

# An Engineer's / Dispute Adjudication Board's Decision Is Enforceable By An Arbitral Award

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Contrary to widespread belief, a “binding” but not “final” decision of an Engineer under the FIDIC Conditions is enforceable by an arbitral award, in appropriate circumstances. This has been established for the first time by the interim award in ICC Case No. 10619 commented upon in this article. By analogy, a “binding” but not “final” decision of a FIDIC Dispute Adjudication Board should also be enforceable by an arbitral award in such circumstances. (There should be no issue that a “final and binding” decision of an Engineer or Dispute Adjudication Board is enforceable by an arbitral award.)

## I. Introduction

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 made under Clause 67 of the FIDIC Conditions of Contract for Works of Civil Engineering Construction (the “FIDIC Conditions” or “Red Book”), fourth edition, 1987, and, since the Engineer’s decision procedure was replaced by the Dispute Adjudication Board (“DAB”) in the 1999 edition of the FIDIC Conditions (the “1999 Red Book”), how to enforce decisions of a DAB made under Clause 20 of the 1999 Red Book. The interim award in Case No. 10619 under the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce (“ICC”), an award made in Paris, France in 2001 but an extract of which has only just been published by the ICC<sup>1</sup>, expressly addresses the question of how to enforce decisions of the Engineer made under Clause 67 of the FIDIC Conditions, fourth edition, and, by analogy, how to enforce decisions made by a DAB under Clause 20 of the 1999 Red Book.

By that award, a tribunal of three arbitrators held unanimously that decisions of the Engineer under Clause 67 of the FIDIC Conditions, fourth edition, could be enforced by a partial or interim award under the Rules of Arbitration of the ICC (the “ICC Rules”),<sup>2</sup> even though a

party — in fact, in that case, the same party who was seeking to enforce the decisions — had given a formal notice of dissatisfaction<sup>3</sup> with respect to the decisions within the time limit (70 days) provided by that Clause. The Engineer’s decisions can be — and should be — given effect to by such an award because the FIDIC Conditions expressly provide that a decision of the Engineer under Clause 67 is binding on the parties notwithstanding that one or both parties have given a notice of dissatisfaction with it. Accordingly, the arbitrators held that an arbitral tribunal should enforce it by an interim or partial award under the ICC Rules, ordering the other party immediately to pay the amount of the Engineer’s decisions.

The effect of this interim award, when it becomes more widely known, should be to enhance respect for decisions of the Engineer under a disputes clause such as Clause 67 as well as decisions of a DAB under Clause 20 of both the 1999 Red Book and the 1999 editions of the other FIDIC contracts for major works, namely, the Conditions of Contract for Plant and Design-Build (the “Yellow Book”) and Conditions of Contract for EPC/Turnkey Projects (the “Silver Book”) (the three Books together being the “1999 FIDIC Books”).

Accordingly, this award merits careful examination.



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<sup>1</sup> ICC International Court of Arbitration Bulletin, Volume 19, No. 2 – 2008, pp. 85 to 90.

<sup>2</sup> The ICC Rules do not distinguish between a partial and an interim award. See Article 2(iii) of the ICC Rules. They mean the same thing and any such award is final as to the issues or matters which it decides.

<sup>3</sup> While the award refers to the notice to be given by a party who disagrees with an Engineer’s decision as a “notice of dissatisfaction” (e.g. interim award, para. 21), Clause 67.1 of the FIDIC Conditions, fourth edition, in fact describes it as a “notice of [a Party’s] intention to commence arbitration... as to the matter in dispute”. This paper will generally use the terminology used in the award in this respect.

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## II. The facts of the case

In 1994, the Contractor/Claimant had entered on the same day (November 16, 1994) into two construction contracts with the Respondent/Employer for the construction of two roads, respectively, in the State of the Employer. The General Conditions of these contracts were based upon the FIDIC Conditions, fourth edition, 1987. The law governing the contracts appears to have been that of a civil law country.<sup>4</sup> During the course of the works, the Contractor asserted numerous claims against the Employer, including claims for time extension and additional payment for work done up to May 31, 1997.

On October 18, 1998, the Contractor had formally requested decisions from the Engineer under Clause 67 in relation to two claims – one apparently under each contract – for time extension and additional payment up to May 31, 1997. On November 17, 1998, the Engineer gave decisions on these requests granting to the Contractor a sum of money under each of the two contracts.<sup>5</sup>

On January 25, 1999, the Contractor had given formal notice of dissatisfaction with such decisions under Clause 67.<sup>6</sup> The Respondent/Employer did not give such notice.<sup>7</sup>

In the meantime, the Contractor had presented two further claims for time extension and additional payment under the two contracts effectively updating the previous ones for work done up to June 30, 1998. On January 29, 1999, the Contractor formally requested decisions from the Engineer under Clause 67 in relation to these

claims. On May 5, 1999, the Engineer made decisions on these claims granting to the Contractor further sums in local currency under each of the two contracts in addition to the sums granted by the Engineer in his decisions on November 17, 1998.<sup>8</sup>

None of the decisions of the Engineer was complied with by the Employer which the Contractor considered to be a breach of the contracts. For this and other reasons, on August 11, 1999, the Contractor/Claimant began arbitration against the Employer/Respondent by filing a Request for Arbitration with the ICC International Court of Arbitration, pursuant to Clause 67. By the Request, the Contractor referred numerous claims to arbitration, one of which was for:

“Respondent’s failure to give effect to Engineer’s decision pursuant to sub-clause 67.1 of the contracts.”<sup>9</sup>

After the filing of the Request for Arbitration and the Employer’s/Respondent’s Answer thereto, the Contractor/Claimant declared its:

“intention to request the Arbitral Tribunal to render an interim Award... to the effect of (i) declaring that the Respondent must give effect to the Engineer’s Decisions pursuant to Sub Clause 67.1 [of the FIDIC conditions] regardless of the pending arbitration, and (ii) ordering the Respondent to immediately pay the amounts determined by the Engineer as an advance payment in respect of any further payment which would result [*sic*] due by the Respondent pursuant to the final award.”<sup>10</sup>

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4 For reasons of confidentiality, the governing law is not identified in the published extracts of the interim or final awards.

5 Interim award, para. 15.

6 Interim award, para. 21.

7 This is clear from the final award in the case, para. 17 (the Respondent/Employer “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”), ICC International Court of Arbitration Bulletin, Volume 19, No. 2-2008, p. 90. But see footnote 24 below.

8 Interim award, para. 15. The interim award does not state whether the Contractor had given formal notice of dissatisfaction with these decisions but presumably it had done so as otherwise the underlying disputes could not have been referred to arbitration. In any case, the matter is irrelevant as the Tribunal finds that the decisions were rendered out of time, as discussed further below.

9 Interim award, para. 4. The full description of the Request for Arbitration in the interim award is as follows:

“On 11 August 1999, pursuant to Article 67 of the FIDIC conditions, the Claimant filed a Request for Arbitration with the International Court of Arbitration of the International Chamber of Commerce in which it raised a number of complaints based upon alleged

- a) Delay and disruption arising from the design and other associated causes,
  - b) Respondent’s failure to grant the Claimant with possession of site,
  - c) Exceptionally adverse weather conditions,
  - d) Other delaying and disruptive events,
  - e) Respondent’s failure to give effect to Engineer’s decision pursuant to sub-clause 67.1 of the contracts,
  - f) Respondent’s failure to provide funding for the contracts,
  - g) Breaches of Contract and law.
- ...”

10 Interim award, para. 6.

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The Claimant's case was said to be grounded on Sub-Clause 67.1 which empowers the Engineer to decide on a provisional basis disputes which are referred to him by one party. The Claimant argued that:

"[s]uch decisions [of the Engineer] are binding... on both parties and shall have effect as soon as they are made notwithstanding any notice of dissatisfaction and/or application or Request for Arbitration, and they must remain effective for as long as that they are not reviewed or cancelled by an out of court settlement or by an arbitral award."<sup>11</sup>

As discussed above, there were four decisions of the Engineer. Two had been made in 1998 in relation to applications of the Claimant for a time extension and payment of additional time-related costs. The other two which were made in 1999 had updated and encompassed the sums granted by the earlier decisions.

None had been complied with by the Employer which, the Claimant argued, was a breach of the contracts. As the decisions were stated in Clause 67 to be binding on both parties at least on a provisional basis, the Claimant maintained that the Tribunal:

"should give them immediate effect by the means of an interim award, without waiting until the time when after a complete review of the factual and legal evidence the Tribunal could adjudicate in full on the merits of the dispute."<sup>12</sup>

In addition to the wording of Clause 67, the Claimant relied on Article 23 of the ICC Rules relating to the power of an arbitral tribunal to order conservatory and interim measures<sup>13</sup> and, as the place of arbitration was Paris, France, on the provisions of the French Code of Civil Procedure relating to the subject of "*référé provision*"<sup>14</sup>. Accordingly, the Claimant requested the Tribunal to order the Respondent:

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<sup>11</sup> Interim award, para. 14.

<sup>12</sup> Interim award, para. 16

<sup>13</sup> Article 23(1) of the ICC Rules, which appears to be the provision relied upon, provides as follows:

"Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate." [Emphasis added]

<sup>14</sup> The *référé provision* refers to a type of summary action before a French court which has been described as:

"a peculiarity of French and Dutch law. It enables a creditor to benefit from emergency procedures, not so as to obtain measures required as a matter of urgency, but to rapidly have its rights enforced, fully or in part, where those rights are "not seriously disputable"." [Emphasis added]

*Fouchard Gaillard Goldman On International Commercial Arbitration* (Edited by Emmanuel Gaillard and John Savage), Kluwer Law International (The Hague, 1999), pp. 728-729.

Such "rights" can include the full payment of a debt, see *V.S.K. Electronics v. Sainrapt et Brice International S.B.I.*, 1990 Rev. Arb. 651, cited in footnote 93 on page 728 of Fouchard Gaillard Goldman referred to above.

<sup>15</sup> It is unclear from the award why the decisions were exclusively in the local currency of the Employer. Possibly, this was because this was the "currency of account" under the contracts.

<sup>16</sup> Interim award, para. 17.

<sup>17</sup> *Idem*.

"to provisionally pay the sums recognized due by the Engineer, plus accrued interest at the annual rate of 7% pending the final judgment of the Tribunal on the merit [*sic*] of the respective arguments of the parties on the whole of the dispute."

The Claimant maintained that the amounts awarded by the Engineer, which were in the local currency of the Employer,<sup>15</sup> should be converted into U.S. dollars at the contractual exchange rate, together with interest on such sums until the date of complete payment.

In response, the Respondent argued essentially as follows:

(1). The Claimant's claim for interim relief was unjustified as there was no evidence of urgency or of a risk of irreparable harm for the Claimant, which is a necessary condition for an interim or conservatory measure. In particular, if the Tribunal were finally to adjudicate in favor of the Claimant, it would be adequately compensated by an allocation of interest in addition to the principal amounts granted to it in a final award and, in the meantime, there was no evidence that the Claimant would suffer from any financial inconvenience as a result of the Employer's failure to pay at this stage. Furthermore, the Respondent maintained that the Claimant had not *prima facie* established its case.<sup>16</sup>

(2). The provisions of Sub-Clause 67.1 relating to the binding character of the decisions of the Engineer:

"aim only at preventing disruption of the works pending the final resolution of disputes between the parties so that they cannot apply in the instant case because the relevant decisions were made after the completion of the works."<sup>17</sup>

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(3). Moreover, if any of the parties had "expressed its disagreement with the Engineer's decisions" (by giving a formal notice of dissatisfaction), which the Respondent maintained both parties had done:

"... the decisions are deprived of their binding character."<sup>18</sup>

The Respondent also relied for its defense on the following points:

- The decisions made on May 5, 1999 were made after the 84-day period allowed to the Engineer under Sub-Clause 67.1,
- The sums granted by the Engineer were expressed in local currency and, consequently, the Claimant could not claim for them in U.S. dollars, and
- The decisions could not be held to be "self executory" because, in the Engineer's decisions, the Engineer had stated that they were "subject to the Employer's prior approval" inasmuch as:

"no payment could be made in the absence of certificates of payment for which prior approval of the Employer was also required."<sup>19</sup>

Therefore, the Respondent asked the Tribunal to dismiss the Claimant's application for an interim award.

### III. The Tribunal's reasoning

The Tribunal began its analysis by recalling the "system" of Sub-Clause 67.1 of the FIDIC Conditions, fourth edition. In brief, this provides that:

(1). if a dispute should arise between the Employer and the Contractor in connection with the Contract, it must be referred in writing to the Engineer who is required to notify the parties of his decision within 84 days;

(2). if the Engineer should fail to notify his decision within that time period, then within a further period of 70 days either party may notify its intention to commence arbitration as to the matter in dispute; and

(3). if, as is ordinarily the case, the Engineer notifies his decision within 84 days, then either party may, also within a time limit of 70 days, address a notice of its intention to challenge the decision by way of arbitration to the Engineer and the other party, failing which the decision will become "final and binding" on both parties and "cannot be revoked in arbitration."<sup>20</sup>

The Tribunal further noted, correctly, that if either party had given a notice of dissatisfaction with the decision within 70 days, then while such decision is not "final", nevertheless it is "binding" on both parties who are required to comply with it forthwith, as stated in the second paragraph of Sub-Clause 67.1 whereby:

"... 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."<sup>21</sup>

After reviewing the facts relating to the Engineer's decisions, the Tribunal determined that the two decisions made on May 5, 1999 were made more than 84 days after the Claimant had requested them pursuant to Sub-Clause 67.1 and, consequently, "they cannot bind the parties."<sup>22</sup> Therefore, the Tribunal denied the Claimant's request for an interim award with respect to those decisions.

However, the Tribunal found that "[s]ince... the 5 May decisions are held ineffective..., those of 17 November 1998 survive."<sup>23</sup> They had, in fact, been made timeously, that is, within 84 days of the Claimant's request therefor. As stated above, the

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<sup>18</sup> *Idem*.

<sup>19</sup> Sub-Clause 2.1 of Part II of the FIDIC Conditions included in the relevant contract here expressly provided – as many construction contracts based on the FIDIC Conditions do – that if the Engineer carried out certain duties under the contract, including apparently the certification of payments, it would need the Employer's prior approval.

<sup>20</sup> Interim award, para. 18. For a commentary on Clause 67 of the FIDIC Conditions, third and fourth editions, see the author's two articles entitled "The Pre Arbitral Procedure for the Settlement of Disputes in the FIDIC (Civil Engineering) Conditions of Contracts" [1986] *The International Construction Law Review* ("ICLR") 315 and "The Principal Changes in The Procedure for the Settlement of Disputes (Clause 67)" [1989] *ICLR* 177, respectively.

<sup>21</sup> Interim award, para. 18 (quoting Sub-Clause 67.1 of the FIDIC Conditions, fourth edition, 1987).

<sup>22</sup> Interim award, para. 20. According to the award:

"... the Engineer took the position that because the parties were at that time in negotiation for a tentative settlement of their difference, it could defer its decisions until 5 May 1999 [that is, until more than 84 days after the Claimant had requested the decisions on 29 January 1999]. But in the absence of any evidence at this stage that both parties had, whether in express terms or impliedly, agreed for the Engineer not to stick to the time condition of Article 67.1, it is this Tribunal's opinion that the Engineer had no authority to depart from a rule which remained binding on the parties." [Emphasis added]

<sup>23</sup> Interim award, para. 21.

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Contractor/ Claimant had filed its formal notice of dissatisfaction within the required 70 days (January 25, 1999).<sup>24</sup> Consequently, the Tribunal found that the decisions made on November 17, 1998:

“... must be considered as capable of producing immediate legal effect on the parties for as long they are not revised or set aside by the parties in an out of court settlement or by an arbitral award. It does not matter whether they were notified after or before completion of the works: in both cases, Article 67.1 states that its provision shall apply.”<sup>25</sup>

The Tribunal then considered the issue of “whether and on what legal basis this Tribunal may adjudicate the present dispute by an interim award.”<sup>26</sup> The Tribunal justified its decision by reference to the contract (Clause 67), after carefully distinguishing this basis for its decision from Article 23 of the ICC Rules and French law relating to *référé provision* (the place of arbitration being Paris), also relied upon by the Claimant. 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.

In this respect, this Tribunal wishes to emphasize that neither the provisions of Article 23 of the ICC Rules, nor the rules of the French NCPC relating to the *référé provision* are relevant. For one thing, the judgement to be hereby made is not one of a conservatory or interim measure, *stricto sensu*, but rather one 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*.<sup>27</sup> [Emphasis added]

The Tribunal could have held merely that the Employer was in breach of contract and required the Employer to pay damages for such breach, represented by interest on the amount of the unpaid decisions. But, instead, the Tribunal ordered the Employer to pay the amount of the Engineer's decisions on the ground that “[t]his is simply the law of the Contract”

In the author's view, this is the right approach. It reflects the intention of the FIDIC Conditions which is that Engineer's decisions are to be respected even if they have been the subject of a timely notice of dissatisfaction from a party and might later be proved to have been wrong. If they specify that an amount is to be paid to the Contractor, then the amount is to be paid even though the decision could later be reversed and the amount paid be required to be returned. How better to promote respect for Engineer's decisions, in keeping with the intention of the FIDIC Conditions, than to enforce them directly by an arbitral award?

Moreover, by relying on the “law of the contract”, instead of Article 23(1) of the ICC Rules or French law on *référé provision*, the Tribunal avoided having to make findings of urgency or irreparable harm, as might have been necessary to justify resort to those procedures. The Tribunal also refrains from describing the payment as an “advance payment” as the Claimant had argued. Rather, the payment is to be made like any other sum due under the contracts (although, if the decision were reversed by an arbitral tribunal, it could be subject to ultimate repayment).

The Tribunal then dealt with the fact that, at the end of each of the Engineer's decisions of November 17, 1998, after stating the amounts that were due to the Claimant, the Engineer had stated as follows:

“By copy of this letter the Employer is requested to give his specific approval (in terms of Sub-Clause 2.1(b) of the Conditions of Contract, Part II) for the Engineer to certify such additional cost for payment.”<sup>28</sup>

On the basis of this particular wording, the Respondent had argued that the Engineer's decisions were conditional upon the Employer's approval and that they were therefore not binding since such approval was not obtained.

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<sup>24</sup> *Ibid.* While the Tribunal finds that the Respondent/Employer had not filed a formal notice of dissatisfaction within the required 70 days (see footnote 7 above), it does note that:

“the Employer even if not in the formal terms prescribed by Article 67.1 expressed its disagreement by its so called “Stand” of January 1999.”

It is unclear from the interim award what “Stand” is referring to. In any event, the Tribunal does not find the Employer's action to have contractual significance.

<sup>25</sup> Interim award, para. 21.

<sup>26</sup> Interim award, para. 22.

<sup>27</sup> Interim award, para. 22. The term “*fumus boni juris*”, which may not be familiar to all readers, is defined as “*prima facie* case” or “probability of the alleged claim” by Webster's Online Dictionary, [www.websters-dictionary.online.org](http://www.websters-dictionary.online.org).

<sup>28</sup> Interim award, para. 23.

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The Tribunal rejected this argument for “at least two reasons,” as follows:

“... First, the Engineer wrongly believed that decisions of that sort were subject to the particular conditions of Sub-Clause 2.1(b) of Part II of the FIDIC Conditions of Contract. In reality decisions taken pursuant to Article 67.1 are not among those for which the Engineer must obtain specific prior approval of the Employer.<sup>29</sup> Moreover, even if issuance of certificates of payment by the Engineer may require approval of the Employer, this condition affects only the validity of such certificates but certainly not that of the relevant decision itself; and, in the case where the Employer although bound to give immediate effect to that decision refrains to do so simply by refusing to approve a certificate of payment, this will obviously result in a breach of its contractual duties justifying a claim from the Contractor. Finally, one could not give any positive effect to a phrase which is inconsistent with the meaning of the decision which is clear and unequivocal.”<sup>30</sup> [Emphasis added]

The Tribunal correctly construed the Employer's obligation to pay binding decisions of the Engineer under Clause 67 as not being subject to the condition that the Engineer issue a certificate of payment for them under Clause 60 (and, as a certificate of payment, be subject to the prior approval of the Employer under Sub-Clause 2.1(b) of Part II of the FIDIC Conditions). While certificates of payment of the Engineer are the means by which the Contractor normally becomes entitled to payments under the FIDIC Conditions and, to be valid, might (if so provided by

Sub-Clause 2.1(b)) require the prior approval of the Employer, the Tribunal noted that:

“this condition [the prior approval of the Employer] affects only the validity of such certificates but certainly not that of the relevant decision [under Clause 67] itself.”

If binding decisions of the Engineer under Clause 67 were subject to the conditions that applied to payment certificates, the Employer could effectively circumvent the Clause 67 procedure by not approving payment certificates, thereby depriving such procedure of effect, which is unlikely to have been the parties' intention.

However, the Tribunal denied the Claimant's request that the amounts of the Engineer's decisions, which were denominated in local currency, be converted into U.S. dollars and be awarded in that currency together with interest. In response to this request, the Tribunal stated that it:

“cannot do any more than to give legal force and effect to the relevant decisions as they are.”<sup>31</sup>

The Tribunal noted the total sum of the two decisions of 17 November 1998 in local currency and stated:

“There is no reason here to depart from the parties' agreement concerning the currency of payment pursuant to [the relevant contracts]. Failing any other indication in the decisions, the payment of the above amount shall be ordered 17.6% in [local] currency and 82.4% in US\$, at the contractual fixed rate of...”.<sup>32</sup>

<sup>29</sup> Sub-Clause 2.1 of Part I of the FIDIC Conditions, fourth edition, deals with the Engineer's duties and authorities. Among other things, it states that the:

“Engineer may exercise the authority specified in or necessarily to be implied from the Contract, provided, however, that if the Engineer is required, under the terms of his appointment by the Employer, to obtain the specific approval of the Employer before exercising any such authority, particulars of such requirements shall be set out in Part II of the Conditions.”

The interim award does not quote or describe Sub-Clause 2.1(b) of Part II of the conditions of the contracts at issue, so it is not possible to know its contents. However, usually such restrictions of authority, which may derive from the requirements of legislation or regulations (governmental or other), require approval by the Employer of variations leading to increases in costs or extensions of time. In effect, they limit the Engineer's authority in various cases where, under the FIDIC Conditions, the Engineer is acting as the Employer's agent. However, the FIDIC Conditions, properly construed, should not allow any restriction on the authority of the Engineer when he is acting under Clause 67 as, under that Clause, he is required, implicitly, to decide disputes fairly and impartially between the parties and not act merely as the agent of the Employer (whose authority, in that capacity, is naturally subject to possible restriction). Accordingly, the Tribunal correctly decides that restrictions on the Engineer's authority pursuant to Sub-Clause 2.1(b) in relation to the giving of payment certificates cannot relieve the Employer from having to pay decisions of the Engineer under Clause 67.

<sup>30</sup> Interim award, para. 23.

<sup>31</sup> Interim award, para. 24.

<sup>32</sup> Interim award, para. 24. The Tribunal's position in this respect is in striking contrast to the position of another ICC tribunal, also in relation to the FIDIC Conditions, fourth edition, 1987, and this time sitting in London and not Paris, which stated:

“The respondent [the Employer] contended that the matter of currencies was dealt with under the contract. While this may provide for the currencies in which payment under the contract is to be made, the contract is silent as to the currency in which any arbitral award is to be given.” [Emphasis added]

As the Tribunal in that case found that the contract “was silent as to the currency in which any arbitral award is to be given,” the tribunal found, for purposes of Section 48(4) of the English Arbitration Act 1996, that the parties had not “otherwise agreed” on a currency of payment for the award and that, therefore, the Tribunal had the power to order payment of any sum of money found to be due in any currency and ordered payment of the award to be made in the European currencies of the claimant (the Contractor), instead of in the currency of Lesotho (Maloti), the currency of the respondent (the Employer) and also largely the currency of payment in the contract. See the description of the ICC award in the decision of the House of Lords in Lesotho Highlands Development Authority v. Impregilo SpA [2005] B.L.R. 351, 354-5. While there may have been other compelling reasons for the Tribunal's decision (as suggested by Antonio Crivellaro, All's Well That Ends Well: London Remains a Suitable Venue for International Arbitration – But Only Thanks to the House of Lords [2005] ICLR 480, 489-91), the Tribunal's stated reason is surprising as contracts rarely, if ever, provide in addition to, and in place of, a currency of payment, a “currency in which any arbitral award is to be given” – certainly the FIDIC Conditions never have. While the arbitrators' award was successfully challenged on the ground of “serious irregularity” before the English Commercial Court (Queen's Bench Division) and Court of Appeal, the House of Lords (Lord Phillips dissenting) set aside the lower court decisions and, effectively, reinstated the award.

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The Tribunal also stated that it was not prepared "at this early stage of the arbitration" to grant interest on the amount awarded, both because "the Engineer said nothing in this regard" (the award does not state whether the Contractor had claimed interest when requesting the Engineer's decisions) and because the Tribunal thought that "more information would be needed in the context of this dispute before deciding the issue."<sup>33</sup>

Finally, the Tribunal noted that, as Sub-Clause 67.1 provides that the Engineer's decisions shall have "an immediate binding effect" that "provisional enforcement" of the award (as permitted under the law of the place of arbitration, France) must be ordered. As the seat of arbitration was Paris, the effect of this under French law was that the award could be immediately enforced, notwithstanding the institution of a judicial procedure to set the award aside.<sup>34</sup>

### IV. The Tribunal's award

The exact manner in which the Tribunal ordered enforcement of the Engineer's decisions is also of interest. The dispositive part of their award provided as follows:

"Therefore, on the basis of the foregoing, the Arbitral Tribunal decides as follows:

The Respondent [\_\_\_\_] shall pay to the Claimant [\_\_\_\_], immediately upon notification of the present award the sums of

[Local currency] ...

US dollars ...

The issue of interest and that of a compensation for the parties' legal expenses as well as the decision on the costs and fees of this part of the arbitration are reserved.

Provisional enforcement of this award is ordered.

The rights of the parties as to the merits of their case, including but not limited to the final and binding effect<sup>35</sup> of the Engineer's decisions are reserved until the final Award of this Tribunal!" [Emphasis added]

The above emphasized words make it very clear that the Tribunal's decision to enforce the Engineer's decisions made on November 17, 1998, by ordering their payment, would not prejudice the Employer's right to argue later in the arbitration that they were wrong and that the corresponding amounts should be repaid to the Employer.<sup>36</sup>

In the final award, the Tribunal confirmed that, even though the Respondent/Employer "had not objected within the prescribed time limit to the Engineer's decisions," the Respondent/Employer "may take advantage of the notice made by the [Claimant/ Contractor objecting to the Engineer's decisions] and request the Arbitral Tribunal to reverse the Engineer's decisions." The Respondent/Employer could do so since "the Claimant has declared his dissatisfaction with the entire content of the Engineer's decisions."<sup>37</sup>

### V. Implications for FIDIC contracts

In the author's view, the Arbitral Tribunal in ICC Case No. 10619 has perfectly understood the way Clause 67 of the FIDIC Conditions is to function and its decision to order payment of the Engineer's decisions by way of an interim award, notwithstanding the Contractor's earlier notice of dissatisfaction, accords fully with the intention of Clause 67.

The notable points in the award are, in summary, as follows:

- (1). an Engineer's decision made under Clause 67 may be enforced by means of an arbitral award notwithstanding that it had been the subject of a notice of dissatisfaction within the time limit provided for by that Clause and regardless of the fact that the works had been completed;
- (2). an Engineer's decision must be made within the designated 84-day time limit if it is to be binding on the parties (and the fact that the parties may have been negotiating a settlement of the dispute did not entitle or authorize the Engineer to defer the making of such decision);

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33 Interim award, para. 25. The Arbitral Tribunal also noted that no question was raised in the application for an interim award about the Engineer's decisions as to an extension of time, interim award, para. 26.

34 See Article 1479 of the French Code of Civil Procedure.

35 The reference to the "final and binding effect" of the Engineer's decisions appears to be excessive as there were no "final and binding" decisions (that is, decisions which had not been the subject of a notice of dissatisfaction from either party) but only "binding" decisions (that is, decisions which had been the subject of a notice of dissatisfaction from one or both parties). Perhaps the Tribunal meant that, if it confirmed them, they would have "final and binding effect" in the sense that they could no longer be reversed or, alternatively, merely used these words out of an abundance of caution.

36 As it happened, the Respondent did not comply with the interim award and the Tribunal later confirmed the amounts awarded by the interim award in its final award in April 2002.

37 ICC International Court of Arbitration Bulletin, Volume 19, No. 2-2008, p. 90, paras. 17 and 18.

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(3). if an Engineer's decision has been made within the required 84-day period and has not been the subject of a notice of dissatisfaction within 70 days, it "cannot be revoked in arbitration";<sup>38</sup>

(4). the Employer's obligation to pay a binding decision of the Engineer under Clause 67 is not subject to a restriction under Sub-Clause 2.1 of the FIDIC Conditions on the Engineer's power to certify payment under Clause 60 of the FIDIC Conditions;

(5). the refusal to denominate the amounts awarded in other currencies than the currencies for payment specified in the contract;<sup>39</sup>

(6). the denial of interest on the sums awarded by the Engineer as the Engineer had said nothing about the subject in his decisions but also because "more information would be needed... before deciding this issue"; and

(7). as confirmed in the final award, that even though the Employer had not formally expressed dissatisfaction with the Engineer's decisions in time, it was entitled to take advantage of the Contractor's formal notice of dissatisfaction and, thus, to request the Tribunal to reverse those decisions in their entirety.

In an earlier award, only a summary of which has been published,<sup>40</sup> an ICC arbitral tribunal had, by an interim award, ordered payment of final and binding decisions of the Engineer under Clause 67 of the FIDIC Conditions, second edition, 1969. However, the interim award in ICC Case No. 10619 is the first example of a published award of which the author is aware where an arbitral tribunal has ordered payment by an award of the amount of an Engineer's decision which is "binding" but not "final"; that is, which had been formally challenged within the required time limit (70 days of the decision under the FIDIC Conditions, fourth edition), by one or both of the parties.

The practical effect of enforcing by an interim award an Engineer's decision ordering a payment to be made to the Contractor – and

assuming the payment were made – is to reverse the parties' roles in the arbitration in relation to the dispute which was the subject of the decision in that the contractor will now hold the corresponding money. The Contractor whose claim has been satisfied, albeit temporarily, no longer has necessarily to claim for it in the merits phase of the arbitration, and is therefore no longer exposed to the risk of the Employer's insolvency in the interim. Instead, the Employer is exposed to the risk of the Contractor's insolvency in the interim should the Employer later prevail on that claim in the merits phase and seek to recover the money.<sup>41</sup>

The author submits that the same result should obtain in the case of a decision of a DAB under Clause 20 of the 1999 FIDIC Books as applies in the case of a decision of the Engineer under Clause 67 of the FIDIC Conditions, fourth edition. This is because the relevant language of Clause 67 of the fourth edition and of Clause 20 of the 1999 FIDIC Books is essentially the same.

Sub-Clause 67.1 of the FIDIC Conditions, fourth edition, provides that, with respect to each decision of the Engineer:

"... 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."

This was the key language relied upon by the Tribunal in their interim award in ICC Case No. 10619 to justify the giving of their award.

The language in Sub-Clause 20.4 is at least as strong. It provides as follows:

"The decision [of a Dispute Adjudication Board] 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."

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<sup>38</sup> Interim award, para. 18.

<sup>39</sup> While the works had apparently been completed (see the interim award, para. 17) and, therefore, the Contractor may no longer have need of local currency to pay expenses in the local country concerned, absent a provision in the relevant contract or French arbitration law (there is none), the Tribunal would have no clear authority to depart from the parties' agreement concerning the currency of payment provided for in their contract.

<sup>40</sup> ICC Case Nos. 3790/3902/4050/4051/4054 (joined cases), also referred to simply as ICC Case No. 3790, *ICCA Yearbook Commercial Arbitration*, Volume XI – 1986, pp. 119 to 127; also summarized in Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, Kluwer, Deventer, 1990, pp. 889 to 891.

<sup>41</sup> It is beyond the scope of this paper to consider whether, as a policy matter, this is necessarily a desirable result. The risk for the Employer can be mitigated if the Engineer (or a DAB, now that it has replaced the Engineer as a decider of disputes under the 1999 FIDIC Red Book) conditions any payment to the Contractor on the provision of appropriate security, such as a bank guarantee in "first demand" form.



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Accordingly, the interim award in ICC Case No. 10619 is directly applicable to a decision of a DAB under the 1999 FIDIC Books.<sup>42</sup> Even if one or both parties have given a notice of dissatisfaction with respect to a decision of a DAB pursuant to Sub-Clause 20.4, each party is bound to give effect to that decision and, if that decision calls for a payment to be made by one party to the other, then that decision should be enforceable directly by an interim or partial award pursuant to the ICC Rules. This is the consequence, this author submits, of the interim award in ICC Case No. 10619.<sup>43</sup>

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<sup>42</sup> See the author's "*The Arbitration Clause in FIDIC Contracts for Major Works*" [2005] ICLR 4.

<sup>43</sup> Interestingly, the interim award in ICC Case No. 10619 – or at least its publication in 2009 – has been anticipated in the ICC Model Turnkey Contract for Major Works (2007), as this provides in Article 67.1:

"No arbitral tribunal can open up review or revise any decision of the CDB [Combined Dispute Board] which has become final and binding in accordance with the Rules, but an arbitral tribunal may, if considered appropriate by the arbitral tribunal and permitted under applicable law, as provided hereafter, make interim awards for the purpose of enforcement of the CDB decision." [Emphasis added]

While in an article dealing with "final and binding" decisions, the provision relating to interim awards is not necessarily limited to them and could include merely "binding" decisions.





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