

ICC International Court of Arbitration

Bulletin

Cour internationale d'arbitrage de la CCI

Extract for restricted use

Extrait à tirage limité



International Chamber of Commerce

The world business organization

International Court of Arbitration

38, Cours Albert 1er, 75008 Paris, France
Tel. +33 1 49 53 29 05 Fax +33 1 49 53 29 33
Website www.iccarbitration.org
E-mail arb@iccwbo.org

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International Construction Contract Disputes: Second Commentary on ICC Awards Dealing Primarily with FIDIC Contracts

By Christopher R. Seppälä*

I. Introduction

This article is a brief commentary on extracts from nine ICC awards dealing with disputes that have arisen in relation primarily to the Second (1969), Third (1977) and Fourth (1987) Editions of the FIDIC¹ Conditions of Contract for Works of Civil Engineering Construction (the ‘FIDIC Conditions’ or ‘Red Book’), published in this issue of the Bulletin.²

The FIDIC Conditions are the best known and probably most widely used international standard form of construction contract conditions. The First Edition of this form, published in 1957, was based on an English domestic standard form: the then current edition of the English Institution of Civil Engineers (‘ICE’) Conditions. Even today, the official and authentic text of this form of contract is the version written in the English language. However, in subsequent editions, the FIDIC Conditions have become progressively more ‘international’ in style and content and today are widely used in civil law as well as common law jurisdictions.

Due to the long time lag (10 to 20 years or more) from the time when a new edition of the FIDIC Conditions is introduced until the time it gains acceptance, comes into general use and is, then, the subject of disputes that go to arbitration, there are still no extracts of awards dealing with the latest suite of FIDIC construction contracts for major works which were published in 1999, namely, the ‘Red’ (for civil engineering construction), ‘Yellow’ (for plant and design-build works) and ‘Silver’ (for EPC/turnkey construction works) Books (the ‘1999 FIDIC Books’).

At the same time, the precedential value of awards dealing with older editions of the FIDIC Conditions, such as the Second (1969), Third (1977) and Fourth (1987) Editions, should not be underestimated. First, because they continue to be in use in certain parts of the world and, consequently, are likely to be the subject of arbitrations for years to

* Member of the New York and Paris Bars; partner, White & Case LLP, resident in Paris; Legal Adviser to the FIDIC Contracts Committee; Alternate Member of the ICC International Court of Arbitration. The views expressed herein are the author’s own and do not necessarily reflect those of any firm or organization with which he is affiliated.

¹ ‘FIDIC’ refers to the Fédération Internationale des Ingénieurs-Conseils or (in English) the International Federation

of Consulting Engineers, which has its Secretariat in Geneva, Switzerland, see FIDIC’s website: <www.fidic.org>.

² The author gratefully acknowledges the assistance of Luka Kristovic Blazevic and Claire Inder, associates at White & Case LLP, Paris, in the preparation of this article.

come. Second, because, while the pre-arbitral procedure for the resolution of disputes by the Engineer under Clause 67 of those editions was replaced in 1999 by the requirement that disputes be submitted to a Dispute Adjudication Board ('DAB'), the disputes clause in the 1999 FIDIC Books (Clause 20) is similar to that in the older editions (Clause 67) and thus awards relating to the resolution of disputes by the Engineer may well remain relevant to the procedure for the resolution of disputes by the DAB. A good example of this is the important interim award in Case No. 10619 in 2001 discussed below. In that case, the arbitrators' decision in their award to enforce a 'binding'—but not 'final'—decision of the Engineer under Clause 67 of the FIDIC Conditions, Fourth Edition (1987), is directly applicable to the enforcement of a 'binding'—but not 'final'—decision of a DAB under Clause 20 of the 1999 FIDIC Books. Thus, awards dealing with the earlier editions of the FIDIC Conditions may continue to be instructive in relation to the 1999 FIDIC Books.

A first series of extracts from ICC awards dealing with construction contracts referring to the FIDIC Conditions was published in Volume 2, No. 1, of this Bulletin in 1991 and a second series was published in Volume 9, Nos 1 and 2, of this Bulletin in 1998, accompanied by a commentary by the present author in Volume 9, No. 2. ICC awards dealing with the FIDIC Conditions have also been published elsewhere.³ However, until the current series of awards interpreting the FIDIC contracts was published, this author had found only about 40 published arbitral awards interpreting them, which is a matter for regret.⁴

The awards relating to the FIDIC Conditions in this commentary will be discussed, first, by reference to the Second Edition and, then, by reference to the Third and Fourth Editions. This discussion will be followed by a brief comment on an award in relation to the FIDIC Client/Consultant Model Services Agreement ('White Book'), Second Edition (1991). Finally, two awards dealing with the important issue of the allocation of costs between parties in an international construction arbitration will be examined.

II. FIDIC Civil Engineering Conditions of Contract (Red Book)

A. Second Edition (1969)—Partial Award in ICC Case No. 9202 (Award in French)

Relevant FIDIC Clauses: 1, 60, 67 and 69.

This majority partial award was issued in December 1998 and the place of arbitration was Paris, France.

The Respondent/Employer, an African State entity, had entered into a construction contract in 1989 with an Italian Contractor, the Claimant, for certain works relating to a

³ For other ICC awards dealing with the FIDIC Conditions, see, among other sources: (i) *Collection of ICC Arbitral Awards*, 1974–85 (Vol. I), 1986–90 (Vol. II) and 1991–95 (Vol. III) prepared by different editors and published by ICC Publishing, Kluwer Law and Taxation/Kluwer Law International; (ii) *The International Construction Law Review*, Vols 1 to 3 (1983–86) and Vol. 6 (1989), published by Lloyds of London Press; and (iii) the *Yearbook Commercial Arbitration*, published by Kluwer Law and Taxation/Kluwer Law International.

⁴ See C.R. Seppälä, 'The Development Of A Case Law In Construction Disputes Relating To FIDIC Contracts' in E. Gaillard & Y. Banifatemi, eds., *Precedent in International Arbitration* (Huntington, NY: Juris Publishing, 2008). A somewhat revised version of this article was subsequently published in C.R. Seppälä, 'The Development of a Case Law in Construction Disputes Relating to FIDIC Contracts' (2009) 26 *The International Construction Law Review* 105.

port project (the contract followed on from an earlier construction contract between the same parties relating to construction works for the same port). In 1990, the Claimant/Contractor terminated the contract for alleged failure by the Respondent/Employer to open the letters of credit required by the contract. Subsequently, the Claimant/Contractor referred the parties' dispute over the letters of credit to arbitration for the purpose of recovering its damages as a result of the contract's termination. A partial award was rendered by a majority of the arbitral tribunal dealing, among other things, with three defenses or counterclaims raised by the Respondent/Employer, as follows:

- (1) the Request for Arbitration was inadmissible under Clause 67;
- (2) the construction contract, which was classified as an 'administrative contract' under local law, was invalid as it was not in the Arabic language as required by such law; and
- (3) alternatively, the Claimant/Contractor's purported termination of the contract was invalid.

The tribunal's consideration of these issues is discussed below.

Issue 1: Is the Claimant/Contractor's Request for Arbitration admissible under Clause 67?

Relevant FIDIC Clauses: 1 and 67.

The Respondent/Employer raised two objections to the admissibility of the Claimant/Contractor's Request for Arbitration:

- (1) the Claimant/Contractor had not validly requested a decision from the Engineer under Clause 67 as the Claimant/Contractor had requested a decision from the Director General of projects and research who was allegedly not the Engineer; and
- (2) the Request was submitted out of time under Clause 67, which provided that the Engineer had to make a decision within 90 days and if the Engineer failed to do so or if either party was dissatisfied with the decision, then either party may, within 90 days after receiving the decision or within 90 days after the expiration of the first period of 90 days (as the case may be), require that the matter be referred to arbitration.

The Claimant/Contractor argued that the Director General of projects and research was the Engineer but that he had not given a decision under Clause 67.⁵

As regards the first objection raised by the Respondent/Employer, the tribunal referred to the manner in which the Engineer is described in Parts I and II of the Conditions:

[The Engineer] is identified in the contract, General Conditions, Clause 1, Definitions and interpretations [*sic*], where paragraph (1)(c) reads as follows:

'1(1)(c). "Engineer" means the Engineer designated as such in Part II or other the Engineer appointed from time to time by the Employer and notified in writing to the Contractor to act as Engineer for the purposes of the contract in place of the Engineer so designated.'

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'Extracts from ICC Arbitral Awards in International Construction Disputes' published in this issue of the Bulletin (referred to hereinafter as 'Extracts'), page 77, paragraph 2. The original language of the award is French. See C.R. Seppälä, 'The Pre-Arbitral Procedure for the Settlement of Disputes in the FIDIC (Civil Engineering) Conditions of Contracts' (1986) 3 *The International Construction Law*

Review 315 (regarding the FIDIC Red Book, Third Edition) and C.R. Seppälä, 'The Principal Changes in The Procedure for the Settlement of Disputes (Clause 67)' (1989) 6 *The International Construction Law Review* 177 (regarding the FIDIC Red Book, Fourth Edition).

The above clause thus refers to Clause 1(1)(c) of Part II containing the Particular Conditions:

‘1(1)(c). The “Engineer” is the *Director General of the projects and research department of the [Employer]* who hereby nominates [name of the Engineer redacted for publication purposes] who have been appointed *consulting Engineers* to the [Employer] to act as Engineer for and on his behalf in all matters relating to the contract except that the Engineer will act conjointly with his delegates in all matters relating to the contract price, and the Engineer (Director General) may delegate his authority in certain matters relating to the contract price to the project Engineer at the site.’ (Emphasis added)⁶

On this basis, the tribunal concluded that the Engineer was the Director General of projects and research.⁷

The tribunal also noted that the Claimant/Contractor had written to the Director General ‘in accordance with article 67 of the contract’ (that is, as though the Director General were the Engineer) without the Respondent/Employer raising any objections thereto.⁸

As regards the second objection raised by the Employer, the tribunal found that the Contractor had requested a decision on 7 September 1990, relating to the damages it had suffered as a result of its earlier termination of the contract (in July 1990), but the Engineer had not rendered a decision. The tribunal stated, as follows:

The Arbitral Tribunal will therefore refer more directly to the contents of the Director General’s letter of 10 October 1990 and enquire whether it contains a ‘decision’ of the kind required at the stage prior to filing a request. It includes the following:

‘... your above-referenced letter relating to indemnification (on account) of contract termination reached us when the two parties were already in the process of negotiating an indemnity due on account of the work being suspended, *and it therefore has no justification*’ (... emphasis added).

This letter continues as follows:

‘We therefore hold that your letter regarding an indemnification (on account) of contract termination should now be considered as suspended for the above reasons’ ...

The Tribunal finds that there was no ‘decision’ by the Engineer. Consequently, as from 7 September 1990, on which date [A] made its request, the Engineer had 90 days to make a decision, i.e. up to 7 December 1990 or, failing a decision, 90 additional days, i.e. up to 7 March 1991, after which no application could be made to the ICC. In this particular case, [Claimant] filed its request with the ICC on 25 February 1991 and the ICC registered the request on 4 March 1991.⁹

Thus, the tribunal found that, where the Engineer had failed to make a decision, to respect the time limit in Clause 67, a Request for Arbitration had to be filed with the ICC within a second period of 90 days after the request for a decision and that the Claimant/Contractor had satisfied this requirement.

Comments:

While the tribunal was clearly correct in finding that—where the Engineer had not made a decision—the Claimant/Contractor had to ‘require that the matter or matters in

⁶ Extracts, page 78, paragraph 5.

⁷ Extracts, page 78, paragraph 6.

⁸ Extracts, page 78, paragraph 9.

⁹ Extracts, page 79, paragraphs 12–13.

dispute be referred to arbitration' within such second period of 90 days, arbitral tribunals have, in fact, been divided over the question of whether this required the filing of a Request for Arbitration with the ICC or merely a notice of some kind to the other party and perhaps the Engineer.¹⁰

Issue 2: Is the contract, which is written in English, 'absolutely void' because it violates a governmental decree relating to administrative contracts prohibiting the drafting of such contracts in a foreign language?

No relevant FIDIC Clause.

The Respondent/Employer argued that the construction contract was an 'administrative contract'¹¹ and that, under the law of the State concerned, which was a civil law country, administrative contracts are void if in a foreign (that is, non-Arabic) language.

The Respondent/Employer claimed that only the five-page Contract Agreement was written in Arabic as well as English, and the other documents were all in English.

The Claimant/Contractor argued that in addition to the Contract Agreement having been signed in Arabic as well as in English, the Conditions of Contract (both General and Particular) had initially been drafted and signed in English but they were also subsequently translated into Arabic and signed as such. In addition, the Claimant/Contractor argued that:

The only contractual documents that exist solely in an English version are documents which, by their nature (technical, mathematical, economic), would be untranslatable: 'drawings', technical 'specifications', 'priced bills of quantities', which merely list unit prices relating to each head of costs multiplied by the quantities provided for each activity or part of the construction . . .¹²

The tribunal noted that according to a governmental decree of the State concerned relating to administrative contracts ('Decree [A]'):

In cases of contracting with foreign companies and establishments, the contract may be written by [*sic*] another foreign language beside [*sic*] the arabic-language, provided that in such case the arabic text shall be the original copy and the one to be relied on for interpretation and the references at contestation.¹³

The tribunal also noted that:

the 'contract agreement', the principal contract document, was signed as a bilingual English and Arabic text. This should be sufficient to dismiss the defendant's claim that it is void on the basis of the language used. For the remainder consists simply of technical appendices. Moreover, the General Conditions and the Particular Conditions were not translated 'too late', but prior to 14 March 1989, on which date the contract was recorded in the Register of [State X].¹⁴

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See C.R. Seppälä, 'International Construction Contract Disputes: Commentary on ICC Awards Dealing with the FIDIC International Conditions of Contract' (1998) 9 *ICC International Court of Arbitration Bulletin* 32 at 35–36. See also C.R. Seppälä, *supra* note 5 (regarding the FIDIC Red Book, Third Edition, and the FIDIC Red Book, Fourth Edition, respectively).

11
In civil law countries, such as the State concerned here, an administrative contract would include a contract for the execution of public works that is concluded by a government department, as is explained later in this same award (see below).

12
Extracts, pages 79-80, paragraph 15.

13
Extracts, page 80, paragraph 16.

14
Extracts, page 80, paragraph 17.

The tribunal then stated that the Respondent/Employer had issued the invitation for tenders, including the form of contract (together with the general and the special conditions), in the English language, and the Respondent/Employer should have been aware of any legal restrictions in its own country.¹⁵

The tribunal noted that it had been the practice in the relevant State to interpret Decree [A] as not preventing the administration from using, with foreign companies, contractual documents which were essentially, if not entirely, in a foreign language during the ‘formation’ phase of the contract. It was only when the contract was finally concluded that documents in Arabic were prepared, usually only the ‘contract agreement’, which had to be registered in the General Registry of the State concerned, while leaving all other contractual documents and annexes in their original foreign language.¹⁶

The tribunal stated that the prohibition on the use of another language than Arabic in official documents did not appear to be mandatory (*d’ordre public*), in as much as the State itself issued international invitations for tenders in a foreign language and thus did not comply with this prohibition itself.¹⁷

The tribunal therefore concluded that the contract was not void.

Comments:

In civil law countries, such as France for example, administrative contracts (roughly speaking, contracts for public procurement¹⁸) are typically subject to administrative law, which is a distinct body of law from that applicable to private contracts, that is, contracts between private parties. This is illustrated by Issue 2 above and Issue 3 below.

This is important to note as construction contracts incorporating FIDIC conditions are often concluded with public bodies, and when the public body is that of a civil law country, the contract may be an administrative contract, with important legal consequences.

Issue 3: Under the law of the civil law country concerned, could the Contractor/Claimant rely on a clause in the construction contract giving it, apparently, the right unilaterally to terminate the contract?

Relevant FIDIC Clauses: 60, 67 and 69.

The tribunal noted that the Claimant/Contractor was given a right, by Clause 60(12), to terminate the contract should the Respondent/Employer delay in opening certain letters of credit beyond a certain date.¹⁹ However, the tribunal also noted that Clause 69 (‘Default of the Employer’) of the FIDIC Conditions, which entitles the Contractor to terminate the contract where the Employer was in default in certain respects, had been deleted from the contract.²⁰

The tribunal found that the contract in this case was an administrative contract as it related to public works and was concluded by a government department.²¹

¹⁵ Extracts, page 80, paragraphs 18 and 20.

¹⁶ Extracts, page 80, paragraph 19.

¹⁷ Extracts, page 81, paragraph 21.

¹⁸ See *supra* note 11.

¹⁹ Extracts, pages 81-82, paragraph 24.

²⁰ Extracts, page 82, paragraph 24.

²¹ Extracts, page 83, paragraph 28.

The tribunal then continued as follows:

As an administrative contract, the 1989 contract does not, or should not, give the foreign contracting company the right to terminate it, for it is made in the general interest of an entire population. . . .

Nearer to our case is the idea, fully accepted in administrative law, that a public authority's failure to honour its obligations, as alleged by [A] against [Respondent], does not exempt the private contracting party from performing its obligations, for the private party cannot normally invoke the *exceptio non adimpleti contractus* principle.

However, the doctrine allows for an exception to this rule: '*exceptio non adimpleti contractus* is not applicable to public works contracts [...] except when the possibility of asserting this exception has been expressly provided in the contract' (*Jurisclasseur Construction, Les Editions techniques du Jurisclasseur—1993*). French administrative case law, which has inspired the law of [State X], has confirmed this position by recognizing that the contractor has a right to terminate a contract due to the fault of the Employer, where there is a contractual clause allowing this (Cons. d'Etat, 29 March 1985, *Société française de travaux publics Fougerolles* nos. 26676 and 26677).

In any administrative contract, the absence of an automatic termination clause means, as one author has written, that 'the private party is always bound to perform, no matter what the default of the public authority'. . . .

. . . the power to terminate an administrative contract lies solely with the public authority which can exercise it unilaterally and at its discretion. There is nothing similar to the benefit of the private contracting party, unless it implements an automatic termination clause provided in the contract.²²

The tribunal found that the only Clause on which the Claimant/Contractor could rely to terminate the contract was Clause 60(12). However, the tribunal found that while such Clause gave the Claimant/Contractor the right to terminate the contract ostensibly, it did not do so '*de plein droit*', that is, automatically:

But if we then turn from the Civil Code of [State X] to the provisions of the 1989 contract, it is true that we find the above-mentioned Clause 60(12), according to which, under certain conditions, 'the contractor shall be *entitled* to terminate the contract' (emphasis added). While considering the contract to be valid, the Arbitral Tribunal may enquire as to the validity of inserting such a clause in an administrative contract, especially in light of the terms, as already analysed, of Article [...] of Decree [A] relating to the regulation of administrative contracts.

Furthermore, upon analysis, Clause 60(12) does not appear to be a clause intended to allow the 'automatic' termination of the contract, relieving the contractor from having to call upon the courts. Clause 60(12) of the 1989 contract ('The contractor shall be entitled to terminate the contract') does not, at least as far as French civil law is concerned, contain the conditions required for it to be characterized as an automatic termination clause, since

- (i) it does not expressly rule out the intervention of the courts,
- (ii) it does not embody the parties' intention to terminate the contract automatically, and lastly
- (iii) it appears flawed by ambiguity, as the contractor is offered an alternative before terminating the contract (payment by way of oil barter). There can be no question of termination being 'automatic', if at the same time another possibility remains open to the contractor.²³

²² Extracts, pages 83-84, paragraphs 31-35.

²³ Extracts, page 84, paragraphs 38-39.

Even disregarding the administrative nature of the contract and the deletion of Clause 69, the tribunal found that the Claimant/Contractor should, in the absence of a clause authorizing it to terminate the contract automatically, have referred the matter to the Engineer under Clause 67 and subsequently (if necessary) requested an arbitral tribunal to decide the termination of the contract.²⁴

As the tribunal found that no clause of the contract authorized the Claimant/Contractor to terminate the contract automatically (*'de plein droit'*) and as the Claimant/Contractor had failed to submit the issue to the Engineer under Clause 67 before requesting an arbitral tribunal to decide the termination of the contract, the tribunal held that the Claimant/Contractor's unilateral decision to stop performing the works was unjustified and, consequently, that it was liable for having abandoned the project.

Comments:

This case highlights a fundamental difference between the law in common law countries relating to the termination of contracts from the law in many civil law countries. In common law countries, the provisions in the FIDIC Conditions giving the Contractor the right to terminate in the case of the Employer's default (albeit that Clause 69 had been deleted from the Contract in this case) are valid and effective. However, in France and other civil law countries (such as the State concerned in this case), the traditional rule of law has been that a bilateral contract, such as a normal construction contract, can ordinarily only be terminated by the Contractor by an order of a court or (where the contract contains an arbitration clause) an arbitral tribunal, unless such contract contains a provision giving the Contractor the express right to terminate the contract automatically (*'de plein droit'*).²⁵ The FIDIC Conditions do not expressly state this. Consequently, it was understandable that the tribunal found in this case that (disregarding the administrative contract issue and deletion of Clause 69) the Claimant/Contractor had to refer its claim for termination of the contract to the Engineer under Clause 67 and subsequently (if necessary) to an arbitral tribunal.

B. Third Edition (1977)—Partial Award in ICC Case No. 11499

Relevant FIDIC Clauses: 11, 12 and 65.

The partial award was issued in September 2002 and the place of arbitration was Wellington, New Zealand.

The Claimant/Contractor, a New Zealand company, and Respondent/Employer, an Asian State, entered into a construction contract relating to the upgrading of a gravel highway. The Claimant/Contractor began arbitration to recover compensation in relation to certain matters.

The partial award considered:

(1) whether unforeseeable physical conditions encountered by the Claimant/Contractor in the procurement of materials (basecourse here) for upgrading the highway could be the subject of a claim under Clause 12; and

²⁴ Extracts, pages 84-85, paragraph 40.

²⁵ French case law now admits the unilateral termination of a bilateral contract by one party without the order of a court or

(where the contract contains an arbitration clause) an arbitral tribunal, even when the contract does not give that party the express right to terminate the contract automatically (*'de plein droit'*).

(2) whether interferences by an indigenous group of landowners with the Claimant/Contractor's work could constitute the 'special risk' of 'disorder' under Clause 65(5) entitling the Claimant/Contractor to relief under Clause 65(4).

Issue 1: Can the conditions encountered by the Claimant/Contractor in the procurement of materials for upgrading the highway be the subject of a claim under Clause 12, due to information provided by the Respondent/Employer at the tender stage regarding the same (Clause 11)?

Relevant FIDIC Clauses: 11 and 12.

The Claimant/Contractor submitted a claim for extension of time and extra cost on account of allegedly unforeseeable physical conditions under Clause 12, i.e. physical conditions which could not have been foreseen by an experienced contractor, based on information provided by the Respondent/Employer at the tender stage ('Information for Tenderers' or 'IFT') (Clause 11).

The Claimant/Contractor maintained that it had encountered an unforeseeable physical condition at the source for the roading material, information about which was provided by the Respondent/Employer during the tender stage.

The tribunal's partial award provides, in part, as follows:

12.9 It is first necessary to consider the scheme of the FIDIC Conditions and the relationship between clauses 11 and 12 and the Contract Addendum paragraph 5.

...

12.11 From a consideration of the legal effects of these provisions [Clauses 11 and 12 of the General Conditions and the Contract Addendum paragraph 5], the Tribunal concludes as follows:

12.11.1 Whilst under Clause 11 of the General Conditions the data in the IFT on hydrological and sub-surface conditions obtained by the Employer 'from investigations undertaken relevant to the Works and the Tender' shall be deemed to have been based on such data, the Claimant is responsible for its own interpretation thereof.

12.11.2 Any inferences drawn by the Claimant from such data and any consequent decisions based on such inferences were at the Claimant's risk.

12.11.3 Provisions such as Clause 12 are common in engineering contracts and have been upheld by the Courts. For example, *Denis Friedman (Earthmovers) Ltd v. Rodney County Council* [1988] 1 NZLR 184 which refers to many authorities which reach similar conclusions. The cases emphasize that the obligations of proper site investigation and the subsequent compilation of an adequate tender rest on the Contractor.

12.11.4 No claim was made in the Statement of Claim nor was any pursued at the hearing based on any misrepresentation by understatement or omission in the IFT about the testing of [river] material. It was accepted by the Claimant that the information there given had been accurate

...

12.11.6 There is no evidence as to what investigations, if any, the Claimant carried out prior to tender. Again, the lack of witnesses about this crucial phase is surprising. As noted earlier from [E, former general manager of one of joint venturers constituting Claimant]'s evidence, there were some investigations but he was unable to enlighten the Tribunal further.

12.12 The Tribunal is not convinced that the particular information contained in the IFT relating to the [river] site as a source of roading material is necessarily covered by Clause 11. That Clause refers to 'investigations undertaken relevant to the Works'. The mining of material from the [riverbed] was not part of "the Works" which term meant, in

general terms, the building of a road. The roading foundations could have come from anywhere, provided the material satisfied the specifications when tested. Indeed, the Claimant had investigated other sources and may have based its tender on supplies being sourced from an outside source. It had a duty under the contract to provide acceptable material. The cost of obtaining that material was written into the tender doubtless, but subject to the necessity to obtain its approval of a source, it was of no concern to the Respondent whether the roading material was to have been won from the [river] or purchased from [company] or anybody else. At least one other river source was seen by the Respondent as at least worthy of consideration.

12.13 The Tribunal considers that the meaning of clause 12 is clear. It is concerned with unforeseen conditions encountered by a contractor in the execution of the works on the site. That must be so because of the following considerations:

12.13.1 The following words contained in clause 12

If however during the execution of the Works, the contractor shall encounter physical conditions, other than climatic conditions on the Site, or artificial obstructions, which conditions or obstructions could not have been reasonably foreseen.

These words are concerned with conditions encountered in the execution of ‘the Works’ on ‘the Site’.

As the Tribunal has said, the definition of ‘the Works’ did not include the winning and processing of aggregate. But quite apart from that, it is clear that the words of clause 12 are directed to conditions encountered on the Site. Indeed the use of both the words ‘Works’ and ‘Site’ make the position clear beyond doubt.

12.13.2 Even if there were any doubt about the meaning and scope of clause 12, the contractual scheme is clear. The words appear in a well-known and much-used international standard form of civil engineering contract.

That contract contains sophisticated provisions which, amongst other things, allocate the commercial and other risks that might be encountered during the execution of Works under such a contract.

One aspect of that scheme is to impose upon the Contractor the consequences of encountering ground and other physical conditions at the site which could reasonably be foreseen. Conversely, the Employer accepts the risk that the Contractor may encounter conditions at the Site which could not reasonably have been foreseen.

...

12.13.3 The supply of specified goods, materials and equipment for incorporation into the works is in a wholly different category. There can be no reason in principle why, in the ordinary course of business, a contractor should not take the commercial risk that problems will be encountered in the supply of such components for the works. To suggest, as the Claimant does, that clause 12 can be extended to include problems encountered in the supply of goods, materials and equipment cannot therefore be correct.²⁶

Comments:

Contractors have always been inclined to give a wide meaning to Clause 12.²⁷ This is understandable both because the Clause grants the Contractor claim rights and because it contains broad terms of uncertain scope, e.g. unforeseeable ‘physical conditions’ and ‘artificial obstructions’. However, in a well-reasoned decision, this tribunal refused to

²⁶ Extracts, pages 98-101, paragraphs 12.9–12.13.

²⁷ See C.R. Seppälä, ‘Contractor’s Claims under the FIDIC Civil Engineering Contract, Fourth (1987) Edition – I’ (1991) 19 *International Business Lawyer* 395, especially at 397–99.

extend Clause 12 to a claim for an unforeseeable physical condition at the source for roading materials for incorporation into the works as opposed to physical conditions at the site (to which the Clause clearly applies).

Issue 2: Do alleged interferences by an indigenous group of landowners with the Claimant/Contractor’s work constitute a ‘disorder’ for purposes of Clause 65 entitling the Contractor to additional costs?

Relevant FIDIC Clause: 65.

The Claimant/Contractor submitted a claim for alleged landowner interference and protests (under Clause 65), which prevented the access to the crusher site²⁸ necessary to process the road basecourse material. The partial award provides in part:

16.1 The Claimant seeks [amount] on the basis that its work was the subject of interference by indigenous [State X] landowners on two occasions as follows:

16.1.1 A landowner from . . . , who was head of the head of the [indigenous group], set up a roadblock close to the entrance to the crusher site and to part of the excavation site between 31 October and 5 November 1996. This roadblock prevented the Claimant from having access to the crusher site.

16.1.2 On 11 January 1997, landowners from nearby villages denied the Claimant access to the crusher site and to part of the excavation site until 20 January 1997 when the High Court of [State X] issued an injunction against the landowners at the suit of the Respondent and the Claimant which permitted access to be resumed.

16.2 Facts relevant to this cause of action are:

16.2.1 The [indigenous group] had permitted the Claimant access to the crusher site over their land.

16.2.2 The Claimant had been issued with a licence from the [authority] to extract gravel from the river but the necessary approval from that body to the access to the crusher site had not been given. In terms of the . . . Act . . . , the Claimant had no legal right to that access at the relevant dates. Under the legislation, it does not matter that the local people had given approval to access by the Claimant to the crusher site.

16.2.3 Under Clause 1213 of the Specification, it was the Claimant’s duty to obtain legal entitlement to access to the land^[29]

. . .

16.2.6 A letter from the Claimant to the Engineer’s Representative dated 14 January 1997 stated that the cause of the disruption was the pursuit of employment opportunities by the demonstrators.

16.2.7 There was no evidence that the activities of the landowners were anything other than peaceful.

. . .

16.4 The . . . basis for the claim is that the activities of landowners complained of amount to ‘disorder’ in terms of Clause 65(4) of the Conditions as a result of which the Claimant suffered delay and disruption and incurred additional costs.

. . .

16.6 In the Tribunal’s view, the peaceful protests of the native landowners, no matter what their motivation, cannot be considered ‘riot’ or ‘commotion’. What occurred was akin to a trade union picket. The question is was it ‘disorder’ in terms of Clause 65(5)? The New Shorter Oxford Dictionary defines ‘disorder’ as: 1. Lack of order or regular arrangement, disarray, a confused state. 2. Disturbance, commotion, breach of public order. Obviously,

²⁸ It appears from the available extracts of the award that the crusher site was not part of the Site.

²⁹ It appears that the ‘land’ refers to the ‘crusher site’.

the second tranche of definitions is the appropriate one. The Tribunal cannot interpret the peaceful protest of the landowners as being ‘disorder’ in terms of Clause 65 particularly when the use of the access was illegal. The term incorporates some form of active, if not forceful, civil disobedience.

16.7 Moreover, although the objective merit in the Respondent’s claim of illegality is scant, the Claimant had no legal right to access because of the lack of [the aforementioned body’s] sanction to its access arrangements with the landowners. The Tribunal has difficulty in seeing, in these circumstances, how the High Court had been able to issue an injunction which would have had the effect of giving approval to a technically illegal action. However, the Tribunal does not have to consider that point, since, in its view, there was no ‘disorder’ in terms of clause 65(3) [*sic*].

16.8 Accordingly, for the reasons given, the Tribunal dismisses this claim.³⁰

Comments:

In summary, the tribunal concluded that inasmuch as the interference by the landowners was a peaceful protest it could not constitute a ‘disorder’ under Clause 65(5), and hence the Claimant/Contractor was not entitled to relief under Clause 65(4). The tribunal’s award is well reasoned and calls for no special comment.

C. Fourth Edition (1987)

1. ICC Case No. 10619

An Italian Claimant/Contractor entered into contracts with a public authority in an African State (the Respondent/Employer) for the construction of roads in that State. A German engineer was appointed for the work. The Claimant/Contractor brought an arbitration for damages for various matters for which it alleged the Respondent/Employer was responsible.

The place of arbitration was Paris, France.

(a) Interim Award in ICC Case No. 10619

Relevant FIDIC Clause: 67.

The interim award was issued in March 2001.

The Claimant/Contractor requested immediate enforcement, by way of an interim award (and the provisional enforcement of such award, as permitted under French law³¹), of certain decisions of the Engineer under Clause 67 with which the Respondent/Employer failed to comply (and which had been the subject of a notice of intention to commence arbitration from the Claimant/Contractor).

Issue: How may a binding but not final decision of the Engineer under Clause 67 be enforced?

One of the most important legal issues in relation to international construction contracts in recent years has been how to enforce decisions of the Engineer under Clause 67 of the

³⁰ Extracts, pages 101-102, paragraphs 16.1–16.8.

³¹ Under French arbitration law (Article 1479 of the Code of Civil Procedure), provisional enforcement refers to the immediate enforcement of an award notwithstanding appeal or another procedure for judicial review of an award.

FIDIC Conditions, Fourth Edition (1987), and, since it was replaced by the DAB in the 1999 FIDIC Books, how to enforce decisions of a DAB. The interim award in Case No. 10619, an award made in 2001 but which has only now been published, expressly addresses this question and the solution which it provides is most welcome and to be commended.

By that interim award, the arbitrators held that, at the request of the Claimant/Contractor, certain decisions of the Engineer under Clause 67 of the FIDIC Conditions, Fourth Edition, could be enforced by an interim or partial³² award under the ICC Rules, even though one of the parties (the Claimant/Contractor in fact, who, as mentioned above, was seeking to enforce the decisions) had given a notice of intention to commence arbitration with respect to the decisions.³³ The arbitrators held that such decisions can be given effect to by such an award because Clause 67 expressly provides that a decision of the Engineer under Clause 67 is binding on the parties notwithstanding that either (or, in this author's submission, both) party (parties) has (have) given a notice of intention to commence arbitration. In this connection, the second paragraph of SubClause 67.1 provides:

... the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.³⁴

The tribunal stated as follows:

If the above Engineer's decisions have an immediate binding effect on the parties so that the mere fact that any party does not comply with them forthwith is deemed a breach of contract, notwithstanding the possibility that at the end they may be revised or set aside in arbitration or by a further agreement to the contrary, there is no reason why in the face of such a breach the arbitral tribunal should refrain from an immediate judgment giving the Engineer's decisions their full force and effect. This simply is the law of the contract.³⁵ (Emphasis added)

In addition to basing its case on the words in Clause 67, the Claimant/Contractor had relied on Article 23 of the ICC Rules relating to conservatory and interim measures and on certain related French legal doctrines (the place of arbitration being France). However, the tribunal emphasized, quite correctly (in this author's opinion), that its decision was not based on these provisions but on the contract itself:

the judgement [*sic*] to be hereby made is not one of a conservatory or interim measure, *stricto sensu*, but rather one [of] giving full immediate effect to a right that a party enjoys without discussion on the basis of the Contract and which the parties have agreed shall extend at least until the end of the arbitration. For the second thing, the will of the parties shall prevail over any consideration of urgency or irreparable harm or *fumus boni juris* which are among the basics of the French *référé provision*.³⁶ (Emphasis added)

Thus, an arbitral tribunal may and, when requested to do so, should enforce decisions of the Engineer under Clause 67 by an interim or partial award under the ICC Rules ordering the other party immediately to pay their amount even though one (or, in this

32
The ICC Rules of Arbitration do not distinguish between interim or partial awards, see Article 2(iii) of those Rules. Both result in final decisions as to the matters decided by them.

33
The interim award was subsequently confirmed in the tribunal's final award, which is commented upon in other respects below.

34
Extracts, page 88, paragraph 18.

35
Extracts, page 88, paragraph 22.

36
Extracts, pages 88-89, paragraph 22.

author's submission, both) party (parties) has (have) expressed dissatisfaction with them. In this author's view, the arbitral tribunal in this case has understood perfectly the way Clause 67 of the FIDIC Conditions was intended to operate.

In an earlier award which has been published,³⁷ an arbitral tribunal had ordered payment of 'final and binding' decisions of the Engineer under Clause 67 of the FIDIC Conditions of Contract, Second Edition (1969), that is, decisions which had not been the subject of any notice of intention to commence arbitration within the contractually stipulated time limit (90 days under the Second Edition) at all. However, the interim award in Case No. 10619 is the first example of a published award of which this author is aware where the arbitral tribunal has ordered payment by an interim award of the amount of an Engineer's decision which is 'binding' but not 'final', that is, which had been challenged, within the contractually stipulated time period, by one or other of the parties.

This author submits that the same result should obtain in the case of a decision of a DAB under the 1999 FIDIC Books as was found to apply in Case No. 10619 in the case of a decision of the Engineer under Clause 67 of the FIDIC Conditions, Fourth Edition. This should be so because the relevant language of Clause 67 of the Fourth Edition and of Clause 20 of the 1999 FIDIC Books is to all intents and purposes the same.

The language in Sub-Clause 20.4 of the 1999 FIDIC Books is, if anything, even stronger than that in the second paragraph of SubClause 67.1 of the FIDIC Conditions, Fourth Edition quoted above. Sub-Clause 20.4 of the 1999 FIDIC Books provides as follows:

The decision [of a DAB] shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below.

Accordingly, the interim award in this case is relevant to a decision of a DAB under the 1999 FIDIC Books.³⁸ Even if one, or (this author submits) both, parties have given a notice of dissatisfaction (which is equivalent to the notice of intention to commence arbitration under the Fourth Edition of the FIDIC Red Book) with respect to a decision of a DAB pursuant to Sub Clause 20.4, each party is bound to give effect to that decision (unless and until overturned by a subsequent amicable settlement or arbitral award) and, if that decision calls, for example, for a payment to be made by one party to the other, then that decision may be enforced directly by an interim or partial award pursuant to the Rules of Arbitration of the ICC which, in France, may be the subject of provisional enforcement by national courts.³⁹ This is the consequence of the interim award in Case No. 10619.

(b) Final Award in ICC Case No. 10619

Relevant FIDIC Clauses: 11 and 67.

The final award was issued in April 2002.

In the final award in Case No. 10619, the arbitral tribunal examined, among other things:

³⁷ ICC Case Nos 3790/3902/4050/4051/4054 (joined cases), summarized in Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (Deventer: Kluwer, 1990) at 889–91.

³⁸ See, in this connection, C.R. Seppälä, 'The Arbitration Clause In FIDIC Contracts For Major Works' (2005) 22 *The International Construction Law Review* 4.

³⁹ See *supra* note 31.

(1) whether the Respondent/Employer could rely on a notice of intention to commence arbitration of the Claimant/Contractor in order to be entitled to request the tribunal to revise decisions of the Engineer under Clause 67; and

(2) whether the Claimant/Contractor could justifiably rely on data as to the local resources for materials provided by the Respondent/Employer during the tender period, for purposes of Clause 11, to justify a claim for unforeseeable physical obstructions or conditions under Clause 12 (which was ultimately rejected by the tribunal).

Issue 1: Can the Respondent/Employer rely on a notice of intention to commence arbitration proceedings issued by the Claimant/Contractor in order to be entitled to request an arbitral tribunal to revise the decisions of the Engineer under Clause 67?

Relevant FIDIC Clause: 67.

The above issue arose as the Respondent/Employer, though evidently dissatisfied with certain decisions of the Engineer, had failed to give itself a notice of intention to commence arbitration with respect to such decisions. In addressing this issue, the arbitral tribunal stated, as follows:

17. . . . Under Clause 67.1 of the Conditions of Contract any dispute arising between the Employer and the Contractor shall have first to be referred in writing to the Engineer, with a copy to the Employer.

This is what the Claimant had done by letters of 18 October 1998, leading to the Engineer's decisions of 17 November 1998, and by letters of 9 September 1998, leading to the Engineer's decisions of 5 May 1999.

The Claimant, being dissatisfied with both the time extensions and the amount of money granted to him by the Engineer has notified the Employer and the Engineer, within the prescribed time limit, of his intention to commence arbitration and filed on 11 August 1999 the Request for Arbitration initiating this proceedings.

The only question which deserves consideration at this stage is whether the Respondent, who has not objected within the prescribed time limit to the Engineer's decisions and has not stated his intention to commence arbitration to have the same reviewed and revised, may take advantage of the notice made by the Claimant to that effect and request the Arbitral Tribunal to reverse the Engineer's decisions.

18. The answer should be in the affirmative considering that the Claimant has declared his dissatisfaction with the entire content of the Engineer's decisions. Therefore, since notification of intention to commence arbitration has been given within the prescribed time limit by the Contractor, the Engineer's decisions have not become final and binding and 'the arbitrator(s) shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute' (Sub-clause 67.3). This conclusion is confirmed by Sub-clause 67.3 when the same provides that 'neither party shall be limited in the proceeding before the arbitrator(s) to the evidence put before the Engineer . . .'.⁴⁰

Comments:

This author agrees with the tribunal's basic reasoning and conclusion: since a notification of intention to commence arbitration has been given by one party—it does not matter which party—the Engineer's decisions had not become final and binding and, consequently, can be opened up in arbitration. However, the last sentence of the above quotation from the award may be irrelevant to the issue, as it relates to the conduct of

the arbitration once it has been validly begun (and therefore may not be a criterion for determining whether it has been validly begun).

Issue 2: To what extent can a Contractor rely on data as to the local resources for materials provided by an Employer during the tender period for purposes of Clause 11?

Relevant FIDIC Clause: 11.

The above issue arose as the Claimant/Contractor claimed to have relied on the information contained in documents provided by the Respondent/Employer during the tender period, the Material Reports, to select its construction equipment and to find materials for the works, which eventually proved deficient and insufficient.

73. A first issue to determine in connection with the [alleged design changes] is whether the Contractor justifiably relies on the Materials Reports as a legal basis for his contention.

There is no doubt that the Materials Reports were not contractual in nature. It was said in introduction thereto that they were ‘not definitive and should be used as a guideline only as to what can be encountered in the projected area. It is also expected that during the construction period additional and differing materials will be encountered from those described therein’. In paragraph 2.2., ‘Pavement materials’, it was also said that ‘the results of the preliminary tests undertaken on these materials indicate that all sites are potential sources for natural gravel wearing course material’: ‘potential’ undoubtedly leaves a margin of uncertainty. Furthermore, in the last lines of the minutes of the pre-bid meeting held on 31 March 1994, ‘the Bidders [*sic*] attention [was] drawn to the fact, that the Materials Report [*sic*] does not form part of the Contract Documents, and is provided for information only’. Undoubtedly that statement should have been an incentive to the bidders to carefully verify by their own means the reliability of the relevant information.

For its part, Article 11 GCC [General Conditions of Contract] requires that ‘the Employer shall have made available to the Contractor, before the submission by the Contractor of the tender, such data from investigations undertaken relevant to the Works, but the Contractor shall be responsible for his own interpretation thereof’. The tribunal thinks, however, that one cannot expect from a bidder, within the short period of time left for him to prepare his bid, to investigate on matters of local resources of materials over the Employer’s findings which are deemed to result from lengthy prior queries in subsoil [*sic*] and are supported by graphs, diagrams, samples and other probatory materials; a bidder is justifiably required to interpret the data made available to him; he is not required to expedite new thorough investigations which the Employer says in good faith to have carefully carried on presumably for months if not years, in the interest of the Works. Interpreting data is one thing; undertaking new investigations in a region plus or minus close to the road of about 180 kms to check whether the required materials exist or not as described in quantity and quality, at the locations identified by the Employer, is not a thing which can reasonably be said to pertain to a bidder.⁴¹

The Tribunal found that the data provided by the Respondent/Employer in its invitation to tender was erroneous and misleading, and confirmed the decision of the Engineer which had granted a time extension and extra costs to the Claimant/Contractor.

Comments:

The arbitral tribunal does not clearly articulate the contractual basis of its decision in this respect in its award. However, this author believes that the decision can be justified on

⁴¹
Extracts, pages 90-91, paragraph 73.

the basis of the last sentence of Sub-Clause 11.1 of the FIDIC Conditions, Fourth Edition, which provides as follows:

The Contractor shall be deemed to have based his tender on the data made available by the Employer and on his own interpretation and examination, all as aforementioned. (Emphasis added)

2. Final Award in ICC Case No. 10892

Relevant FIDIC Clauses: 1.1, 39 and 63.

The award was issued in March 2002 and the place of arbitration was the Caribbean.

In order to build a sport's stadium, a Caribbean State engaged the services of the Respondent/Employer, a Caribbean company, who entered, in turn, into a construction contract with the Claimant/Contractor, also a Caribbean company.

While the construction contract incorporated the FIDIC Conditions Parts I and II, Fourth Edition, the Respondent/Employer never filled in the name of the Engineer in Clause 1.1 of Part II of the FIDIC Conditions, thereby leading to a dispute over the Engineer's identity.

The Respondent/Employer terminated the construction contract on account of the Claimant/Contractor's alleged default. The Claimant/Contractor initiated arbitration proceedings claiming the termination of the contract was wrongful and seeking damages for, among other things, sums allegedly due and owing under the contract and the value of alleged variations.

Issue 1: What are the attributes of the Engineer and when can a party be said to have tacitly accepted someone as the Engineer?

Relevant FIDIC Clause: 1.1 (of Parts I and II).

With respect to the parties' dispute over the identity of the Engineer, the tribunal stated, as follows:

159. At the first site meeting of August 14, 1997, [Employer] is expressly reported as appointing itself as Engineer. . . . [Employer] delegated [Primary Consultant] as its representative to act on its behalf. . . . In the first Quarterly Progress Report submitted in October 1997, however, [Primary Consultant] reported that [A senior] was the Engineer. . . . [A senior], the Project Manager, was apparently delegated the responsibility of signing the Engineer's certifications for payment, which he did on all but one occasion before August 1998. As the last witness in the case—long after the fact—[A junior] testified that [A senior] was empowered at times to sign payment certificates as the Engineer, but otherwise, he was never the Engineer. Before August 7, 1998, apparently because [A senior] signed payment certificates as Engineer, [Contractor] appeared to think of him as the Engineer.

160. Apparently in response to letters from [Contractor] complaining about the lack of a clear designation of the Engineer, and wishing to remove [A senior] from the project, by letter of August 7, 1998, [Employer] purported to expressly designate [B], the Project Manager of [Primary Consultant], as Engineer for certain important (but limited) purposes: (1) certifying payments to the contractor, (2) determining the value of variations, (3) determining the cost of construction, and (4) determining the Contractor's rates. . . . But the same letter purports to designate [C] to replace [A senior] as Project Manager with the authority to vary the decisions of the 'consultants', except for certifying payments. According to the letter, the Employer . . . also maintained the authority to instruct the Contractor. This ultimate letter of [Employer] should be noted.

. . .

162. In these circumstances, which are wholly the responsibility of the Employer, it is not surprising that there was considerable confusion as to the identity of the Engineer. In various letters, [Contractor] brought this matter to the attention of [Employer] and sought a clear appointment of an engineer.⁴²

The tribunal found that, in these circumstances, the Engineer was the Employer itself:

163. I find that the Engineer for the entire term of the project was [Employer], the Employer itself. This was true before August 7, 1998, because [Employer] was expressly designated as the Engineer at the first site meeting. Even thereafter, [B] signed all payments certificates 'For and on Behalf of the Engineer', designated usually as [Employer]. Also, although [B] was purportedly designated as Engineer by [Employer]'s letter of August 7, 1998, he was designated Engineer only for certain limited purposes. For all other purposes, it must be assumed that [Employer] retained the position of Engineer as stated at the first site meeting and as indicated by [Employer]'s express retention in the letter of August 7, 1998, of the power to instruct the Contractor. I find that the letter of August 7, 1998, referred to by [Employer]'s own expert as ambiguous in its appointment of the Engineer, was intended to delegate certain functions of the Engineer to [B], but with [Employer] retaining the role of Engineer.

...

165. The FIDIC Conditions require the Engineer to be impartial in making his decisions. While the FIDIC Conditions do not expressly say the engineer must be independent, an independent engineer is clearly preferable because impartiality is then more transparent. . . . There are different levels of independence. At the lowest level, when a government, employer or owner appoints itself or its own employee as engineer, there is no independence, and impartiality is unlikely.

...

167. In this case, it was not the Engineer ([Employer]) who issued the certificate of failure by [Contractor] to carry out instructions, which led to termination, but its delegate, [B]. The acts of [B], [Primary Consultant] or [A senior], as delegates of the Engineer, must be deemed to be acts of the Engineer, [Employer]. The Engineer's conflict of interest in also being the Employer prevents it from claiming it acted impartially by delegating its responsibility to a third party. The Employer who also acts as Engineer cannot hide behind its delegate to claim impartiality. This is especially true here since certain of [B]'s decisions appear to consist of relatively uncritical acceptance of [Employer]'s 'suggestions'.⁴³

The tribunal also noted that the Contractor had tacitly accepted the Respondent/Employer as the Engineer:

168. If this situation is accepted by the Contractor, as it was grudgingly and reluctantly here (despite its questioning of the situation) by the Contractor continuing to work, then the Employer is accepted as the Engineer. . . . A Contract governed by the FIDIC Conditions of Contract is unworkable without an Engineer, and it cannot be accepted that the parties moved forward with performance of the Contract without any way in which the Contractor could be terminated for cause, if necessary. . . . The acceptance of the Employer as Engineer and its delegates is imperfect under the facts of the case, but necessary for the functioning of the Contract and project. [B] was entitled to issue a certificate of non-performance by [Contractor] upon which [Employer] could rely to terminate the Contractor because [Contractor] impliedly accepted [Employer] as the Engineer and [B] as the Engineer's delegate (however grudgingly and however ambiguous the appointment) by continuing to work.⁴⁴

⁴² Extracts, page 92, paragraphs 159–62.

⁴³ Extracts, pages 92-93, paragraphs 163–67.

⁴⁴ Extracts, page 93, paragraph 168.

Comments:

An Employer may sometimes be reluctant to delegate power to administer a construction contract incorporating the FIDIC Conditions to an independent Engineer as those Conditions require. On the other hand, the Employer may itself often have neither the competence nor experience to administer such a contract itself. These conflicting pressures or factors appear to have contributed to the confusion about the identity of the Engineer in this case, leading the tribunal to consider that the Engineer was the Respondent/Employer.

The tribunal is plainly correct in stating that a contract incorporating the FIDIC Conditions is normally ‘unworkable without an Engineer’. Among other things, a certificate of the Engineer that the Contractor is not performing the contract may be a necessary condition precedent to the giving of a notice of termination by the Employer under Clause 63.1.

Issue 2: Did the Respondent/Employer validly terminate the Contract under Clause 63?

Relevant FIDIC Clauses: 39 and 63.

The arbitral tribunal then examined whether the Respondent/Employer had validly terminated the Contract under Clause 63, as follows:

172. [Employer] purported to terminate [Contractor] for failure to comply with the instructions of [B], the Engineer’s delegate, under Clause 39.1 of the FIDIC Conditions [empowering the Engineer to issue instructions for removal from the site of any materials or Plant which, in the opinion of the Engineer, are not in accordance with the Contract]

...

180. It must be remembered that [B] was the Engineer’s delegate, not the Engineer. If [B] were the Engineer, as testified by [A junior], he would have been the Engineer for the limited purposes only expressly stated in [Employer]’s letter of August 7, 1998 [author’s note: see paragraph 160 above]. The letter of August 7, 1998, does not purport to designate [B] as the Engineer for the purpose of giving instructions under Clause 39.1 or certifying noncompliance with such instructions under Clause 63.1 of the FIDIC Conditions. Thus, [B] was not empowered as Engineer to make such decisions or take such actions. As the supervisor on the project for [Primary Consultant], the delegate of the Engineer ([Employer]), as shown by the minutes of the first site meeting, however, he was so empowered.

181. Clause 63.1(e)^[45] of the FIDIC Conditions requires that ‘the Employer may, after giving 14 days’ notice to the Contractor, enter upon the Site and the Works and terminate the employment of the Contractor . . .’ [Employer] gave a 14-day notice of its intent to terminate the Contract (dated October 29, delivered on November 1, and terminated on November 15), but it did not wait 14 days to enter the premises. [Employer] obtained an injunction on the date of its notice, ejected [Contractor] from the site the same day, and seized [Contractor]’s equipment and records for its use.

182. I find that the failure to wait 14 days to take possession was a violation by [Employer] of Clause 63.1(e).

45

In fact, the correct reference in the FIDIC Conditions should be to Clause 63.1 and not Clause 63.1(e). Thus, the 14-day notice period clearly applies to defaults of the Contractor described in paragraphs (a) to (e) of Sub-Clause 63.1 and not just to Sub-Clause 63.1(e).

183. In determining whether the termination was substantively proper, it must be kept in mind that [B] did not recommend termination and did not believe that the two items that were the subject of his September 1999 instructions justified termination. . . . I do not find that the termination was proper.⁴⁶

Comments:

It is a commonplace that when a party terminates a contract on account of the other party's default, it must strictly observe the termination procedures provided for by the contract or risk itself being found to have wrongly terminated the contract with all the ensuing consequences in damages. The decision to terminate a construction contract is the remedy of last resort and rarely risk free. The Respondent/Employer failed here, among other things, strictly to respect the 14-day notice period provided for in Clause 63 entitled 'Forfeiture' and had therefore to bear the consequences.

3. Final Award in ICC Case No. 8677

Relevant FIDIC Clauses: 20, 65 and 67.

The final award was issued in September 1997 and the place of arbitration was London, UK.

A Middle East Claimant/Contractor had entered into a construction contract with the Government of an Asian State, the Employer/Respondent, for the performance of certain works in that State.

While the Claimant/Contractor was mobilizing Contractor's Equipment, Plant and materials in the Claimant/Contractor's country for shipment to the Asian State concerned, the Claimant/Contractor's country was invaded and war ensued. As a result of looting by the invading forces, such Contractor's Equipment, Plant and materials were lost. While the Claimant/Contractor completed the contract (having replaced the original Contractor's Equipment, Plant and materials at its own cost), it began arbitration against the Respondent/Employer for, among other things:

(1) approximately USD 5 million for the loss of Contractor's Equipment, Plant and materials as a result of the outbreak of war in the Claimant/Contractor's country, where such items were being assembled before their transport to the Asian State concerned; and

(2) the release of approximately USD 140,000 of retention money.

Issue 1: Whether the Contractor could recover for the loss of Contractor's Equipment, Plant and materials situated in its own country as a result of invasion and war even before they had been transported to the Employer's country where the site was located?

Relevant FIDIC Clauses: 20 and 65.

As stated above, the Claimant/Contractor claimed for the loss of Contractor's Equipment (as defined), Plant (as defined) and materials as a result of the invasion of Claimant/Contractor's country and ensuing war.

⁴⁶
Extracts, pages 94-95, paragraphs 172-83.

After reviewing Clauses 20 and 65 generally,⁴⁷ the sole arbitrator examined whether Clause 20 applied to risk of damage or destruction to ‘materials’ or ‘Plant’ intended to be incorporated into the Works which were still in the Claimant/Contractor’s country (and had not yet been transported to the Respondent/Employer’s country). The sole arbitrator concluded that Clause 20 did apply to such risk:

(1) the Commencement Date (as defined) had occurred with the result that under Clause 20, the Claimant/Contractor assumed responsibility for the Works (as defined), and the materials and Plant to be incorporated therein, except in the case of loss or damage resulting from Employer’s Risks (as defined); and

(2) the Employer’s Risks referred to in Sub-Clause 20(4), which included ‘war’ and ‘invasion’, were of ‘worldwide application’.

The sole arbitrator stated, as follows:

53. . . . The starting point is Clause 20. The purpose of this Clause is to allocate the risk of damage or destruction to the Works and to material and Plant intended to be incorporated into the Works during the period for which the Contractor is to be responsible, namely from the Commencement Date to the Taking-Over Certificate. . . . Given that this is an international contract where various parts of the performance of the core obligation may take place in several different countries, one would, I think, expect that the Clause 20 risks were stateless in the sense of it being immaterial where in the world the particular risk occurred. This construction gains support from Clause 65.2(b) which, for Clause 65 purposes, limits the risk of rebellion, revolution, insurrection and so on to the country in which the Works are to be executed. This is in contradistinction to the other special risks, which, in my opinion, are ‘worldwide’ for both Clause 65 and Clause 20 purposes. If this were not so, the limitation introduced by Clause 65.2(b) is inexplicable. . . . I conclude that [Claimant’s counsel] is entitled to base his Clients’ claim for materials or Plant on Clause 20.3 in the alternative and so hold. . . .⁴⁸

The difficult point for the sole arbitrator was whether the Claimant/Contractor could also recover for the loss of Contractor’s Equipment, the loss of which was not provided for in Clause 20, which deals only with care of the Works (as defined). The sole arbitrator found that the Claimant/Contractor could recover for this based on Clause 65(3), reasoning as follows:

57. . . . The difficult point is whether a loss suffered by reason of looting by an invading army constitutes ‘destruction or damage’ within Clause 65.3. It seems to me to be clear that the looting of materials or Plant amounts to the loss [emphasis in original] of materials or Plant for incorporation in the Works within Clauses 20.2 and 20.3. [Defendant’s counsel] says that Clause 65.3 does not cover items which were, in effect, stolen: ‘damage’ must connote items which are available still but which require repair: ‘destruction’ means physically destroyed or demolished so that the item is beyond repair. So [Defendant’s counsel] would argue that, on the findings above, the Claimants could recover for the work boat (assuming, for the sake of argument, that this was owned by the Contractor) and for the grout spears but for nothing else. This is a question of the interpretation or construction of the Contract . . .

At first sight, the juxtaposition of ‘destruction’ with ‘damage’ in Clause 65.3 strongly supports [Defendant’s counsel’s] argument, and I accept that damage must mean physical

⁴⁷ Extracts, pages 73-74, paragraph 52. Clause 20.1 (Care of Works) of the Fourth Edition of the FIDIC Red Book, which is not quoted in the award, is also relevant and provides, in relevant part, as follows: ‘The Contractor shall take full responsibility for the care of the Works and materials and

Plant for incorporation therein from the Commencement Date until the date of issue of the Taking-Over Certificate for the whole of the Works, when the responsibility for the said care shall pass to the Employer.’

⁴⁸ Extracts, pages 74-75, paragraph 53.

damage. But the general intention behind Clause 65.3 (and Clause 20.3) is to protect the Contractor from the occurrence of the special risks, which would otherwise certainly affect the Contractor's price and might result in international contractors being unwilling to tender. In interpreting the meaning of destruction, regard must be had to the scope of the Employer's risks as defined in Clause 20.4. In sub-paragraph (a) of that Clause, there are grouped together war, hostilities (whether war be declared or not), invasion and act of foreign enemies. Civil war falls within the risks in sub-paragraph (b). If 'destruction' were limited to physical destruction, there would appear to be no point in including 'invasion' and 'act of foreign enemies' as special risks. Furthermore, an indication that 'destruction' within Clause 65.3 may include a total loss caused otherwise than by physical destruction is provided by Clause 54.2, which provides:

The Employer shall not at any time be liable, save as mentioned in Clauses 20 and 65, for the loss of or damage to any of the said Contractor's Equipment Temporary Works or materials.

Since the only term of this contract which places Contractor's Equipment at the risk of the Employer in the event of war, hostilities invasion and so on is Clause 65.3, it seems to me that the language of Clause 54.2 is not consistent with [Defendant's counsel]'s construction of 'destruction' in Clause 65.3. While I confess to having found this point most difficult, I have decided that [Claimant's counsel]'s arguments prevail. Subject to the remaining issues going to liability and to quantum, I propose, therefore, to allow the Claimants' claim for the Loss of Contractor's Equipment under Clause 65.3.⁴⁹

The sole arbitrator thus determined that looting was covered by 'destruction or damage' under Clause 65.3.

Issue 2: May a Contractor enforce an undisputed contract entitlement by way of arbitration without first complying with the pre-arbitral procedures in Clause 67?

Relevant FIDIC Clause: 67.

In addition to the Claimant/Contractor's main claim referred to above, the Claimant/Contractor also sought in the arbitration to recover approximately USD 140,000 of retention money. The Respondent/Employer had not disputed that the Claimant/Contractor was entitled to recover this sum but, at the same time, the Respondent/Employer had not returned it to the Claimant/Contractor. This gave rise to the issue of whether the Claimant/Contractor could claim for this amount in the arbitration although it had not referred the issue through the pre-arbitral procedures in Clause 67.

The sole arbitrator first reviewed Clause 67 of the FIDIC Conditions, which provides, among other things, that:

- (1) if a dispute arises between an Employer and a Contractor in connection with, or arising out of, the Contract or the execution of the Works, the matter shall first be referred to the Engineer; and
- (2) only a dispute in respect of which the decision of the Engineer has not become final and binding (because it has been challenged by one of the parties within a 70 day time limit) can be referred to arbitration.⁵⁰

The sole arbitrator then examined the parties' respective positions.

⁴⁹ Extracts, page 76, paragraph 57.

⁵⁰ Extracts, pages 71-72, paragraph 42.

The Respondent/Employer argued, as follows:

- (1) there is no entitlement to start an arbitration and the arbitrator does not have jurisdiction to determine a dispute unless the procedure under Clause 67 is followed;
- (2) the relevant dispute has never been referred to the Engineer; and
- (3) the relevant dispute had never crystallized as it has never been the subject of any communication between the parties.⁵¹

The Claimant/ Contractor argued, as follows:

- (1) the existence of a dispute was clear from the amended counterclaim (where this claim was first raised) and from its inclusion in the Terms of Reference;
- (2) the Respondent/Employer cannot rely on the absence of a Clause 67 reference to the Engineer, as by the time the money which was the object of the claim became due, there was no Engineer in place (which was a breach of contract by the Respondent/Employer); and
- (3) alternatively, it was impossible to refer this claim to the Engineer and Clause 13.1 of the Conditions⁵² operated to 'excuse' the absence of a Clause 67 reference.⁵³

While the sole arbitrator found that the retention money was a 'debt due' about which 'there was no crystallized dispute',⁵⁴ he then stated, as follows:

49. The question for me is whether or not, in all the circumstances, I have power to make an award in the Claimants' favour for this sum of . . . There is great force in [Defendant's counsel]'s argument that an ICC arbitrator is appointed to resolve disputes which are existing [emphasis in the original] disputes at the time of the appointment and about which there is either an Engineer's Clause 67.1 decision or a failure to give a decision. However, it seems to me that [Defendant's counsel]'s quintessentially English law submission on this point is one which ought not to be slavishly accepted in the case of an international civil engineering contract. Not all countries, in which a contract incorporating the FIDIC Conditions falls to be performed, have a legal system as good as that in [State X], embryonic though that system may be. If a party cannot enforce a contract entitlement over which there is no or no real dispute through the arbitral process, there will be cases . . . in which there is no available remedy. For this reason, I have concluded that it would be right to award the Claimants the [aforementioned sum].⁵⁵ (Emphasis added)

Comments:

The sole arbitrator thus decided to award the claimed money to the Claimant/ Contractor, notwithstanding that the issue had not been referred to the Engineer under Clause 67. In this connection, it should be noted that the sum was relatively small (approximately USD 140,000) in relation to the Claimant/Contractor's main claim (approximately USD 5 million), which had clearly satisfied Clause 67. It was considered to be a 'debt due' and would almost certainly itself not have justified a further arbitration for its recovery. Consequently, this result is understandable on the particular facts in this case.

⁵¹ Extracts, page 72, paragraphs 43–45.

⁵² Clause 13.1 ('Work to be in Accordance with Contract') provides, as follows: 'Unless it is legally or physically impossible, the Contractor shall execute and complete the Works . . . in strict accordance with the Contract . . .'

⁵³ Extracts, pages 72-73, paragraph 46.

⁵⁴ Extracts, page 73, paragraph 48.

⁵⁵ Extracts, page 73, paragraph 49.

III. FIDIC Client/Consultant Model Services Agreement (White Book, Second Edition (1991))— Final Award in ICC Case No. 11039

Relevant FIDIC Clause: 17 of the FIDIC White Book (Second Edition).

The (majority) award in ICC Case No. 11039 was issued in April 2002 and the place of arbitration was Berlin, Germany.

The Respondent/Consultant, a Danish engineering company, entered into an agreement to provide technical assistance to the Claimant/Client, a German construction company, which proposed to submit a tender for a construction project in Germany. The construction project was awarded to the Claimant/Client, which pursued its collaboration with the Respondent/Consultant under a further contract covering detailed design. During construction, the Claimant/Client incurred additional costs as a result of underestimations of quantities in its tender for which it maintained that the Respondent/Consultant was responsible.

Consequently, the Claimant/Client initiated arbitration against the Respondent/Consultant to recover these costs. In the arbitration, the parties disputed whether their agreement incorporated the FIDIC's Client/Consultant Model Services Agreement ('White Book') and, if so, whether a one-year period of limitation in Part II thereof was valid under German law and, hence, whether the Claimant/Client's claim was time-barred.

Issue 1: Did the agreement between the parties include the FIDIC White Book contract, which in this case provided for a one-year time bar on liability?

No relevant FIDIC Clause.

The first issue was whether the parties' contract consisted only of correspondence between parties (and was a works contract (*Werkvertrag*) in accordance with §§ 631 *et seq.* of the BGB⁵⁶ through correspondence) or incorporated the FIDIC White Book contract which included Clause 17, which provides that:

[N]either the Client nor the Consultant shall be considered liable for any loss or damage resulting from any occurrence unless a claim is formally made on him before the expiry of the relevant period stated in Part II, or such earlier date as may be prescribed by law.⁵⁷

Part II provided for a one-year duration of liability 'reckoned' from 22 May 1995, which was about when work began (work was completed on 15 or 29 June 1995).

The Claimant/Client argued, among other things, that the Respondent/Consultant could not expect the Claimant/Client to have agreed on contract terms that 'in comparison to the equilibrium that should normally prevail in such contracts, created a considerable unbalance'. According to the Claimant/Client, Clauses 17 and 18.1 (which also limited the Respondent's liability to DEM 250,000) of Part II would create an imbalance between the parties, arguing:

⁵⁶ *Bürgerliches Gesetzbuch* (the German Civil Code).

⁵⁷ Extracts, page 95, section 6.2.3.

In the guide to the FIDIC Agreement ten (10) years is recommended as [*sic*] figure in the statute of limitation. Furthermore, it is suggested that the duration should begin to elapse at the completion or termination of the services. This is to be compared with the one (1) year term from the beginning of the services as [Respondent] alleges was agreed between the Parties. This period is unreasonably short and it was possible that [Respondent]’s liability would have been covered by the statute of limitation prior to the completion of [Respondent]’s services.⁵⁸ (Emphasis added)

After reviewing the facts, the tribunal concluded that, although the parties never signed the FIDIC (White Book) Agreement, it formed part of the contract that they had entered into by correspondence, stating:

The Parties had earlier made their intention clear to enter into the FIDIC Agreement and had now agreed on the wording by the exchange of various drafts and views on individual clauses. [Claimant] must have been aware that [Respondent] presumed that the Agreement was valid between the Parties, even without joint signatures on the FIDIC Agreement. The exchange of the written drafts fulfils the requirement of a written contract under German Law (§ 127 BGB). [Claimant] had therefore to object before 30 June 1995 [the deadline set by the Respondent for the Claimant to discuss the latest version of the FIDIC Agreement] if it did not wish to be bound by the typed version of the FIDIC Agreement sent to [Claimant]. [Claimant] never objected and is therefore bound to the FIDIC Agreement by way of passivity.

Thus, the majority of the Arbitrators find that the FIDIC Agreement in its entirety was validly agreed between the Parties.⁵⁹

Comments:

The award illustrates a quite common practice in relation to FIDIC contracts: as they are so well known in the construction industry, they are often incorporated by reference into parties’ contracts, subject to specific agreements of the parties in relation to the contents of Part II, without actually being incorporated physically into a contract or set of contract documents.

Issue 2: Is a one-year time bar on liability included in a FIDIC White Book contract valid under German law?

Relevant FIDIC Clause: 17 of the FIDIC White Book (Second Edition).

The majority of the tribunal considered whether the one-year limitation period in Clause 17 was valid under German law and thus barred the Claimant/Client’s claim. The majority concluded that the Claimant/Client’s claim was time-barred:

[Respondent] undertook to deliver a work result to [Claimant]. [Respondent] had to perform the Tender Design calculations and deliver them to [Claimant] before 30 June 1995. The Arbitrators have therefore qualified the FIDIC Agreement as agreed by the Parties as a works contract [under German law].

The Arbitrators have not found that the limitation period agreed by the Parties should be void according to German law. A reduction of the statutory limitation period is permissible according to § 225 sent. 2 BGB. The reduction of the limitation period was proposed by [Respondent] and was accepted by [Claimant] as is evidenced by the Annex to the letter of 13 June 1995. The reduction has thus been agreed between two business parties. The reduction of the period of limitation agreed by two business parties with equal bargaining

⁵⁸
Extracts, page 95, section 6.2.4.

⁵⁹
Extracts, page 96, section 6.2.6.

power cannot be deemed unreasonable or create an unreasonable imbalance between the parties.

The reduction does also not contravene the principles of § 9 of the AGBG [60], since the AGBG is not applicable. The insertions in Part II have to be specifically drafted by the parties for each individual contract. The provisions of Part II have no meaning unless their details are entered into the blanks by the Parties. The insertion in respect of the reduction of the period of limitation is therefore no preformulated general condition but a specific provision, which has been individually agreed upon by the Parties.

[Claimant]’s claim was thus time barred before the request for Arbitration was filed to the ICC and the claim is therefore not recoverable.⁶¹

Comments:

The case illustrates that even comparatively short (1 year) time-bars may be valid though it is unusual for them to commence as from the beginning of services, as was the case here.

IV. Non-FIDIC construction contract issue: allocation of costs in construction arbitrations

As international construction disputes are often factually and/or technically complex, involving voluminous documents and expert evidence, the amount of arbitration costs (actual or anticipated) can weigh heavily on a party’s decision whether to arbitrate and on how such disputes are resolved. Accordingly, although not involving FIDIC contracts, the following two awards are of interest as they relate to use of special arrangements for the allocation or payment of legal fees and expenses in construction arbitrations. In this author’s view, the use of a so-called ‘Calderbank offer’ (see Case No. 11499), especially, should be much better known and more widely resorted to in international arbitrations than is the case today.

A. Conditional fee arrangement—Final Award in Case No. 11813

The award was issued in October 2005 and the place of arbitration was London, UK.

Under Article 31 of the ICC Rules, a final award must fix the costs of the arbitration and decide how they are to be allocated between the parties. How should an arbitral tribunal deal with an award of costs when there is a conditional fee arrangement, i.e. where one party’s lawyer is to be paid based on a success or contingency fee, that is, a fee for lawyer’s services the payment of which is dependent, in whole or in part, upon whether there is a favorable result, as defined?

This was an issue in a case involving two German Claimants/Contractors who had entered into a construction contract with an Egyptian Respondent/Employer for the design, supply and erection of certain works in Egypt. Disputes arose between the parties and the resolution of certain of these was the subject of a partial award. One of the issues in the final award was whether and, if so, how the Claimants/Contractor could recover for a success or contingency fee paid or payable to their counsel.

⁶⁰ *Allgemeines Bürgerliches Gesetzbuch* (the Austrian Civil Code).

⁶¹ Extracts, pages 96-97, section 6.3.3.

This issue was addressed by the arbitral tribunal, which (as mentioned above) was sitting in London, as follows:

83. . . . the Tribunal is not persuaded that it would be appropriate to require [Respondent] to bear the costs of a success fee when [First Claimant] did not disclose the existence of the Conditional Fee Agreement to [Respondent]. [First Claimant]'s claimed expectation that the arbitration would be heard in Paris and subject to French procedural law is not relevant. As made plain in the Second Partial Award (at paragraph 12), the seat of the arbitration is London, England. This was obvious from a very early date in the proceedings and whatever initial expectations [First Claimant] may have had, it knew from this date forward that England would be the seat of the arbitration and that the Arbitration Act 1996 and other relevant English *lex arbitri* would apply.

84. Under English law, a successful party cannot recover a success fee from the other side unless the other side was notified (in a timely fashion) of the existence of that agreement. The rationale for the English law rule is that the other side should be made aware of this additional risk of continuing to litigate if it is to be held liable to pay the success fee. According to English legislation, therefore, conditional fee agreements which do not satisfy the requirements of the principal and subordinate legislation (e.g., the requirement to notify the other party of the existence of such an arrangement) are not considered lawful and are thus unenforceable.

85. It is true that the foregoing rule is applicable, by its terms, in English litigation and not necessarily in international arbitrations sited in England. Nonetheless, just as the English rule that 'costs follow the event' applies generally in international arbitration sited in London, so the general approach towards conditional fee arrangements should also inform the allocation of costs in international arbitration. That is particularly true where the substance of the rule (e.g., parties should be aware of unusual fee arrangements, for which costs might be claimed, before they can be liable pursuant to such arrangements) applies in international arbitration as well as in domestic litigation.

86. It is undisputed that the CFA was not disclosed to [Respondent] by [First Claimant]. For this reason as well, the Tribunal would disallow the success fee sought by [First Claimant].⁶²

Comments:

Consequently, despite Article 15 of the ICC Rules (providing for the autonomy of arbitral procedure from the rules of procedure of any national law, including that of the place of arbitration), a party always needs to be attentive to the procedural law at the place of arbitration, especially perhaps if the place is London (the assumption by the tribunal that the English 'costs follow the event' rule applies to the allocation of costs between the parties where London is the place of arbitration should be noted). It follows from this award that, when an international arbitration is taking place in London, a party with a conditional fee agreement with its lawyer or law firm needs to disclose that agreement if it wants to be able to recover the success fee from the other party. In addition, as such disclosure would seem to be fair and reasonable in any event (the other side should be made aware of this additional risk of continuing to arbitrate if it is to be held liable to pay the additional amount represented by the success fee), it could be expected that the same principle should be applied in international arbitration generally, whatever the place of arbitration.

⁶²
Extracts, page 105, paragraphs 83–86.

B. 'Calderbank offer' (or 'sealed offer')—Final Award in Case No. 11499

The award was issued in March 2003 and the place of arbitration was Wellington, New Zealand.⁶³

The final award in this case on costs included discussion of whether an offer to settle made by the Respondent/Employer prior to the arbitration constituted a 'Calderbank offer', which calls for a brief explanation of the meaning of such an offer.

In ICC arbitrations, as under civil procedure in England, reasonable legal fees and expenses are typically awarded to the successful party, however 'success' may be defined for the purposes of any given case. Quite often, in construction cases, legal fees and expenses can come to represent a high proportion of the amount in dispute. Consequently, a respondent's exposure to liability for the claimant's legal fees and expenses can be an important factor for a respondent to take into account in assessing whether to proceed or continue with an international construction arbitration.⁶⁴

The so-called 'Calderbank offer' is a written offer to settle a dispute referred to arbitration or litigation made by one of the parties to the other, 'without prejudice save as to costs'. The effect of the offer is that should the other party reject it and subsequently fail to obtain a more favourable award by continuing the proceedings, an arbitral tribunal familiar with such a procedure should award reasonable legal fees and expenses after the time the offer expired (or was rejected) to the party that had made the offer. The justification for this solution is that, had the offer been accepted when it was made, such legal fees and expenses could have been avoided.⁶⁵

The Calderbank offer can therefore be a useful procedure for respondents⁶⁶ as, in addition to potentially limiting their liability for future legal fees and expenses, it can be an incentive for the offeree (the claimant) to settle a dispute or case if a reasonable offer is made. When the Calderbank offer results in a settlement between parties, no award is usually issued and the case is therefore not reported.

In Case No. 11499, the Respondent/Employer argued that it had issued a Calderbank offer after the date of Practical Completion and before the arbitration had been commenced:

At the time when the Claimant [the Contractor] had first presented its claim to the Respondent [the Employer] in an organized way, after the date of Practical Completion and before the arbitration had been commenced, it rejected an offer made by the Respondent to settle, made without prejudice save as to costs . . .⁶⁷

The Claimant/Contractor argued that the Respondent/Employer's offer was not a true Calderbank offer.⁶⁸ The tribunal agreed, for the following reasons:

⁶³ See Section II.B above (which relates to the partial award in the same ICC case) for a summary of facts.

⁶⁴ Similarly, if the respondent submits a counterclaim, a claimant can find itself in a comparable position to that of a respondent with possibly a similar incentive to issue a Calderbank offer.

⁶⁵ See P. Anjomshoaa, 'Costs Awards in International Arbitration and the Use of "Sealed Offers" to Limit Liability for Costs'

(2007) 10 *International Arbitration Law Review* 38 for a further explanation of the Calderbank offer.

⁶⁶ As well as claimants when they are subject to a counterclaim.

⁶⁷ Extracts, page 103, paragraph 4.2(b).

⁶⁸ Extracts, page 103, paragraph 5.2.

(1) the offer was made and withdrawn before completion and two years before any arbitration had begun; and

(2) it did not coincide with the claim that was ultimately brought in arbitration.

The tribunal also commented, as follows:

7.2 . . . legal authorities cited by the Claimant show:

(a) An offer to settle must be unambiguous and clear;

(b) The offeree must be given reasonable time and opportunity to assess the relative strengths and weaknesses of the other party's case;

(c) The fact that an unsuccessful party failed at trial does not necessarily mean it acted unreasonably in rejecting the initial offer when it did;

(d) The fact that the initial offer was itself reasonable does not mean that it was unreasonable to reject it at the time.⁶⁹

The tribunal thus concluded that the offer should not be considered a Calderbank offer.⁷⁰

Comments:

While the Respondent/Employer was found not to have used the Calderbank offer procedure effectively in this case, this author was involved in a case where this procedure was used successfully on behalf of a respondent in an ICC construction arbitration relating to a claim by an Asian subcontractor against a contractor that was an unincorporated joint venture made up of European and Asian companies. This case has been briefly described in a published article.⁷¹ Within three to four weeks after the contractor had made its offer, it was accepted and the matter settled. In that case, the seat of arbitration was London and, while the chairman of the arbitral tribunal was a civil law lawyer, the two party-nominated arbitrators were English and the claimant was represented in the arbitration by an English claims consultant.

While the Calderbank offer procedure is well known in England, it is not yet well known in international construction arbitrations, as it should be, in this author's opinion. This makes it especially important, if such procedure is resorted to in an international case, that the full meaning and consequences of the procedure are explained in detail in the offer letter or document, so that all parties (including potentially the arbitrators) are informed and the risk of argument about its purported meaning and effect reduced.⁷²

69
Extracts, page 103, paragraph 7.2.

70
Extracts, pages 103-104, paragraphs 7.3-7.7.

71
P. Anjomshoaa, *supra* note 65.

72
For an example of where a Calderbank offer letter was insufficiently explicit and therefore failed in its intention in an international arbitration, see J. Wood, 'Protection Against Adverse Costs' Awards in International Arbitration' (2008) 74 *Arbitration: the Journal of the Chartered Institute of Arbitrators* 139.