

II CONGRESO INTERNACIONAL DE DERECHO DE LA CONSTRUCCIÓN

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New Developments:

**ICC Report, Sealed Offers and FIDIC
Emerald Book**

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Outline

- I. **ICC Report:** Recommended Tools and Techniques for Effective Management of Arbitrations under ICC Arbitration Rules (2019)
- II. **Sealed Offers** - ICC Note (2019)
- III. **FIDIC Conditions of Contract for Underground Works** (2019) (“**Emerald Book**”)

I. ICC Report

- International construction arbitrations tend to have specific characteristics:
 - specialized forms of contract, specialized legal concepts and vocabulary
 - factually and/or technically complex
 - involve large volumes of documents
 - require expert evidence
 - preceded by pre-arbitral procedures raising jurisdictional and other issues
 - state parties are often involved
- To address these issues, the first edition of the “Final Report on Construction Industry Arbitrations” was published in 2001

I. ICC Report

A. Purpose of the 2019 Updated Report

- Like its predecessor, the 2019 Report provides guidance on a range of **tools and techniques** for use in successfully managing construction arbitrations
 - There is no single 'right' way in which a construction arbitration should be conducted
 - Every case is different (although many construction arbitrations have familiar patterns) and everyone should pause and consider whether a standard or common technique is appropriate
- Intended primarily for the use of arbitrators but some of the proposals also concern the parties

I. ICC Report

B. Selected Recommendations and Suggestions

1. Composition of the Tribunal

- Key qualities to consider in the selection of arbitrators:
 - Familiarity with the industry, construction contracts and cultural nuances
 - Familiarity with relevant law and/or main legal traditions
 - Strong case management skills
 - Availability
 - “Balanced” tribunal, including diversity
- The arbitration clause should provide for flexibility in the number of arbitrators (e.g. “one or more arbitrators”), and the parties should consider a sole arbitrator, where appropriate, in view of the amount in dispute, complexity, and cultural factors

I. ICC Report

B. Selected Recommendations and Suggestions (cont'd)

2. Case Management Conference (“**CMC**”)

- To be conducted after the issuance of the Terms of Reference and prior to the issuance of the first procedural order and procedural timetable
- Topics for the CMC agenda:
 - Manner of presenting evidence
 - Need for expert evidence
 - Need for splitting the case
 - Need for tests and site visit(s)
 - Document management
 - Translation and interpretation issues
 - Settlement discussions and sealed offer procedures, if applicable

I. ICC Report

B. Selected Recommendations and Suggestions (cont'd)

3. Procedural Timetable

- Important to balance the need for expedition with the need to allow each party sufficient time to present its case, taking into consideration:
 - Application of the Expedited Procedure Rules (Appendix VI)
 - Need for preliminary determinations/partial awards
 - Need for one or more rounds of written submissions
 - Need for a separate stage for production of documents
 - Impact of any multi-party or multi-contract proceedings
 - Need for one or more hearings

I. ICC Report

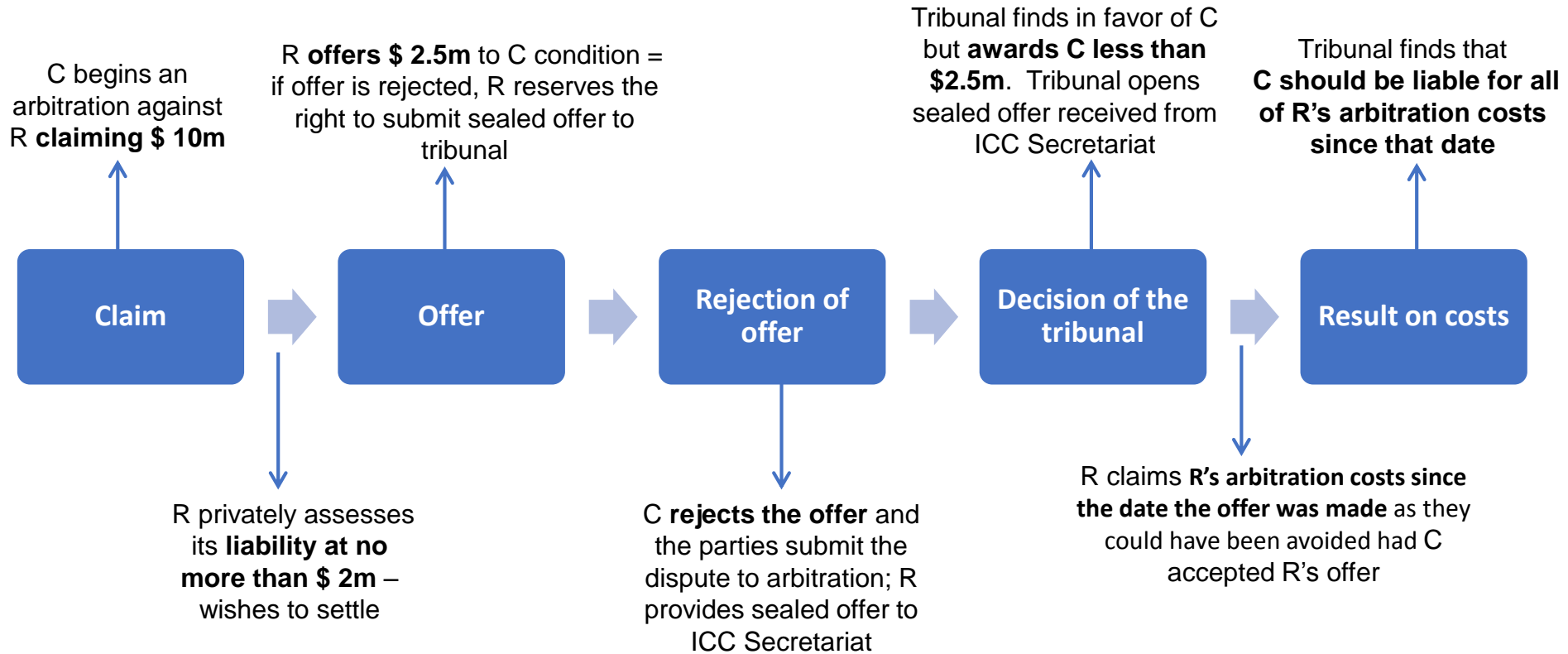
B. Selected Recommendations and Suggestions (cont'd)

4. Splitting the Case

- Matters to be considered:
 - Likelihood that the separated issues can be determined without considering or affecting the overall merits of the case
 - Specific reasons for splitting the case and the parties' expectations
 - Effect of the split on timing and costs of the arbitral proceedings
 - Possibility that the demand to split is a mere tactical device
 - Prima facie likelihood of success of the party seeking the split
 - Necessity of expeditious determinations of specific issues
- Decisions about splitting a case should be left until it is clear that it will be sensible and cost-effective to do so

II Sealed Offers

Example of a Sealed Offer



II. Sealed Offers

What is a Sealed Offer?

- ICC Note (1 January 2019) [paras. 227-230]
- Any party to the arbitration sends to the Secretariat a copy of an **unaccepted settlement offer made to the other party**
- The Secretariat informs the tribunal but keeps the Offer **confidential from the tribunal** until all issues of liability and quantum have been resolved

II. Sealed Offers

What are the powers of the tribunal?

- Fixes arbitration costs and decides which party bears them and in what proportion (ICC Rules, Art. 38)
- May take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner (ICC Rules, Art. 38(5))
- Retains discretion whether or not to give weight to the Sealed Offer
- In my experience, the tribunal will usually give weight to it

III. FIDIC Emerald Book

- Underground construction is a fast growing market sector, as there is a growing demand for utilizing underground space for infrastructure
- The difficulty of predicting underground conditions and behaviour poses unique challenges for construction practicability, time and cost
- Thus, allocation of ground-related risk among the parties' is critical
- To address these risks FIDIC and ITA-AITES have developed conditions of contract for underground construction - the ***Emerald Book*** - based on the FIDIC Yellow Book, 2017

III. FIDIC Emerald Book

A. Employer's Invitation to Tender Documents

- Geotechnical Data Report
- Bill of Quantities
- Geotechnical Baseline Report (“**GBR**”) containing:
 - description of all anticipated subsurface conditions
 - contractual classification of anticipated subsurface conditions
 - allocation of risk – baselines for each class of ground
 - baseline = ground condition the Employer wants tenderer to assume

III. FIDIC Emerald Book

A. Employer's Invitation to Tender Documents (cont'd)

- Schedule of Baselines containing:
 - division of works into units (sections of works)
 - quantities estimated for each unit, and
(tenderer invited to supply its corresponding production rates)
- Completion Schedule stating the Employer's Times for Completion:
 - for each Milestone in Completion Schedule, and
 - compatible with Schedule of Baselines

III. FIDIC Emerald Book

B. Contractor's Proposal

- The Contractor:
 - Prices Bill of Quantities
 - Completes Schedule of Baselines with its production rates e.g. units of work completed per work day
 - Completes Completion Schedule based on Schedule of Baselines
- As a result, the Engineer will have the Contractor's production rates for each class of soil anticipated in the GBR, which can be applied to the quantities of each class excavated by the Contractor

III. FIDIC Emerald Book

C. Execution of the Works

- Subsurface conditions are monitored daily. The Engineer records the actual subsurface conditions encountered, and the Contractor measures the quantities of Excavation and Lining works necessarily carried out – and, in both cases, they endeavor to agree the records
- If the measured quantities of a particular type of ground condition are more or less than the quantities foreseen in the Schedule of Baselines for that unit of work, the Time for Completion will be increased or reduced
- The Engineer re-assesses (reduces or increases) the time allowed in the Completion Schedule by applying the production rates provided by the Contractor to the measured quantity of each item of work carried out (as agreed with the Engineer)

III. FIDIC Emerald Book

D. Key Point

- Just as the original Bill of Quantities and Contract Price are adjusted upwards or downwards to reflect the actual quantities of work executed compared to those estimated, so the Time for Completion is adjusted upwards or downwards to take account of the actual subsurface conditions encountered compared to those anticipated by the baselines

III. FIDIC Emerald Book

E. Risk Allocation

- Under this system, the Employer takes the risk if subsurface conditions are more adverse than anticipated in the GBR, but the Contractor takes the risk if it is unable to achieve its production rates
For example:
 - TBM to build a tunnel in two types of rock: difficult and easy (to excavate)
 - Exact amount or quantity of each type of rock is unknown
 - In GBR the Employer anticipates difficult rock as being between 30% and 60% of tunnel length
 - In GBR, the Employer sets baseline – that is, the Contractor is to assume - difficult rock for 45% of tunnel length
 - If difficult rock exceeds 45%, the Contractor may get time/cost relief
 - If difficult rock is less than 45%, the Time for Completion may be reduced, and
 - If difficult rock is 45% and the Contractor cannot meet the Completion Schedule because it cannot achieve its production rates, the Contractor may pay Delay Damages

III. FIDIC Emerald Book

F. Unforeseeable Conditions and Extensions of Time

- All subsurface physical conditions which are not explicitly anticipated in the scope of the GBR are deemed to be Unforeseeable:
 - If they cause additional cost, they are compensated in the usual way under Sub-Clause 4.12 [*Unforeseeable Physical Conditions*]
 - If they delay the Time for Completion, they are entitled to extensions of time in the usual way, pursuant to Sub-Clause 8.5 [*Extension of Time for Completion*] (excluding time adjustments arising out of measurement of anticipated underground works)

III. FIDIC Emerald Book

G. Conclusion

Special features:

- It requires the Employer - before inviting tenders - to make a detailed study and classification of anticipated underground conditions and to prepare a GBR
- At the tender stage, it requires tenderers to develop and commit to production rates
- Time and cost adjustment to deal with anticipated underground conditions requires daily monitoring by the Contractor and the Engineer, their cooperation and their agreement



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