EXTRACTS OF ICC ARBITRAL AWARDS

ON CONSTRUCTION CONTRACTS REFERRING TO THE F.I.D.I.C. CONDITIONS

In recent years construction disputes have represented some 21 per cent of cases submitted annually to ICC arbitration. A significant portion of these construction cases is governed by the F.I.D.I.C. (Fédération Internationale des Ingénieurs Conseils) Conditions of Contract (International) for Works of Civil Engineering Construction or on conditions modelled on the F.I.D.I.C. Conditions. Clause 67 of the F.I.D.I.C. Conditions provides that any dispute between the contractor and employer must first be referred to the engineer for decision; if one of the parties is dissatisfied with the engineer's decision then the party has a certain period of time within which to give the other party notice of its intention of submitting the dispute to ICC arbitration, unless otherwise specified in the contract.

Several extracts of ICC Awards on disputes concerning contracts governed by the F.I.D.I.C. Conditions have already been published. These are listed below following the nomenclature which was used at the time of their publication:

- Preliminary Award in Case N° 2321 (1974)
English : 1 *Yearbook Commercial Arbitration*, (hereafter : *"Yearbook"*) p. 133, (1976); Jarvin, S. & Derains Y., *Collection of ICC Arbitral Awards - Recueil des sentences arbitrales de la CCI 1974-1985* (hereafter: *"ICC Arbitral Awards"*) Kluwer (1990), p.8. French : *Journal du Droit International* (hereafter: *"J.D.I."*), 1975, p.938; *ICC Arbitral Awards* p. 246.

- Final Award in Case N° 2763 (1980)
English : X *Yearbook*, p.43 (1985); *ICC Arbitral Awards*, p. 157.

- Award in Case N° 3790 (1983)
English : XI *Yearbook* p.119 (1986); 1 *International Construction Law Review* (hereafter : *"I.C.L.R."*), Part 1, p. 372, (1984).
French : *J.D.I.*, p. 910 (1983); *ICC Arbitral Awards*, p. 476.

- Award in Case N° 3902 (1984)
English : 2 *I.C.L.R.*, Part 1, p. 50 (1984)

- Interim Award (1984)
English : 2 *I.C.L.R.*, Part 3, p.298, (1985)

- Interim Award in Case N° 4416 (1985)
English : 3 *I.C.L.R.*, Part 1, p.67 (1985). French : *J.D.I.*, p.969 (1985) ; *ICC Arbitral Awards*, p. 67.

- Award in Case N° 4707 (1986)
English : 3 *I.C.L.R.*, Part 5, p.470 (1986)

- Partial Award in Case N° 4840 (1986)
English : 3 *I.C.L.R.*, Part 3, p. 279 (1986)

- Interim Award in Case N° 4862 (1986)
French : *J.D.I.*, p. 1018 (1986).

- Award in Case N° 5029 (1986)
English : XII *Yearbook*, p.113 (1987); 3 *I.C.L.R.*, Part 5, p. 473 (1986)

-Interim Award in Case N° 5277 (1987)
English : XIII *Yearbook*, p. 81 (1988)

- Partial Award in Case N° 5333 (1986)
English : 4 *I.C.L.R.*, Part 4, p. 321 (1987)

- Final Award in Case N° 5428 (1988)
English : XIV *Yearbook*, p .146 (1989)

Other sanitized extracts are hereafter being published for the first time. In presenting the following extracts, a note of caution is necessary: the F.I.D.I.C. Conditions have been revised in 1977 (Third Edition) and more recently in 1987 (Fourth Edition). None of the extracts published so far nor those which appear in this issue deal with the latest (1987) Edition which contains significant changes from previous versions. Several extracts deal with Clause 67 of the 1977 (Third Edition).(1)

Lack of space does not permit to quote each specific F.I.D.I.C. Clause mentioned in these cases. However all extracts are preceded by a note indicating which edition is referred to by the arbitral tribunal in its award.

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(1) Clause 67 of the F.I.D.I.C. Conditions, 1977 (Third Edition) reads as follows:
"If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor or the Engineer and the Contractor in connection with, or arising out of the Contract, or the execution of the Works, whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of ninety days after being requested by either party to do so, give written notice of his decision to the Employer and the Contractor. Subject to arbitration as hereinafter provided,

Partial Award N° 5600 (1987)
Original: English

F.I.D.I.C. Conditions, Third Edition/ Dispute between Contractor and Employer/ Clause 67/ Time limits within which a request for arbitration must be made/ Meaning of a 'claim to arbitration'/ Manner in which matters must be referred to arbitration.

" In accordance with Clause 67, by a letter of 16 November 1983 Contractor referred to Engineer a summary of previous claims made by it. These claims fell under two heads :-

(A) The performance bond claim for US$ XXX.
(B) The variations and/or omissions claim for US$ XXX.
(...)

Pursuant to clause 67, the Engineer was required, within a period of ninety days, to give written notice of his decision with respect to such claims to the Employer and the Contractor.

[By letters dated 13 December 1983 and 21 December 1983, the Engineer replied to the Contractor regarding the performance bond claim and the claim for variations and/or omissions]

In response to the letter of 13 December 1983 with respect to the performance bond claim, *Contractor* wrote to *Engineer* on 17 January 1984. A copy fo this letter was forwarded to *Employer*. The letter indicated clearly that Contractor did not

accept the Engineer's decision and traversed the merits of its claim. The second last paragraph of the letter stated:-

'Before we conclude, we would like you to clarify whether your letter of December 13, 1983 is a decision under Clause 67 of the Conditions of Contract which we do not think it is. However, in the event the aforesaid letter is your decision under Clause 67, then please treat this letter as a notice of our disagreement to your decision and we hereby serve our notice to refer the matter to Arbitration under Clause 67 of the Conditions of Contract and/or to pursue any other legal remedy under a proper jurisdiction.'

Contractor wrote a separate letter dated 18 January 1984 to *Engineer* (with a copy to *Employer*) regarding its claim for variations and/or omissions. It again clearly indicated that Contractor did not accept the Engineer's decision and discussed the merits of its claim. The second last paragraph was in virtually identical wording to that of the letter of 17 January 1984.

(...)

On 11 March 1984 *Engineer* wrote to *Contractor*, with a copy being sent to *Employer*, with respect to the performance bond claim. The letter read:-

'Your letter of 16 November, 83 presented your claim for extra costs incurred in providing a 100% Bank Guarantee. After a careful review of your letter and all related documents your claim was denied in our letter of Dec. 13, 1983. Additional review of the claim and reading of your letter of Jan.17, 1984 has not brought any arguments to light which would lead us to change our decision. We confirm that our decision is made under clause 67 of the *EMPLOYER/CONTRACTOR* Contract dated 16 October 1981. Your claim is denied.'

On the same date, a letter was forwarded by Engineer to Contractor (...) in similar terms to the letter of the same date with respect to the performance bond claim.

On 12 March 1984, Contractor replied to Engineer, with a copy to Employer, with respect to the performance bond claim. The letter read :-

'...We hereby reaffirm our position indicated in our letter...dated 17 January 1984 in which we have served our

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such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor and shall forthwith be given effect to by the Employer and by the Contractor, who shall proceed with the execution of the Works with all due diligence whether he or the Employer requires arbitration, as hereinafter provided, or not. If the Engineer has given written notice of his decision to the Employer and the Contractor and no claim to arbitration has been communicated to him by either the Employer or the Contractor within a period of ninety days from receipt of such notice, the said decision shall remain final and binding upon the Employer and the Contractor. If the Engineer shall fail to give notice of his decision, as aforesaid, within a period of ninety days after being requested as aforesaid, or if either the Employer or the Contractor be dissatisfied with any such decision, then and in any such case either the Employer or the Contractor may within ninety days after receiving notice of such decision, or within ninety days after the expiration of the first-named period of ninety days, as the case may be, require that the matter or matters in dispute be referred to arbitration as hereinafter provided. All disputes or differences in respect of which the decision, if any, of the Engineer has not become final and binding as aforesaid shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, revise and review any decision, opinion, direction, certificate or valuation of the Engineer. Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute or difference referred to the arbitrator/s as aforesaid. The reference to arbitration may proceed notwithstanding that the Works shall not then be or be alleged to be complete, provided always that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works."

notice to refer the matter to Arbitration under Clause 67 of the Conditions of Contract and/or to pursue any other legal remedy under a proper jurisdiction.'

On the same date it wrote to Engineer in similar terms, with a copy to Employer, with respect to the variations and/or omissions claim....'

HAS CLAUSE 67 BEEN COMPLIED WITH ?

(...)

At the outset, let me state that it is my clear view that the letters of *Engineer* dated 13 December 1983 with respect to the performance bond claim and of 21 December 1983 with respect to the variations and/or omissions claim are a 'decision' within the meaning of clause 67... .

Clause 67 provides that *Engineer's* decision is final and binding unless a 'claim to arbitration' has been communicated to it by either party within ninety days. The clause also provides that within this ninety day period, *Contractor*, if dissatisfied with *Engineer's* decision, may, 'require that the matter or matters in dispute be referred to Arbitration as hereinafter provided'.

The time constraint in Clause 67 that steps must be taken to dispute the *Engineer's* decision within ninety days causes no problems.(...)

The issue is rather whether, apart from the time question, the letters of 17 January 1984 and 18 January 1984 comply with the requirements of Clause 67 or if not, whether the two letters from *Contractor* to the *Engineer* dated 12 March 1984, and which are in substantially similar terms, comply with the requirements of Clause 67.

Do these letters of 17 January 1984 with respect to the performance bond claim and 18 January 1984 with respect to the variations and/or omissions claim amount to a 'claim to Arbitration' and a requirement 'that the matter or matters in dispute be referred to Arbitration' as required by Clause 67?

Mr. Duncan Wallace in his article referred to above ["The Time Bar in FIDIC Clause 67", The International Construction Law Review, Vol. 2 Part 4, July 1985] (at p. 332) suggests that the difference in these two sets of wordings is of no real significance. I find his article generally, very compelling and, on this point, accept his approach.

His article is primarily addressed to the issue of whether or not Clause 67 requires a formal Request for Arbitration to the ICC in accordance with the Rules for the ICC Court of Arbitration to be given within the ninety day period. He concludes that it does not. *Employer* however, does not contend for such an extreme interpretation of Clause 67 (...).

He makes the point of the practical necessity of one of the parties indicating the seriousness of its intention to dispute the *Engineer's* decision and to give a final opportunity for resolution of the matters in dispute. There is also a need to avoid any assertion of waiver of rights. The notification also ascertains whether the other party is willing to co-operate in preparations for the Arbitration including such matters as agreement upon an Arbitrator. The article also makes the trite points that an exclusionary provision must be interpreted strictly (p.337) and that in cases of ambiguity the more reasonable of two meanings is to be adopted (p.337). The author concludes (at p.334):-

'In my opinion, the contract intention is that the dissatisfied party should record or notify his intention to arbitrate. In matters not in my opinion whether he is said to 'require', 'claim to', 'call for' or 'request' arbitration within the stipulated period. The essential requirement is the notification of a serious intention to arbitrate, perhaps at a relatively early stage...'

Again at p. 340), the author states:-

'It is therefore submitted that a serious notification of an intention to claim or require arbitration will satisfy the requirements of both of the relevant sentences in Clause 67 of FIDIC'

(...)

Subject to one qualification, I adopt the approach of Mr. Duncan Wallace as set out above and take the view that the wording in the letters of 17 and 18 January 1984, '...please treat this letter as a notice of our disagreement to your decision and we hereby serve you (only in the letter of 18 January 1984) our notice to refer the matter to Arbitration under Clause 67 of the Conditions of Contract' is a 'claim to arbitration' and a requirement 'that the matter or matters in dispute be referred to arbitration' within the meaning of Clause 67. I particularly note the use of the word 'refer' which picks up the reference to 'referred' in Clause 67. I note that copies of the letters of 17 and 18 January 1984 were forwarded to *Employer. Employer* appears to half concede that the quoted words comply with the requirements of Clause 67 when it states at page 13 of its submission that 'Had Contractor not mentioned that they might choose legal action, Contractor could possibly argue that they made a request for arbitration if the Engineer would not review his decision'.

The tentative suggestion of Mr. Wallace that perhaps there should be an indication that arbitration is to be pursued at a relatively early stage does not appeal to me. I see nothing in the wording of Clause 67 which requires such a conclusion. In any event, at the date of giving of the notices on 17 and 18 January 1984, there is no indication that the arbitration is not to be immediately pursued.

Contractor in its submission refers me to ICC case number 5029 where an arbitral tribunal of three arbitrators approved the comment of the arbitral tribunal in ICC case number 3790 upon Clause 67, 'A claim to arbitration without need for particular formalities is to be explicit and clear and clearly show that a Plaintiff's intention to submit the dispute to arbitration'. The tribunal, in case 5029 again comments :

'...Clause 67 must be interpreted as requiring a party who is dissatisfied with the decision of the Engineer, in order not to loose his right to have the matter resolved by arbitration, solely to notify the Engineer, within 90 days after the Engineer has rendered his decision, that he requires the dispute to be referred to arbitration.' The quoted words from the letters of 17 and 18 January 1984 in my view fall within these requirements.

The real issue with respect to whether or not Clause 67 has been complied with lies in the additional wording in the letters of 17 and 18 January 1984 'and/or to (only in the letter of 17 January 1984) pursue any other legal remedy under a proper jurisdiction'. Employer contends that these words make 'the claim' or 'requirement' equivocal and therefore do not comply with Clause 67. To quote from page 4 of its reply 'But in the present proceeding the alleged notices of arbitration were equivocal and conditional and far from being positive in its terms and did not reflect any 'serious' intention to go for arbitration. By the alleged notices of arbitration, *Contractor* did not notify its clear intention to submit the disputes to arbitration, but merely notified the Engineer that *Contractor* would in future choose between arbitration and legal action and, in fact, *Contractor* went for legal action.' I cannot accept this argument.

The procedure for the resolution of disputes between the parties as set out in Clause 67 does not, and cannot, preclude a party from taking proceedings somehow connected with or related to the contract against a party not a party to the contract. In the present case, *Contractor* wished to pursue a claim against the United States. The only method it could do this was by Court proceedings. It also wanted to pursue its remedies against *Employer*. The only method it could do so was by arbitration pursuant to Clause 67. If it did not pursue arbitration, then the decisions of the Engineer became final and binding. Contractor filed its claim against KZ in the United States Claims Court on 12 March 1984. It only submitted its formal Request for Arbitration over two years later. It could have submitted its Request for Arbitration in 1984 or 1985 while the proceedings in the United States Claims Court were still pending and run both actions concurrently. It chose not to do so.

In making reference to pursuing other legal remedies in its letters of 17 and 18 January 1984, *Contractor* in my view was only indicating that it may pursue remedies against other parties in other jurisdictions such as it in fact did. It was in no way suggesting that it did not wish to pursue its rights to proceed to arbitration against *Employer*.

It was indicating to the *Engineer* that it was seriously disputing its decision. To emphasise the seriousness of its approach it indicated that not only was it giving notice pursuant to Clause 67 requiring the matters in issue to be referred to arbitration between it and *Employer* but also indicating that it may seek redress by other means against other parties.

Employer has referred me to three cases which require comment.

In Nea Agrex SA v Baltic Shipping Co. Ltd. & Anor. [1976] 2 All E.R. 842, the English Court of Appeal considered Section 27(3) of the Limitation Act 1939 which provided that '... an arbitration shall be deemed to be commenced when one party to the arbitration serves on the other party or parties a notice requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator...' Under consideration was a letter which stated `Please advise your proposals in order to settle this matter, or name your arbitrators'.

It will be noted that this case was concerned with the construction of a statutory provision and not with Clause 67. The word 'require' which appears in Clause 67, however, also appears in Section 27(3) which was under review. The Court held that the wording under review, although somewhat vague, fell within the meaning of Section 27(3) and was an appropriate notice. Lord Denning M.R. in his judgment (at p.848), stated:

'In a commercial dispute, a letter requesting arbitration should not be construed too strictly. The writer should not be impaled on a time-bar because he writes in polite and courteous terms or because he leaves open a possibility of settlement by agreement.'

The decision of the Court and the comment of Lord Denning, if anything, would seem to assist Contractor rather than *Employer*.

In Surrendfa Overseas Ltd. v. Government of Sri Lanka [1977] 2 All E.R. 481, Kerr J. again considered Section 27(3). There he had to decide whether the words 'In view of the attitude taken by the Charterers in their calculation of Laytime, owners will be putting the matter to Arbitration. We will be advising you concerning details of the Arbitrator appointed in due course.' Kerr J. found that this wording did not amount to a 'notice requiring' the addressee to appoint an arbitrator or to agree to the appointment of an arbitrator. So far as is relevant, the wording in the clause under consideration in this case was not clearly as clear and definite as the wording in Contractor's letters of 17 and 18 January 1984.

Finally, I was referred to the decision in International Tank & Pipe SAK v. The Kuwait Aviation Fuellingh Co. KSC [1975] 1 All E.R. 242 which is concerned with the Second Edition of the F.I.D.I.C. Conditions of Contract where Clause 67, so far as is relevant, is in similar terms. There, the contractor had written within the 90 day period,

'We take the opportunity of advising you that at present the dispute between ourselves and the employer is being discussed with a view to possible settlement, before proceeding to arbitration in accordance with Clause 67 of the Contract 'Settlement of Disputes'. Should no settlement be reached, we reserve our right to have the matters in dispute settled by arbitration in accordance with Clause 67.'

As the contractor had doubts as to whether this amounted to proper notice in accordance with Clause 67, it applied for an extension of time under Section 27 of the English Arbitration Act and the Court granted the extension. No determination was made by the Court as to whether or not Clause 67 had been complied with in the first instance.

I therefore determine that Contractor has properly challenged the Engineer's decision in accordance with Clause 67 by giving a 'claim to arbitration' and by requiring 'that the matter or matters in dispute be referred to arbitration' by its letter of 17 January 1984 with respect to the performance bond claim and by its letter of 18 January 1984 with respect to the variations and/or omissions claim. Therefore the Engineer's decision is not final and binding upon Contractor within the meaning of Clause 67. "

Final Award N° 5597 (1990)
Original: English

F.I.D.I.C. Conditions, Third Edition/ Dispute between Contractor and Employer/ Unforeseen Conditions/ Costs incurred by Contractor/ Clauses 11, 12, 41, 52, 55 and 56.

" UNEXPECTED MATERIAL TO BE DREDGED

In the original contract and pre-contract documentation, the Defendant, through its Engineer declared that the material was sand and broken shells, with some silt and clay. That statement in the Specification (Clause 25.4) forms part of the Contract. Therefore, the Claimant was entitled to assume that the material was as described hereabove and that, if the material was different, the Conditions of Contract would be fully operational to compensate him for any losses that he might suffer as a result.

It is clear that both the statements in the Contract and the Conditions of Contract will have legal effects, as they give rise to an obligation on the part of the Defendant that it is legally bound both by the statements which were made on its behalf by its Engineer in the Contract. Thus, as here, the provisions of the Contract give the Claimant the right to additional payments where it meets condition which it could not reasonably have foreseen. (Clause 11 of the FIDIC Conditions, as amended by Part III of the Dredging and Reclamation Work Conditions, and Clause 12).

Moreover, pursuant to Clause 41, on a remeasurement of the work done, the Claimant is entitled to be paid for the dredger days spent at the site in connection with the dredging. The claim is justified on a simple re-measure and value basis (Clauses 55 and 56). Additional work involved was however in compliance with the Defendant's and its Engineer's requests.

According to Article 154, of the Yemen Civil Code, Law number 11 for the year 1979, if both parties agree to all the essential contents of a contract but certain details are left to be agreed upon later, and if such agreement is not reached at the time and later a dispute occurs as to those details, the judge must rule in accordance with and taking account of the nature of the matter and as determined by the provisions of the law, customs and justice.

Therefore, the Claimant is entitled to be paid additional sums (Clause 12) which reflect actual reasonable costs incurred by the Claimant in relation to the unexpected nature of the material to be dredged, by way of damages, or also alternatively by way of valuation under Clause 52.

The above mentioned additional sums are calculated on the basis of the Contract rates. (...) "

First Partial Award in Case N° 5634
Original: English

F.I.D.I.C. Conditions, Third Edition/ Dispute between Contractor (First Claimant) and its Assignee (Second Claimant), and Employer/ Clause 67/ Steps to be taken by a dissatisfied party with the Architect's decision in order to stop the time limits of Clause 67/ Effect of the absence of decision of the Architect on the disputes referred to him.

" [On November 4, 1982, First Claimant, as Contractor addressed the following letter to the Architect]:

'Dear Sirs
Requests that an Extension of Time be Granted
We refer to our requests that extensions of time be granted for the completion of (...)
We have advised you that we do not accept your award relative to either of our requests. (...)
As a result of the above, we hereby give you notice that we dispute your adjudication of our requests that extensions of time be granted to us and in consequence, refer this dispute to you for settlement in accordance with Clause 67 of the Conditions of Contract.
We will be pleased to forward to you any further information you may require and without prejudice, meet with you to discuss this matter as advised in our letter dated 29 October 1982.'

It is common ground that the Architect ignored this letter and that the First Claimant did not take any step to refer these claims to extension of time to arbitration within 180 days of the dispatch of it. The First Claimant now argues :

(i) that there was in fact no dispute or differences within Clause 67 over these claims before the 4th of November

1982 and that the apparent reference to the Architect for a Clause 67 decision was premature;

(ii) since the Architect made no ruling on the matters referred to him, there was no decision under Clause 67 which became final and binding on the parties. On the proper construction of that clause, where the Architect gave no decision it remained open to the party seeking a ruling to refer the dispute a second (or even a third or a fourth) time to the Architect ;

(...)

C.2. ISSUE 5.3., EXCEPT IN SO FAR AS IT RELATES TO FACTS AND MATTERS ALLEGED IN VOLUME 7 :
'Is the Arbitral Tribunal without Jurisdiction to hear and determine any of the Claims to relief sought in the Request for Arbitration by reason of the alleged failure by the Claimants to comply with the requirements of Conditions 67 of the Conditions of Contract? If so, which of these claims are outside the jurisdiction of the Arbitral Tribunal?

Clause 67 of this Contract is basically a standard form condition for the settlement of disputes which has attracted a good deal of criticism. The only relevant authority cited to the Arbitrators was the decision of the Court of Appeal in Monmounthshire County Council -v- Costelloe & Kemple Limited (1965) 5 BLR 83, which concerned a similar condition in another form of contract. The Monmounthshire case does not, however, bear directly on any of the difficult points which have to be decided in this case. The ground on which that appeal succeeded was that there had not in fact been a reference to the Engineer for a decision under the dispute clause (Clause 66) at the material time. The Arbitrators, nevertheless, bear in mind the observations of Harman L.J. at p. 91 :

'This is a process by which the Defendants can be deprived of their general rights at law and therefore one must construe it with some strictness as having a forfeiting effect. It is not a penal clause, but it must be construed against the person putting it forward who is, after all, trying to shut out the ordinary citizen's right to go to the courts to have his grievances ventilated'.

The Arbitrators hold that, where the Employer or the Quantity Surveyor or the Contractor (as the case may be) is dissatisfied with the decision of the Architect under Clause 67, it is not necessary for the dissatisfied party to file a Request for Arbitration with the International Chamber of Commerce in order to stop the time limits of Clause 67 running. What is necessary is the communication to the Architect of a 'claim to arbitration' on the decision within 90 days of the Architect giving written notice of his decision. This appears from the third sentence of Clause 67(1). If the full panoply of a Request for Arbitration had been required, we think such a requirement would have been clearly stated. The Claimants have drawn attention to an article by I.N. Duncan Wallace Q.C., published in the International Construction Law Review in July 1985. To the extent that Mr. Wallace's arguments support the conclusion reached by the Arbitrators on this point, those arguments are respectfully adopted.

The next question arising on the proper construction of Clause 67 is more difficult. What is the intention of this Clause, where the Architect makes no decision on the disputes or differences referred to him? Is it open to the Contractor, the Quantity Surveyor or the Employer (as the case may be) to refer the matters in dispute back to the Architect on subsequent occasions or must the matters in dispute be the subject of a notice claiming arbitration, such notice being given within the second period of 90 days?
It was submitted that the purpose of the reference of disputes and differences to the Architect was to put a 'brake on the headlong rush to arbitration' and to give the Architect power to 'settle' the matters in dispute in the sense of putting forward a conciliation. The Arbitrators do not read the word 'settled' in the first sentence in that sense : the word has to be construed in its ordinary meaning, the dictionary definition of the word 'settle' does not include 'conciliation'. Furthermore, they think that the function of Clause 67(1) is to provide machinery for the resolution of disputes. It seems to them that a construction which leads to the conclusion that the Clause, when operated, could leave some disputes resolved and others unresolved is unlikely to represent the reasonable intention of the parties.

The fourth sentence of the Clause reads as follows :

'If the Architect shall fail to give notice of his decision as aforesaid, within a period of ninety days after being requested as aforesaid, or if the Employer or the Quantity Surveyor or the Contractor be dissatisfied with any such decision, then and in any such case the Employer or [or] the Quantity Surveyor or the Contractor may within ninety days after receiving notice of such decision or within ninety days after the expiration of the first named period of ninety days, as the case may be, require that the matter or matters in dispute be referred to arbitration as hereinafter provided.'

This part of the Clause treats the two possible situations - that is (a) no decision or (b) a decision with which a party is dissatisfied - alike. It was argued that the words '... may ... require ...' were permissive in case (a).

The Arbitrators do not accept that is the proper construction of those words as used in that sentence. The words are permissive only in the sense that a party to a dispute may choose not to exercise the right to arbitrate. Clearly there will be cases where a party is dissatisfied but is, nevertheless, unwilling to incur the cost and run the risks of an arbitration. In the Arbitrators' opinion, in both situations (a) and (b), a party who wishes to take 'matters in dispute' beyond the reference to the Architect must give notice of arbitration within the stipulated time limits. This opinion is reinforced by the appearance of the words 'if any' in the opening phrase of the fifth sentence of Clause 67(1).

The language used by the First Claimant in his letter of 4th November 1982 is consistent only with there being a dispute within the meaning of Clause 67 prior to the date of the letter. To the extent (if any) that the door remained open in respect

of the awards of extensions of time previously made by the Architect, the Arbitrators consider that the letter itself shut it. No notice of arbitration was given within 180 days of 4th November 1982 and, subject to the contention that the Defendant is 'precluded' from relying on the First Claimant's failure to comply with Clause 67, the Arbitral Tribunal has no jurisdiction to consider the First Claimant's entitlement to extensions of time on the grounds put forward in the documents referred to in the letter of 4th November 1982. "

Second Partial Award N° 5634 (1988)
Original : English

F.I.D.I.C. Conditions Third Edition/ Dispute between Contractor and Employer/ Clause 67/ Conditions for the Communication of a claim to arbitrate to the architect/ Clause 68.

"ISSUE 1.1. - JURISDICTION OF THE ARBITRAL TRIBUNAL IN RESPECT OF CLAIM VOLUME 7 :

(...)

'Is the Arbitral Tribunal without jurisdiction to hear and determine any of the claims to relief sought in the request for Arbitration by reason of the alleged failure by the Claimants to comply with the requirements of Condition 67 of the Conditions of Contract ? If so, which of these claims are outside the jurisdiction of the Arbitral Tribunal?'
The question in this Issue is : Does the Arbitral Tribunal have jurisdiction to hear and determine the disputes and differences arising out of the Claimant's Claim Volume 7 on its merits. By Claim Volume 7, the Claimant seeks financial relief and/or extensions of time arising out of events and their consequences which were alleged to have occurred between the beginning of August and 31st December, 1984.

CHRONOLOGY OF EVENTS :

This Volume was first submitted by the Claimant to the Architect on 18th April, 1986. By letter dated the 27th of August, 1986, the Architect granted an extension of time of 14 days for the delays alleged in Volume 7. He did not deal in that letter with the other matters raised. On 23rd September, 1986, the Claimant referred a dispute over the Volume No. 7 matter to the Architect under Clause 67. On 26th September, 1986, the Architect wrote to the Claimant :

'Dear Sirs,
Claim Volume 7.
I confirm receipt of your letter of 23rd September, 1986, recording that you dispute my determination of an extension of time related to your Claim Volume 7. I now confirm this decision under Clause 67 of the Contract.'

By the time of these exchanges, this reference was already well under way. The Claimant had given a notice of arbitration and the Request for Arbitration was filed on 9th May, 1986. The Defence and Counterclaim was submitted on 16th July, 1986 and by 26th September, the Chairman of this Arbitral Tribunal had been appointed. It is thus obvious that the dispute over the Volume 7 claims arose after the reference to arbitration and the appointment of the Tribunal. Accordingly, the Tribunal would not in any event have had jurisdiction over the "Volume 7 disputes" in the absence of the consent of both parties. Without such consent, the Claimant would have had to make a further reference to arbitration and file a further Request for Arbitration. That course of action had very little appeal since it certainly risked delay and could have lead to the unsatisfactory position where the Tribunal deciding the "Volume 7 dispute" was differently constituted from that appointed to decide the claims referred to arbitration earlier.

At the Hearing leading to the drawing up of the Terms of Reference, the Defendant very sensibly agreed to submit "the Volume 7 dispute" to the jurisdiction of the Arbitrators provided that they were not thereby deprived of an accrued Clause 67 defence. The Tribunal accepted jurisdiction subject to that proviso.

SUBMISSIONS OF THE PARTIES :

The Claimant contends that a claim to arbitration against the Architect's Clause 67 decision of 26th September 1986 was communicated to the Architect within the 90 day period limited by that clause and particularly by virtue of a letter dated 3rd November, 1986. Alternatively they say that the Defendant had by its Solicitors, before the Terms of Reference Hearing, agreed to submit the "Volume 7 dispute" to the jurisdiction of the Arbitral Tribunal without qualification. In support of the latter contention, the Claimant relied on a telephone conversation between Solicitors on 12th December, 1986 and a telex from the Defendant's Solicitors dated 23rd December, 1986.

The Defendant answers those arguments in this way. The Defendant accepts that the letter of 3rd November, 1986, found its way to the Architect within the 90 day period but say that since that letter was not sent on behalf of the Claimant to the Architect there is no communication of a claim to arbitration to the Architect within Clause 67. As Mr. X on behalf of the Defendant very clearly put it, a "windfall communication" is not good enough. On the second point, objection is taken to the admissibility of a contemporary note of the telephone conversation of 12th December, 1986, on the ground that the conversation was expected by the Defendant's Solicitors to be a "without prejudice" conversation. But whether or not that conversation and the note which is a record of it are admissible, Mr. X argued that the sole subject-matter of any agreement was to extend time for a challenge to the Clause 67 decision by 21 days.

The letter of 3rd November, 1986, was signed by ..., Solicitor for the Claimant, and addressed to ..., Solicitors for the Defendant. The text reads :

'As you are no doubt aware, a dispute has arisen on this project regarding the extension of time to which the Claimants are entitled in respect of the matter set out in their Claim Volume N° 7; of the eleven weeks' extension of time requested in respect of the period from 1st August, 1984 to 31st December 1984, the Architect granted my clients a 14 day extension of time. My clients were dissatisfied with that extension and accordingly requested a formal decision under Clause 67 of the Contract. On 26th September, the Architect confirmed his decision under Clause 67.

My clients wish to pursue this dispute in arbitration and it would seem both acceptable and economic if that dispute were dealt with in the existing arbitration proceedings between our respective clients. I would therefore ask you to take instructions on whether your clients are prepared to consent to the dispute in respect of volume 7 being heard in the current proceedings without the necessity of my commencing separate arbitration proceedings with the I.C.C.

You will appreciate that if your consent is not forthcoming, an application would have to be made through the I.C.C. within ninety days of the Architect's decision. I would be grateful therefore if you would let me have your clients views on my proposal within the next 21 days.'

THE TRIBUNAL'S FINDINGS

In the First Partial Award, the Arbitral Tribunal held that it was not necessary for a party to file a Request for Arbitration with the I.C.C. to stop the limit bar in Clause 67 from running; what mattered was the communication of a claim to arbitration to the Architect. In the Arbitrator's judgment, the letter of 3rd November, 1986 is clear enough to amount to a claim to arbitrate the decision of 26th September, 1986. Indeed, the contrary was not argued.

The letter addressed to Solicitors for the Defendant, appeared to have been, as one would expect, sent by that firm to their clients, the Defendant. The evidence showed that ..., the Resident Architect to whom all the powers of the Architect had been delegated, received a copy of the letter, at the address stipulated by Clause 68 of the Conditions of Contract, within the 90 day period from the Defendant. The Arbitrators have already set out, both in the First Partial Award and again in this Award, the principles which they hold should be applied to the construction of Clause 67. Although in practice, the communication of the claim to arbitration to the Architect will almost invariably be made by the party challenging a Clause 67 decision, it is not an express requirement of the clause that it should be so and, consistently with such principles, the Arbitrators would not (unless constrained by authority to do so) imply any such requirement.

Mr. X cited the decision of the Court of Appeal in Getreide - Import - Gesellschaft G.m.b.H. -v- Contimar S.A. (1953) 1 Lloyds Rep. 572. He did so by way of example and not as authority for a proposition of substantive law that in a situation like the present a "windfall communication" is never enough. The contract before the Court in that case provided for an appeal from an award in the following terms :

'Appeal - In case any party to an award shall be dissatisfied with the award a right of appeal shall lie to the Committee of Appeal..... provided the following conditions are complied with :

(...)

(b) Notice claiming appeal is given to the Secretary of the Association within fourteen consecutive days from date of the award ...
(c) Within the said fourteen consecutive days, notice that the appeal has been claimed is given by appellant direct to his seller or buyer, as the case may be.'

The award published on 30th July, 1952, found that the sellers, Contimar, were in default. On 11th August, the London agents for Contimar wrote to the Secretary of the Association claiming an appeal. Next day, Contimar wrote, as they thought, to the buyers. By mistake, this letter was sent to the wrong address and, by the time the error was discovered, time had run out. Contimar were driven back to arguing that a letter written by the Secretary of the Association of the buyers on the 12th August, indicating or passing on information about the seller's appeal was written by him as agent for the buyers so that paragraph (c) above was satisfied. This argument was rejected on the grounds that there was no such agency : see per Singleton L.J. at p. 579. Jenkins L.J. p. 583, Morris L.J. at 585.

In the Arbitrators' opinion, the point of distinction between the present case and the decision in Contimar lies in the requirement in that case that notice of appeal be given direct. There is no similar requirement in the instant contract and, for reasons given, it would be wrong to imply one. The Arbitrators are therefore satisfied that the Architect was aware of and had communicated to him a claim to arbitrate his decision of the 26th of September, 1986, in time.

For these reasons, the Arbitral Tribunal holds that it has jurisdiction to entertain the "Volume 7 disputes" and decides this issue in favour of the Claimant. It is therefore unnecessary to decide the second point raised by the Claimant and the Arbitrators do not do so. "

Final Award in Case 5634 (1989)
Original: English

F.I.D.I.C. Conditions, Third Edition/ Dispute between Contractor and Employer/ Clause 52(1) and 52(2): can a Claimant recover global sums for delay and disruption losses caused by an instruction for a variation under Clause 52(2) ?/ Does Clause 52(5) oblige the Contractor to give the Architect's Representative particulars of claims to damages

for breach of contract?/ Should a claim to damages be valued and certified under Clause 60(5)?/Does failure by a Claimant to comply with the requirements of Clauses 6, 44 and 52 as to notices mean that the Arbitrators should reject an otherwise valid claim?

" 5.4. Question (c) - Clause 52 (2) of the Conditions of Contract

'Can the Claimant recover global sums for time-related losses or for disruption caused by an instruction for a variation under Clause 52(2) of the Conditions of Contract?'

Clause 52(1) requires 'all extra or additional work done or work omitted by order of the Architect' to be valued at the rates or prices set out in the Contract if applicable. The rate or prices here referred to may include rates or prices for on site overheads or preliminaries so that, in a case where a Clause 51 instruction causes delay, the Contract rates for preliminaries as well as the Contract rate for the additional work are applied to value the variation.

However, the first sentence of Clause 52(1) clearly does not entitle the Contractor to claim the loss and expense caused by extra or additional work without any regard to the rates or prices included in the Contract. The insistence of Clause 52(1) on the valuation of the nature and effect of variations by adjusting rates or fixing new rates is also emphasized by the second sentence.

An instruction requiring a variation may cause delay or disruption to other parts of the Works. If so, Clause 52(2) provides a remedy, but, in the opinion of the Arbitrators, this remedy is only by way of revised or substituted rates or prices. A 'suitable rate or price' which, if the circumstances of the variation make the Contract rate or price 'unreasonable or inapplicable', is to be agreed, must be a suitable rate or price for an item or items in the Bills of Quantities. It is essential that a comparison be undertaken between a rate or a price which has become unreasonable with one which is now, in the circumstance, suitable.

Claimant submits :

"11. There is no suggestion anywhere in the contractual phraseology that these valuation exercises are to be in any way necessarily related to the proof by the Claimant that it has itself incurred specific expenditure or loss. Accordingly, once the contractual entitlement has been properly established, the Claimant is entitled to recover the sums in question."

This submission ignores the fact that to properly establish a contractual entitlement it is first necessary to establish which existing contract rates or prices were unreasonable or inapplicable. Nevertheless the Arbitrators accept that valuation exercises, under Clause 52, are not necessarily related to specific expenditure or loss. However that is the way the Claimant has presented its claims both to the Architect and in this Arbitration.

Later, in relation to damages claimed, the Claimant relies on the decision of Donaldson J (now the Master of the Rolls) in J. Crosby & Sons Ltd v Portland UDC. In 5 BLR 121 on page 136 Donaldson J. said:

"... I can see no reason why he (the Arbitrator) should not recognize the realities of the situation and make individual awards in respect of those parts of individual items of claim which can be dealt with in isolation and a supplementary award in respect of the remainder of these claims as a composite whole..."

With respect to the Claimant's delay claims, it has made no attempt to distinguish between the additional costs it has incurred due to late instructions (Clause 6(4) claims), and what might be suitable rates or prices under Clause 52(1) or what rates and prices might be unreasonable or inapplicable under Clause 52(2). The decision in Crosby clearly requires arbitrators to first make individual awards under the appropriate Clauses of the Contract and then, and only then, to contemplate making a composite award in respect of the remainder of the claims. The Arbitrators are accordingly unable to accept the submission that they should fix a suitable rate or price to reimburse the Claimant its losses and expenses under the provisions of Clause 52.
Although this point is a matter of pure construction, Counsel for the Claimant appeared to support his argument by reference to what he inferred was the usual practice. He said that Clauses 51 and 52 had been "around for a very long time" and that it would be "an odd state of affairs" if provision had not been made for the consequences of delay. The answer to the latter point is that Clause 52(2) is such a provision. There is no evidence of a usual practice and the Arbitral Tribunal does not, with respect, agree that it is usual for contractors to seek the recovery of delay and disruption losses, caused by a variation under Clause 51 of this form of contract, in the way in which the Claimant has done in this reference.

5.5. Question (d) - Clause 52(5) of the Conditions of Contract

'Does Clause 52(5) of the Conditions of Contract, on its proper construction, oblige the Contractor to give the Architect's Representative and the Quantity Surveyor's Representative particulars of claims to damages for breach of contract, and, if so, should a claim to damages be valued and certified under Clause 60(5)?'

It is necessary to explain the background to this question. As indicated above, the fact that the Defendant was not able to give the Claimant possession of the XXX part of the site caused delay and additional costs. An extension of time was granted for this and a sum for additional costs was certified and paid. Item G of the Claimant's Submissions was a claim entitled "Deletion of the XXX Part". It is not entirely clear from the text of that submission what relief is there being asked for.
(...)

Recognizing (we suspect not for the first time) the difficulties caused by the way in which the Claims Volumes and, hence, the disputes referred to arbitration have been formulated, Mr B, on behalf of the Claimant, accepted that he could not ask for a review of the extension of time granted since XXX Part is not one of the heads of claim in either the claims volumes (...). But he also ably and ingeniously contended that the Claimant had received only 'partial reimbursement' for the extension of time granted by the Architect, and that the Arbitrators had jurisdiction to review this level of reimbursement and to award a 'balance' which the Claimant was looking for. It is this contention that promotes question (d) above.
Broken down into constitutent steps, the contention is as follows:

(i) Claims Volume No. 1 reads: "The Contractor hereby request the Arbitral Tribunal to determine a full Extension of Time to cover the period of the balance of the delay between 109 weeks and 82 days as detailed in Volumes 1-8 and to certify the reimbursement of all loss and expense associated with the total delay." This, it is said, gives jurisdiction to the Tribunal to review the sums certified and paid for the delay caused (inter alia) by the failure of the Defendant to give possession of XXX Part.

(ii) Clause 52(5) of the Conditions should be read with Clause 60. On the proper construction of these Clauses, the Contract contemplated that any claim, including a claim for damages for breach of contract, was to be 'the subject of certification under Clause 60': to that extent, Clause 52(5) was substantive and not merely procedural because it linked a claim for damages to the machinery for certification and ultimately to the Arbitrators' powers of review.

It was, rightly, common ground that Clause 52(5) does not itself give any right of action. The text of that subclause is as follows:

"The Contractor shall send to the Architect's Representative and to the Quantity Surveyor's Representative once in every month an account giving particulars, as full and detailed as possible, of all claims for any additional payment to which the Contractor may consider himself entitled and of all extra and additional work ordered by the Architect which he has executed during the preceding month.

No final or interim claim for payment for any such work or expense will be considered which has not been included in such particulars. Provided always that the Architect shall be entitled to authorize payment to be made for any such work and expense, notwithstanding the Contractor's failure to comply with this condition, if the Contractor has, at the earliest practicable opportunity, notified the Architect in writing that he intends to make a claim for such work."

The words in the first sentence 'all claims for any additional payment to which the Contractor may consider himself entitled...' are, certainly, wide and, taken by themselves and disjunctively from the rest of the first sentence, may be wide enough to include a claim for breach. But the Arbitrators do not read this sentence in that way. They consider that the second and third sentences must qualify the whole of the first and not just part of it: and that the language of the latter two sentences is inconsistent with a claim for damages being within the scope of Clause 52(5).

Nevertheless, Counsel for Claimant was plainly correct in submitting that the Contract must be read as a whole and Clause 52(5) read with other provisions, particularly with Clause 60. After all, Clause 52(5) is concerned with monthly claims and interim payments authorized by the Architect, i.e. certified. But the Arbitrators hold that Clause 60 does not support Counsel for Claimant. On the contrary, on its proper construction, it is against his submission.

The certificate to be issued by the Architect under Clause 60(5)(a) is based on, although it need not precisely reflect, the Quantity Surveyor's valuation. That valuation is, in turn, based on (although, again, it will not necessarily echo) the Contractor's Monthly Statement provided under Clause 60(2). That sub-clause legislates very meticulously for the contents of the Monthly Statement. There is no reference in Clause 60(2) to claims for damages nor is there any such reference in the proforma Monthly Statement to be found at Schedule 5 to the Conditions and to which Clause 60(2) expressly refers.

Paragraph (b) of Clause 60(2) requires the Monthly Statement to set out:
"Any amounts to which the Contractor considers himself entitled in connection with all other matters for which provision is made under the Contract including any Temporary Works or Constructional Plant for which separate amounts are included in the Bills of Quantities."

In the Arbitrators' opinion, a claim for damages for breach cannot properly be said to be a matter 'for which provisions is made under the Contract' (our emphasis). Quite apart from the general context of this paragraph, there is a significant contrast between the words 'under the contract' and the wider languages used in the opening sentence of Clause 67. No other paragraph comes anywhere near embracing claims for damages for breach.

It was argued that 'the architect under this contract is in the business of evaluating all claims which the contractor may put forward', including damages. For the reasons given above, the Arbitrators do not accept this. In addition, Clause 60(5) which we have already set out is inconsistent with the argument.

(...)

5.7. Question (f) - Notices

'Does a failure by the Claimant to comply with the requirements of Clauses 6, 44 and 52 as to notices mean that the Arbitrators should reject an otherwise valid claim?'

The question is prompted by the Defendant's final submissions. (...) These arguments could and should have been advanced clearly at an earlier stage in the proceedings. If we had reached a conclusion that a substantial claim for recovery or an extension of time failed purely on the ground of want of a timely notice, we would have considered inviting further arguments from both parties. For the reasons which follow in the succeeding sections of this Award, the Arbitral Tribunal has not faced such a difficulty.

On Clause 6, the Defendant says that the parties have agreed an express code for the issue of 'further' drawings, directions, instructions and approvals and, accordingly, no obligation about the timely provision of design information can be implied. It is submitted that a notice complying with the requirements of Clause 6(3) is a condition precedent to any entitlement to recover costs or any extension of time for any delay or disruption caused by the late issue of drawings. In general, the Arbitrators accept both these arguments. But they also hold that on particular facts there may be an exception. The exceptional case would arise where the contractor did not, and had no reason to, anticipate that further necessary design information would be issued. The exception would be, indeed, rare since no variation is involved, but the Arbitrators consider that it is certainly possible.

As to Clause 44, the Defendant submits that the service of a document, giving full and detailed particulars of any extension of time to which the contractor considers himself to be entitled, in order that the claim may be investigated at the time is a condition precedent to any such entitlement.

We emphasize the word 'entitlement', because the Defendant goes on to indicate acceptance of the proposition that, in the absence of such full and detailed particulars, the Architect has a discretion to 'take matters into account'. Again, the Arbitrators accept these submissions. The matter does not end there because the Defendant, while implicitly accepting that the Tribunal has power (as, in our view, it undoubtedly does) to review and revise the exercise of this discretion by the Architect, submits that, having regard to the limitations of the Claimant's discovery, the Tribunal should be cautious in the exercise of that power. On this, it is, we think, necessary only to say that we have had this point well in mind in considering the evidence now adduced in support of the claims to extensions of time.

On Clause 52 which deals with both valuation of variations and with claims, the Defendant contends that compliance with the notice requirement in Clause 52(2) is a condition precedent to the fixing of an increased rate or price. The clause provides that a notice shall have been given in writing as soon after the date of the 'order' as is practicable and, in the case of extra or additional work, before the commencement of work or as soon thereafter as is practicable.

In respect of Clause 52(5), the Defendant contends that the provisions are such that neither final nor interim payment for a claim ought to be considered if particulars as full and detailed as possible have not been provided and that those particulars form a condition precedent to payment at any time. However, as in the case of Clause 44, the Defendant accepts that the Architect is once again given discretion to take matters into account.

Having regard to the Arbitrators' reasoning and their answer to the question formulated in Paragraphs 5.4 and 5.5 of this Award, the notice provisions in Clause 52 assume less importance. Generally, however, the Arbitrators accept these submissions. However, while recognizing that the language of Clause 52(5) is somewhat different (particularly that, here, a failure to comply with the Notice requirement affects the Contractor's right to final as well as interim payment) to the language of its equivalent provision in the contract before the Court of Appeal in Tersons Ltd. -v- Stevenage Development Corporation [1965] 1QB 37, the Arbitrators, where necessary, are guided by that decision when applying the principles. Furthermore, in any exercise of their power under Clause 67 of the Conditions to review the Architect's discretion, the Arbitrators will weigh the points made by this Defendant.

It follows that the question posed in paragraph 5.7 (f) of this Award cannot be answered "yes" or "no" but it is considered that sufficient has now been said to indicate the approach which the Arbitrators intend to take to the submissions based on want of notice in the determination of individual claims."

Interim Award in Case N° 6216
Original : English

F.I.D.I.C. Conditions, Third Edition/ Jurisdiction of the Arbitrators/ Clause 67/ Failure of the Engineer to decide within ninety days/ Time limits for commencement of an arbitration.

" FACTS

Whatever the state of agreement between the parties immediately prior to the events with which we have to deal, it is accepted by both parties that their relationship was governed by a contract which incorporated Clause 67 of the General Conditions of Contract (International) for the Works of Civil Engineering Construction published by the Federation Internationale des Ingenieurs Conseils (FIDIC), 3rd Edition, March 1977.

(...)

On 19 February 1988 the Claimant, being dissatisfied with not having received payments which they claimed to have been due to them, gave notice under Clause 69 of the Contract.

On 7 March 1988 the Claimant wrote to Defendant terminating the Contract.

On 9 March 1988 both the Claimant and the Defendant requested the decision of the Engineer under Clause 67 of the Contract Conditions on the dispute which had arisen regarding the validity of the Claimant's action under Clause 69 of the Contract Conditions.

(...)

On 18 April 1988 X submitted a request for arbitration on behalf of the Claimant to the ICC Court of Arbitration, a copy of which was sent to the Defendant and received on 29 April 1988.
On 10 May 1988 the Engineer wrote to the Defendant (but not to the Claimant) expressing the opinion that the termination of the Contract was invalid.

On 11 May 1988 the Defendant wrote to the Secretariat of the ICC Court of Arbitration pointing out that the reference to arbitration by the Claimant was "well before the deadline for the Engineer's decision, which has not yet been given, is premature and contrary to the procedure agreed by the parties to the settlement of disputes with reference to arbitration."

On 4 June 1988 the Engineer wrote to the Claimant and sent a copy of the letter to the Defendant stating

'VALIDITY OF TERMINATION BY CONTRACTOR
Further to your request, we have reviewed the documentation available to us and have reached the opinion that your termination of the contract under Clause 69(1)(a) is not acceptable in the letter and intent of the Clause.'
According to the Claimant this letter was not received until about 15 June 1988. (There is a dispute as to whether the Claimant obstructed its delivery by hand so that it had to be sent by post: we are not concerned to decide this dispute, for reasons which will appear.)
The Defendant delivered its Answer to the request for arbitration dated 21 July 1988 in which it did not take any further objection to the jurisdiction of the arbitrator.

The Parties' Arguments.

As may be seen from the Terms of Reference the claims and counterclaims in these proceedings arise out of events leading up to the departure (to use a neutral term) of the Claimant from the site in March 1988 and subsequently. The parties have presented many arguments to us on the issues relating to jurisdiction but essentially they concern the interpretation of Clause 67 of the Conditions and its application to the facts of this case.

The Claimant contends that the requirements of Clause 67 have been met or have been varied either by agreement of the parties, or by estoppel or by waiver or that bias, impracticability or renunciation excuse them from complete compliance with the requirements of the Clause. In particular the Claimant has argued that the time limits in Clause 67 do not necessarily apply to the commencement of the arbitration which might be properly commenced before the expiry of the time limits without prejudicing the position of the party seeking arbitration; and the Engineer's letter of 4 June 1988 was not a decision, merely an expression of opinion.

The Defendant contends that the reference to arbitration was premature and its invalidity cannot be overcome by the subsequent actions of the Claimant; that the requirements of Clause 67 had not been varied; that there has been not estoppel or waiver; that there was no bias or impracticability or renunciation and that even if there was any one of these they would not affect the invalidity of the Claimant's actions. The arguments of both parties were extensive and referred to many documents and prior authorities. For reasons which will shortly become apparent it is not necessary for us to do more than summarise the position of each of the parties since their submissions make it clear that the primary question which we have to answer is whether the requirements of Clause 67 of the Contract Conditions were met so as to enable us to have jurisdiction in this case.

At this stage in the arbitration we express no opinion about the substance of the parties' claims and counterclaims and in particular about the actions of the parties prior to 9 March 1988 when the dispute was referred to the Engineer for his decision.

DISCUSSION

Although a contract may incorporate a standard form it is always necessary to consider the whole of each contract and not simply to interpret a standard clause in the manner in which it may have been interpreted in other contracts. That said, however, we see no reason in this case to give to Clause 67 of the General Conditions of Contracts a meaning other than that which it usually bears. Clause 67 requires certain steps to be taken or conditions to be satisfied before an arbitral tribunal has jurisdiction :

(i) There must be dispute or difference.

(ii) It must be referred to the Engineer for settlement.

(iii)The Engineer is obliged, within 90 days after being requested to do so, to give written notice of his decision to both the employer and the contractor.

(iv) If the Engineer gives a decision within that period then a party dissatisfied with the decision must require that the matter or matters in dispute be referred to arbitration and the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

(v) If the Engineer shall have failed to have given a decision within the 90 day period then a party dissatisfied with that

failure must similarly require arbitration in accordance with the ICC Rules within the period of 90 days from the latest stage when the Engineer ought to have given his decision.

If arbitration is not requested then the decision of the Engineer becomes final and binding. (It is not clear what the position would be if the Engineer had merely failed to give a decision in respect of a dispute about some matter which was not in itself final and binding on either party - but that does not require to be decided in this case.)

Both parties accept that there was a dispute or difference and that it was referred to the Engineer for decision. We do not therefore have to consider whether points (i) and (ii) above were met.
We conclude that, having regard to the clear reference to the Engineer for a decision, the letters of 9 March 1988 requested the Engineer to reach a decision within ninety days.

We equally conclude that the Engineer did reach a decision by his letter of 4 June 1988 even though it was expressed in terms of an "opinion". The letter was written to answer the letters of 9 March 1988 and, in those circumstances, we consider that it should only be read as a decision. The prior letter of 10 May 1988 was not notified to the Claimant and could not therefore have been a decision. (It is not necessary for us to reach a conclusion about the propriety of the Engineer communicating only with one party at a time when his decision was being sought under Clause 67.)

However that decision was not notified to both parties before the expiry of the 90-day period so that there was in effect a "failure to decide".

If we were wrong in our conclusion that the letter of 4 June 1988 was a decision, there would still have been a failure to decide by the Engineer within the 90 days from 9 March 1988 since there was no other letter which was a decision.

The Claimant's request for arbitration of 18 April 1988 was clearly premature and was ineffective to comply with the requirements of Clause 67. That Clause is intended to lead to the settlement of disputes (in echoing the words of the title and side-note we do so as a matter of convenience as we bear fully in mind that Clause 1(3) states that the headings and marginal notes 'shall not... be taken into consideration in the interpretation or construction (of the Conditions of Contract) or of the Contract'). It is quite clear from the structure and intent of Clause 67 that if Engineer reached a decision with which neither party was dissatisfied or with which no dissatisfaction was expressed within the requisite period that decision would then settle the dispute finally and be binding on both parties. That is an object which is a desirable one and which should not be pre-empted by a premature request for arbitration.

Nevertheless we conclude that Claimant's Counsel observations of 13 June 1988, read with the earlier request for arbitration, were intended to overcome and meet the objection which had been raised by the Defendant to the earlier request for arbitration being premature. At that stage the Defendant had not delivered its Answer to the request for arbitration.

In the circumstances of this case, we have no doubt that the two documents constitute the request for arbitration since the Claimant was, by 13 June 1988, quite clearly dissatisfied with what appeared to have been a failure to decide the dispute.

It is not therefore necessary to consider any of other arguments advanced by either party as these are now irrelevant. However we add that if the Claimant had prevented delivery of the Engineer's letter of 4 June 1988 within the 90-day period that action, although culpable, would clearly not have led to the decision being accepted as satisfactory within the next 90-day period.

We are therefore firmly of the opinion that the requirements of Clause 67 have been complied with by the Claimant; that the dispute, which on the subject of the letters of 9 March 1988, was both referred to the Engineer for decision and was effectively referred to arbitration on 13 June 1988 and that we have therefore jurisdiction to hear and determine both the Claimant's claims in this arbitration and the Defendant's claims by way of defence and counterclaim. "

Final Award in Case N° 6230 (1990)
Original : English

F.I.D.I.C. Conditions, Second Edition/ Dispute between a Subcontractor and the Main Contractor/ Application by analogy of Clause 67 to a subcontract/ / Engineer appointed in main contract but not in subcontract/ Non resort to the Engineer as provided in Clause 67 prior to instituting arbitral proceedings is not a basis for asserting the arbitral tribunal's lack of jurisdiction.

" The subject matter of this arbitration is a dispute on the payment for civil works performed by the Claimant under a Subcontract.

(...)

By a Main Contract, dated Apr. 18, 1977, the Respondent as Main Contractor agreed with the Government of X as Owner to carry out and complete certain construction works (off-shore pipe work) for the above-mentioned project... . The main Contract incorporated the FIDIC Conditions of Contract (International) for Electrical and Mechanical Works (1st ed. May 1963; reprint 1975) and, for particular matters of civil works not covered therein, the FIDIC Conditions of Contract (International) for Works of Civil Engineering Constructions (2d ed. July 1969; reprint 1973).

The Owner nominated E to act as Engineer under the Main Contract.

Following acceptance of a tender submitted by the Claimant on May 2, 1977, the Claimant and the Respondent entered into a Subcontract Agreement... . This Subcontract comprised the following documents:

-- the Subcontract agreement;
-- (...)
-- the FIDIC Conditions of Contract, Parts I and II (Civil Works), concluded between the Respondent and the Government of X, as far as applicable to the scope of the supply; ...

With respect to the Subcontract, no additional Engineer was nominated by the Respondent.
(...)

REASONS FOR THE AWARD:

The Arbitral Tribunal has full jurisdiction over the Arbitral Complaint, including the matters covering the Claimant's claim for compensation for the preparation of drawings... .

In this regard the Respondent may not rely on the fact that the Claimant failed to resort to the Engineer pursuant to Clause 67 of the FIDIC. Specifically, this result is reached from the following considerations:

It is not disputed that the Respondent did not nominate an Engineer for the Claimant with regard to the subcontractor relationship existing between them. According to No. 1 (c) of Part I of the FIDIC General Conditions, it could have done so either by designating the Engineer in Part 2 or by informing the Claimant of an Engineer in some other manner with separate writing. Neither transpired in the relationship between the parties.

Clause 67 of the FIDIC is thus to be applied to the relationship between the parties in such a way as if the Respondent had not elected an Engineer for contractual dealings in the subcontractor relationship. In this context, it is also to be noted that pursuant to No. 2 (c) of the Subcontract, it was agreed that Clause 67 of the FIDIC was not to be applied literally but rather by analogy to the parties subcontractor relationship ('as far as applicable to this scope of supply'). Despite the Respondent's assertion to this effect, it also may not be assumed that E --the Engineer nominated for the relationship between the Owner X and the Respondent -- tacitly, automatically fulfilled the functions of an Engineer in the subcontractor relationship. This would not only have created a conflict of interest for E in its contractual relationship with the Owner X; it is also not compatible with the undisputed, practical treatment of rendering invoices and issuing certificates in the parties' subcontractor relationship. The constructions works performed by the Claimant were indeed directly certified (following approval by the Resident Engineer) not by E but rather by the Respondent's local site management. In addition, the correspondence between July 20, 1977 and Dec. 21, 1978 regarding the Claimant's claims for compensation was not conducted via E but rather directly between the parties themselves.

Thus, E (as Engineer in the main Contract relationship between X and the Respondent) was at no time an Engineer in the sense of Clause 67 of the FIDIC for the parties' subcontractor relationship.

The risk-shifting provision in No.9 of the Subcontract as well did not make E an Engineer in the parties' subcontractor relationship: No. 9 refers only to those risks and obligations of the Respondent entered into by it as Contractor vis-à-vis the Owner. These risks of the Respondent are to be viewed as having been assumed by the Subcontractor (Claimant). But in view of the actual practice of rendering invoices by the Claimant and the above-mentioned certification procedure, No.9 is not to be regarded as an `extension of the functions of the Engineer under the Main Contract relationship'. On the contrary, No. 9 must be interpreted in such a way that a contractual risk (in particular, with regard to outstanding payments) was to be passed on to the Subcontractor but not that the Engineer's contract between the Owner X and the Engineer E, which is to be viewed separately from the Main construction Contract, was to be extended to cover the Claimant.

The arbitral tribunal thus considers Clause 67 of the FIDIC Conditions as having become part of the parties' contractual relationship only with the limitation that the Respondent failed to nominate an engineer vis-à-vis the Claimant. For this reason, the procedure for resorting to the Engineer prior to instituting arbitral proceedings, along with the deadlines accompanying this, is of no significance for the relationship between the parties.
The Respondent is therefore unable to rely upon the non-resort to the Engineer E as a basis for asserting the Arbitral Tribunal's lack of jurisdiction with regard to the deduction of the compensation claim (...). "

Final Award in Case N° 6326 (1990)
Original: English

F.I.D.I.C. Conditions Third Edition/ Dispute between the Contractor and Employer/ Jurisdiction of the Arbitrators under Clause 67/ Bearing of Clauses 51, 52 and 93 on Clause 67.

" To ground the jurisdiction of the Arbitrators under Clause 67, to determine a dispute or difference, such dispute or difference must first be referred to the Architect for decision. On 20th April, 1988, the Claimants wrote to the Architect in these terms:

'(...)
In accordance with Clause 60(13), the Contractor submitted its Final account to QS, the Quantity Surveyor, on 9th. November, 1986. Additional information relating to certain of the Nominated Sub-Contractors was supplied a little later as it became available.

The Final Account consisted of the Contract Sum, the Variation Account and Claims for reimbursement to which the Contractor considered himself entitled; The Final Account includes the Claims as submitted and referred to Arbitration and which, accordingly, now fall to be dealt with quite separately from the `Contract Sum/Variation Account' (hereinafter for convenience called `the Final Account').

Throughout the period following submission of the Final Account until October, 1987, QS checked the Final Account and where they deemed it appropriate, negotiated certain elements of the Final Account with the Contractor.
During negotiations with the Quantity Surveyor, the Contractor reviewed the items and amounts claimed as Variations to the Works in the Final Account as originally submitted and following that review revised the items and amounts claimed and these figures are now incorporated in this Claim as summarised in Column `A' of Schedule `A', which is enclosed with this letter.
Following the review and negotiations, QS issued its Final Valuation to the Contractor on 28th. October, 1987. The Quantity Surveyor's value of variations to the Works are summarised in Column `B' of Schedule `A'. Item 1 of Column `B' represents the value of Variations agreed by the Quantity Surveyor and the Contractor.

By its letter ref. XXX dated 19th April 1988 to the Quantity Surveyor, the Contractor has disputed the Quantity Surveyor's Final valuation in respect of Variations included in item 2 of Column `B'. The Value of Variations in dispute between the Contractor and the Quantity Surveyor is summarised in Schedule `C', which is also enclosed in this letter.

The Quantity Surveyor has taken the view that he cannot issue the formal Bill of Valuations until Clause 93 approvals have been received for each Variation. This he has stated in his letter dated 28th. October, 1987.

The Architect and the Employer each received a copy of the Quantity Surveyor's proposed Final Valuation, but neither has taken any steps to provide such further approvals (if any) or as may be required to enable the Quantity Surveyor to proceed to issue the formal Bill of Valuations.

A dispute or difference has therefore arisen between the Contractor and the Employer and/or the Quantity Surveyor, in connection with the Contract. The said dispute or difference arises from the persistent failure to produce a proper Bill of Valuations which fully recognises the Contractor's entitlement to be paid the Contract Sums properly adjusted in respect of all Variations carried out during the course of the works on the instructions of the Architect (which said instructions were, or ought to have been, approved by the Employer).

We now refer the above dispute or difference, to the Architect for his decision in accordance with Clause 67. The Architect is requested to decide that a Bill of Valuations ought to have been issued in accordance with the figures summarised in Column `A' of Schedule `A' and to issue any and all certificates which may be necessary to facilitate payment of the outstanding balance by the Employer to the Contractor.(...)'

The first point taken on behalf of the Defendants is that there was not in fact a dispute about the Final Account or about payment of the Balance of the Contract revenues to the Contractor before 20th. April, 1988. It is contended that the only dispute capable of reference to the Architect in existence before 20th. April, 1988, was of more limited scope. The second point advanced on behalf of the Defendants comes to this: there cannot be a dispute over the so-called Final Account or the payment or discharge of any balance due to the Contractor unless or until the employer has given his approval for the purpose of Clause 93 of the Conditions of Contract or has improperly refused to give such approval.

To understand these arguments, it is necessary to refer to some of the provision in this Contract.

Clause 51 of the Conditions concerns variations to the Works. The material part of Clause 51(1) is in the following terms:

'1) The Architect shall, subject to the provision of clause 93 hereof, make any variation of the form, quality or quantity of the Works or any part thereof that may, in his opinion, be necessary and for that purpose or if for any other reason it shall, in his opinion be desirable, he shall have power to order the Contractor to do and the Contractor shall do any of the following:-...'

Clause 52 sets out the rules for the valuation of variations; The application of the rules stipulated in sub-clauses (1), (2) and (3) is, in each case, expressed to be 'subject to the provisions of Clause 93'.

(...)

... the Arbitrators are satisfied and find as a fact that there was indeed a dispute or difference about non-payment before 20th. April, 1988, that all parties appreciated that there was such a substantive dispute and had done so for a considerable period of time.

As a variant of the first point, the Defendants then argue that the only dispute referred to the Architect for a decision under Clause 67 was a dispute over the valuation of variations. The Arbitrators do not accept that submission. The letter of 20th. April, 1988, clearly seeks 'payment of the outstanding balance by the Employer to the Contractor'.

In answer to the first two of the questions put forward by the Defendants at paragraph 3.5 of their written submissions, the Arbitrators conclude that there was a dispute or difference over the alleged non-payment of the balance of the adjusted Contractor Sum and such dispute or difference was referred to the Architect. They are fortified in this conclusion by the fact that the Architect does not appear at the time to have expressed the view to anyone, least of all to the Contractor, that the letter of 2Oth. April, 1988, was premature.

(...)

The Defendants in their pleadings also denied that the Arbitral Tribunal could consider the merits of the Claimants' claims on the grounds that the provisions of Clause 93 of the Conditions of Contract has not been complied with. (...) This point was developed by Leading Counsel for the Defendants during his able and cogent argument on 31st. August 1990. We refer, in particular, to pages XX of the transcript of the proceedings on that day. One passage, at page 2 of the transcript is worth setting out.

'In particular, the question of the final account or the final certificate, we say, was not in issue for a variety of reasons, one is that it was not raised by the letter of the 19th. April. Second, because it couldn't have been in issue until the bill of valuations question had been cleared up. Again, see our submissions; And thirdly, the difficult question of the effect of Clause 93 and those approvals. And one has to ask the question, what is the effect of Clause 93 which is, on the face of it, a fairly simple [clause] but the effect it may have is far from simple in relation to disputes. And we say that on one view there couldn't be a dispute at all relating to variations until approvals under 93 B and C had been obtained unless the dispute is of a different kind, namely whether approvals under 93 should have been given. Now, that would be a difficult dispute to raise because Clause 93 apparently gives the Employer a complete discretion, [it] might be that it could be alleged that he had to act reasonably. One could formulate disputes of that sort. But of course that wasn't the dispute. What the Claimants did was to ignore Clause 93.'

In our opinion, Counsel -wholly innocently and understandably- mis-stated the position. The Claimants did not ignore Clause 93. As early as February 1987 -if that be early- the Claimants had rejected Mr. X's proposition that it was their obligation to secure and produce approvals for the purpose of Clause 93. Furthermore, the Claimants' letter of 20th. April, 1988, which requested the Architects' Clause 67 decision, read :

"The Quantity Surveyor has taken the view that he cannot issue the formal Bill of Valuations until Clause 93 approvals have been received for each variation; This he has stated in his letter dated 28th. October, 1987.

The Architect and the Employer each received a copy of the Quantity Surveyor's proposed Final Valuation, but neither has taken any steps to provide such further approvals (if any) or as may be required to enable the Quantity Surveyor to proceed to issue the formal Bill of Valuations."

The Claimants then proceeded to formulate the dispute. It seems to us that one element of the referred dispute was a failure by the Defendants, and their agents, to act reasonably in obtaining Clause 93 approvals.

Accordingly, we hold that there was, before 20th. April, 1988, both in law and in fact a dispute over the non-payment of the balance of the Contract revenues and that the dispute, with all its constituent parts was referred to the Architect for decision.

The next question is whether the Architect in fact decided the dispute referred to him.
On 1st. June, 1988, Mr Y wrote, not to the Claimants but to their principal subcontractors, Z, in the following terms:"

"Dear Sirs,
Final Account Dispute
We refer to your letter XXX dated the 20th April 1988.
(...)
In the Employer's letter you are informed that all decisions have been taken on the Final Account data sheets (Contracts Sum/Variation Account) and Clause 93b approval is given except where noted. We have no cause to amend the Quantity Surveyors valuations.
Please contact the Quantity Surveyor for further information."

(underlining is added)

Having argued that only a limited dispute could have been, and in fact was, referred to the Architect for a decision under Clause 67, the Defendants relied on the letter of 1st. June, 1988, as a Clause 67 decision on that limited dispute.

The Arbitrators were referred to the judgment of Harman L.J. in Monmouthshire C.C. v. Costelloe & Kemple 5 BLR 83 at p. 91 and to the decision of the Court of Appeal in Token Construction v. Charlton 1 BLR 48. The Token case concerned inter alia, the form of a default certificate, but the Arbitrators accept the submission of the Claimants that the decision is helpful by way of analogy. A Clause 67 decision has potentially crucial consequences. Whether a document is or is nor a Clause 67 decision must, in the Arbitrators' opinion, be determined on the basis of the document seeking the decision and the alleged decision alone. In the Arbitrators' opinion, it is essential that the language by which a Clause 67 decision is made be the clear, unambiguous and readily understandable expression of the discharge by the Architect of his Clause 67 functions.

In the Arbitrators' judgment, the letter dated 1st. June, 1988, does not come near to meeting these requirements. It is true,

as the Defendants' representatives were quick to point out, that the Claimants themselves in the Amended Request for Arbitration pleaded the letter of 1st. June 1988, as a Clause 67 decision, although subsequently in Points of Reply the Claimants made it clear that the primary case was that the letter was not such a decision. If this issue were a jury question, the Defendants' comment on paragraph XX of the Re-Re-Amended Request for Arbitration would, of course, have considerable force - but, it is not a jury question.

Even if, contrary to what we have found and held to be the case, the dispute referred to the Architect under Clause 67 had been limited to the value of certain variations, we would not have considered the Architect's letter of 1st. June, 1988, to be the clear and unambiguous expression of a Clause 67 decision. When consideration has to be given to the status of the letter of 1st. June as a potential Clause 67 decision, the fact that the letter was not addressed to the party by whom the dispute was referred is significant. Common sense alone dictates that. Furthermore, the Arbitrators accept the submission made by Mr K, leading Counsel for the Claimants, that on a true construction of Clause 67(1) and 68(1) of the Conditions, it is a contractual requirement that the Architect's written notice of his decision be served on the Contractor.

The Defendants seek to answer this point in paragraph 3.19 of their written submissions.

That paragraph reads:
"3.19. The Claimant now seeks to contend that the letter of 1st. June, 1988 was not addressed to the Claimant. This is irrelevant. The Architect is required to give written notice of his decision to the Claimant. By 30th. June 1988 Mr. B a director of the Claimant had seen the decision as he sent a copy to the Quantity Surveyor....

If the letter was sent inadvertently to Z not the Claimant C/o Z that does not matter. It need not be addressed to anyone. The requirement is for written notice to be given."

It seems to us, with respect, that this passage really begs the critical question, namely: whether the document is a decision at all.

Then, again, it is obvious that the principal purpose of the letter was to make available to the Claimants and their main subcontractor, Z, the advice tendered by the Architect to the Employer for the purpose of Clause 93. Furthermore, while it may not be a mandatory requirement of a decision that the document, in which it is expressed, refer to Clause 67, the Arbitrators consider that the text of the letter should make it clear that a decision is being made. In the Arbitrtors' view, this letter does not do this.

The Arbitrators have held that the disputes or differences referred to the architect for decision on 20th. April, 1988, were wider than contended for by the Defendants. On this basis, it is abundantly plain that the letter of 1st. June, is not a Clause 67 decision, since many of the matters referred to the Architect are nowhere addressed.

The Arbitrators conclude therefore that the Architect gave no decision on the disputes referred to him. The alternative arguments advanced in the written submissions, and at the hearing do not therefore arise. At paragraph 3.25 of the written submissions, the Defendants concede that if the letter of 1st. June, 1988, was not a Clause 67 decision, then 'the matter of the valuation of variations was referred to arbitration by the ICC within 90 days of the expiry of 90 days from 20th. April 1988'. This concession must necessarily apply to the wider dispute which we have held to have been referred to the Architect by the letter of 20th. April, 1988.

The Arbitrators for these reasons accept that they have jurisdiction over the Claimants' claims..."