PROPOSAL FOR ENFORCEMENT OF AGREEMENTS OF THE PARTIES, FINAL AND BINDING DETERMINATIONS OF THE ENGINEER AND DECISIONS OF THE DAAB UNDER FIDIC'S 2017 RAINBOW SUITE (AS AMENDED IN 2022)

CHRISTOPHER R SEPPÄLÄ*

Independent Arbitrator and Mediator

The dispute resolution clause in FIDIC's forms of construction contract has long provided that multiple tiers or steps need to be satisfied before a party can bring a dispute to arbitration. The 1999 and 2017 Rainbow Suites[1] provide, in certain cases, that where a party fails to comply with a tier or step, then the other party may refer that failure directly to arbitration, bypassing whatever pre-arbitral conditions remain to be satisfied. However, these forms provide no guidance as to how such direct arbitration is to proceed.

Accordingly, this paper makes a proposal in this respect. It will: first, describe the provisions for direct arbitration in the two Rainbow Suites; secondly, propose how those provisions should be implemented; thirdly, identify the respondent's limited potential defences; and finally, conclude with the author's recommendations.

I. THE PROVISIONS FOR DIRECT ARBITRATION IN THE 1999 AND 2017 RAINBOW SUITES

Under the arbitration clause in the 1999 Rainbow Suite, a dispute between the parties had to exist[2] and to have been referred to a Dispute Adjudication Board (DAB) for decision.[3] If a party had given a notice of dissatisfaction with that decision within 28 days of receiving it, the parties were then required to attempt to settle the dispute amicably for a minimum period

* Member of the New York and Paris Bars and independent arbitrator and mediator. The author is grateful to Dimitar Kondev and Vanessa Pitassi, associates at his former firm (White & Case), for their comments on this paper in draft. However, only the author is responsible for its contents.

[1] Each Rainbow Suite comprises the so-called Red, Yellow and Silver Book forms of construction contract.

[2] A dispute was, and is, to be distinguished from, for example, a claim. See Seppälä, C R, "The Arbitration Clause in FIDIC Contracts for Major Works", [2005] ICLR 4, 5.

[3] For example, in the Red Book, 1999, sub-clause 20.2.

of 56 days before either party could commence arbitration of that dispute.[4] There were only two exceptions to this procedure:

(1) where a party had failed to comply with a "final and binding" decision of the DAB (that is, one which had not been the subject of a notice of dissatisfaction from either party within 28 days after receiving the decision) the other party could, without prejudice to its rights, refer the failure itself directly to arbitration;[5] and
(2) where a dispute had arisen between the parties and there was no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise, a party could refer that dispute directly to arbitration.[6]

While the arbitration clause in the 2017 Rainbow Suite is much more detailed,[7] the same basic pre-arbitral procedure applies: a "Dispute" (now a defined term) has to be referred to a "Dispute Avoidance/Adjudication Board" ("DAAB") (the new name for the DAB) for decision and, assuming that a party has given a "Notice of Dissatisfaction" (now also a defined term) with that decision within 28 days of receiving it, arbitration of that Dispute can only be commenced after observance of an amicable settlement period of 28 days (reduced from 56 days in the 1999 Rainbow Suite).

However, there are now four exceptions to that procedure instead of the two in the 1999 Rainbow Suite described above. A party is entitled to proceed directly to arbitration where:

(1) the other party has failed to comply with an agreement of the parties, as provided for in sub-clause 3.7.5, last paragraph;
(2) the other party has failed to comply with a final and binding determination of the engineer, as also provided in sub-clause 3.7.5, last paragraph;
(3) the other party has failed to comply with a decision of the DAAB, whether binding or final and binding, as provided for in sub-clause 21.7, first paragraph; or

[4] See Seppälä, C R, "The Arbitration Clause in FIDIC Contracts for Major Works", [2005] ICLR 4.

[5] 1999 Rainbow Suite, sub-clause 20.7. This right to direct arbitration was later properly recognised by case law to apply also where the other party had failed to comply with a "binding" but not "final" decision of the DAB (that is, one which had been the subject of a notice of dissatisfaction from a party). See to this effect eg, *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2015] SGCA 30.

[6] 1999 Rainbow Suite, sub-clause 20.8.

[7] In the 2017 Rainbow Suite, "Disputes and Arbitration" are the subject of an additional clause, clause 21, from claims, whereas the 1999 Rainbow Suite had grouped "Claims, Disputes and Arbitration" together in a single clause, clause 20. The 2017 Rainbow Suite was amended in 2022, including by amending the definitions of "Claim" and "Dispute", and should not be used without incorporation of the 2022 amendments. See Seppälä, C R, "Welcome Amendments to FIDIC's 2017 Contracts", [2023] ICLR 131.

(4) there is no DAAB in place (or being constituted), whether by reason of the expiry of the DAAB's appointment or otherwise, as provided for in sub-clause 21.8.

In each of the first three cases, the first party may, "without prejudice to any other rights it may have, refer the failure itself directly to arbitration under sub-clause 21.6 [*Arbitration*]"[8] and, as was the case under the 1999 Rainbow Suite, the provisions requiring the prior referral of a dispute to a dispute board and to amicable settlement are expressly stated not to apply.[9] This arbitration may be commenced and pursued to address the failure concerned. But if there are other issues between the parties which have become Disputes and satisfied the preconditions to arbitration in clause 21, these are not prevented from being included in the same arbitration as well.[10] But, whatever the overall scope of the arbitration, as each of these three cases is essentially an action to enforce either a prior agreement of the parties, or a prior final and binding determination of the engineer, or a prior decision of the DAAB – by which each party is bound – the arbitral tribunal is, exceptionally, given in those cases "the power, *by way of summary or other expedited procedure*, to order, whether by an interim or provisional measure or an award …, the enforcement of that decision [or agreement]".[11] An arbitral tribunal is accorded no special power to act expeditiously in the fourth case as, where there is no DAAB in place, there has not necessarily been a prior failure by a party to comply with the contract such as to justify expedition.

II. HOW SHOULD THE PROVISIONS FOR DIRECT ARBITRATION BE IMPLEMENTED?

While the arbitral tribunal is empowered to act summarily or expeditiously in each of these three cases, neither the 2017 Rainbow Suite nor FIDIC's 2017 Contracts Guide, second edition, 2022, describe how an arbitral tribunal and the parties are to proceed.

While, as we have seen, the arbitral tribunal is empowered to enforce the agreement, determination or decision either by an interim or provisional measure, on the one hand, or by an award, on the other hand, it should do so by an award *as what is involved is the enforcement of a contractual right* and not merely an interim or provisional measure. As stated by an ICC tribunal

[8] Sub-clauses 3.7.5, last paragraph and 21.7, first paragraph.

[9] This results from the following language in sub-clause 21.7, first paragraph (to which sub-clause 3.7.5, last paragraph, refers): "in which case sub-clause 21.4 [*Obtaining DAAB's Decision*] and sub-clause 21.5 [*Amicable Settlement*] shall not apply to this reference."

[10] See under II How Should the Provisions for Direct Arbitration be Implemented?

[11] Sub-clause 21.7, first paragraph. (Emphasis added)

when enforcing a pre-arbitral decision of the engineer under the Red Book, fourth edition (1987), which is a comparable situation: "the judgment … is not one of a conservatory or interim measure, *stricto sensu*, *but rather one giving full immediate effect to a right that a party enjoys without discussion on the basis of the Contract* …".[12] Accordingly, the contractually proper measure should be by an award, whether interim or final.

As each of the three cases involves an enforcement action, in practice, often – though not necessarily – as the result of the employer's failure to pay the contractor a sum of money, the Expedited Procedure Rules in Appendix VI of the International Chamber of Commerce (ICC) Arbitration Rules, 2021 (Expedited Rules) furnish, as their name indicates, the logical solution.[13] They provide, among other things, for the possibility of appointment of a sole arbitrator,[14] a fast-track arbitration procedure (no Terms of Reference; a limitation on new claims after the arbitral tribunal has been constituted; the speedy convening of a case management conference; limitations on the number, length and scope of written submissions and witness evidence; possibility to exclude document production; and for an award based solely on documents) and that the "final award"[15] be rendered within six months.[16]

However, the Expedited Rules stipulate no qualifications for the sole arbitrator (or three arbitrators). Yet, in an expedited case, there will be no time to educate the arbitrator on the basics of construction contracts. Accordingly, it is suggested that, at least in the three cases provided for above, the sole arbitrator (or three arbitrators) must be experienced in dealing with construction contracts and, thus, familiar, among other things, with the ordinary cash flow needs of the contractor under a construction contract.

While the Expedited Rules would ordinarily only apply where the arbitration agreement under the ICC Rules was concluded on or after

[12] ICC case 10619 (2001), ICC Int'l Ct Bull, vol 19, no 2, 2008, 85–90. The relevant portion of this award is quoted in Seppälä, C R, "Enforcement by an Arbitral Award of a Binding but not Final Engineer's or DAB's Decision under the FIDIC Conditions", [2009] ICLR 414, 420–421. (Emphasis added)

[13] While the 2017 Rainbow Suite authorises a tribunal to adopt a "summary or other expedited procedure", FIDIC did not have the Expedited Rules in mind when the 2017 Suite was published as the Expedited Rules were only introduced and came to public attention in 2017. Consequently, the 2017 Rainbow Suite cannot be considered to be referring to the Expedited Rules.

[14] Notwithstanding any contrary provision of the arbitration agreement. Article 2.1, Expedited Rules.

[15] The reference to "final" award in the Expedited Rules appears to have been an error as the arbitration may include other claims or counterclaims (see the reference to "new claims" in article 3.2 of the Expedited Rules) with the consequence that the claim which is the subject of the Expedited Rules should in that case ordinarily result in an interim award.

[16] Six months from the date of the case management conference which must normally take place no later than 15 days from the date on which the file was transmitted to the arbitral tribunal. See articles 3.3 and 4.1, Expedited Rules. The ICC Court may extend the time limit pursuant to article 31(2) of the ICC Arbitration Rules. Article 4.1, Expedited Rules.

1 March 2017 and the amount in dispute does not exceed US$2 or US$3 million,[17] the parties are free to agree otherwise.[18] In the author's view, these limits would be too low in the three cases described above. Accordingly, it is suggested that the parties amend sub-clause 21.6 [*Arbitration*] in the Particular Conditions of a FIDIC form of contract to provide that, in any of these three cases, the Expedited Rules shall apply either irrespective of the amount in dispute, or, alternatively, with a higher threshold (such as US$5 or US$10 million). The ICC Arbitration Rules contain a standard clause for each of these alternatives,[19] which can be adapted appropriately.

The ICC has already had considerable experience with its Expedited Rules. Between March 2017, when they entered into force, and December 2022, a total of 524 cases had been conducted under them.[20] The vast majority (77 per cent) fell under the automatic application of the Expedited Rules because the conditions for their application were satisfied. In the remaining cases (23 per cent), parties had agreed to opt into their application, either in the arbitration agreement or at a subsequent stage of the proceedings, showing the willingness of parties to use them for cases regardless of the amount in dispute or arbitration agreement date.[21] Of the 269 awards rendered in cases administered under the Expedited Rules, 67 per cent were delivered on or around the six-month time limit provided for.[22] Thus, the ICC Court and ICC arbitrators will generally act expeditiously when required.

Indeed, given that there may or should be little or no dispute in the three cases described above, the ICC may – the next time that it revises its rules – want to adopt, for cases such as these, a procedure with a shorter

[17] The Expedited Rules provide that they apply where the amount in dispute does not exceed $2 million if the arbitration agreement was concluded on or after 1 March 2017 and before 1 January 2021, and $3 million if the arbitration agreement was concluded on or after 1 January 2021. Article 1.2, Expedited Rules. The Expedited Rules do not apply if the arbitration agreement under the ICC Arbitration Rules was concluded before 1 March 2017. Article 30(3)(a), ICC Arbitration Rules.

[18] Article 30.2(b), ICC Arbitration Rules.

[19] Thus, if the Expedited Rules are to apply irrespective of the amount in dispute, the following clause is recommended:

> "The parties agree, pursuant to article 30.2(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply irrespective of the amount in dispute."

On the other hand, if there is to be a ceiling for the application of the Expedited Rules but it is to be higher than that specified in them (as this paper suggests), then the ICC recommends the following clause:

> "The parties agree, pursuant to article 30.2(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply, provided the amount in dispute does not exceed US$ [specify amount] at the time of the communication referred to in article 1(3), Expedited Procedure Rules."

[20] Dupeyré, R and Ziatanska, E, "Expedited Procedures – Practical and Comparative Considerations", ICC Disp. Resol. Bull., 2023, Issue 1, 76.

[21] *Ibid.*

[22] *Ibid*, 78.

time limit than the six months provided for in the Expedited Rules. In the case of an ongoing construction project, six months – assuming that the time limit is complied with – will often be too long for a party to have to wait to enforce, for example, an agreement of the parties (under sub-clause 3.7.5) or a final and binding decision of the DAAB.[23] Accordingly, the ICC should consider adopting for such cases a shorter time limit and a more expedited procedure, as some international arbitral institutions do[24] or are planning to do. Thus, the Singapore International Arbitration Centre (SIAC) is considering a "Streamlined Procedure" requiring a final award to be issued within three months from the date of constitution of the arbitral tribunal unless the Registrar of the SIAC Court extends this.[25] The ICC may want to adopt a similar procedure which, where there is little or no dispute, would potentially be available to apply in the three cases described above.

The heightened risk for the parties of an expedited procedure is mitigated by the power of the ICC Court, at any time during the arbitral proceedings:

> "… on its own motion or upon the request of a party, and after consultation with the arbitral tribunal and the parties,"

to decide that the Expedited Rules shall no longer apply to a case.[26] This may be the situation, for example, if unforeseen circumstances should arise, eg the dispute ends up being much more complex, or the amount in dispute much greater, than anticipated, or it becomes otherwise impossible for a party to have a reasonable opportunity to present its case.[27] Given this safeguard, the author submits that, in the above three cases, parties would be justified, in many cases, in agreeing to their application irrespective of the amount in dispute.

If international arbitration is to remain competitive with national courts[28] then, once an arbitral tribunal in an expedited procedure has been

[23] The typical case will be where the agreement of the parties or the final and binding decision concerns an interim or other payment to the contractor which would ease its cash flow. But, of course, the agreement or decision could also be in favour of the employer. The difference between the situation of the contractor and the employer is that the contractor is dependent upon funds from the employer to perform the contract whereas the employer is not so dependent on the contractor.

[24] Three months in the case of the Rules for Expedited Arbitrations of the SCC (Stockholm Chamber of Commerce) Arbitration Institute in force as from 1 January 2023, article 43. Unlike the Expedited Rules, the SCC Arbitration Rules stipulate no monetary threshold.

[25] Article 13 of Schedule 2 Streamlined Procedure of a Consultation Draft (undated) of the SIAC Rules, 7th Edition.

[26] Expedited Rules, article 1.4.

[27] See article 5, Expedited Rules and article 22.4, ICC Arbitration Rules.

[28] A number of English and Commonwealth judges are reportedly decrying the resort to arbitration in standard forms of construction contract as this (in the words of Lord Thomas) "reduces the potential for courts to develop and explain the law". Cited in Tamburro, P, "The Privatisation of Justice: Is Arbitration Impacting the Development of Australian Construction Law?", [2023] ICLR 139, 145. A solution they propose is the Singapore International Commercial Court (SICC) which can "accommodate disputes entirely disconnected with Singapore", offers a "neutral forum to international parties to resolve their disputes, as an alternative to arbitration" and "whose judgments are published and can form a body of precedent over time". *Ibid*, 149. However, the publication of judgments is contrary to one of the

constituted, it should be capable of rendering an award within at least the same time period as, for example, a common law court requires to issue a summary judgment.[29] While no statistics appear to be available for how long it takes to obtain a summary judgment from an English court, statistics are available for obtaining the same relief from a US federal court. In the US, the time required for a federal court to rule on a summary judgment motion varies "from a low of 63 days [or roughly two months] on average in the fastest court to a high of 254 days [or roughly eight months] on average in the slowest court".[30]

Statutory adjudication of construction disputes is provided for in England and numerous other English common law jurisdictions. The time required for statutory adjudication, which results in a binding decision and satisfactorily resolves "many complex construction disputes",[31] is much shorter than that required for a summary judgment in the US. According to a source, "(o)n average, 90 per cent of adjudications commenced in the first 12 years after the introduction of statutory adjudication were completed within 28 or 42 days from the date of being referred (despite the parties having the right to extend this timeframe by agreement)".[32] A statutory adjudicator's decision can, in turn, be enforced by a rapid summary judgment procedure in England.[33] While statutory adjudication involves a particularly fast procedure compared to arbitration, nevertheless, the statistics available for summary judgment and for statutory adjudication suggest that an arbitral tribunal should be able to render an award in an expedited procedure within a shorter time limit than six months.

Whether or not parties agree to the Expedited Rules in any of these three cases, where the respondent has no real prospect of success (see Section III below), the claimant should be entitled to an arbitration award specifically enforcing the relevant agreement (made under sub-clause 3.7.5), final and

advantages of arbitration: its confidentiality or at least privacy. *See*, for example, article 26.3 of the ICC Rules of Arbitration.

The way forward, in the case of international standard forms of construction contract, is not through the strengthening of domestic law, whether common law or civil law, but the further development of the UNIDROIT Principles of International Commercial Contracts 2016, which reflect best international contract practice. Only such international principles – and laws grounded on them – can be expected or hoped eventually to enjoy universal consensus. See Seppälä, C R, *The FIDIC Red Book Contract: An International Clause-by-Clause Commentary* (Wolters Kluwer, 2023) 138–152.

[29] In the US, a federal court may grant summary judgment if the claiming party (referred to as the "movant") shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a) of the Federal Rules of Civil Procedure.

[30] Institute for the Advancement of the American Legal System, *Civil Case Processing in the Federal District Courts*: *A 21st Century Analysis* (University of Denver, 2009) 5.

[31] Steensma, A and Bell, A, "Expedited Arbitration and the Future of International Construction Disputes", [2018] ICLR 251, 258.

[32] *Ibid.* According to the same authors, between 2001 and 2008, 3 per cent of disputes referred to statutory adjudication were for a value of above one million pounds, doubling to more than 6 per cent between 2010 and 2015. *Ibid.*

[33] See HM Courts and Tribunals Judiciary, The Technology and Construction Court Guide (October 2022), section 9.2.

binding determination of the engineer or decision of a DAAB, whether binding[34] or final and binding, as soon as practicable and in priority to unliquidated claims or counterclaims. If the arbitration should encompass such other claims or counterclaims (whether submitted in the short time before the arbitral tribunal is constituted or authorised by it thereafter),[35] then the arbitration should be split so that the case or cases entitled to expedited treatment are dealt with first and can be the subject of an interim or partial award.[36]

As a practical matter, where the claimant requests direct arbitration in any of the three cases, the respondent may not yet have many (if any) counterclaims eligible to submit to arbitration, as any such request may be made before the respondent's potential counterclaims[37] have satisfied the relatively time-consuming conditions to arbitration in clauses 20 and 21 of the 2017 Rainbow Suite. It can take a year or more from the time an "event or circumstance" has given rise to a claim for time and/or money for it to pass through the required channels and be eligible for submission to arbitration.[38]

There should be no difficulty for the arbitral tribunal to order specific performance. National courts, whether in civil law or common law countries, have repeatedly upheld international arbitration awards that do so.[39] Such an order may be enforced by a monetary penalty, as is permitted in some civil law countries (and referred to in French law as an *astreinte*) in case of non-compliance,[40] and/or by a new arbitration or in judicial enforcement proceedings.

[34] In which case the decision would be binding pending the arbitrator(s)' award.

[35] Article 3.2, Expedited Rules.

[36] As was recognised in the case of an engineer's decision under clause 67 of the 1987 Red Book. See the interim award, ICC case 10619 (2001), ICC Int'l Ct Bull, vol 19, no 2, 2008, 85 (commentary 52–54). On splitting the case, see the *ICC Commission's Report on Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management* (2019 Update), 19 (paragraph 15).

[37] Such as, in the case of the employer, for Delay Damages, as liquidated damages for delay are defined in FIDIC's 2017 Contracts.

[38] *See* Figure 12 on page 1166 of Seppälä, C R, *The FIDIC Red Book Contract: An International Clause-by-Clause Commentary* (Wolters Kluwer, 2023).

[39] Born, G, *International Commercial Arbitration* (3rd Edition Kluwer Law, 2021), vol III, 3327–3328. The common law, unlike the civil law, distinguishes between the right to require payment of monetary and non-monetary obligations. Under the common law, a right to require payment of a monetary obligation is usually known as the "action for an agreed sum" or "action for the price", whereas a right to require performance of non-monetary obligations is denoted as "specific performance". Whereas specific performance of non-monetary obligations is an equitable and discretionary remedy for common law courts, the action for an agreed sum is based on the true right and is not discretionary. Vogenauer, S (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd Edition, Oxford UP, 2015) 884. The distinction is visible in the English Arbitration Act 1996 (compare section 48(4) with section 48(5)(b)) where it is stated that an arbitral tribunal has "the same powers as the court" in the case of non-monetary obligation. On the other hand, the distinction is of less – or no – importance under the civil law. *See* Hugh Beale and others, *Cases, Materials and Text on Contract Law* (3rd Edition, Hart Publishing, 2019), 901.

[40] Schneider, M E and Knoll, J (eds), *Performance as a Remedy: Non-Monetary Relief in International Arbitration* (Swiss Arbitration Association, Juris, 2011) 342–346.

So long as the rights of defence of the breaching party are respected, an arbitral tribunal should not hesitate specifically to enforce compliance in any of the three cases described above.[41]

III. THE RESPONDENT'S LIMITED POTENTIAL DEFENCES

It is axiomatic, in the above three cases, that the respondent cannot ordinarily dispute the merits or substance of the agreement of the parties (under sub-clause 3.7.5) or of the final and binding determination of the engineer or of the decision of the DAAB, whether binding or final and binding. They are all "binding" on the respondent (and even "final" except in the case of a non-final decision of the DAAB), whether they are right or wrong. Consequently, the respondent's potential defences are limited. Assuming the arbitral tribunal has been properly constituted and has jurisdiction, they would typically include the following:

(1) In the case of a failure to comply with the agreement of the parties, as provided for in sub-clause 3.7.5, grounds such as:
   - The agreement was not signed by the parties or was otherwise invalid; or
   - The engineer had not given a notice of it in compliance with sub-clause 3.7.1.

(2) In the case of a failure to comply with a final and binding determination of the engineer, as provided for in sub-clause 3.7.5, grounds such as:
   - The engineer's determination was invalid or the engineer had given no notice of it in compliance with sub-clause 3.7.2; or
   - A party had given a Notice of Dissatisfaction with respect to it in compliance with sub-clause 3.7.5 with the consequence that it was not final and binding.

(3) In the case of a failure to comply with a decision of the DAAB, whether binding or final and binding, as provided for in sub-clause 21.7, grounds such as:
   - There was no dispute, or it was not referred to the DAAB in compliance with sub-clause 21.4; or
   - The DAAB was not validly constituted; or
   - The DAAB had not given its decision in compliance with sub-clause 21.4.

[41] Both the UN Convention on Contracts for the International Sale of Goods, 1980 (article 46) and the UNIDROIT Principles on International Commercial Contracts 2016 (articles 7.2.1 and 7.2.2), as well as the English Arbitration Act 1996 (section 48(4) and section 48(5)(b)), provide for specific performance as a remedy for the enforcement of contracts. Under the UNIDROIT Principles, specific performance is not a discretionary remedy; a court or arbitral tribunal must order performance unless an exception applies.

In the above three cases, unless the respondent can demonstrate that the claimant's claim for enforcement has no real prospect of success, the respondent should be ordered to comply with the relevant contractual obligation.

IV. CONCLUSION

The Particular Conditions of the FIDIC contract concerned should be amended to specify that, in the three cases described above:

(1) direct arbitration should be implemented through application of the Expedited Rules either irrespective of the amount in dispute or with a higher threshold than those provided for in the rules, as a safeguard exists in them for cases where the rules should not apply;
(2) the sole arbitrator (or, exceptionally, three arbitrators) appointed should be required to be experienced in dealing with construction contracts; and,
(3) the award should, where appropriate, be rendered within less time than the six-month time limit provided for in the Expedited Rules.[42]

Like other international arbitration awards, an award resulting from the Expedited Rules would be enforceable in any of the more than 150 countries which have ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Where the claimant is, as will often be the case, the contractor, expedited relief may be critical to assuring its cash flow to permit the uninterrupted execution of the project. But the contractor's cash flow is not the sole reason for expeditious enforcement in the three cases described above. The speedy, cost-effective and final resolution of disputes is a desirable end in itself for both parties.

If a party knows or ought to know that it has no defence to a claim for enforcement, then resisting such an application should expose it to liability for the costs of the arbitration pursuant to article 38 of the ICC Rules of Arbitration and possibly other damages, if any.[43]

[42] The next time that the ICC amends the Expedited Rules it may want expressly to provide for this, as to do so would be responsive to the needs of the international construction industry.

[43] See the last paragraph of sub-clause 21.7 of the 2017 Rainbow Suite expressly providing for the "award of damages" where a decision of the DAAB has not been complied with.