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ICC GROUP READIES ADVICE ON CONSTRUCTION ARBITRATION MANAGEMENT

Behind-the-scenes efforts of the Forum on Arbitration Issues and New Fields will produce valuable guidance for users and practitioners in major construction disputes.

Every seasoned practitioner of construction arbitration will acknowledge that large and complex cases need special management in order to run smoothly and efficiently. Recent evolution in the construction industry has brought about more sophisticated procurement processes and there is a greater emphasis on the responsibilities of the contractor as manager and facilitator. Joint ventures have become commonplace and disputes are as likely to be between contractor and designer or sub-contractor as between contractor and client. Computerisation has simplified some aspects of the job but also made possible vastly more complex montages. There are more advisors and consultants, and the financial people are wielding more clout. The role of the Engineer changed substantially with the introduction of the new FIDIC contract and many projects now use Dispute Review Boards and other pre-arbitral venues for dispute resolution.

The issues are often technically complex, the stakes enormous, the parties intractable, the procedures lengthy, and the costs substantial.

The ICC Commission on International Arbitration (the group responsible to the ICC World Council for the ICC Court of International Arbitration) has been labouring to set out some serious guidance for the arbitrators charged with administering and deciding these cases smoothly, efficiently and fairly. The end result, it is hoped, will be an internationally enforceable award with the least possible pain for the tribunal, the counsel and above all, the clients.

Co-chaired by two eminent practitioners, the Forum on Arbitration Issues and New Fields¹ has produced a draft set of guidelines and sent them to national committees around the world for comment. The working party, itself composed of nine seasoned professionals², has asked for participation from about 40 experienced practitioners from both common law and civil law jurisdictions and a wide variety of legal and cultural backgrounds.

Their guidelines, if approved at the autumn meeting of the Arbitration Commission and ICC World Council, will be available by year-end to suggest best practices for the conduct of construction industry arbitrations. Beginning with the choice of the arbitral tribunal and the steps to be taken in preparation for the Terms of Reference, the report will also suggest useful practices to clarify the dispute. The recommendations will also deal with the content and form of Terms of Reference and topics for an initial procedural meeting. Suggestions will be included for dealing with issues particular to the construction industry - delay and disruption, computation of claims, joint tests and site visits are a few examples.

When is it advisable to split the case? Which methods are best for storage and retrieval of documents? How much documentation is really necessary? How should the tribunal treat testimony from witnesses - who are often from several different countries and legal cultures? What is the role of the expert, and when is a hearing necessary? At the hearing, how should the tribunal allocate time? What material should be available and how should it be organized for easy reference?

After detailing the possible responses to these issues, the group brings them all together along with some general remarks and some typical schedules, to make a series of concrete recommendations for best practices. The report will provide a valuable and accessible resource for both experienced arbitrators and neophytes. Arbitration counsel would be well advised to pay attention as well, for the Guidelines are certain to become "state of the art" in the resolution of construction industry disputes.

For further information about the Guidelines, or ICC issues generally, contact Louise Barrington.

¹ A sub-group of the ICC Commission on International Arbitration

² Humphrey Lloyd (UK) and Nael Bunni (IR), co-chairs; plus Michael Schneider (CH), William Laurence Craig (US), Aktham El Kholy (EG) Joachim Goedel (D), Vera van Houtte (BE) Sigvard Jarvin (SW) and Igor Leto (I)