

Insights

URDG 758: FINALLY TESTED AND IT DOES WHAT IT SAYS ON THE TIN

Jun 18, 2020

SUMMARY

2020 is anything but normal. It is rare for there to be any judicial treatment of the **ICC Uniform Rules on Demand Guarantees No. 758** (URDG 758) but 2020 has already brought us not one but two cases on its interpretation and applicability.

URDG 758 applies to all **demand guarantees** (commonly **performance bonds** or **advance payment guarantees** in the construction industry) that **incorporate the rules**. Despite being around for almost a decade, uptake and usage of URDG 758 has been patchy, which is often blamed on the rules not being sufficiently tested in the courts. 2020 court rulings may encourage users of demand guarantees, particularly in international construction projects, to now adopt URDG 758.

Two cases: two similar decisions

The first case of the year was the TCC's judgment in **Tecnicas Reunidas Saudia for Services and Contracting Co Ltd v Korea Development Bank**.

In that case, the court considered whether a term in an advance payment guarantee was a condition which had to be complied with for the beneficiary (Tecnicas) to call the demand guarantee. The court found, as a **matter of construction**, that Tecnicas had complied with the condition, but helpfully also went on to make *obiter* comments about the application of URDG 758.

The second case of the year is a decision from the Appellate Court of the Qatar Financial Centre in **Leonardo SpA v Doha Bank Assurance Company LLC**. In that case, the court dismissed an appeal from Doha Bank in regard to calls made on two demand guarantees, an advance payment guarantee and a performance guarantee, on the basis that the calls were valid as made in strict compliance with URDG 758.

Three key principles

In **Leonardo**, the Appellate Court helpfully summarised three key principles that underpin URDG 758, namely:

- The independence or “autonomy principle”: as enshrined in Article 5(a), the demand guarantee is independent from the underlying contract. The conditions giving rise to the obligation to pay are found exclusively in the demand guarantee and the terms of the underlying contract are of no relevance.
- The “documents principle”: enshrined in Article 6:



Guarantors deal with documents and not with goods, services or performance to which the documents may relate.

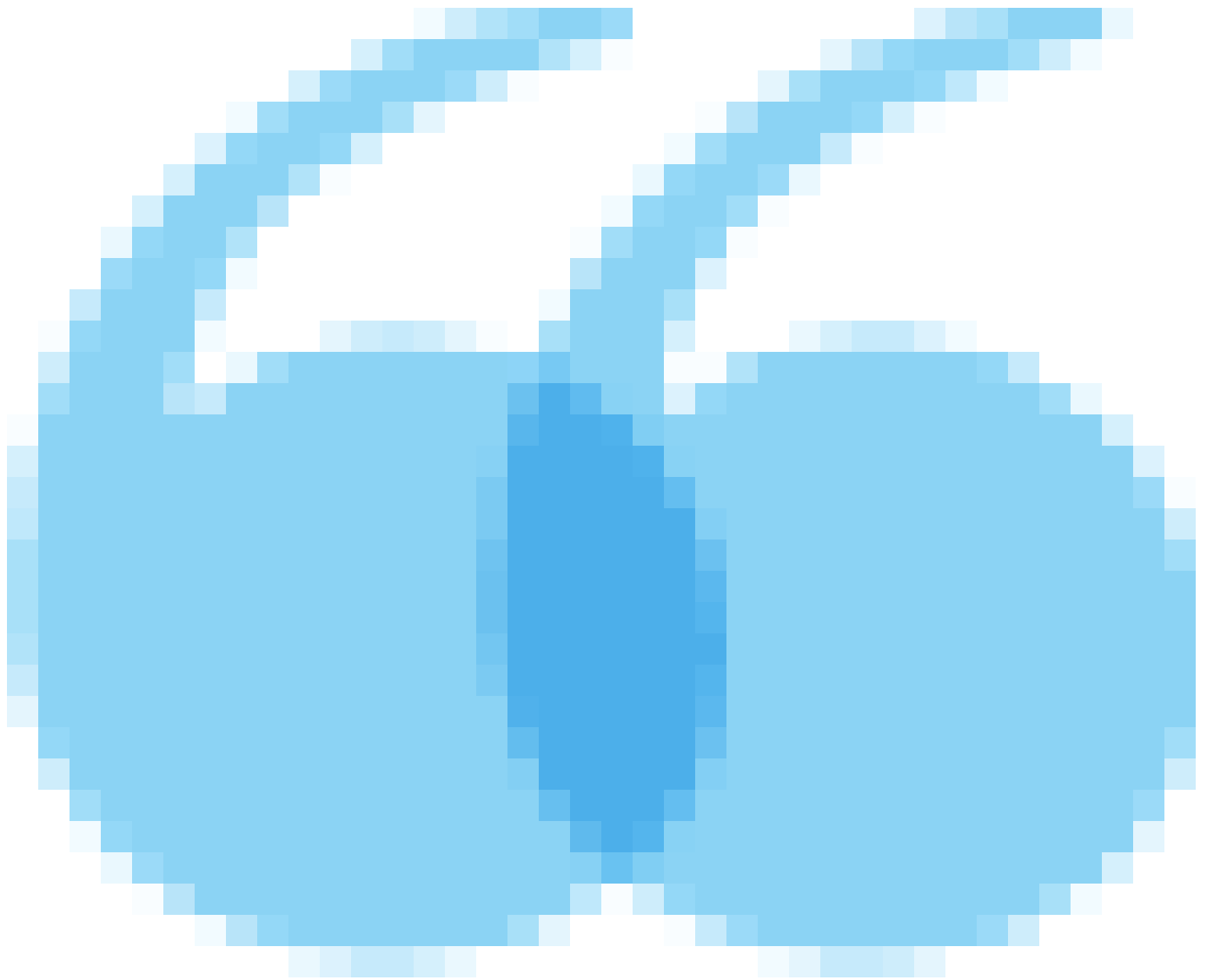


This is a crucial principle, and is a close relative to the first principle; guarantors (often banks) are **only** concerned with whether the documents presented to call the demand guarantee are in accordance with the guarantee's terms and conditions and not whether the relevant goods and services conform with the underlying contract.

- The "strict compliance principle": the documents presented to call the demand guarantee must strictly comply with the requirements of the guarantee.

Supremacy of URDG 758

In **Tecnicas**, Waksman J commented that:

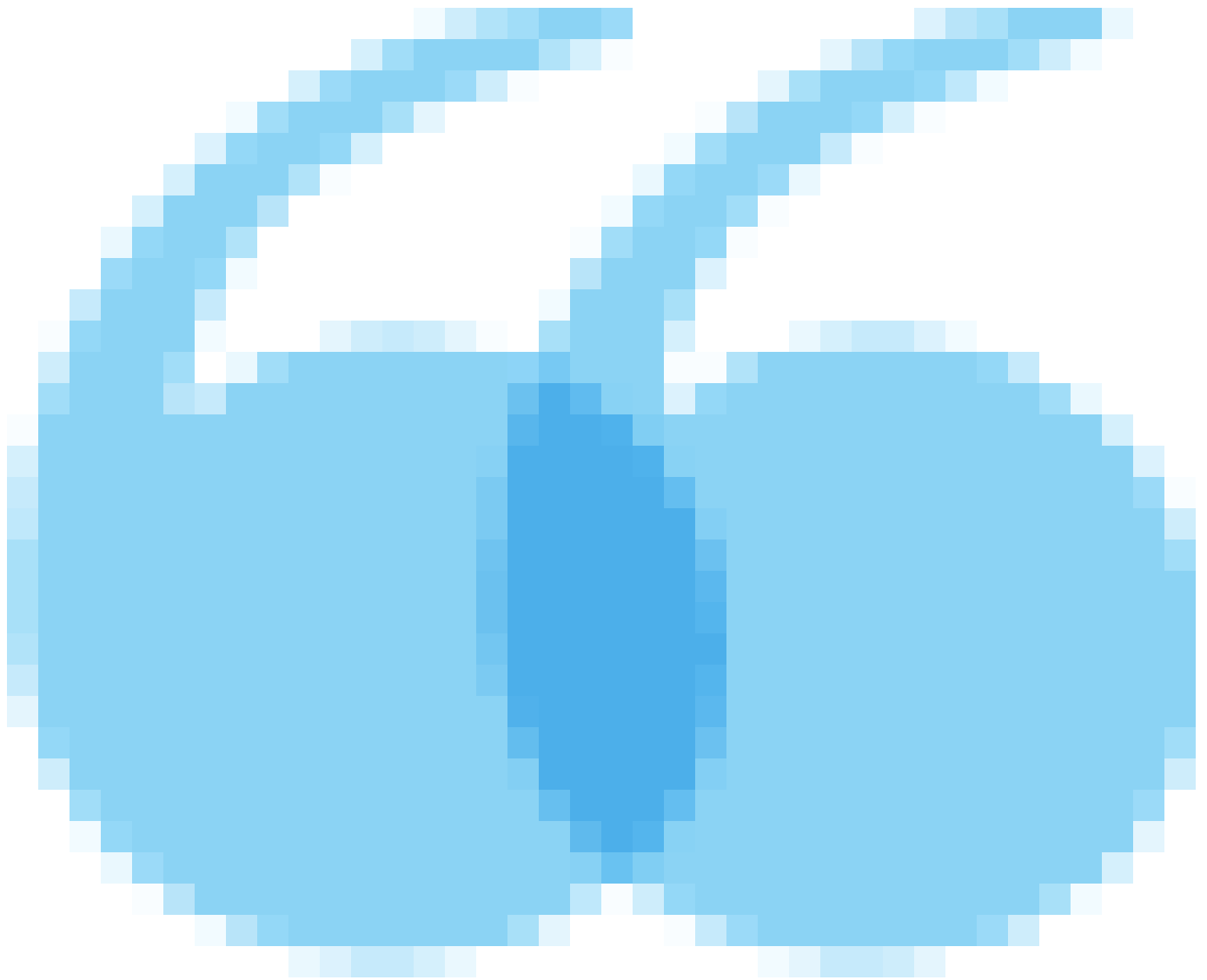


The URDG is not a set of arbitrary or random standard terms that one party or other may habitually attach to its contracts regardless of where they came from or how they were drafted. The URDG is an internationally recognised set of rules which are contributed to and revised from time to time by a group of international users, including banks, so as to provide clarity and certainty to the creation and the performance of demand guarantees.



For this reason, the court noted that it was wrong to treat URDG 758 as a set of standard conditions and to apply national rules of interpretation to them – they are a stand-alone code and should be applied equally and in the same way in any jurisdiction in the world.

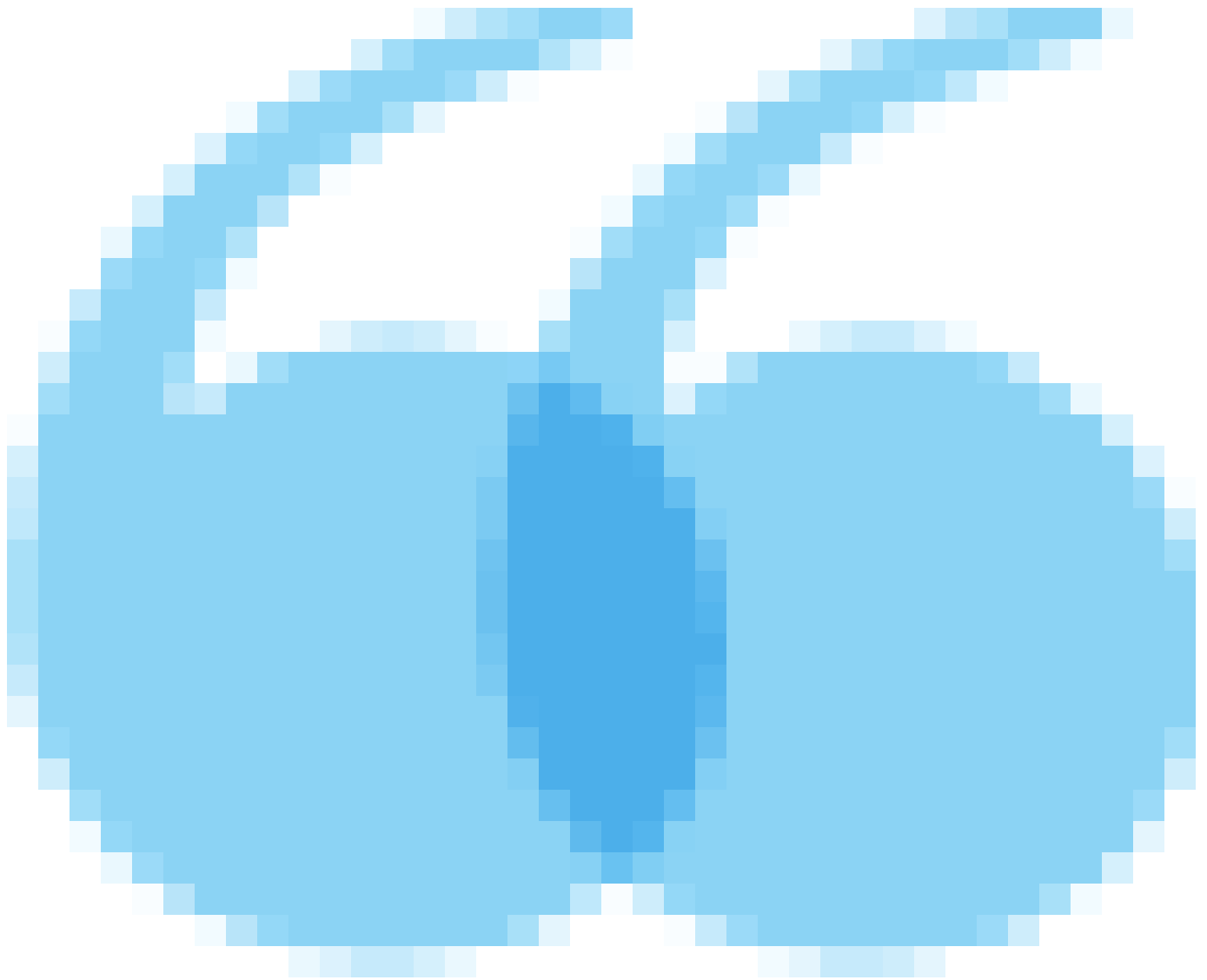
The supremacy of URDG 758 was also reinforced in *Leonardo* where the court stated:



... it is important URDG 758 is not interpreted in a literalistic manner or by the adoption of rules of national law.



The Appellate Court concluded that, when applying URDG 758, regard need only be had to the wording of the guarantee itself and URDG 758. Echoing the **obiter** comments in **Tecnicas**:



Those engaged in international trade, commerce and finance should be entitled to rely on the terms of the URDG 758 interpreted in the way we have explained without having to have in mind national case law which predates it.



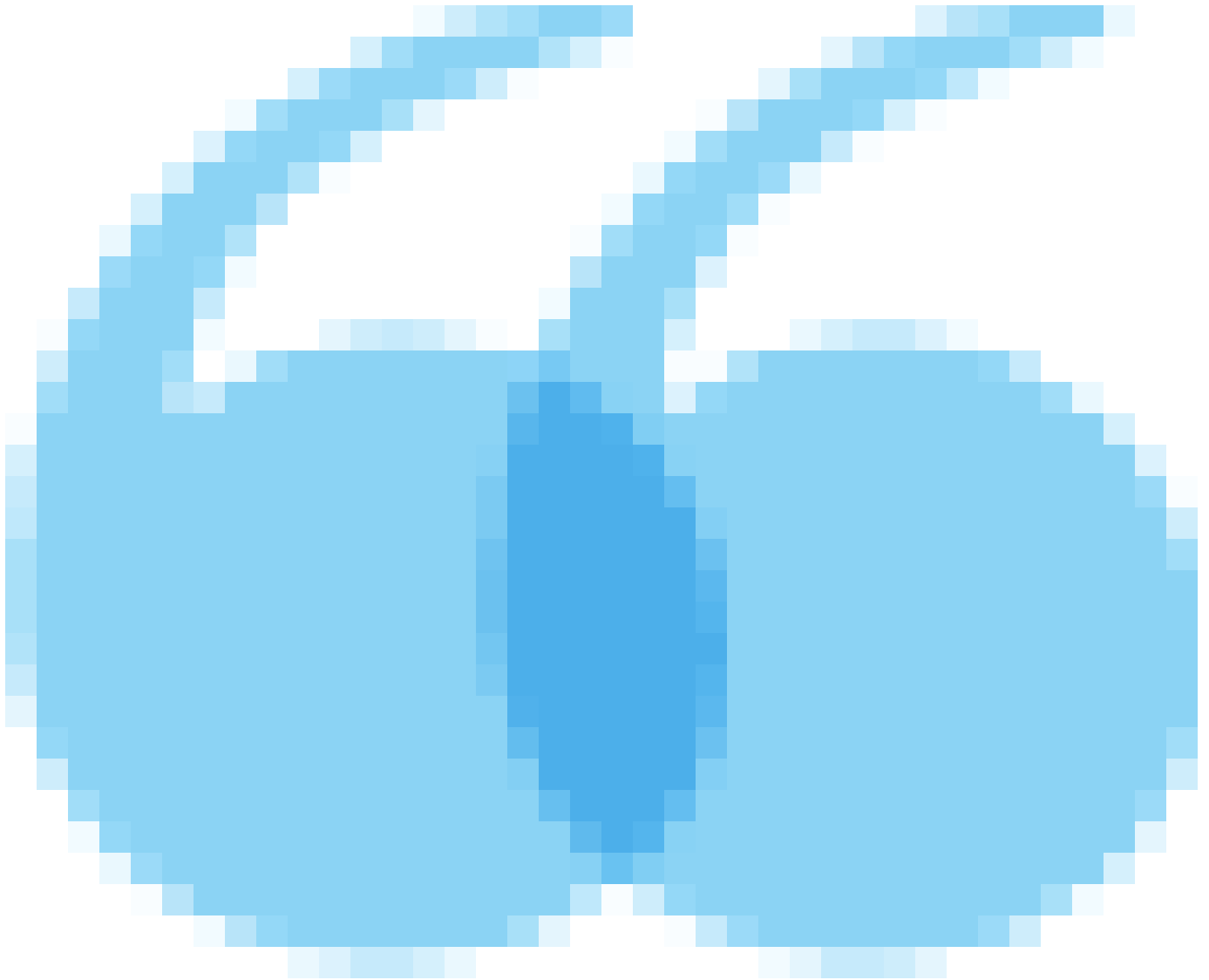
The supremacy of UDRG 758, and the three principles outlined above, are demonstrated in their application by the respective courts to the underlying facts of each case.

Article 7 URG 758

Article 7 relates to the “documents principle” and reinforces Article 6 (above). It states that demand guarantees should not contain a condition other than a date or lapse of time without specifying a document to indicate compliance with the condition. The guarantor (the bank) will disregard any condition to the contrary.

In **Tecnicas**, the TCC found that a condition in the advance payment guarantee, which provided that the initial advance payment was to be paid into an HSBC account, was a factual condition and not a documentary one: there was no requirement that payment into the HSBC account was to be indicated by documentary evidence to the guarantor and therefore Article 7 operated to remove the

condition. The condition would have otherwise been enforceable. In that context, and underlying the supremacy of URDG 758, the TCC commented:



The importance attributed to the URDG here is reflected in that part of the guarantee which says if this is a conflict between English law and the URDG, URDG prevails



In **Leonardo**, the Appellate Court applied Article 7 to draw a distinction between documents referred to in the demand guarantees (in this case, written claims made under the underlying construction contract) and documents required for presentation to call the demand guarantees. The court held that, if presentation of documents are required to call the demand guarantee, it should explicitly say so – the mere mention of a document is not enough. A reminder to banks that if documents are required for presentation, the demand guarantee must say so in very clear terms.

Article 24(d) URDG 758

Both cases also considered the application of Article 24(d), which provides that, if a guarantor rejects a call on the demand guarantee, it must, among other things, state “each discrepancy for which the guarantor rejects the demand.” Under Article 24(e), such notice must be given to the presenter of the demand within five business days of its demand. In both cases, the relevant bank

issued a rejection notice within the requisite time but, in both instances, the purported rejection was unsuccessful.

In **Tecnicas**, the TCC commented that, while the bank had given a rejection notice within five business days, it was given to the wrong party. It had been given to another bank, the advising bank, when the “presenter” of the demand was Tecnicas. While the comments are **obiter** it is reminder that the terms of URDG 758 are to be strictly complied with.

In **Leonardo**, in the court proceedings, the bank sought to rely on discrepancies in the original demand that were not noted in its Article 24 rejection notice. The Appellate Court, adopting a strict reading of Article 24(d), held that the bank should note “each discrepancy” in its rejection notice and, if it failed to do so, it could not later rely on discrepancies not included in that notice.

Conclusion

The timing of the judgments is welcome. The construction industry has not avoided the turbulence of 2020. Now the initial wave of **force majeure** notices (and blogs about them!) have subsided, we are increasingly seeing projects mothballed resulting in terminations and the inevitable rise in calls on performance and advance payment bonds.

In the Middle East, the courts are increasingly intervening in bond calls with unpredictable and, at times, inconsistent results. Incorporating URDG 758 in demand guarantees used in international construction projects would likely bring much needed consistency and uniformity to this issue.

We now have two high-profile cases from internationally respected courts that endorse the clarity and simplicity offered by URDG 758 to demand guarantees. It is hoped that this will allay concerns that URDG 758 is untested. We could not have a clearer endorsement of the benefits of international adoption of URDG 758.

This [article](#) first appeared on the Practical Law Construction blog dated 17 June 2020.

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