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THE PRINCIPAL CHANGES IN THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES (CLAUSE 67)

The purpose of this article is to point out, and comment upon, the principal changes in Clause 67 ("Settlement of Disputes") of the F.I.D.I.C. Conditions of Contract for Works of Civil Engineering Construction (the "Conditions") effected by the fourth edition, published in September 1987. In an earlier article in this *Review*,[2] the author described in some detail the procedure for the settlement of disputes in Clause 67 of the third edition. That article described briefly the Conditions, disputes under the Conditions and, at greater length, the five-step procedure for dealing with them laid down in Clause 67 of that edition. Though much of that article remains relevant to the Clause in the fourth edition, the author will not repeat what was stated there but, instead, refers readers who may be interested in such background to that article.

I. THE CHANGES FROM THE THIRD EDITION

Under the fourth edition, much in Clause 67 remains the same. The mandatory reference of disputes to the decision of the Engineer as a condition to arbitration has been retained. The Rules of Arbitration of the International Chamber of Commerce (the "I.C.C.") remain the preferred, though no longer the exclusive, arbitration rules provided for by the Clause (see Section

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[2] Seppala, "The Pre-Arbitral Procedure for the Settlement of Disputes in the F.I.D.I.C. (Civil Engineering) Conditions of Contract" (1986) 3 I.C.L.R. 316 (hereinafter called "Pre-Arbitral Procedure"); *see also* Seppala, "Contractor's Claims under the F.I.D.I.C. International Civil Engineering Contract" (1986) 14 *International Business Lawyer* 179.

II.6 below). The arbitrator(s) continue to have the power to open up, review and revise any decision or other action of the Engineer.

However, there have been a number of changes in Clause 67 from the third edition. These concern principally: (1) .the manner of referring a dispute to the Engineer; (2) the time periods both for the Engineer to give a decision and for the parties to challenge one; (3) the limitation of the Engineer's (and arbitrator's(s')) freedom of decision where the Contractor has failed to observe the new procedure, established by the fourth edition, for the making of claims; (4) the manner of reserving the right to arbitrate; (5) the amicable settlement of disputes; (6) the option to use arbitration rules other than those of the I.C.C.; and (7) the scope of the arbitration clause.

Each of these changes will be discussed below under three sub-headings. Under the first, the relevant provision of the third edition is summarised; under the second, the change made by the fourth edition is described; and under the third, the change is commented upon briefly.

II. DISCUSSION OF THE CHANGES FROM THE THIRD EDITION

1. The manner of referring a dispute to the Engineer

(i) *Third edition*

This edition simply stated that if a "dispute or difference"[3] shall arise: "it shall, in the first place, be referred to and settled by the Engineer . . .".

(ii) *Fourth edition*

The new edition states that the "matter in dispute" "shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause."

(iii) *Comment*

As the third edition did not state that the reference had to be in writing, or that it had to mention Clause 67 or be sent to the other party, a party could in theory invoke the clause without the other, or the Engineer, being aware of this fact. Thus, it was once argued, based upon the similar wording of Clause

[3] The third edition referred to a "dispute or difference" between "the Employer and the Contractor *or the Engineer and the Contractor*" (emphasis added) whereas the fourth edition refers to a "dispute" between the "Employer and the Contractor". As the reference in the third edition to a dispute with the Engineer was to the Engineer as agent for the Employer (see the author's Pre-Arbitral Procedure *op. cit.* note 2, 322), the fourth edition effects no change in this respect. Similarly the reference to "dispute" (fourth edition) instead of "dispute or difference" (third edition) effects no substantive change (see the author's Pre-arbitral Procedure, *op. cit.* note 2, 320 note 24).

66 of the English I.C.E. Conditions, that a letter to the Engineer merely enclosing claims was, in fact, a reference to the Engineer under that Clause.[4] The new wording should overcome this difficulty.

2. The time periods for the Engineer to give a decision or for the parties to challenge one

(i) *Third edition*

The Engineer was required to give written notice of his decision "within a period of ninety days after being requested by either party to do so." Assuming the Engineer had done so, each party then had a further period of 90 days after receiving such notice within which to "require" arbitration. If the Engineer had not rendered a decision within the specified period, the 90 days to require arbitration ran from the expiration of the 90-day period allowed to the Engineer to give his decision.

(ii) *Fourth edition*

The Engineer is required to give notice of his decision within 84 days after receiving a reference of a dispute (instead of 90 days after a request therefor): "No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor."[5]

Assuming the Engineer gives notice of his decision within the required period, each party has a period of 70 days after the day on which he received notice of that decision (instead of 90 days after receiving notice of such decision) to give "notice of his intention to commence arbitration" (see Sub-section 4 below). If the Engineer does not give notice of his decision within the required period, such 70-day period begins to run the day after the day on which the period of 84 days expired.[6]

(iii) *Comment*

The change from periods of 90 days to periods of 84 and 70 days is the result of a new policy of F.I.D.I.C. to make all time periods under the Conditions that are measured in days divisible by seven, that is, divisible into weeks.[7]

[4] *Monmouthshire C.C.* v. *Costelloe and Kemple* (1965) 5 B.L.R. 83, at 89–90 (the argument was unsuccessful).

[5] The new edition further provides, unlike the third edition, that the decision must state that it is made pursuant to Clause 67.

[6] In the fourth edition, a "day" is defined as a calendar day, see Sub-Clause 1.1(g)(ii). The third edition contained no definition of this term.

[7] For example, the Contractor must provide insurance policies to the Employer within 84 days of the Commencement Date (Clause 25.1); the Contractor must give a notice of an intention to claim within 28 days after the event giving rise to the claim has arisen (Clause 53.1); and the parties have 56 days in which to attempt the amicable settlement of a dispute (Clause 67.2) (see Sub-section 5 below).

While the above two time periods in the Clause have been shortened, the time that must elapse after referral of a dispute to the Engineer, before arbitration may be commenced, is now longer under the fourth edition as a result of the addition of an amicable settlement provision in Clause 67.2 (see Sub-section 5 below).

3. The Engineer's (and Arbitrator's(s')) freedom of decision

(i) *Third edition*

Under the third edition, the Contractor was required to send to the Engineer's Representative a monthly account giving particulars of the Contractor's claims (see Clause 52(5) of the third edition). However, if he should fail to do so, the consequences were not very clear. On the one hand, the Clause stated that "(n)o final or interim claim for payment" would be considered which had not been included in such particulars. On the other hand, the Clause stated that the Engineer could authorise payment if the Contractor had "at the earliest practicable opportunity" notified the Engineer of his intention to claim.

(ii) *Fourth edition*

Under the new edition, the procedure for notifying and substantiating claims is both more stringent and more elaborate. Sub-Clause 52(5) in the third edition has in fact been replaced by an entirely new clause, Clause 53, entitled "Procedure for Claims".

For purposes of the new Clause 67, the significance of new Clause 53 resides in Sub-Clause 53.4 which provides as follows:

> "If the Contractor fails to comply with any of the provisions of this Clause [Clause 53] in respect of any claim which he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub-Clauses 53.2 and 53.3)."

In essence, if, with respect to any claim, the Contractor neglects to observe the procedures laid down in Clause 53, his "entitlement to payment in respect thereof" is limited to such amount as the Engineer or arbitrator(s) "consider(s) to be verified by contemporary records".

(iii) *Comment*

New Sub-Clause 53.4 is intended to promote greater discipline in the notification and substantiation of claims. It is designed, among other things, to limit the practice, frequent in international arbitrations applying English

rules of evidence, for Contractor's claims to be advanced years after the event, supported by little more than the oral testimony of the Contractor's own employees.

4. The method of reserving the right to arbitrate

(i) *Third edition*

Under the former Clause 67, it was unclear what action a party was required to take within 90 days of receiving the Engineer's decision (or, if the Engineer had rendered no decision, within 90 days of the 90-day period allowed to him to render his decision) in order to reserve the right to arbitrate a dispute. Some I.C.C. arbitral tribunals interpreted the Clause to require the submission of a Request for Arbitration to the I.C.C., thereby commencing an I.C.C. arbitration, and the communication of a copy thereof to the Engineer, whereas others held that the sending of an appropriate notice to the Engineer and the other party was sufficient.[8] The consequences of this uncertainty were serious, as a failure to take the right action would bar the claim.

(ii) *Fourth edition*

The new edition provides that if the Employer or Contractor is dissatisfied with an Engineer's decision, or if the Engineer fails to give notice of his decision within 84 days after the day he received the reference, then:

> "either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, *give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration*, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, *no arbitration in respect thereof may be commenced until such notice is given.*" (Emphasis added.)

Thus, to become entitled to arbitrate a dispute, a party must, within 70 days of receiving a decision (or, if there has been no decision, within 70 days after the expiration of the 84 days allowed for the decision) give a notice to the other party, with a copy to the Engineer, of his intention to commence arbitration. The giving of such a notice is necessary to be entitled later to commence arbitration in respect of the dispute at issue. Assuming such notice has been given, arbitration need not be commenced by any particular time.

[8] See Jarvin, "I.C.C. Court of Arbitration Case Notes" (1986) 3 I.C.L.R. 470; Seppala, Pre-Arbitral Procedure, *op. cit.* note 2, 330–332; and I.C.C. case No. 4862 reported [1989] I.C.L.R. 44 and *Cour d'arbitrage de la Chambre de Commerce Internationale, Chronique des sentences arbitrales* (1987) *Journal du Droit International* 1018.

(iii) *Comment*

The new edition appears to have removed the earlier uncertainty as to the steps necessary to reserve the right to arbitrate.[9]

5. Amicable settlement

(i) *Third edition*

Under the previous edition, no time period was set aside for the parties to attempt amicable settlement of a dispute before proceeding to arbitration. If a party were dissatisfied with an Engineer's decision under Clause 67, or if the Engineer failed to render such a decision, such party could refer the dispute directly to arbitration.

Since the third edition's Clause 67, like the standard I.C.C. arbitration clause, referred to the "Rules of Conciliation", as well as to the "Rules" of "Arbitration" of the I.C.C., the option of conciliation was already envisaged. But, in practice, the I.C.C.'s Conciliation Rules were overlooked or, at least, little used.

(ii) *Fourth edition*

Under the new Clause (Sub-Clause 67.2), where a notice of intention to commence arbitration has been given, arbitration of the dispute may not be commenced, in principle, unless an attempt has first been made to settle it amicably. However, the new Clause continues, on or after the fifty-sixth day after the notice of intention was given, arbitration of the dispute may be commenced whether or not any attempt at amicable settlement thereof has been made.

(iii) *Comment*

Strictly speaking, Sub-Clause 67.2 is superfluous since parties are always at liberty to settle a dispute amicably. But it does provide justification for the initiation of settlement discussions immediately before arbitration: they may now take place as the result of prior agreement, not the threat of arbitration. Absent such justification, representatives of public Employers could hesitate to engage in such discussions at such a time, when facing substantial claims by a foreign contractor.

Thus, while Sub-Clause 67.2 may, in most cases, tend to delay the commencement of arbitration by 56 days, it may also promote early settlement in others.

[9] The "time bar" in Clause 67 is derived from Clause 66 of the Conditions of Contract of the English Institution of Civil Engineers. Those unfamilar with the use of a time bar clause may find it instructive to refer to English practice, e.g., "Time Bar Clauses" in Yates and Hawkins, *Standard Business Contracts: Exclusions and Related Devices* (Sweet & Maxwell, London, 1986) at p. 212.

Despite the first sentence of Sub-Clause 67.2, there is, in fact, no obligation to attempt amicable settlement: A party may commence arbitration of a dispute 56 days after the date on which it gave notice of intention to commence arbitration of such dispute regardless of whether it, or the other party, had attempted amicable settlement thereof. This is the intention of the second sentence of Sub-Clause 67.2, and in particular, the final words of that sentence: "whether or not any attempt at amicable settlement thereof has been made."

6. The Arbitration Rules to be applied

(i) *Third edition*

Disputes not resolved by the Engineer were to be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

(ii) *Fourth edition*

Disputes not resolved by the Engineer shall be finally settled: "unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce . . ." Thus, the Clause now expressly recognises that other arbitration rules may be incorporated into Clause 67 in place of the I.C.C. Rules.

However, the commentary on Clause 67 in Part II of the Conditions quite properly cautions that incorporation of different arbitration rules may require amendment to the wording of Clause 67, which has been drafted only with the I.C.C. Rules in mind.

(iii) *Comment*

Many construction arbitrations have taken place under the I.C.C. Rules. Generally, they are believed to have proceeded satisfactorily.

However, the UNCITRAL arbitration rules, which are referred to in Part II of the Conditions, may be an appropriate alternative in some cases.

7. The scope of the Arbitration Clause

(i) *Third edition*

Only "disputes or differences in respect of which the decision, if any, of the Engineer had not become final and binding" could be submitted to arbitration under the old edition. This in turn implied, or could imply, that disputes which had become the subject of "final and binding" decisions (that

is, disputes concerning which neither party had required arbitration within 9 days of the Engineer's decision) were not subject to arbitration; even if such decisions were not respected, but were instead to be remitted to the local courts. Such an implication could cause difficulty in countries where "final and binding" decisions (e.g., against the Employer) could not be readily enforced in the local courts.

(ii) *Fourth edition*

This potential difficulty is addressed in Sub-Clause 67.4 which provides that

> "Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become final and binding, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-Clause 67.1 and 67.2 shall not apply to any such reference."

Thus, the failure of a party to comply with the Engineer's "final and binding" decision is now expressly referable to arbitration directly: the "failure" need not first be referred either to the decision of the Engineer under Sub-Clause 67.1 or to the amicable settlement procedure in Sub-Clause 67.2.

(iii) *Comment*

This change appears to deal satisfactorily with the difficulty that had arisen under the earlier edition.

III. CONCLUSION

Clause 67 in the third edition was subject to considerable criticism. Those who are dissatisfied with the mandatory reference of disputes to the Engineer as a condition to arbitration are unlikely to view the Clause in the new edition much more favourably. Moreover, in the new Clause there are, undoubtedly several issues left unresolved.[10]

[10] In the author's view, although he would express some of them differently today, these include points 1, 4, 7 and 8 in his article, "Pre-Arbitral Procedure", *supra*, note 2, at 335–337, which concerned the third edition. In point 1, the author noted that to invoke the Clause there must, first of all, be a "dispute or difference" between the parties. The author criticised such "dispute or difference" language as being too narrow in scope, inasmuch as it might not encompass uncontested—but steadfastly unpaid—debts. See *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, London, 10th ed., 1979), p. 854 (*Grant* v. *Trocadero* (1938) 60 C.L.R. 1 (Australia) and *Placis* v. *Fryer* (1967) 41 A.L.J.R. 192) and the first supplement (1979) 854, footnote 79 (*L.N.W.R.* v. *Billington* [1899] A.C. 79). In this connection, Dr. Albert Jan van den Berg, the well-known authority on international arbitration, has drawn the author's attention to a fairly recent decision of the United States Court of Appeals, Second Circuit, *Shaheen Natural Resources* v. *Sonatrach* which addressed this issue, where the court concluded: "Shaheen's failure to honour its debt, constitutes a dispute subject to resolution through arbitration." 733 Fed. 2d 260 (1984) cited in the *Yearbook Commercial Arbitration*, Vol. X, 1985, 540, at p. 545. With respect to this case, Dr. van den Berg commented: "If it were

However, the major problems that arose under the prior Clause, and in particular, the uncertainty about the action necessary to reserve the right to arbitrate, have been addressed and the new Clause is, in the author's view, a considerable improvement over the prior one.[11]

to be allowed that a dispute is non-arbitrable because a party admits the debt due, the door to chicanery would be wide open. A claimant should be entitled to obtain an internationally enforceable title in the form of an arbitral award." If arbitral tribunals could be relied on to show the same good sense in interpreting the "dispute" requirement in the fourth edition, there would be no need to broaden the language of the Clause in this respect.

[11] The author cannot plead complete objectivity as he was, like some other lawyers, invited to comment on F.I.D.I.C.'s new version of Clause 67 in draft form.