FIDIC approach as set out in the 2nd Edition is to adopt a number of "step-by-step" procedures and deeming provisions. The purpose of these is to provide clarity about what needs to be done,

by whom and when. These are key considerations when it comes to outlining requirements on a BIM-enabled project and so suggest that this current FIDIC approach is well suited to the drafting of BIM provisions.

For example, consultants are encouraged to clearly define:

- the proposed systems and management processes;
- access rights and limitations of the client, other consultants and contractors;
- reliance other parties may place on data in the digital environment;
- potential access limitations and exclusions of liability for downtime;
- potential exclusion of liability in the event of cyberattack;
- potential exclusion/limitations on professional liability for the actions of others;
- access to all versions of the project model/the audit trail of changes.

FIDIC's Strategic Plan for 2019⁴ recognises that one of the major emerging challenges for the consultancy and engineering industry is:

"The impact of new technologies: Building Information Modelling (BIM), collaborative work, big data and others."

FIDIC seems well placed to deal with this and we await their BIM guidelines with interest. In the interim, remember that BIM is more than simply digital working. It is a management process, which should establish who is responsible for what. With that in mind, always remember

that Contract risk management never changes, whether using BIM or not:

- No matter what contracts, protocols, guidance notes or otherwise are required on a particular project, it is important to understand your obligations, liabilities and limitations within each document.
- If the contract documents do not align with each other and/or are not considered sufficiently in detail, this can lead to ambiguity and uncertainty.
- Make sure you understand what you are being asked to do as, depending on the terms of your contract, these could be binding documents with obligations contained therein which you need to understand and be alert to.

Footnotes

1. A group set-up to support understanding & knowledge-sharing of BIM amongst the legal community & those in industry who instruct them, encouraging & facilitating best practice: see their Twitter account: @BIM4Legal
2. <http://fidic.org/sites/default/files/Blog/%20pdf/BIM%20Use%20Survey%20Report-Final%2022Sep17.pdf> [Accessed 28 November 2019]
3. Comment made as part of the launch of ISO 19650 in January 2019. See <https://www.iso.org/news/ref2364.html> [Accessed 28 November 2019]
4. <http://fidic.org/node/24097> [Accessed 28 November 2019]



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Saudi Arabia's legal system is based on the principles of Sharia Law which, following the Hanabali school of Islamic interpretation, adopts a fundamentalist and literal interpretation of the teachings of the Qur'an.

The way in which Saudi courts regulate contractual relationships is therefore strikingly different from the common and civil law systems. Parties are of course free to contract with each other; however, the degree of freedom with which they can do so is governed by certain prohibitions in the Qur'an. Generally speaking, contractual provisions that violate the fundamental principles of Sharia law will not be enforced by the Saudi courts.

There is no construction law in Saudi Arabia, therefore all construction agreements in the private sector

Snapshot of Construction Law Issues in Saudi Arabia

We have recently signed a new alliance with Hammad Al-Medhar, one of the leading law firms in the Kingdom of Saudi Arabia. Working together will allow clients access to a high level of local and focussed construction, energy and engineering law advice to meet the increasingly complex nature of projects across the Kingdom. If you would like to know more please contact Toby Randle.

are subject to the parties' consent, provided that the agreement does not contradict Sharia Law. However, there are some specific rules that apply to public sector contracts pursuant to the Government Tenders and Procurement Law 2006 ("the Procurement Law") issued by Saudi Arabia Royal Decree No. M58/1427, which was introduced to promote transparency, honesty, economic efficiency and competition in the Kingdom.

A brief snapshot of some of the key issues facing contractors in Saudi Arabia is set out below.

Contracts and regulations

- For public works contracts, the Saudi Arabian government uses its own standard form of contracts (generally available at www.saudiembassy.net). Public works contracts are subject to the provisions of the Procurement Law.
- For private contracts, the standard form of contract tends to be the same for both local and international contractors. FIDIC contracts are widely used throughout the region.
- Any contractor designing or building in Saudi must abide by the Saudi Building Code,

which is a set of technical, legal and administrative regulations regarding the minimum construction standards.

Duty of good faith

- The principles of Sharia Law place great importance on the duty of good faith. Whether a party has acted in good or bad faith will depend on the particular facts and circumstances of each case.
- One such example is a breach of the duty to warn. If the contractor was aware of an error or defect but continued work without informing the employer or the engineer they are likely to have acted contrary to the duty of good faith.

Limitation/time bars

- In common and civil law jurisdictions, if a claim is time-barred this will provide the defendant with a very strong defence. However, there is no statutory limitation period in Saudi Arabia. Saudi courts will uphold contractual limitation periods if they accord with Sharia Law principles.
- For example, Saudi courts may refuse to dismiss a claim on the

basis of a limitation argument in circumstances where (i) it would be unfair to the claimant, and (ii) rights should not be lost with the passage of time, both of which would contravene the principles of Sharia Law. Allegations of fraud and bad faith are not subject to limitation periods.

Remedies for breach of contract

- Sharia law prohibits riba (unjust enrichment) and gharar (speculation). Therefore contractual remedies are limited to direct and actual damages suffered and damages cannot be claimed for indirect or consequential losses, loss of business, loss of profit, economic loss of a chance or any other type of speculative or uncertain losses. Similarly, specific performance and injunctive relief are generally unavailable.

Delay, disruption and acceleration

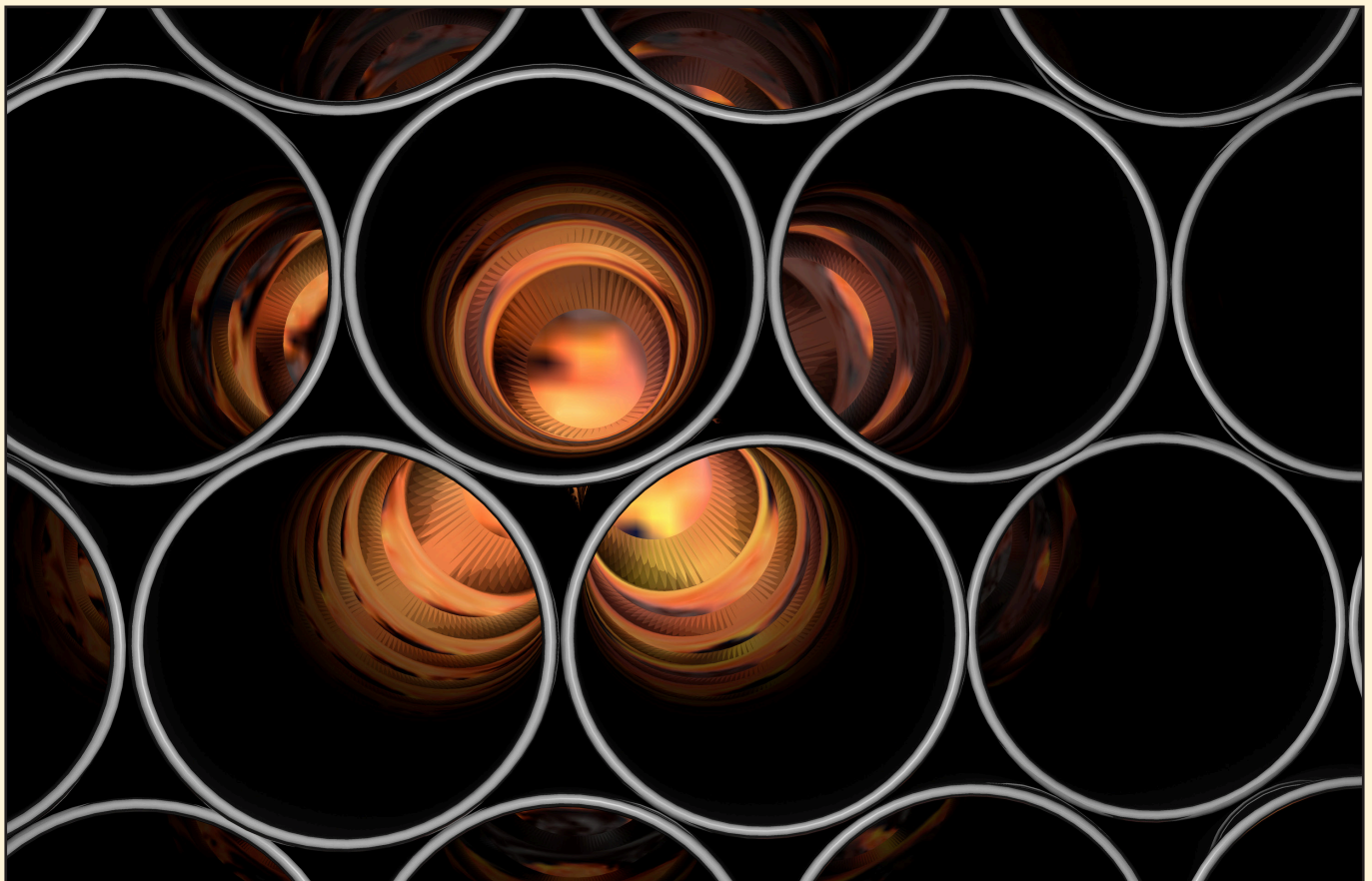
- Article 52 of the Procurement Law permits extensions of time if the contract is extended because: (i) the employer requests additional works; (ii) the annual budget allocated to the works is insufficient for completion by the original completion date, and (iii) the relevant public authority suspends the works through no fault of the contractor.
- A disruption claim will only be successful if the loss suffered was direct, fair and proportionate, and that the contractor took reasonable steps to mitigate the losses. As set out above, Sharia Law prohibits unjust enrichment and speculation, therefore a contractor may only recover damages for the amount of loss actually incurred.

Liquidated damages

- Liquidated damages clauses are generally permitted but are subject to the principles of Sharia Law set out above. Therefore they will only be enforceable to the extent that the amount of delay damages accurately reflects the actual damages incurred.
- In relation to public sector contracts, Articles 48 and 49 of the Procurement Law stipulate that delay penalties should be subject to 10% liability cap for all tenders and procurements undertaken by government entities and a 6% cap for supply contracts.

Termination

- For public works contracts, the government has the right to



terminate the contract in certain circumstances, as set out in Article 53 of the Procurement Law. The circumstances include (i) bankruptcy of the contractor; (ii) assignment or subcontracting the contract without permission of the government; (iii) the contractor's failure to rectify delay or breach of contract within 15 days of the government's notice to do so, and (iv) if the contractor commits bribery. Article 54 entitles a contractor to damages if the government authority terminates the contract with no valid grounds.

- The Saudi courts will generally uphold the termination provisions for private contracts. The courts will also permit termination for reasons not stipulated in the contract if there are valid grounds.

Force majeure

- Force majeure provisions are recognised in Saudi law; however, the courts will only recognise exceptional events beyond a party's control that make performance absolutely impossible rather than overly burdensome.
- However, for public sector contracts Article 51 of the Procurement Law provides that a contract will be extended (and the penalty waived) if the delay is due to unforeseen circumstances or reasons beyond the contractor's control.

Variations

- In relation to public works contracts, variations are permitted under Article 36 of the Procurement Law. An

increase in the scope of work is permitted up to 10% of the contract value whereas omissions are capped at 20%. In relation to private contracts, the courts will generally uphold the provisions of the contract provided that they do not violate the principles of Sharia Law.

Completion of the works

- There are no specific rules governing completion of the works save for (i) Article 53 of the Procurement Law which confirms that in relation to public projects, the government has the right to withdraw work from a contractor and rescind the contract or execute it at its own cost if the contractor abandons the project without completing, and (ii) Article 40 of the Procurement Law which provides that the last payment (not less than 10% for public sector contracts and 5% for private sector contracts) should be paid after the initial handover of the works.

Dispute resolution

- Construction disputes can be heard by the Sharia Court, the Board for the Settlement of Commercial Disputes, the Board of Grievances and the Labour Courts.
- In the private sector, parties are free to litigate or arbitrate (pursuant to an arbitration agreement) in accordance with the terms of the contract. As per Article 11 of the New Arbitration Law 2012, parties are bound by their agreement to arbitrate but can also bring parallel proceedings in the Saudi courts if there are issues of Sharia Law that must be resolved. It is worth noting that

domestic arbitration is governed by the Board of Grievances and can therefore be just as costly and time consuming as litigation. Mediation is typically only used where mandatory under statutory requirements.

- In the public sector, an ad hoc committee will be formed to hear disputes concerning (i) an alleged breach of contract by the government body; (ii) an alleged breach of contract by the contractor; (iii) defective performance by the contractor, and (iv) fraud, deceit or manipulation, but only on the part of the contractor. Either party can appeal the committee's ruling to the Board of Grievances within 60 days of the decision.

Bankruptcy/insolvency

- Bankruptcy or insolvency of the contractor is grounds for termination in a government contract pursuant to Article 53(d) of the Procurement Law.
- In relation to the private sector, the parties are free to include termination provisions in the contract in the event of bankruptcy or insolvency. There is no provision in Saudi law that automatically treats a contract as void or voidable in those circumstances.



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Rules on the Efficient Conduct of Proceedings in International Arbitration (“Prague Rules”)

One of the benefits of international arbitration as a dispute resolution forum is that participants have the flexibility to develop a framework that best suits them and their dispute by combining institutional and ad hoc rules. This flexibility and, to a certain extent, the control the participants have when compared with, say, domestic court systems are a compelling drawcard for international arbitration.

On the other hand, a significant number of participants in international arbitration consider the costs of such proceedings to be excessive.¹ The Prague Rules Working Group believes that these high costs are likely caused by the common law, adversarial style approach which is favoured in the institutional rules that are available, such as the IBA Rules. In a draft version of the Prague Rules, the Working Group stated:

“... from a civil law perspective, the IBA Rules are still closer to common law traditions, as they follow a more adversarial approach regarding document production, fact witnesses and Party-appointed experts. In addition, the parties’ entitlement to cross-examine witnesses is almost being taken for granted.

These factors contribute greatly to the costs of arbitration, while their efficiency is sometimes rather questionable.”²

To this end, the Working Group formulated the Prague Rules, which are based on a civil law, inquisitorial approach, in an effort to resolve or reduce the cost issues prevalent in the common law alternatives, particularly the IBA Rules.

The Prague Rules were launched on 14 December 2018 and now the questions on everyone’s mind are:

1. do the Prague Rules represent an alternative style of proceeding to that provided by the IBA Rules; and
2. will they result in a more time- and cost-effective mode of international arbitration?

How the Prague Rules are Different

The Prague Rules’ overarching expectation is that the tribunal be proactive in its management of proceedings. This is set out at Article 2 of the Prague Rules, with Article 2.1 requiring the tribunal to hold a case management conference without delay. Article 2.2 states that, as part of this case management conference, the parties and tribunal will consider a procedural timetable and the parties will set out:

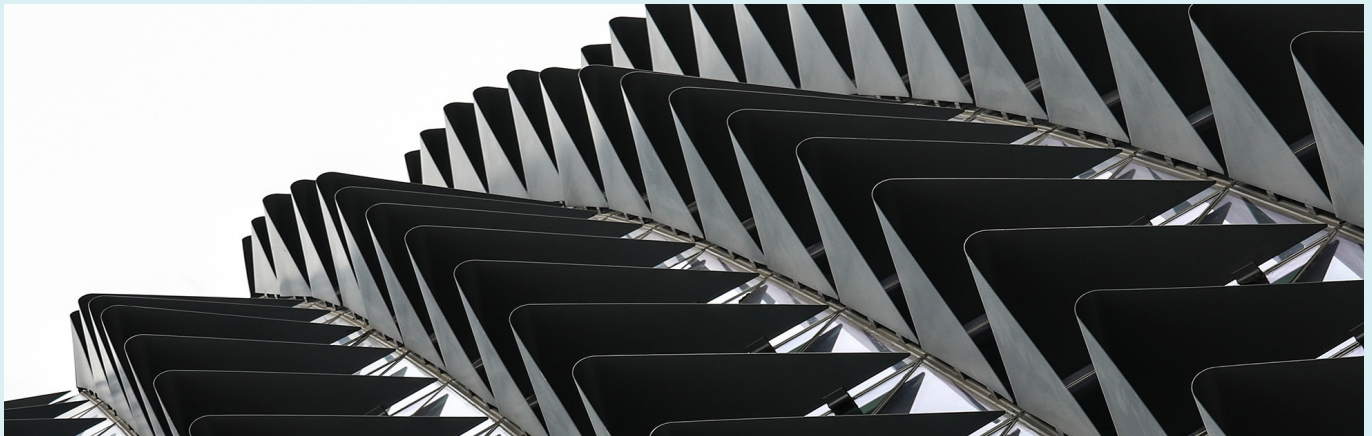
1. the relief sought by the parties;
2. the facts that are undisputed between the parties and the facts that are disputed; and

3. the legal grounds on which the parties base their positions.

There is no such provision in the IBA Rules for a case management conference that requires the parties to have formed positions on the above. This does place a higher burden on parties at the early stages of proceedings, which could result in a front-loading of costs that is not encountered when following the IBA Rules. If cases settle at the early stages of proceedings, which is something encouraged by the Prague Rules, then it could be that the costs in parties reaching that stage are higher under the Prague Rules than they would have been under the IBA Rules, even if the Prague Rules are successful at reducing the costs of proceedings in their entirety.

Another important area of divergence between the two sets of rules concerning the case management conference is that the tribunal has an opportunity under Article 2.4 to set out, amongst other things, its preliminary views on:

1. the allocation of the burden of proof between the parties;
2. the relief sought;
3. the disputed issues; and
4. the weight and relevance of evidence submitted by the parties.



Although receiving an indication from a tribunal on these issues could assist in focusing the parties' minds and perhaps, ultimately, a narrowing of the issues to be addressed, the prospect of a tribunal exercising such a right is likely to cause trepidation amongst parties and practitioners more accustomed to a common law system. Article 2.4 is completed by a disclaimer that *"expressing such preliminary views shall not by itself be considered as evidence of the arbitral tribunal's lack of independence or impartiality, and cannot constitute grounds for disqualification"*. Whether this is sufficient to assuage the minds of those concerned remains to be seen.

In a similar vein, Article 9 provides the tribunal with the ability to assist the parties in reaching an amicable settlement at any stage of the proceedings. Again, this may generate concerns in relation to impartiality if a settlement is not ultimately reached (particularly in circumstances where the tribunal has acted as mediator, as allowed for under Article 9.2). Article 9.3 provides that the member of a tribunal who has acted as a mediator may, in the case of non-settlement:

1. continue to act as an arbitrator with the written consent from all parties at the end of the mediation; or

2. terminate his or her mandate.

The final provision that has no sister provision in the IBA Rules is contained in Article 7. This is the Prague Rules' allowance for the *lura Novit Curia* principle. Essentially, this provision allows the tribunal to apply legal principles or rely on legal authorities that have not been pleaded by the parties, but which it nonetheless considers relevant to the proceedings. This does not extinguish either party's burden of proof,³ and where a tribunal chooses to exercise this right it must allow the parties the opportunity to comment on the legal principles or authorities proposed.

Where the Prague Rules are "Same Same, but Different"

The Prague Rules Working Group had particular IBA Rules in mind that it sought to improve upon when drafting its own Rules. These included the provisions for document production, fact and expert witnesses, and examination at hearing.

Document production

The Prague Rules encourage tribunals to avoid any form of document production, including e-discovery.⁴ Rather, the parties are encouraged to provide copies of the documents upon which they intend

to rely.⁵ If a party believes that it may need to request documents from another party, it needs to indicate this and the reasons for this at the case management conference. If the tribunal agrees that the document production may be needed, then it will decide on the procedure for this and allow for it in the timetable.⁶ Document requests after the case management conference will only be considered in exceptional circumstances and if the tribunal is satisfied that such a request could not have been made at the case management conference.⁷

The IBA Rules contemplate a process carried out outside the tribunal's oversight. The tribunal will order a time by which documents are to be submitted;⁸ however, the process of requesting documents occurs between the parties.⁹ Where one party objects to the categories of documents it has been requested to produce, this disagreement is referred to the tribunal as umpire for decision.¹⁰

Witnesses of fact

The Prague Rules state that a party will identify which fact witnesses it intends to rely on and the elements of their testimony at the time it files its statement of claim or statement of defence.¹¹ The tribunal will then determine which witnesses, if any, will be called to present evidence at

hearing.¹² A party is still entitled to submit a written witness statement for a witness, even if the tribunal has decided that that witness should not be called for examination.¹³ If a party insists, the Prague Rules encourage the tribunal to allow the witness to testify at the hearing; however, the Rules do allow for the tribunal to refuse this if there are “good reasons not to do so”. The Prague Rules contain a disclaimer that the decision not to call a witness for examination, even if he or she has submitted a witness statement, does not limit the tribunal from affording as much evidential weight to that statement as it deems appropriate.¹⁴ To have the tribunal afford weight to a witness statement that has not undergone cross-examination, particularly when documentary evidence is also significantly limited, is likely to cause concern for both parties and practitioners that are accustomed to a common law system.

Expert evidence

The expectation under the Prague Rules is that expert evidence will be provided by a tribunal-appointed expert.¹⁵ The parties are involved in the selection of the expert and the formulation of the terms of reference,¹⁶ and will have the opportunity to examine him or her at the hearing.¹⁷ The appointment of an expert by the tribunal does not preclude one or both parties appointing their own experts,¹⁸ although the clear default position is that the issues in dispute that require expert opinion are intended to be addressed by one, rather than multiple experts. The IBA Rules, however, provide separately for party-appointed experts¹⁹ and tribunal-appointed experts²⁰, with the provision for party-appointed experts occurring first in time. The IBA Rules also outline an expectation of a joint process where there are experts appointed for both parties and areas of disagreement remain after the initial reports are submitted.²¹ This type of process is

not encouraged under the Prague Rules.

What are the Answers?

The Prague Rules Working Group clearly consider that the best way to increase time and cost efficiency is by placing more control of the proceedings in the hands of the tribunal. Perhaps the high costs of international arbitration are attributable to parties making larger than necessary document requests, introducing witness evidence that replicates information already in documents, requiring hearings in person, undertaking extensive cross-examination during hearings and requiring party expert evidence rather than assisting with the instruction of a tribunal expert. In these cases, the tribunals often acquiesce to these participant preferences rather than exercise the control afforded to them in the interests of time and cost.

Though some of the powers granted to the tribunal under the Prague Rules do not exist within the IBA Rules and their default positions may be more restrictive, tribunals have always had similar power when it comes to management of the proceedings under the IBA Rules. Therefore, if the participants have had the flexibility and the tribunals have had the power to conduct proceedings in the way envisaged by the Prague Rules all along, it is hard to see how the Prague Rules will be sufficient to change the way parties already approach cases and tribunals manage them.

To conduct the proceedings in another way (not to ensure they have seen every document they may want to see from the other side, or put every bit of documentary and witness evidence in front of the tribunal that they think could be important, or have control over the instruction of and unrivalled access to an expert) would be to relinquish a large amount of the control that

participants feel over their cases when engaging in international arbitration. When it is your time and your money, control can be important.

The Prague Rules are still too new an addition to see any real change in the international arbitration sphere yet, and so, unfortunately, the tribunal is still out when it comes to the two questions we asked at the beginning of this piece. We will certainly be watching trends as they develop and, if people engage with the Prague Rules in the spirit in which they were intended, it could be that they present the streamlined, cost-efficient, international arbitration option people have been waiting for.

Footnotes

1. 2019 International Arbitration Survey conducted by the School of International Arbitration, Queen Mary University of London.
2. Note from the Working Group, Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), draft dated 1 September 2018.
3. Article 7.1.
4. Article 4.2.
5. Article 4.1.
6. Article 4.3.
7. Article 4.4.
8. Article 3.1.
9. Article 3.3.
10. Article 3.5.
11. Article 5.1.
12. Article 5.2.
13. Article 5.4.
14. Article 5.8.
15. Article 6.1.
16. Article 6.2.
17. Article 6.4.
18. Article 6.5.
19. Article 5.
20. Article 6.
21. Article 5.4.

