EXTRACTS FROM ICC AWARDS

CONSTRUCTION CONTRACTS REFERRING TO THE FIDIC CONDITIONS — PART II

In the following extracts, details which are not indispensable for the intelligibility of the award may have been expunged from the original text. Awards rendered in English or French are printed in their original language.

Final Award in Case No. 7910 (1996)

FIDIC Conditions, 3rd ed./ Dispute between Employer and Contractor/ Clause 67/ Admissibility of claims/ Whether "final and binding" decision of Engineer may be submitted to arbitration to confirm Claimant's entitlement to payment ordered in Engineer's decision, no/ Comparison between 3rd and 4th ed. of FIDIC Clause 67/ ICC Case 3790 considered.

This extract concerns the issue of whether the party in favour of which a decision of the Engineer was made can submit this decision to arbitration in order to get it confirmed, for enforcement purposes, in the form of an award. The answer is clear under the 4th edition, but less so under the 3rd edition, which the Arbitral Tribunal was applying in this case with the hindsight provided by the 4th edition.

" [...]

As already pointed out, the arbitration clause is worded in article 69 of the first Contract.

The wording of this article 69 of the Contract is identical to that of FIDIC clause 67 (3rd edition, 1977).

1. Defendant's plea

The Defendant argues that under the said article only the party dissatisfied with the Engineer's decision may, after receiving notice of such decision, require that the matter in dispute be referred to arbitration. Claimant having indisputably been satisfied with the Engineer's decision, its referral of the matter to arbitration, though taking place within the prescribed time period, is inadmissible under article 69 of the Contract.

The new clause 67.4 in the 4th edition of FIDIC conditions, as amended in 1987 reads as follows:

> "67.4 Failure to comply with Engineer's decision
>
> Where neither the Employer nor the Contractor has given notice of intention to concurrence 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 fourth FIDIC version introduced a basic modification by allowing the party satisfied with the Engineer's decision to refer to arbitration the inexecution of the said decision by the other party.

The Defendant infers that the Claimant cannot refer to arbitration Defendant's inexecution of the Engineer's decision without violating the General Conditions of Contract which are the law of the parties.

Therefore, the Defendant requests the Arbitral Tribunal to decide the inadmissibility of the claims arising out of the first Contract.

As regards the Partial Award of January 20, 1983, rendered in the ICC case No. 3790 and invoked by the Claimant as supporting its view, the Defendant considers the said award as disputed and isolated.

The Defendant concludes that the Claimant cannot submit a request for arbitration pursuant to article 69 of the Contract corresponding to FIDIC clause 67 (3rd edition) on the ground of Defendant's failure to comply with the Engineer's decision.

2. Claimant's response to the plea

The Claimant acknowledges that the Engineer's decision on the claims submitted to the latter by the Claimant became final and binding upon the parties. As a consequence, the Defendant was under the obligation to make the payments as stated in the Engineer's decision, all the more that [*applicable Administrative contract Regulations*] provide that the Contractor's entitlements shall be paid within 45 days from the date of the approval of the statements.

The Claimant considers that the refusal by the Employer to fulfil this contractual obligation entitles the Claimant to protect its rights through the only way provided for in the Contract, i.e., by initiating the arbitration proceedings as per article 69. Therefore, the partial award that the Claimant is requesting must be merely declaratory, since it must state that the obligation of the Employer became final and binding and that the same omitted to make the payments due, the same partial Award also having to enforce the obligation of the Employer, ordering the same to make the payments in the amounts due, plus interest, as per provisions of the Administrative contract Regulations.

In Claimant's argumentation, article 69 of the Contract, shaped in conformity with clause 67 of FIDIC conditions (3rd edition, 1977) is aimed at providing in general settlement of disputes (this being the heading of article 69). This article is providing for a unique remedy in case of any and all disputes arising from the Contract. It results therefrom that if the Contractor is not allowed to resort to arbitration, he would not be in a position to apply to any tribunal or authority and would not have any other means to obtain a decision for the enforceability of the order of payment against the Employer.

The Claimant acknowledges that clause 67 of the third edition of FIDIC conditions (issued in 1977) is not totally clear in explaining the consequences of a refusal by a party to comply with the final and binding Engineer's decisions. The Claimant considers that this is confirmed by the fact that the fourth edition of FIDIC contract conditions amended the previous obscurity and clarified it.

The Claimant contends that the new, better formulation of clause 67 in the fourth edition is perfectly in line with the interpretation that the Arbitral Tribunal must give to the previous wording of the clause. The Claimant adds that it could not find any comment by authors who examined the FIDIC conditions disagreeing with its interpretation of clause 67 of FIDIC conditions third edition, and that the authors who commented on both FIDIC conditions and ICC awards concerning cases in which clause 67 was involved never gave any indication in line with Defendant's assumptions.

The Claimant supported its arguments by filing an ICC partial award dated January 20th, 1983, in the ICC case No. 3970, in a dispute between a French Contractor and a Libyan Employer (published in the Collection of ICC Arbitral Awards, 1986-1990). The contract in reference incorporated clause 67 of the FIDIC conditions, 2nd edition, identical to article 69 of the Contract. In the said partial award of 1983, the Arbitral Tribunal, after having found that the decision of the Engineer became final and binding, awarded the Contractor the amount of money claimed.

Therefore, the Claimant availed itself of the above-mentioned partial award of 1983 in support of its view.

3. The findings of the Arbitral Tribunal

The Arbitral Tribunal's understanding of article 69 of the Contract is that it envisages recourse to arbitration in two specific cases exclusively.

The first is the case of failure by the Engineer to give notice of his decision ("if the Engineer shall fail to give notice of his decision").

The second is the case of the Employer or the Contractor being dissatisfied with the decision of the Engineer ("or if either Employer or the Contractor be dissatisfied with any such decision").

In the present arbitration this Tribunal is not in the presence of the first case, since the Engineer has given notice of his decision.

Nor is the Tribunal in the presence of the second case, since both Employer and Contractor were satisfied with the decision of the Engineer.

Article 69 of the Contract does not provide for a third case in which recourse to arbitration is allowed.

On the contrary, the provisions of article 69 do not leave the slightest shadow of doubt that if the two parties are satisfied with the decision of the Engineer, this decision becomes final and binding upon the two parties, and the door of arbitration is then closed. It is only when one party is not satisfied with the decision that it may require that the matter or matters in dispute be referred to arbitration. This is the clear meaning of the provisions of article 69 of the Contract, and particularly the clear meaning of the following provision of the same article: "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 ICC." This means *a contrario* that the issues in respect of which the decision of the Engineer has become final and binding cannot be referred to arbitration. It results therefrom that article 69 does not envisage arbitration where, although the parties have accepted the Engineer's decision, one of them has not complied with the latter.

In the Arbitral Tribunal's views, no rule of interpretation or construction can allow extension of the field of arbitration beyond the limits defined in the wording of article 69 to cases and situations not envisaged therein, by way of interpretation or construction, without distorting the said wording. The Arbitral Tribunal considers that, in view of these clear terms, there is no room for interpretation or construction. [...] Assuming there is room for seeking the intention of the parties, it cannot be contended, the wording of article 69 being as it is, that the parties had the intention to resort to arbitration in case one of them fails to comply with a decision of the Engineer which became final and binding, without a shred of evidence or the slightest indication that they had such intention in such case.

The Arbitral Tribunal does not share Claimant's view that there was only an obscurity in clause 67 of FIDIC conditions, third edition, as regards recourse to arbitration in the event of a party failing to comply with a decision of the Engineer which became final and binding, that such obscurity has been dissipated in the fourth edition, and that the new better formulation of clause 67 in the fourth edition is in line with the interpretation that the Arbitral Tribunal must give of the previous wording of clause 67 of FIDIC conditions corresponding to article 69 of the Contract.

In the previous edition of FIDIC conditions there was not only an obscurity in clause 67, but arbitration was clearly excluded a contrario in case the Engineer's decision becomes final and binding.

In any case, assuming that in the previous edition there was a silence in clause 67 as to whether arbitration is allowed or not for non-compliance by a party with an Engineer's decision which became final and binding, such silence can by no means be understood as allowing arbitration, especially where there is no indication at all of an intention of the parties to arbitrate in such a situation.

The Arbitral Tribunal views the amendment of clause 67 of FIDIC conditions in the 4th edition as the conclusive evidence that the said clause in its previous version did not allow referral to arbitration of a failure by one party to comply with an Engineer's decision which became final and binding and that a clear provision was needed to allow arbitration in such a case. This was the *raison d'être* of the amendment of the clause in the 4th edition.

Nor does the Arbitral Tribunal share Claimant's view that the only way to protect its rights is arbitration and that if arbitration is not allowed, it would not be in a position to apply to any tribunal or authority and would not have any other means to obtain decision for the enforceability of the final and binding Engineer's order of payment against the Defendant. Where, as in our case, there is no arbitration clause allowing the Claimant to resort to arbitration with a view to reaching enforcement of the Engineer's decision through an arbitral award, Claimant has obviously the right to institute proceedings before the competent State Court to seek the relief it needs for the protection of its right.

As far as the partial award of 20 January, 1983 in the ICC case 3790 is concerned, the Arbitral Tribunal cannot share the line of reasoning underlying it. In the view of the Arbitral Tribunal, under article 67 of the FIDIC conditions (3rd edition), the fact that the decision of the Engineer has become final and binding does not justify adjudication by the Arbitral Tribunal to the Claimant of the amounts approved by the Engineer in such a decision and claimed in the arbitration process. Quite to the contrary, the fact the said decision has become final and binding justifies inadmissibility of such claims for lack of jurisdiction of the Arbitral Tribunal, in view of the fact that the clause as it is worded does not provide for arbitration where the decision of the Engineer has become final and binding on the parties.

The present conclusion of the Arbitral Tribunal finds support in a commentary of FIDIC conditions, 3rd edition ("The pre-arbitral procedure for the settlement of disputes in the FIDIC conditions of Contract" by Christopher Seppala, in *The International Construction Law Review*, volume 3, Part 4, July 1986, pp. 315-337, especially at page 336). In the words of the commentator, "Clause 67 should be amended to make clear that a dispute which is the subject of a (definitive) 'final and binding' decision of the Engineer may, nevertheless, be submitted to arbitration for certain purposes, such as to obtain an arbitral award confirming a party's entitlement to the amount of the 'final and binding' decision." Actually, such amendment came in the 4th edition.

Whereas the Claimant requests the Arbitral Tribunal to rule that because these claims have been already settled by the Engineer and consequently, the Defendant is obligated to pay the amounts of the said claims, the Arbitral Tribunal decides that these claims are inadmissible for lack of an arbitration clause giving jurisdiction to the Arbitral Tribunal.

[...] "

Partial Award on Jurisdiction in Case No. 6238 (1989)

FIDIC Conditions, 3rd ed./ Dispute between Employer and Contractor/ Clause 67/ Date of referral to Engineer/ Request for arbitration filed within time-limit/ Jurisdiction of Tribunal upheld.

" [...]

The essence of Defendant's argument on the issue of competence runs as follows:

A tribunal acting under clause 67 of the conditions of Contract is only competent to entertain claims resulting from

(a) A written decision from the Engineer

or

(b) Failure of the Engineer to issue a decision within the 90 days provided by the contract.

It is not disputed that in this case there was a submission to the Engineer, nor that the Engineer failed to issue a decision within the 90 days prescribed. Thus, it was necessary for the Request for Arbitration to be lodged within 180 days from submission of the dispute to the Engineer.

The crux of this matter lies in determining when such submission to the Engineer took place. The Defendant claims that the operative date was that of a letter sent by Claimant to the Under-Secretary of the Ministry of Public Works with a copy to the Engineer, viz., November 4, 1987. The Claimant contends that the submission of the dispute to the Engineer was by its

letter of January 11, 1988. In the latter case the request for Arbitration was clearly submitted within the 180 day period.

The Defendant contends that a "dispute or difference" existed between Claimant and Defendant as early as June 18, 1987, when Claimant sent a registered letter to the Engineer complaining about Defendant's failure to reduce the bank guarantee from 20% to 10%. It is not however contended by Defendant (in the Tribunals' view correctly) that this letter constituted a submission of a dispute under Clause 67. However, on November 4, 1987, the Claimant addressed the letter to the Under-Secretary of the Ministry of Public Works with a copy to the Engineer demanding a reduction of the guarantee. The Memorandum of March 14 filed by the Defendant quotes an extract from this letter as follows:

> "We see no alternative than to inform the Government [...] via the Minister of Public Works of this matter and to open a 'settlement of disputes' in accordance with Clause 67 of the General and Particular Conditions of Contract 1 Book of Tender, Document II."

This letter, contends the Defendant,

> "[m]ust by any reasonable construction be treated as a reference of the dispute under claim to the Engineer, thereby triggering the first 90 day period contemplated by that clause."

The Claimant, in its Memorandum of March 31, contends that it is clear beyond reasonable doubt that Claimant's letter of November 4 "constitutes no such request" because

> "First. The letter is not addressed to the Chief Engineer, but to his Excellency the Under-Secretary of the Ministry of Public Works; the Chief Engineer received only a copy for information."

> "Second. The letter does not refer any dispute to any person but specifically and expressly declares that the Claimant would do so in the future if certain conditions were not met in the meantime."

The Claimant points out that the portion of the November 4 letter quoted by the Defendant omits relevant wording which should prefix the quotation:

> "Should this reduction not be granted by November 30, 1987, we see no other alternative..." (underlining added by Tribunal).

In the judgment of the Tribunal having regard to the terms of the letter as a whole, it did not constitute a submission to the Engineer under Clause 67. Such a submission should be a clear reference to the Engineer for a decision. On the contrary, however, the letter of November 4 expressed at most an intention to submit the dispute to the Engineer only if the matter was not settled by November 30, 1987. In the event it was not settled and therefore on January 11, 1988, the Claimant sent a letter containing a formal submission to the Engineer under Clause 67.

In the judgment of the Tribunal it was this letter which constituted the only true reference to the Engineer. Thus, the Request for Arbitration filed on May 9, 1988, was lodged within the 180 day period prescribed by the Contract.

Accordingly the Tribunal dismisses the plea of the Defendant, and holds itself competent to entertain this case. "

Partial Award on Jurisdiction in Case No. 6611 (1992)

FIDIC Conditions, 2nd ed./ Dispute between Contractor and Sub-Contractor/ Arbitration clause validly incorporated in Sub-Contract by reference to Main Contract/ Claimant's Request for arbitration and Defendant's Answer jointly constituting new arbitration agreement/ Obligation to refer to Engineer before initiating arbitral proceedings not applicable.

" I. FACTS AND SUMMARY OF PARTIES RESPECTIVE CLAIMS

1. In April 1977, the Defendant (a European contractor) and the Employer (not a party to this arbitration) entered into an agreement (the "Main Contract") for the extension of a steam power plant in an Arab country.

The Defendant chose the Claimant (a contractor from another Arab country) as subcontractor and, on May 17, 1977, the Claimant and the Defendant entered into a contract under which the Claimant was to carry out the construction, completion and maintenance of a part of the civil works (the "Subcontract"). On the same date the Defendant also subcontracted with a European company (not a party to this arbitration), for undertaking other civil works.

The Employer appointed a European firm as consulting engineer.

2. The relevant provisions of the Subcontract are the following:

"Article 3

"In consideration of the payments to be made by the Contractor to the Subcontractor as hereinafter mentioned the Subcontractor hereby covenants with the Contractor to construct complete and maintain the works in conformity in all respects with the provisions of the Subcontractor's construction programme.

"The payments shall be made to the Subcontractor according to the following methods:

"a) 15% of the civil works Contract value as down payment, i.e., 5 957 343,30. This payment has to be made within 40 days after signing of Contract with the Employer and presentation of Subcontractor's down payment guarantee in favour of the Contractor. This down payment guarantee will be valid for 19 months.

"b) 75% of the civil works Contract value, i.e., 29 786 716,50, will be paid monthly against approved progress invoices submitted by the Contractor for the value of measured civil works including deliveries of material to site. A bill of quantity to assist with the preparation of monthly invoices will be prepared by the Subcontractor.

"c) 5% of the civil works Contract value, i.e., 1 985 781,10, will be paid on substantial completion certificate issued by the Engineer for the civil works.

"d) 5% of the civil works Contract value, i.e., 1 985 781,10, will be paid on completion of the twelve months maintenance period.

"e) All payments due under clauses 3(b) to 3(d) inclusive shall be made by the Contractor to the Subcontractor not later than 7 days after the Contractor has received payment from the Employer.

"In case of any delay in payment caused by the Employer beyond the Contractor's control, payments to the Subcontractor will be made upon receipt of delayed payments made by the Employer and the applicable interest received from the Employer will be paid to the Subcontractor.

"Article 4

"The Contractor hereby covenants to pay the Subcontractor in consideration of the construction, completion and maintenance of the works the Subcontract price at the times and in the manner prescribed in the Contract to be concluded between the Employer and the Defendant.

"Article 9

"In the internal relationship the Subcontractor will take upon himself and bear all obligations and risks arising from the Contract to be concluded between the Employer and the Defendant in such a way as if the Subcontractor has concluded a direct Contract with the Employer for his scope of supply and services.

"Article 11 : This Subcontract agreement will become effective only after the Contract between the Employer and the Defendant comes into force in clause 8 of the 'Conditions of Contract'."

3. Shortly after the conclusion of the Subcontract, the Defendant paid to the Claimant the 15% contractual down payment (in accordance with article 3(a) of the Subcontract), after having received from the Employer the initial 15% payment provided for in the Main Contract.

The Claimant started to work on the Site in the spring of 1978.

It is not disputed that the Claimant submitted monthly invoices ("Valuations") to the Defendant covering work and equipment provided. On the basis of these Valuations, the Defendant forwarded "Progress Invoices" to the Employer which were examined by the Engineer who issued a payment certificate to the Defendant. The Defendant thereafter issued a corresponding payment certificate to the Claimant stating the following:

"We hereby certify that the sum of ___ is in accordance with invoice No. ___ the Claimant to be paid 75% of the above mentioned work."

The Defendant issued 28 such payment certificates between May 3, 1978 and July 6, 1980 for a total certified amount of 26 416 539, for work carried out by the Claimant. The amounts correspond to the total amount invoiced by the Claimant. In addition, the Defendant approved payment of a variation order for extra work performed by the Claimant in the amount of 121 178.

However, the Employer was experiencing financial difficulties and various negotiations, with a view to revising the payment terms of the Main Contract, took place, without success. The Employer has never paid any money to the Defendant, except the down payment and, in early 1980, the project was

eventually abandoned. In June, the Defendant ordered the Claimant to stop all work, before the completion of the Subcontract. (Meanwhile, the Engineer had ceased to operate.)

The Claimant never received payment of the amounts listed in the payment certificates and for the extra order. (The only payment made to the Claimant was the down payment as said before.)

4. The Claimant claims payment by the Defendant of the contractual value of unpaid works performed by the Claimant according to the Subcontract, plus interest and additional damages.

In support of its claims the Claimant argues that:

- The Defendant's failure to pay constitutes a breach of the Subcontract. The Defendant had indeed an unconditional obligation to pay the Claimant: the Claimant had to be paid even when the Defendant has not received full payment from the Employer.

- In any case, the Defendant received payment from the Employer for the civil work performed by the Claimant: the down payment that was paid to it by the Employer is indeed not only an advance paid prior to the beginning of the work but also a payment on account for work to be performed and the amount of this down payment exceeds the total value of all work actually performed under the Contract, including the civil work performed by the Claimant. Moreover, the Defendant received other payments on account of the work from sources other than the Employer.

- Independently of the arguments hereabove, the delays in the Employer's payments to the Defendant were not beyond the Defendant's control and, for this reason, the Defendant has to pay the Claimant immediately according to article 3 in fine of the Subcontract.

The Defendant contests the claims and argues that:

- Article 3 (e) of the Subcontract clearly provides that the Defendant must pay the Claimant only upon receipt by the Defendant from the Employer of the corresponding amounts provided for under the Main Contract. Except for the 15% down payment, the Defendant did never receive any monies from the Employer.

- The Defendant claimed compensation against the Employer for all losses incurred as a result of the Employer's default under the Main Contract (including compensation for work performed by the Claimant [and the other subcontractor (not a party to this arbitration)], but was not paid.

- The down payment that the Defendant received from the Employer was allocated among the Claimant and the other Subcontractors (and members of the consortium, that were, under the leading of the Defendant, joint ventures for the project). For this reason. it cannot be regarded as payment on account of the Claimant's work only.

- Additionally, article 9 of the Subcontract undoubtedly provides that payment risks are on the Claimant.

- Furthermore, the Claimant is not entitled to argue that the payment certificates issued by the Defendant were independent payment obligations. Their only purpose was to establish that both the Defendant and the Engineer had examined the Claimant's invoices and that these invoices were "to be paid" by the Employer.

- The Defendant did everything it could to obtain payment from the Employer and, therefore, did not breach any (implied) fiduciary duty it allegedly owed to the Claimant.

- Alternatively ("eventualities"), part of the amounts claimed by the Claimant are barred because the applicable statute of limitation has expired.

Consequently, the Defendant refuses to allocate any payment to the Claimant.

II. THE ARBITRATION CLAUSE AND APPLICABLE PROCEDURAL RULES

5. As explained above, article 2 of the Subcontract contains an arbitration clause, by reference. This provision mentions some specific listed documents that are deemed to be part of the Subcontract and, among these, are the Conditions of Contract, Parts I and II (the "Conditions of Contract...") of the Main Contract.

Article 39 of Part II of the Conditions of Contract provides for the settlement of disputes by arbitration according to article 67 of the FIDIC (*Fédération Internationale des Ingénieurs conseils*) "Conditions of Contract (International) for Works of Civil Engineering Construction," second edition, published 1969 and reprinted 1973 (the "FIDIC article 67") and states that the arbitration shall be held in Zurich.

6. FIDIC 2nd edition article 67 reads as follows: [...]

7. This article provides that any dispute between the "Employer" (i.e., the Employer and, by reference, the

Defendant) and the "Contractor" (i.e., the Defendant and, by reference, the Claimant) should be firstly referred to the Engineer following which either party may start arbitration.

However, according to the Claimant, no Engineer was appointed under the Subcontract and, furthermore, the Engineer named under the Main Contract was discharged in November 1979, so that the Claimant could proceed directly to arbitration.

8. The Arbitral Tribunal has to apply the Rules of Conciliation and Arbitration of the International Chamber of Commerce in force as from January 1, 1988, as supplemented or amended by the mandatory provisions of the Swiss Law.

[...]

Following developments relating to the arbitration clause by reference, the Arbitral Tribunal finds:

26. It is undeniable, in the present case, that the Defendant knew and accepted the arbitration provision. A survey of some relevant facts undoubtedly leads to such a conclusion.

a) It was the Defendant itself that drafted the Subcontract.

b) The conditions of Contract of the Main Contract (in which article 39 refers to FIDIC article 67) were attached to the Main Contract that the Defendant signed (and possibly drafted). These conditions of Contract were imported by the Defendant from the Main Contract for inclusion in the Subcontract.

c) The Defendant made some deletions in said Conditions of Contract before inserting them in the Subcontract (for example, on pages 2 to 7, some information was wiped out). But the Defendant did not delete the reference to FIDIC article 67.

d) Part II of the Conditions of Contract are not standardized but instead have been tailored to respond to the specific demands of the project. This is particularly sensible for article 39, which is contained in a separate item entitled "Settlement of Disputes — Arbitration. Article 39 is not merely a reference to FIDIC Article 67: the parties have individualised this clause by including some specific provisions as to the place of arbitration. The term "Arbitration" is repeated two more times in the text.

e) The reference to FIDIC conditions in the Conditions of Contract is also meaningful. An experienced international contractor as the Defendant should know that the standard FIDIC conditions (whether civil or electro-mechanical) contain an arbitration provision.

f) The Defendant concedes that it knew about the arbitration clause in the Main Contract. It explains that "there existed a real commercial need to have an arbitration clause with the Employer" (para. 30, p. 15 of the Defendant's submission of August 23, 1991). Thus the Defendant was perfectly aware of the existence of the arbitration provision in the Conditions of Contract, which it supplied as part of the Subcontract.

g) As said above, the Defendant entered into a virtually identical subcontract with an other subcontractor. This subcontract contains the same Conditions of contract with the same arbitration clause in article 39.

h) By answering "Agreement to arbitrate: undisputed" in its reply to the Claimant's request for arbitration, the Defendant clearly acknowledged that it knew that it had consented to arbitration in the Subcontract. It was only one year after that the Defendant contested the arbitral tribunal's jurisdiction.

[...]

After further developments on the validity and scope of the arbitration agreement, the Arbitral Tribunal continues:

28. The incorporation by reference in the Subcontract of clause 39 of the Conditions of Contract of the Main Contract consequently constitutes a valid arbitration agreement under the Swiss Statute and the New York Convention. It was made in writing and was signed and unequivocably accepted by both parties.

Did the Defendant's reply of November 30, 1989 to the request for arbitration create a new agreement to arbitrate?

29. In its reply of November 30, 1989 to the request for arbitration, the Defendant not only failed to contest the jurisdiction of an Arbitral Tribunal constituted in accordance with the Rules of Arbitration of the International Court of Arbitration, but unequivocably accepted it. Thus, at that time the Defendant and the Claimant entered into another agreement to arbitrate - an agreement which was completely distinct from the arbitration provision contained in the Subcontract. This separate agreement consists of the Claimant request for arbitration and the Defendant's reply. It fulfills, with respect of the written form and the signature of parties, the requirement of both the Swiss Statute on International Private Law and the New York Convention.

> "In the event the defendant answers on the merits and does not object to the proceedings, the Court will allow the arbitration to proceed irrespective of a flawed or even nonexistent agreement to arbitrate. A new agreement to arbitrate is deemed to have arisen, the Request constituting the offer and the non-objecting Answer, the acceptance."

(W.L. CRAIG, W.W. Park and J. PAULSSON, International Chamber of Commerce Arbitration, 1990 (2nd ed.), p. 30.)

The Claimant's request for arbitration and the Defendant's reply clearly jointly constitute in themselves an arbitration agreement, which the Defendant cannot unilaterally alter or rescind at a later time. This agreement alone is therefore a sufficient basis of jurisdiction for the Arbitral Tribunal to settle this dispute.

30. The Defendant's then counsel who signed the submission of November 30, 1989 — and so expressly accepted the jurisdiction of the Arbitral Tribunal constituted under the Rules of Arbitration of the Court of Arbitration — clearly had the powers to bind the Defendant and to conclude in the Defendant's name an arbitration agreement. This undoubtedly Proceeds from the power of attorney of the Defendant's then counsel, dated August 17, 1989, which was transmitted to the Secretariat of the International Court of Arbitration with the Defendant's reply.

[...]

Furthermore, the Defendant cannot reasonably claim in good faith not to have known and approved what was submitted in its name in its counsel's reply to the request for arbitration.

Does the Claimant have the right to start arbitration proceedings, considering the provisions of FIDIC article 67 dealing with the prior reference of the dispute to the Engineer?

31. As explained before, the Defendant's reply to the request for arbitration of November 30, 1989, created a new arbitration agreement, submitted to the Rules of Arbitration of the International Court of Arbitration, that is entirely independent from the arbitration agreement contained in article 39 of the Subcontract referring to FIDIC article 67.

In this second arbitration agreement, the parties submitted to the jurisdiction of the Arbitral Tribunal without reservation. No engineer has whatsoever anything to do with this and the question whether the Claimant had the obligation to refer to an engineer is simply irrelevant.

32. However, even with respect to the arbitration agreement contained in the Subcontract and to FIDIC article 67, the Claimant had no obligation, under the circumstances, to refer to any engineer before initiating arbitral proceedings.

33. The first reason is that there was no engineer appointed by the Defendant under the Subcontract, in accordance with article 2 of the Conditions of Contract. The Engineer was named — and eventually dismissed — as Engineer by the Employer under the Main Contract but never acted as Engineer vis-à-vis the Claimant. The Engineer functioned only for the Employer under the Main Contract and never performed the normal functions of the Engineer under the Subcontract. Substantive contacts during the project were only between the Claimant and the Defendant, not the Engineer.

It may not be acknowledged, despite the Defendant's contentions, that the Engineer tacitly fulfilled the functions of an Engineer between the Defendant and the Claimant. This fact is not proved by the Defendant. Furthermore it is inconceivable, for this would have created a conflict of interest for the Engineer in its relationship with the Employer that appointed it.

So it was impossible for the Claimant to refer the dispute to any engineer.

34. Moreover supposing that the Engineer named under the Main Contract was deemed to act also as Engineer under the Subcontract, and assuming that, under FIDIC article 67, the Engineer is empowered to decide on disputes not involving technical matters but legal rights of the parties, it is undisputed that the Engineer had ceased its office ten years before the present proceedings.

In a telex of November 1979, the Defendant informed the Claimant that, according to the Employer's decision, "the Engineer duties have been stopped for the present." The Defendant did not contest that the Engineer never resumed its charge on the project.

Subsequently it would not have been possible for the Claimant to refer the dispute prior to commencing the arbitration proceedings in 1989 to an Engineer which was no longer employed.

FOR THESE REASONS,

The Arbitral Tribunal decides that it has jurisdiction on the dispute. "

Final Award in Case No. 6611 (1993)

FIDIC Conditions, 2nd ed./ Dispute between Contractor and Sub-Contractor/ Project abandoned following financial difficulties of the Employer/ Interpretation of "pay when paid clause"/ Whether Sub-Contractor bears risk regarding Employer's default/ Payment certificates approved/ Whether down payment by Employer covered Sub-Contractor's work/ Claim of Sub-Contractor covered by down payment to Contractor.

"[...]

I. Facts

II. The parties Claims and Defences

The facts and parties' respective claims are summarized in the Partial Award on Jurisdiction, above.

III. Definition of issues to be decided on

12. Under the terms of reference, the main issues to be determined by the arbitral tribunal are:

- Does the Claimant have an unconditional claim against the Defendant for the payment of the contractual value of the work performed by the Claimant in accordance with the Subcontract?

And, depending on the answer :

- If the Claimant's claims pursuant to the Subcontract are unconditional, are they (i) due and payable and (ii) not barred by virtue of the applicable statute of limitation rules?

- If the Claimant's claims pursuant to the Subcontract are conditional, has the contractual condition been satisfied or, if not, did the Defendant, in violation of the principle of good faith or any other implied or express obligation, prevent the condition from being satisfied?

IV. Discussion

A. Does the Claimant have an unconditional claim against the Defendant for the payment of the contractual value of the work performed by the Claimant in accordance with the subcontract?

13. Article 3, especially second paragraph (e) and third paragraph, of the Subcontract contains a so called "pay when paid" provision. According to the above mentioned provision, the subcontractor (i.e., the Claimant) will be paid "at the time and in the manner" the main contractor (i.e., the Defendant) receives payment from the Employer.

A first interpretation of such a provision in a subcontract may have the significance of a mere due date rule: only the maturity of the remuneration owed by the main contractor to the subcontractor is postponed and dependent upon the employer's payment. However, the subcontractor's right to remuneration itself is untouched and intact. Accordingly, in case of a definite non-payment by the employer, "the maturity must be assumed to set in as soon as such absence of payment can be established" (P. Gauch, "Special problems of construction law: international approach," p. 246). The failure by the employer to pay the main contractor does not prevent the subcontractor's claim from eventually falling due.

However, depending on the particular circumstances of the case, the "pay when paid" clause may also lead to the result that the main contractor's duty to pay is subject to the employer's payment. In other words, the subcontractor has a right to payment only provided that the main contractor himself has been paid for the part of the work performed by the subcontractor. The risk of non-payment by the employer shifts then from the main contractor to the subcontractor.

In the present case, articles 3, especially second paragraph c) and third paragraph, and 4 of the Subcontract, if read in connexion with article 9, imply such a displacement of the risk of non-payment described above. According to article 9, the Claimant will "bear all obligations and risks" arising from the Main Contract "in such a way as if the Claimant had concluded a direct contract with the Employer for his scope of supply and services." It is clear that the Claimant has accepted not only the risk of delay with respect to payment made by the Employer but also the non-payment risk in itself. Accordingly, the Defendant is only obliged to pay the Claimant if and when the Defendant has received payment from the Employer in consideration of the work executed by the Claimant. Therefore the payment to be made by the Defendant to the Claimant of the amounts corresponding to the payment certificates (and the extra order) is subject to the condition precedent that the Defendant has itself been paid the corresponding amounts by the Employer.

14. Such a condition precedent, however, is generally speaking inconsistent with the concept of subcontract.

A subcontract is regarded as a full independent contract vis-à-vis the main contract. There is no connection between the subcontractor and the employer. The subcontractor is not liable towards the employer and, equally the employer has normally no

direct compensation duty towards the subcontractor. Provisions of the main contract do not apply mechanically to the subcontract for the sole reason that the subcontract contains such a stipulation.

15. And construing anything like a direct contract between the Employer and the Claimant would be in contradiction with the parties' behaviour. The Claimant always sought payment from the Defendant, not from to the Employer. (See, for example, Engineer, June 18, 1978 meeting memo: "the Claimant is facing financial difficulties with the Defendant [...]. The Employer and the Engineer consider this is as an internal matter."; this is confirmed as well by the March 1, 1986, letter from the Claimant to the Defendant: "[...] in respect of the amounts long outstanding to us against you for work done by us, on your behalf, in the project [...]").

Moreover, had the Defendant been nothing but a contractor entrusted with the Claimant's claim against the Employer, then, the Defendant would have reported to and sought the Claimant's instructions. The Defendant would have at least consulted with the Claimant in the prosecution of the Claimant's claim.

Instead, the Defendant treated the claim of the Claimant against the Employer as if it were its own, i.e. in its own discretion, amalgamating it with other claims of the Defendant and eventually giving a political turn to the whole matter. Surely, had there been a direct claim by the Claimant against the Employer, this would have been pursued by the Defendant in the Claimant's best and sole interest.

16. A subcontractor is not a "partner" of the main contractor. The Claimant (as the other subcontractor [not a party to this arbitration]) was not made a party to the Consortium Agreement, even if it could have been (the value of the Claimant's contribution was substantially in excess of that of one of the partners). The Claimant has only to bear the risks resulting from the Subcontract, not the ones generated by the Main Contract or by the fortune of the common venture.

17. Articles 3, 4 and 9 of the subcontract are however lawfull and enforceable under Swiss law, but they must be very carefully interpreted i.e., in a way compatible with the notion of subcontract. The Claimant has indeed to bear all the hazards inherent in his proper contractual task, but not the risks belonging to the responsibility of the main contractor (nor the main contractor's partners and other subcontractors) or the fortune of the common venture.

B. Has the contractual condition of the Claimant's claim against the defendant been satisfied: has the Defendant been paid by the employer in respect of the work performed by the Claimant?

18. It is undisputed that the Defendant received nothing from the Employer but the down-payment of 63 429 180 (or, according to the Claimant, 62 826 947), representing 15% of the contractual price owed to the Defendant for the whole project. Of this amount the Defendant distributed a total of approx. 28.5 million to its partners and subcontractors (including the Claimant that was paid 5 957 343.30). Thus each of the Defendant's partners and subcontractors (including the Claimant) received, as down-payment, 15% of the total amount owed to it under the Consortium agreement or the Subcontract for the work, supplies and services which they were to deliver. The Defendant retained the balance of approx. 34.5 million.

It is also undisputed that the Claimant has performed work for a total price of 26 416 539, for which amount the Claimant submitted statements that were certified by the Engineer and approved by the Defendant and the Employer. This amount exceeds substantially the down-payment paid to the Claimant by the Defendant.

19. The issue to be determined by this arbitral tribunal is the following: shall the down-payment received by the Defendant from the Employer be considered, at least in part, as payment by the Employer for the work performed by the Claimant?

This question may not be answered without considering the principles hereabove mentioned: the agreement concluded between the Claimant and the Defendant has been qualified as a subcontract by both parties and the "pay when paid" clause has to be interpreted in accordance with the notion of a subcontract.

20. The Defendant has received from the Employer a sufficient amount of money, even after deduction of payments made by the Defendant to its partners (and its other subcontractor, the other subcontractor [not a party to this arbitration]), to pay the Claimant. The down-payment surplus retained by the Defendant amounted to approx. 34.5 million. The remainder, even after payment to the other subcontractor (not a party to this arbitration), is more than the amount owed by the Defendant for the work performed by the Claimant under the Subcontract. So it may be decided that indeed the Defendant has been paid by the Employer enough funds to pay the Claimant and that consequently the condition precedent hereabove explained has been fulfilled.

21. Obviously, the payment made by the Employer to the Defendant on June 23, 1977 was nothing but a down-payment, i.e., an advance payment.

The Defendant denies that this advance payment could be treated as a payment for work performed:

when the down-payment was received from the Employer, no work had yet been performed by the Claimant, nor by anyone else. Nevertheless, this down-payment was divided among the Defendant, its partners and subcontractors, in the very proportion of the value of the work to be performed by each of them. In the view of the Defendant, there would be no legal or contractual basis to reallocate this down-payment ex post among the parties according to any criteria, such as the amount of work performed by each party or the damage it claims to have suffered. Therefore, in the Defendant's opinion, there should not be any reason to change the initial allocation, to which all the parties had consented.

Such a reasoning cannot be followed. A down-payment is a payment on account for work to be performed in future and no contractor has an inherent right to keep the same; it may do so only to the extent that it performs work for a value equal or greater than the amount of the down-payment. A contractor who never performs any work is not entitled to retain the down-payment. In fact, it seems that a partner of the Defendant under the Consortium Agreement, paid back to the Defendant a fair amount of the down-payment which it initially received, commensurate to the part of the work it did not perform.

Down-payments do not survive the termination of the contract, even if the termination is the result of the default of the employer. They are, at termination, transformed into a definite payment and must be applied against amounts due, according to the ex-post evaluation of the work that the contractor has performed. In the present case, the project was terminated at the latest on June 15, 1980. At that date, the Defendant assigned and sold substantial equipment for the project to another entirely separate project, under a new contract. The project was stopped and the fulfilment of the Subcontract was no longer possible. Consequently, on June 15, 1980, the down-payment was effectively transformed into a definite payment since the termination of the project necessarily resulted in a final clearing of all accounts.

The initial apportionment of the down-payment was only provisional. In respect of the Claimant's claim, the arbitral tribunal is fully entitled to reallocate it and to decide that the Defendant has indeed received payment from the Employer for the work performed by the Claimant, under the form of a down-payment transformed into a definite one.

22. Assuming the Defendant, as it contends, has not been fully compensated by the Employer, under the project, for its own work and any damage it has suffered, the above interpretation does give the subcontractor a *de facto* priority right with respect to the payment made by the Employer to the main contractor (i.e., the down-payment that has been transformed into a definite payment by the termination of the project) the Claimant (and the other subcontractor [not a party to this arbitration]) will receive complete payment (at least for the work performed, if not for the possible loss arising from the breach of the Subcontract resulting from the abandonment of the project).

Such a priority is totally appropriate however considering the subcontractor's position. As stated before, the subcontractor is not a partner under any consortium agreement (as others were with the Defendant). The subcontractor does not bear the risk of a possible employer's default, whereas the main contractor does (the main contractor's partners, too).

23. Article 9 of the Subcontract states that "the Subcontractor will take upon himself and bear all obligations and risks ... in such a way as if the Subcontractor had concluded a direct contract with the Employer for his scope of supply and services." This provision does not only, as we have seen, define and limit the risk borne by the Claimant ("his scope of supply and services"), but it also, not surprisingly, connects the risk to the Employer: whether the Claimant's work has been paid for, or shall be deemed paid for in relation to the final apportionment of the down-payment, is a question to be answered by reference to the Employer. This is the risk accepted by the Claimant.

The January 22, 1989 special committee report — the committee members included the Employer — must be regarded as the final and definite position of the Employer on the question of payments in respect of the project. In this report, the Employer acknowledges certified works and supplies totalling approx. 52.5 million, and these include all of the Claimant's works for which payment is sought in the present proceedings. Further, given the lower amount of the down-payment of approx. 63.5 million, the Employer holds that all civil works carried out by the Claimant, and for that matter all other civil works, have in fact been paid for. It concludes that there was in fact a substantial overpayment.

24. The Defendant questions the reliability of the above report, without however adducing any convincing evidence.

The Defendant claims further that this tribunal, in adjudicating the claim made by the Claimant against the Defendant, ought to concern itself and take into account the Defendant's alleged loss and related claim against the Employer.

Preliminarily and incidentally, one may notice that, in the above 1989 special committee report, the Employer does acknowledge an amount of over 10

million worth of supplies certified by the Engineer on top of the civil works of the Claimant and the other subcontractor (not a party to this arbitration), it denies payment, however, claiming set-off. Even if one were to disregard this set-off, the amount of the down-payment (63.5 million) exceeds the sum of all certified works and supplies (52.5 million).

This tribunal is in no position to pass judgement on any claim of the Defendant against the Employer under the Main Contract, whether as a matter of jurisdiction or actual information. It is worth noting that the question of the Defendant's loss was not raised by the Defendant at the outset. It appears to have been developed only in response to loss comparisons subsequently made by the Claimant by way of general background. These are not to the point. The Defendant's alleged own loss and claim for compensation are irrelevant as a defence in this action, which turns on the question of whether or not the Defendant has been paid in respect of the works carried out by the Claimant.

It would be most extraordinary and unacceptable if the outcome of this action were made dependant on the standing of claims of the Defendant the prosecution of which is not only totally outside of the scope of jurisdiction of this tribunal but also lies within the Defendant's exclusive discretion.

The Claimant's certified works have been acknowledged by the Employer; so has the payment of the same pursuant to the final clearing of accounts. In the circumstances, a non-adjudicated claim by the Defendant against the Employer is incapable of being held against the Claimant. Any other holding would be tantamount to having the Claimant bear a risk beyond that assumed under the Subcontract, pursuant in particular to the provisions of article 9, i.e., the risk pertaining to the Claimant's scope of supply and services with regard to the performance of the same, their acknowledgement and payment.

Any remaining claim of the Defendant may only be directed against the Employer. The Defendant seems to have renounced the prosecution of such claim. Nothing in the submissions stands for the proposition that the Claimant would have consented to the same with the consequence of waiving its own claim against the Defendant under the Subcontract.

25. We conclude from the above considerations that the Defendant has been paid — as soon as on June 15, 1980 — by the Employer in respect of the work performed by the Claimant. Thus the payment condition of the Subcontract was met on this date and the Defendant must accordingly pay the Claimant.

Accordingly, the ten-year prescription period began to run on June 15, 1980. Since the Claimant filed its request for arbitration in July 1989, none of its claims for payment is time-barred. The Defendant's eventual request for the allocation of a reasonable amount in compensation of its efforts after June 15, 1980 to obtain payment by the Employer — particularly of the Claimant's claims — is unfounded.

26. The Defendant's objection that the Claimant "decided upon its own judgement to continue its work" after it became allegedly clear that the Employer experienced serious financial difficulties and thereby failed under its obligation to minimise its damage and accordingly could not seek compensation in good faith from the Defendant can not be sustained.

Such a contention is irrelevant because all of the Claimant's payment certificates — including certificates issued after July 1979 — were unreservedly approved by the Defendant (and by the Employer) and the Defendant has been fully paid by the Employer for the whole work performed by the Claimant. Furthermore, the Claimant continued to work confident that the negotiations between the Defendant and the Employer would still end successfully. Finally and importantly, the Claimant was never instructed to stop work by the Defendant (or by the Employer).

[...]

FOR THESE REASONS,

The Arbitral Tribunal rules, at the majority of its members,

that the Defendant shall pay to the Claimant the sum of 20 580 374 plus interest from December 12, 1986 to the date of payment at the rate of 8%;

[...]"

Partial Award on Jurisdiction in Case No. 7423

FIDIC Conditions, 3rd ed./ Dispute between Contractor and Sub-Contractor/ Application of Clause 67 to disputes under Sub-Contract/ Interpretation and adaptation of Clause to Sub-Contract disputes/ Absence of an Engineer with respect to Sub-Contract performance/ Obligation to refer to Engineer before initiating arbitration proceedings not applicable.

The Defendant is the Main Contractor for the construction of a Power Generating Station. He

subcontracted some civil works to the Claimant (Sub-Contractor). The Claimant claims additional costs due to various delays, and contractually agreed payments allegedly withheld by the Contractor, Defendant. This extract from the partial award on jurisdiction briefly addresses the issue of the application of Clause 67 to disputes under sub-contracts. See also Partial Award on Jurisdiction in Case 6611, above.

" [...]

The problem here is twofold: that the Sub-contractor is not a nominated subcontractor in the terms of Clause 69 of the Main Contract and apart from being approved under Clause 4 by the Engineer under the Main Contract is not under the direct control of the Engineer, and that the Engineer has no duties or powers in connection with the sub-contract. There is therefore no Engineer to refer to.

In order to resolve this issue we must go to Clause 28 of the sub-contract. I quote: "In effect the Sub-Contractor shall observe, perform and comply with all the provisions of the Main Contract on the part of the Contractor to be observed, performed and complied with so far as they relate and apply to the sub-contract works (or any part of the same) AND ARE NOT REPUGNANT TO OR INCONSISTENT WITH the express provisions of this sub-contract as if all the same were severally set out hereon" (Emphasis is mine).

I construe this to mean that the sub-contract, setting out the equivalent dispute clause to Clause 67, would be redrafted to remove the inconsistencies, to identify the Contractor and the Sub-Contractor as the proper parties, to identify the Sub-Contract and the Sub-Contract works and to omit requirements for adjudication by "The Engineer."

Accordingly I RULE that Clause 67 of the Main Contract as so adapted is applicable to the resolution of disputes under the Sub-Contract [...]. "

Partial Award in Cases 6276 and 6277 (1990)

FIDIC Conditions, 3rd ed./ Dispute between Employer and Contractor/ Dispute settlement clause similar in relevant respects to FIDIC Clause 67/ Engineer not specified/ Failure of Claimant to refer claim to Engineer/ Precondition for resort to arbitration not met/ Claim premature.

1. This Arbitral Tribunal has been set up in the cases No. 6276/CI and No. 6277/CI between a Swedish Company (the Contractor and the Claimant in this arbitration) and the Secretary of the People's Committee for a municipality of an Arab State and the Secretary of the People's Committee of Health of that municipality (Defendant) and consists of three arbitrators.

2. During the phase devoted to the question of arbitrability of requests No. 1 and 2 of the Claimant and the counterclaim of the Defendant, the Claimant agreed that the Secretary of the People's Committee for the Municipality should be deemed to be the sole Defendant in the two cases. The Arbitral Tribunal takes due note of this and renders hereinbelow its partial award relating to the question of arbitrability of the Claimant's requests No 1 and 2 and the Defendant's counterclaim.

ON THE QUESTION OF THE ARBITRABILITY OF REQUEST NO. 1

3. On 19 August 1981, the Claimant and the Defendant concluded a contract for the alteration and extension of a Hospital.

4. The Claimant maintains that it has fulfilled its obligation under the contract but that the Defendant has failed to pay to it most of the amounts due. Its request is based on articles 17 and 63 reproduced below.

5. Article 17 of the contract reads as follow:

> "Settlement of Disputes
> Any differences arising out of the execution of the Contract shall be settled friendly and according to mutual goodwill between the two parties; if not, it shall be settled in accordance with Clause 63 of the General Conditions of Contract. The place of arbitration shall be Geneva, Switzerland."

6. Article 63 on "General Conditions of Contract" which form an integral part of the contract of 19 August 1981, reads as follows:

> "SETTLEMENT OF DISPUTES
> 63. If any dispute or difference of any kind whatsoever shall arise between the Employer or the Engineer and the Contractor in connection with, or arising out of the Contract, or the carrying out 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, within a period of 90 days after being requested by either party to do so, shall give written notice of his decision to the Employer and Contractor. Save as hereinafter provided, such decision in

respect of every matter so referred shall be final and binding upon Employer and the Contractor until the completion of the Work and shall forthwith be given effect to by the Contractor, who shall proceed 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 90 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 or his decision, as aforesaid, within a period of 90 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 90 days of receiving notice of such decision, or within 90 days after the expiration of the first named period of 90 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 in accordance with the said Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, direction, certificate or valuation of the Engineer and 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 a witness and giving evidence before the arbitrator/s as aforesaid. [*sic*] The arbitrator/s on any matter whatsoever relevant to the dispute or difference referred to the arbitrator/s as aforesaid. The arbitrator/s shall not enter on the reference until after the completion or alleged completion of the works unless with the written consent of the Employer and the Contractor provided always:

(i) that such reference may be opened before such completion or alleged completion in respect of the withholding by the Engineer of any certificate or withholding of any portion of the retention money to which the Contractor claims in accordance with the conditions set out in the Contract Agreement to be entitled or in respect of the exercise of the Engineer's power to give a certificate under the Contract Agreement.

(ii) that the giving of a certificate of Completion under clause 47 hereof shall not be a condition precedent to the opening of any such reference.

7. The Tribunal must ascertain that the Claimant has duly satisfied the two preconditions for arbitration, namely first the resort to amicable settlement and secondly the submission of the dispute to the Engineer.

8-13. With regard to prior resort to amicable settlement [...t]he Tribunal is of the view that the prerequisite of the search for an amicable settlement has been satisfied by the Claimant in the present case.

14. With regard to the submission of the dispute to the Engineer prior to arbitration in conformity to article 63 of the "General conditions of contracts" the Tribunal considers that the procedure, which has been voluntarily made detailed, encased within precise time-limits and requiring the Engineer to draft a report, is strictly binding upon the parties and governs their conduct before resorting to arbitration.

15. The Tribunal observes that while the first prerequisite, i.e., that relating to amicable settlement, is not subject to any pre-established and rigid rule, the second, i.e., that relating to resort to the Engineer, is governed by precise rules which may not be transgressed. Unlike other functions of the Engineer (control, sundry authorizations, modification of works, etc.) which have been performed by various individual or collective organs (varying according to the circumstances) with the express or tacit consent of the parties, a function of such decisive importance, which triggers the arbitration proceedings, has, for its part, never been exercised by any varying individual or collective organ. In other words, while the functions of the Engineer mentioned in the contract may, in the course of everyday routine and normal relations, have been exercised with the consent of the parties by different technical organs which have varied with the times, the particular function of disputes settlement has never been examined by any of the organs and remains governed by the contract and by the strict modalities of substance and form (time limits, report, etc.) which it sets forth.

16. The Claimant claims that it has been dispensed from this contractual prerequisite by the Defendant's failure to notify it in writing of the name of the Engineer specially authorized to discharge that particular pre-arbitral function. The Tribunal considers that the Claimant cannot thereby be dispensed from this substantive phase and that it was under a duty to put the Defendant on notice to indicate to it the name of the Engineer to whom the dispute could be submitted. It was only if it had met with a

refusal or in the event of the failure to reply on the part of the Defendant that the Claimant could have been dispensed from complying with this pre-arbitral phase.

17. The Claimant has maintained that because of the completion of the operations and the final receipt of the work it was too late to request the appointment of an Engineer. Although this argument is obviously relevant for other technical functions of the Engineer such as the modification of operations and their technical execution or control, or the approval of invoices at their respective due dates, the specific function connected with disputes settlement, for its part, can be exercised according to the circumstances both during the work and after its completion so long as all the legal effects of the contract have not been fully exhausted.

18. The Tribunal has thus reached the conclusion that the Claimant has not satisfied the prerequisite set forth in the "General conditions of contracts." Consequently, the request for arbitration concerning the 1981 contract, which is certainly not impossible for the future, is at present premature. It therefore behoves the Claimant formally to demand from the Defendant the designation of an Engineer to whom to submit the present dispute before it comes before the Tribunal.

[...]

IV. GENERAL CONCLUSIONS

For these reasons,

The Tribunal

decides that it cannot consider request for arbitration No. 1 (case original No. 6276/CI) unless the Claimant complies with the prior formality relative to the submission of the dispute to the Engineer.

[...]"

Final Award in Case No. 6535 (1992)

FIDIC Conditions, 2nd edition/ Dispute between employer and contractor/ clause 67/ Admissibility of claims/ Whether a "dispute" existed under the contract which could be referred to the engineer under clause 67, no/ Assuming there was such a "dispute", whether it had been validly referred to the engineer under clause 67, no.

This extract concerns a case where the contractor had referred some 216 claims against the employer to ICC arbitration. The employer had responded by claiming that the ICC tribunal did not have jurisdiction under clause 67. Specifically, the employer raised two jurisdictional defences, as follows:

(1) In order to be able to refer a matter to the engineer under clause 67, there must first exist a "dispute" as to such matter between the contractor and the employer. The contractor had been unable to establish that there had existed a dispute as to any of the matters which the contractor had referred to the engineer under clause 67. Instead, the contractor had merely referred "claims" to the engineer under other clauses of the FIDIC Conditions, e.g., clause 44 dealing with extensions of time and clause 52 dealing with payment for variations. Such claims could not ripen into disputes until at least they had been rejected by the engineer, which had not happened before these matters were referred to arbitration.

(2) Even if there had existed disputes as to such matters, the contractor had not formally referred such disputes to the engineer under clause 67.

With respect to these two jurisdictional defences, the tribunal commented in its award as follows:

"The first issue for consideration is whether the three letters referred to in paragraph 3.1 to 3.3 above constitute an effective reference under clause 67 of the I.C.E. Conditions. The tribunal accepts that clause 67 involves a 'two-tier' process. This means that before a claim or contention can constitute a dispute to be referred under clause 67, it must first have been submitted and rejected under the contract. It follows that if the matters submitted to the engineer are claims which have not previously been rejected, they cannot be regarded as submitted under clause 67, whatever language is used in the submission. Furthermore, where a claim has been submitted to the engineer, it is open to the contractor to re-submit the claim for consideration under the contract, without invoking the special pre-arbitral procedure of clause 67. The procedure under clause 67, if invoked, obliges the parties to proceed thereafter to arbitration in accordance with the time scale laid down. If clause 67 is to be invoked, it has been consistently held that the reference must be clear and unequivocal in view of the serious consequences which may flow from the reference: See Keating on Building Contracts, 5th ed., p. 922-927 and the English case *Monmouth C.C. v. Costelloe & Kemple* [1964] 63 LGR 131 and [1965] 64 LGR 429.

Applying these principles to the 3 letters in question, the tribunal is of the view that the letters demonstrate a clear intention to submit the claims for consideration under the appropriate conditions of the contract, particularly under clauses 44 and 52, regarding

respectively extensions of time and additional payment. Whether or not the claims referred to have previously been submitted to the engineer, the letters suggest strongly an intention to have the matters reviewed rather than submitted as an existing disputes. Further, to the extent that any of the claims had previously been submitted, the tribunal finds that the three letters do not constitute a clear or sufficient reference under clause 67 so as to invoke the second tier procedure under that clause.

The tribunal, therefore, is of the opinion that as at the date on which the claimant maintained the engineer had given a decision under clause 67, the engineer had been asked only to review the claims which were submitted or re-submitted. The response given by the engineer on the above date is entirely consistent with this construction. The tribunal therefore finds that on the above date disputes or differences come into existence which, in accordance with the first sentence of clause 67, should be referred for decision to the engineer as a pre-condition to arbitration. These disputes remain capable of being so referred subject, however, to the Claimants further contentions that the tribunal has jurisdiction."

The tribunal thus upheld both of the employer's jurisdictional defences: it concluded that there had been no existing disputes between the parties when the contractor had referred matters to the engineer under clause 67 and, even if there had existed such disputes, the contractor had not clearly requested a decision of the engineer on such matters under clause 67. Consequently, the tribunal ruled that the contractor had not complied with clause 67 so as to give the tribunal jurisdiction over any of the claims advanced. As a result, the tribunal declared that it had no jurisdiction over such claims. [Note: An extract of the award in this case is also published in French translation in the *Journal du Droit International,* 1993, p.1024.]

Final Award in Case No 8873 (1997)

International construction contract NOT based on FIDIC Conditions/ Dispute between Employer and Contractor/ Force majeure alleged by Claimant/ Application of international commercial usages, UNIDROIT principles, or general principles of law/ Whether relevant provisions of FIDIC and/or ENAA Conditions amount to principles or usages that may apply independently of parties' agreement.

In this case an event characterized by the Claimant as force majeure caused difficulties of execution that led to a dispute between the Employer and the Contractor as to the payment of additional costs.

The Claimant argued, inter alia, that international commercial usages or general principles of law applied to the situation of force majeure: the UNIDROIT principles, and "the rule according to which the party who suffers losses as a result of force majeure is entitled to compensation by the other party for the additional costs incurred in overcoming the force majeure situation, a rule which allegedly results from internationally used standard forms of contract, among which the FIDIC Conditions."

The Tribunal finds that the relevant rules contained in the FIDIC and ENAA forms of contract are not "ripe" for consideration as autonomous principles of law.

" [...]

Les conditions FIDIC et ENAA

En ce qui concerne les conditions générales invoquées par la demanderesse, il faut souligner qu'il s'agit de contrats-type, qui ne s'appliquent, en principe, que lorsque les parties ont expressément ou implicitement montré leur intention de soumettre leur contrat aux conditions générales en question. Certes, les principes contenus dans des contrats type utilisés avec grande fréquence dans une certaine branche peuvent devenir, en vertu de leur répétition constante, des véritables usages. Toutefois pour arriver à une telle conclusion il faut prouver que le principe en question représente désormais une règle qui s'impose — sans nécessité d'accord — aux entreprises de la branche dans laquelle il est appliqué.

Or, afin que des solutions contractuelles typiques puissent devenir des usages il faut:

- qu'il s'agisse de solutions établies dans la pratique des affaires avec un degré suffisant d'uniformité pour pouvoir être appliquées directement (comme formule standard) sans besoin de négocier des éléments ultérieurs;

- qu'il soit prouvé que les principes que l'on veut considérer comme des usages sont appliqués par les entreprises de la branche en question même dans l'absence d'une prévision expresse dans le contrat.

En ce qui concerne le premier aspect, il faut tout d'abord souligner que le principe selon lequel le maître de l'ouvrage doit prendre en charge les coûts supportés par l'entrepreneur en conséquence d'une situation de force majeure ne s'applique, dans le cadre des contrats-type précités, que dans certaines situations exceptionnelles de force majeure (en particulier en cas de guerre), et suivant des procédures

précises, réglementées en détail dans ces contrats type. Ainsi, dans les conditions FIDIC, la situation de guerre doit être immédiatement notifié à l'*Engineer* qui déterminera, après consultation de l'entrepreneur et du maître de l'ouvrage les surcoûts relatifs (art. 65.5 FIDIC); les conditions ENAA prévoient la notification à temps par écrit du montant des surcoûts comme condition pour engager une responsabilité du maître de l'ouvrage. En outre, les *special risks* des conditions FIDIC (art. 20.4, a-e) ne correspondent pas exactement aux *war risks* des conditions ENAA (art. 38.1).

Tout ceci montre clairement que les principes contenus dans les conditions précitées, ne sont pas encore « mûrs » pour se transformer en une règle uniforme et autonome capable de s'imposer comme usage : il ne s'agit pour le moment que de solutions contractuelles, inutilisables hors du contexte du contrat type dans lequel elles sont étroitement intégrées sans procéder à des mises au point au niveau contractuel. Ainsi, il serait absurde d'appliquer hors de leur contexte des solutions, comme celles citées ci-dessus, qui contiennent des mécanismes particuliers (comme le rôle de l'*Engineer* dans les conditions FIDIC ou l'obligation d'indiquer tout de suite le montant des surcoûts réclamés dans les conditions ENAA) visant à réaliser un équilibre des intérêts des parties qui ne peut pas être obtenu hors de ce contexte sans négocier une série d'éléments supplémentaires.

En ce qui concerne le second aspect, aucune preuve n'a été apportée que, en présence de clauses de force majeure classiques (comme celle contenue dans le contrat du 31 mai 1994), se limitant à prévoir une exemption de responsabilité du débiteur qui n'exécute pas ses obligations, les entreprises travaillant dans la branche de la construction se considèrent liées, dans l'absence de toute clause contractuelle en ce sens, par un usage qui imposerait au maître d'ouvrage de rembourser les surcoûts supportés par l'entrepreneur comme conséquence de la force majeure.

[...] "
