EXTRACTS FROM ICC AWARDS

CONSTRUCTION CONTRACTS REFERRING TO THE FIDIC CONDITIONS — PART I

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

This is the second series of ICC Awards on construction contracts referring to the FIDIC Conditions of Contract for Works of Civil Engineering Construction (also called the "Red Book") published by the Bulletin. The first series appeared in Vol 2, No. 1, in 1991. This second series is divided into two parts, the second of which will be published in the Fall, in the second number of this volume, accompanied by a commentary by Christopher R. Seppala, Member of the Paris and New York Bars and Legal Adviser and Member of the FIDIC Task Group for Updating the FIDIC forms of construction contract.

As in 1991, the awards published in this issue cover the Second (1969) and the Third (1977) Editions of the FIDIC Conditions. None of the awards applies the Fourth (1987) Edition directly, though the latter is at times the subject of comments by arbitral tribunals when dealing with earlier editions. A "test edition" of what will be the Fifth Edition of the FIDIC Red Book is due to appear towards the end of this year.

Final Award in Case No. 7641 (1996)

FIDIC Conditions, 3rd ed./ Dispute between Employer and Contractor/ Clause 67/ Jurisdiction/ Whether right to submit dispute to arbitration validly reserved by notice of intention to arbitrate, yes/ Whether Request for Arbitration must be filed within 90-day period specified in Clause 67, no/ Comparison between 3rd and 4th ed. of FIDIC Clause 67/ ICC Cases No. 4707, 4862, 5029, 5277, 5600 and 5634 considered.

This extract concerns the question of the action a party must take, under the 3rd Edition, to secure its right to arbitration following a decision of the Engineer or a failure of the Engineer to issue a decision, i.e.: is a mere notice of the intention to arbitrate sufficient, or must the party file a Request for Arbitration? The answer is clear under the 4th Edition, but less so under the 3rd Edition, which the Arbitral Tribunal was applying in this case with the hindsight provided by the 4th Edition.

The Claimant, as Contractor (a European Company), and the Defendant, as Employer (a government body of an African country), entered into a contract for the performance of dredging and associated works to improve access to a port for larger ships. Although the substantial and final completion certificates had been issued, certain disputes arose between the parties during the performance of the works, which the Claimant referred to the Engineer pursuant to clause 67 of the contract. The Claimant notified the Defendant that the disputes submitted to the Engineer would be referred to arbitration. The Request for Arbitration was filed after the expiry of the 90-day time period specified in Clause 67 for reserving the right to arbitration.

" [...]

Has the Claimant timely "required that the matter or matters in dispute be referred to arbitration (as provided under Clause 67(1) CC)?"

The Claimant had 90 days, after the expiration of the first 90-day period, to "*require that the matter or matters in dispute be referred to arbitration*":

> "If the Engineer shall fail to give notice of his decision, as aforesaid, within a period of ninety days after being requested as aforesaid, or if either the Employer or the Contractor be dissatisfied with any such decision, then and in any such case either the Employer or the Contractor may within 90 days after receiving notice of such decision or within 90 days after the expiration of the first named period of 90 days, as the case may be, require that the matter or matters in dispute be referred to arbitration as hereinafter provided" (Clause 67 (1), emphasis added).

The Defendant's contentions

According to the Defendant, the Claimant did not commence arbitration within the required time period. A mere expression of intent to commence arbitration is not sufficient to prevent an Engineer's Clause 67 (1) decision from becoming final and binding. The objecting party must actually commence the arbitration.

The 90-day period is a time-bar whose purpose is to provide parties with certainty that after the expiration of the period, no claims may be brought against them with respect to matters covered by the relevant Clause 67 (1) CC decision.

This very concern has prompted prominent commentators like Mr Seppala and Mr Jarvin to take the position that the 90-day time bar is met only when a party actually commences arbitration (Christopher Seppala, "The Pre-Arbitral Procedure for the Settlement of Disputes in the FIDIC (Civil Engineering) Conditions of Contract", *International Construction Law Review* (1986), p. 315; Sigvard Jarvin, Yves Derains and Jean-Jacques Arnaldez, *Collection of ICC Arbitral Awards 1986-1990*, Case Note on No. 4862.

In ICC Award No. 4707 rendered in 1986 (*International Construction Law Review* (1986)

pp. 470-73), the Arbitral Tribunal held that actual commencement of the Arbitration is required.

ICC Award No. 5277 rendered in 1987 (*Collection of ICC Arbitral Awards*, 1986-1990, pp. 112-122) held that after the Engineer gives written notice of a FIDIC Clause 67 decision, the party dissatisfied with the decision must file a request for arbitration with the ICC within 90 days thereof.

The modification to Clause 67 CC in FIDIC's fourth edition actually supports the Defendant's position that Clause 67 (1) of the Contract at issue here (which is based on FIDIC's third edition) required the Claimant to actually commence arbitration within 90 days of the Engineer's Decision. Such a modification would not have been necessary if the drafters of the FIDIC conditions believed that the previous version of clause 67 allowed for the same.

The Claimant's contentions

According to the Claimant, a plaintiff must only notify the Engineer of its intention to submit the matter to arbitration. It need not actually commence arbitration.

The majority of cases indeed hold that a claimant satisfies the requirement of Clause 67 CC by notifying the engineer of its "*intention*" to arbitrate:

- ICC Case 5029: "[A] claim to arbitration without need for particular formalities is to be explicit and clear and clearly show the plaintiff's intention to submit the dispute to arbitration;"

- ICC Case 4862: "The plaintiff did not actually commence arbitration until over five years after it initially notified the Engineer that it intended to submit the matter to arbitration;"

- ICC Case 5634: "The tribunal held that it was not necessary to submit a request to the arbitrators but simply to notify the Engineer of the decision within 90 days."

The Claimant relies on Mr Duncan Wallace's comment to the effect that the relevant language of clause 67 FIDIC requires only "*notification of a serious intent to arbitrate*", not actual commencement of proceedings (Ian Duncan Wallace, *Construction contracts: Principles and Policies in Tort and Contract*, London, 1986, p. 276, §18-13).

FIDIC 4th ed. clarified FIDIC 3rd edition and brought it into line with the majority position. FIDIC 4th edition provides that a dissatisfied party must notify the other party and the engineer of its "*intention to commence arbitration*". Actual commencement is not required. This revision has removed any prior uncertainty.

The Tribunal's decision

The Tribunal notes that under Clause 67 (1) CC, the Contractor must, within the 90 days, "*require that the matter in dispute be referred to arbitration.*"

The majority of ICC Awards rendered in cases where Clause 67 CC of FIDIC second and third editions was at issue held that an actual beginning of the arbitration procedure was not required.

In addition to the three ICC awards quoted by the Claimant, the award rendered in ICC case No. 5600 (1987) should be mentioned. In this case, an arbitral tribunal decided that the Contractor's letter stating: "*Je vous prie de considérer le présent courrier comme une notification de notre désaccord sur votre décision et vous notifions par la présente que nous soumettons l'affaire à l'arbitrage, conformément à la Clause 67 des Conditions Contractuelles*" was a "*demande d'arbitrage*" in conformity with Clause 67 CC's requirements "*que la question ou les questions en litige soient soumises à l'arbitrage*" (*ICC International Court of Arbitration Bulletin*, (1991) Vol 2/No 1, pp. 16-19).

The Tribunal further notes that Clause 67 of FIDIC's 4th edition (1989) now provides for the sole requirement of a notification to the other party of the "*intention to commence arbitration*":

> [*3rd ed.*] "If the Engineer shall fail to give notice of his decision, as aforesaid, within a period of ninety days after being requested as aforesaid, or if either the Employer or the Contractor be dissatisfied with any such decision, then and in any such case either the Employer or the Contractor may within 90 days after receiving notice of such decision or within 90 days after the expiration of the first-named period of 90 days, as the case may be, require that the matter or matters in dispute be referred to arbitration as hereinafter provided." (emphasis added)
>
> [*4th ed.*] "If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as

to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor" (emphasis added).

The Commentary of this article in the 4th edition states:

"the action necessary to prevent a decision from becoming final and binding is a notification by one party (no longer to the Engineer) to the other party of his intention to commence arbitration as to the subject matter of the decision" (Guide to the use of FIDIC fourth edition 1989).

The Tribunal considers that the redrafting of Clause 67 in the fourth edition was a clarification rather than a reversal.

Consequently, the Tribunal is satisfied that the Claimant's letter dated December 12, 1990, in which it notified the Defendant that the claims would be referred to arbitration, complies with the requirements of Clause 67 (1) CC.

This solution is preferable as otherwise it would hamper attempts to settle the dispute amicably, which is contrary to the spirit of FIDIC rules. Indeed, FIDIC's 4th edition added a new clause 67 (2): "*Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-clause 67 (1), arbitration of such dispute shall not be commenced unless an attempt has first been made by the parties to settle such dispute amicably.*"

Accordingly, in view of the above reasons, the Tribunal decides it has jurisdiction [...]. "

Second Partial Award in Case No. 5948 (1991)

FIDIC Conditions, 2d ed./ Dispute between Contractor and Employer/ Clause 63/ Clause 67.

Clause 63/ Expulsion from Site/ Certificate by Engineer under Clause 63/ Letter in this case not amounting to certificate/Arbitral Tribunal not bound by Engineer's determination where requirements of Clause 63 not complied with/ Expulsion unlawful under conditions of contract/ Expulsion unlawful under applicable law.

Clause 67/ Whether Engineer's decision has become final and binding/ Letter from Claimant to Engineer stating that Contractor requires that dispute and decision be referred to arbitration/ Actual Request to ICC not filed within 90-day period/ Notification in writing to Engineer that aggrieved party requires dispute to be referred to arbitration sufficient to preserve right to proceed to arbitration thereafter.

" **Background** [*from first partial award*]

The Claimant [*an American contractor*] and the Defendant [*the Government (Ministry of Public Works) of an Arab State*] entered into a contract dated 19th January 1982 for the construction, completion and maintenance of a new hospital. The general conditions of the Contract are those of the State (Ministry of Public Works, Engineering Services Department), being largely identical with the FIDIC Conditions for Civil Engineering Works, 2d edition.

According to Art. 1(1)(c) of the Contract, the Engineer was defined as the Director of Engineering, Ministry of Public Works or other the Engineer appointed from time to time by the Government and notified in writing to the contractor to act as Engineer for the purposes of the Contract in place of the Engineer so designated.

Facts [*from final award, below*]

1. This case arises out of the construction of a hospital in an Arab country.

Pursuant to the Tender of the Claimant (the Contractor) dated 5 October 1981, a contract for the completion and maintenance of a hospital (the Contract) was awarded by the Defendant (the Employer) to the Claimant in April 1982. The contract starting instruction was given on 19 June 1982 designating the contract start date as 20 June 1982. The Articles of Agreement were signed on 4 August 1982.

In respect of certain matters which arose during the execution of the Contract, the parties subsequently entered into the Memorandum of Agreement of 28 June 1986.

On 30 November 1986 notice was given to the Claimant referring to Clause 63(1) of the Contract and on 15 December 1986 the Claimant was expelled from the site.

2. The Request for Arbitration dated 14 May 1987, was received by the International Chamber of Commerce on 18 May 1987. The Request for Arbitration comprised the Claimant's Claims 1 to 8

arising out of the performance of the Contract and the Claimant's expulsion from the site.

3. The Defendant objected to the jurisdiction in respect of any of the Claims raised by the Claimant principally by reason of the Claimant's asserted failure to satisfy one or more preconditions to arbitration under Clause 67 of the Contract. In requesting the dismissal of the Claimant's Claims the Defendant also raised certain Counterclaims against the Claimant.

4. By our first Partial Award in this matter dated 22 February 1989 we decided that we have jurisdiction in the present arbitration to hear and determine only Claims 1 and 2 raised by the Claimant. We further determined that we do not have jurisdiction over any of the Defendant's Counterclaims raised as such in the Defendant's Amended Answer and Counterclaim.

In view of the revised Claims 1 and 2, further briefs were exchanged by the parties on Claims 1 and 2.

[...]

By our second Partial Award of 21 October 1991 in these proceedings [*set out below*] we decided *inter alia* that the Claimant was not lawfully expelled from the site and that the Defendant has no valid claim under Clause 63 of the Contract or under the General Law of the Employer's country [*lex contractus*] in respect of the Claimant's expulsion from the site and therefore no right of set-off based thereon.

In our Partial Award we did not determine, whether the Government might invoke by way of set-off or defence any of its Counterclaims in these proceedings.

[Second Partial Award (1991)]

The Arbitral Tribunal rendered a [*First*] Partial Award in this arbitration on 22nd February 1989.

Subsequently the parties agreed that we should hear and determine the four preliminary issues set out below. The formulation of the issues agreed between the parties and of certain agreed assumptions is as follows:

1. What is the effect in law of the Engineer's letters/certificates issued on 13th March 1989 under Clause 63 (3) of the Conditions of Contract?

2. What is the effect in law of the Engineer's letter and decision, or purported decision, of 2nd August that "a sum of XXX is due from the Claimant to the Defendant pursuant to Clause 63 (3) of the Conditions of Contract"?

3. Was the Claimant lawfully expelled from the site:

   a) in accordance with Clause 63 of the Conditions of Contract; or

   b) as an exercise of any right available to the Defendant under the contract and/or as a matter of general law?

4. If the answer to Issue 3 is no, what is the effect in law, if any, of this determination on:

   a) the Engineer's letters/certificates issued on 13th March 1989;

   b) the Engineer's letter and decision, or purported decision, of 2nd August 1989; and

   c) each of the Defendant's claims and counterclaims in respect of which the Arbitral Tribunal has jurisdiction?

In order to determine these issues, the parties agree that the Arbitral Tribunal should assume, for the purposes of these issues only, that all facts relied upon by the Defendant are true and have been so proved.

We heard arguments upon these issues in London in July 1991. During this hearing an expert-witness gave testimony on the law of the Defendant's State.

Having duly considered these arguments and that testimony we now make a further Partial Award on the aforementioned issues.

Reasoning

1. Issue 1

What is the effect in Law of the Engineer's letters/certificates issued on 13th March 1989 under Clause 63 (3) of the Conditions of Contract?

The issue as stated by the parties appears to assume that these documents were issued "... under Clause 63 (3) of the Conditions of Contract". They are documents in the form of certificates, are written in the first person, are signed by the Engineer, and expressly purport to be given under Clause 63 (3). But they cannot be effective under Clause 63 (3) unless the Defendant has entered upon the Site and expelled the Contractor under Clause 63. That Clause is a forfeiture clause and if it is to be relied upon its machinery must be complied with strictly.

2. There can be no entry and expulsion under that clause (and therefore no valid certificate under Clause 63 (3)) unless in the first instance the Engineer has certified in writing to the Defendant as far as is

herein relevant that in his opinion the Contractor was not executing the Works in accordance with the Contract or was persistently or flagrantly neglecting to carry out his obligations. If, and only if, such certificate is addressed by the Engineer to the Defendant the latter may give 14 days written notice to the Contractor, enter upon the Site, and expel the Contractor therefrom. The first question, therefore, is whether the Government can demonstrate that there was a valid certificate in writing by the Engineer under Clause 63 (1). Without such a valid certificate the Defendant cannot invoke the machinery of Clause 63 (3), for it would not have entered upon the Site and expelled the Contractor "under this Clause", and thus a condition precedent to the issuance of a certificate under Clause 63 (3) would not have been fulfilled.

3. The document relied upon by the Defendant as a certificate of the Engineer satisfying Clause 63 (1) is a letter of 30th November 1986. But:

i) this was not addressed to the Defendant, but to the Contractor — the fact that a copy was sent to the Director of Financial and Administrative Affairs of the Public authority (Employer) of the Ministry is not enough to constitute a certification "to the Defendant". Assuming for the moment that the letter to the Contractor "certifies" certain matters, a notification to the Defendant that a certificate has been addressed to the Contractor is not a certification to the Defendant of the matter in that certificate.

ii) It is debatable if this purported to be a communication from the Engineer, as such, at all. It was not written in the first person. The "we" on whose behalf the document was written recorded "... our intention to enter upon the site... and expel you therefrom", and "our intention to engage another Contractor to complete the Works...".

This suggests a communication from the Defendant, not from the Engineer. Under Clause 1 of the Contract the "Defendant" and the "Engineer" are distinguished by separate definitions. It is true that earlier in the document there is a passage that invokes Clause 63 (1) (d) and states "...we are of the opinion that your company is not executing the Works and is persistently and flagrantly neglecting to carry out your obligations under the Contract". But it is not obvious that this is expressing the opinion of the Engineer, as opposed to the opinion of the Defendant. The letter has only one signatory. If this was the Engineer, he did not address his opinion to the Defendant, but to the Contractor. If it was the Defendant, the document is not an Engineer's certificate at all.

iii) The document does not in form "certify" anything at all. It does not use the word "certify". The contrast with the documents of 13th March 1989 ("I hereby certify") is striking.

4. These are very technical objections, since there can be no doubt of the opinion of the Engineer; and no doubt that the Contractor after receipt of the letter of 30th November 1986 was aware of that opinion, and of the intention of the Defendant to enter upon the Site. But it is necessary to decide whether they are valid objections in the context of interpreting a forfeiture clause. In our judgement by reason of the points (i) to (iii) above the letter of 30th November 1986 was not a certificate satisfying Clause 63 (1). On that basis, and subject to what is said in respect of Issue 4 below, the certificates of 13th March 1989 were not certificates complying with Clause 63 (3).

5. Issue 2

This issue requires us to determine the effect in law of the Engineer's letter or decision of 2nd August 1989 that "a sum of XXX is due from the Claimant to the Defendant pursuant to Clause 63 (3) of the Conditions of Contract."

In the first instance the answer here must depend upon the answer to Issue 1 above. Since the machinery of Clause 63 was not complied with, nothing is due to the Defendant pursuant to that clause. It follows that the decision of 2nd August 1989 on that basis cannot be supported in law, and unless it subsequently became final and binding (as to which see Issue 4 below) the Arbitral Tribunal would not be bound by it.

6. Issue 3

This asks two questions. Question (a) is whether the Contractor was lawfully expelled from the Site in accordance with Clause 63.

The answer is dependent on whether the requirements specified in Clause 63 were ever satisfied. For the reasons given above, we consider that they were not and accordingly the answer to (a) is "No".

This leaves question (b), which asks whether the Contractor was lawfully expelled by virtue of any right available to the Defendant under the Contract and/or as a matter of general law.

This depends partly upon the facts. The Arbitral Tribunal is required to assume, for the purposes of these issues only, that all facts relied upon by the Defendant are true and have been so proved. One of the facts relied upon by the Defendant is that, at the material time or times the Contractor was not executing the Works in accordance with the Contract,

or was persistently and flagrantly neglecting to carry out its obligations under the Contract. If that fact is assumed it becomes difficult to think of any conduct by the Contractor which could be more repudiatory, and one would expect that under most systems of law this would entitle the Defendant to terminate the Contract and expel the Contractor from the site. Nothing in Clause 63 of the Contract provides that the Defendant's right to exercise the option conferred upon it by that clause is to be the exclusive remedy for persistent and flagrant neglect on the part of the Contractor to carry out his obligations.

But the matter is regulated by the Civil & Commercial Law of the Employer's State, under which the concept of rescission of contract for breach is recognized. The expert witness in law explained that the Law allows a rescission subject to the fulfilment of the requirements of either Art. [*A.1*] or [*A.2*]. Art. [*A.1*] allows a judicial rescission pursuant to an application to the Court, which did not take place in the present case. Art [*A.2*] allows a non-judicial rescission pursuant to an express contractual agreement. Under Art. [*A.2*] a further precondition to rescission is an "intimation" to the defaulting party — such intimation must state the intention to rescind the contract — unless the parties have agreed that such intimation is not necessary. The Consultant testified that by virtue of Art. [*B.1*] no intimation would be necessary if the debtor declares in writing that he is not willing to carry out his obligations.

Our conclusions on the above matters are as follows:

(i) We find no contractual agreement under which the Contract was brought to an end "automatically" as envisaged by Art. [*A.2*];

(ii) We find no contractual provision agreeing to dispense with the need for "intimation;"

(iii) With respect to Art [*B.1*] we find no declaration in writing by the Contractor that it was not willing to carry out its contractual obligations;

(iv) We find nothing in the nature of an intimation by the Defendant prior to this arbitration either of an intention to rescind or of a purported rescission of the Contract — on the contrary, by the various documents invoking Clause 63 the Defendant asserted that the Contract was not avoided.

For the above reasons we conclude that the necessary prerequisites in the Law of the Employer's State for a valid rescission of the Contract by the Defendant have not been established. Accordingly we conclude that question (b) must also be answered "No."

7. Issue 4

Issues 4 (a) and (b) require the Arbitral Tribunal to determine the effect in law, if any, of the Engineer's letters/certificates of 13th March 1989 and/or of the Engineer's letter or decision of 2nd August 1989.

8. We have concluded above that the documents of 13th March 1989 are *prima facie* not, in the circumstances, in accordance with Clause 63 (3). However, without taking any action in respect of these documents, the Contractor (Claimant) failed to pay the certified [amount] after that amount had been demanded in writing by the Defendant. The Defendant, faced with this failure alleged that in consequence a dispute had arisen and referred that dispute to the Engineer by its letter of 13th July 1989. The Engineer gave his decision on that dispute by his letter to the parties dated 2nd August 1989. Under Clause 67 that decision would become final and binding in respect of the dispute unless within the 90 days time limit one of the parties decided to "*require that the matter or matters in dispute be referred to arbitration as hereinafter provided.*"

If these quoted words call for the formal filing of a Request for Arbitration in accordance with the ICC Rules, this was not done within the 90 days period, and the decision (right or wrong) has become final and binding.

9. Essentially, the question is whether the letter from the Claimant's counsel addressed to the Engineer, satisfied Clause 67. The final paragraph of that letter expressed dissatisfaction with the decision, and stated that the Contractor required that the dispute and decision be referred to arbitration for resolution. It is true that nothing in that letter initiated arbitration proceedings. It is true that if a mere written intimation to an non-contracting party that the Contractor "required" that the dispute be referred to arbitration is sufficient to satisfy Clause 67, the Contractor would be under no obligation to pursue any arbitration within any specified limit of time at all. But Clause 67 is a clause containing provisions which potentially bar a party from exercising its legal rights within the time limits which the law would otherwise allow. Basically, therefore, to be effective its barring stipulations must be unambiguous. While the rival arguments have been dealt with extensively in many ICC awards and differing views on this point have been put forward by various prominent authors, all of which have been duly considered, it seems to us that under the version of Clause 67 found in this Contract (which is modelled on the 2nd edition of the FIDIC Civil conditions) a notification in writing by the aggrieved party to the Engineer that he requires that the dispute be referred to arbitration under the Contract is sufficient to preserve the right thereafter to proceed to arbitration.

10. This conclusion is confirmed by the Court of Appeal of the Employer's State in a decision of 1984 relied on by the expert witness according to which:

> "the fact of raising the objection freezes the Engineer's decision and terminates its existence. Then either of the parties to the dispute would have been able to follow the next step provided in Article (67) namely reference of the dispute to arbitration in accordance with the Rules of Conciliation and Arbitration applied by the International Chamber of Commerce. For this reason, this Court does not see the need to discuss the various grounds for challenging the Decision as it had become non-existent by the mere objection to it for whatever reason — formal or substantive..."

For the above reasons we conclude that, despite the absence of any formal Request for Arbitration, in the circumstances prevailing this Arbitral Tribunal is under no obligation to treat the documents of 13th March 1989 as in any way binding upon it.

As a consequence of the above we find in respect of Issues 4 (a) and (b) that neither (a) the Engineer's letters/certificates issued on 13th March 1989 nor (b) the Engineer's letter or decision of 2nd August 1989 have any conclusive effect in law.

11. The final question, under Issue 4 (c), is as to the effect of the foregoing upon any of the Defendant's claims or counterclaims in respect of which the Arbitral Tribunal has jurisdiction.

The Arbitral Tribunal has ruled on 17th November 1989 that "the Defendant may invoke any defences to Claims 1 and 2, including any defence under the Clauses of the Contract, in particular Clauses 47 and 63 thereof, which he may seek to put forward. We therefore shall hear the defences raised by the Defendant under Clauses 47 and 63 of the Contract".

The effect in law of our present determination is that the Defendant has no valid claim under Clause 63 or under the general law of its country in respect of the Claimant's expulsion from the Site and therefore no right of set-off based thereon. We therefore answer question 4 (c) accordingly.

12. In view of the aforesaid we rule on the issues submitted to us as follows:

a) The Engineer's letters/certificates of 13th March 1989 were not certificates complying with Clause 63 (3) of the Conditions of Contract.

b) The decision of 2nd August 1989 cannot be supported in law.

c) The Claimant was not lawfully expelled from the site:

- either in accordance with Clause 63 of the Conditions of Contract

- or by virtue of an exercise of any right available to the Defendant under the Contract and/or as a matter of general law.

d) Neither the Engineer's letters/certificates issued on 13th March 1989 nor the Engineer's letter or decision of 2nd August 1989 have any conclusive effect in law.

The Defendant has no valid claim under Clause 63 of the Conditions of Contract or under the general law of its country in respect of the Claimant's expulsion from the Site and therefore no right of set-off based thereon. "

Final Award in Case No. 5948 (1993)

FIDIC Conditions, 2d ed./ Dispute between Contractor and Employer/ Damages due to late payment of advance payment.

Damages due to late payment of advance payment/ Method of valuation of damages/ Contractor put in the same position as if advance payment made on time/ Commercial value of capital vs losses suffered by reason of inability to spend capital earlier towards fulfilment of contractual obligations/ Foreseeable extra expenditures and liabilities incurred due to breach of contract/ Deduction for productive work performed during advance payment delay period/ Quantum of damages/ Claims relating to losses suffered by sub-contractors/ Tribunal unable to make satisfactory findings on quantum of such losses or liability of Claimant in respect thereof.

The background and facts are set out in the Second Partial Award, above.

" [...]

Introduction

13. The remaining subject matter of this ICC Arbitration N° 5948 consists of Claim 1 and Claim 2 advanced by the Claimant, and the defences (in particular by way of set-off) to those Claims invoked by the Defendant. It is convenient to begin by first examining those Claims on the assumption that no set-offs are available to the Defendant.

14. Claims 1 and 2 are essentially claims for alleged additional costs incurred by the Claimant during

extended contract periods. In respect of neither Claim 1 nor Claim 2 it is suggested by the Claimant that any work done by it during the relevant periods has not been paid for. In the case of Claim 1 additional costs are claimed for a period of 247 days, during which the Defendant allegedly prevented or hindered progress from being made with the contract work. The prevention is said to be due to a breach of Contract — late payment of the Advance Payment. In the case of Claim 2 additional costs are claimed for a period of 193 days due to alleged variations in the work and other factors beyond the Claimant's control. In the case of Claim 2 the basis for recovery must presumably be a claim for re-evaluation of variations so as to compensate for the extra time related costs of executing such variations.

CLAIM 1 — Applicable Principle

15. The Advance Payment was certified by the Engineer on 3 August 1982. We find no basis in the Contract or otherwise to treat this certificate as an Interim Certificate. By 3 August 1982 the revised Performance Bond and Advance Payment Guarantee had been furnished in accordance with the Contract and accepted by the Defendant. The next day the formal Agreement was signed, and under Clause 60(9)(a) of the Contract, the Advance Payment fell due. It was not paid until 22 February 1983, *i.e.* with a delay of 202 days. Claim 1 is a claim for damages for late payment of the amount involved. The delay to be compensated is for 202 days.

16. In theory, the Claimant should be put in the same position as if the Advance Payment had been made on time. It should thus in principle recover on one of the following two alternative bases:

(A): -

The commercial value at the relevant time of the right to use for 202 days a sum of money equal to the Advance Payment. This would *prima facie* be measured by applying a fair commercial rate of interest over that period.

OR

(B): -

Approach (A) above focuses on the commercial value, for the notional period of delay, of the capital the payment of which was delayed. In that sense it would restore to the Claimant the fair value for the period in question of the cash of which it was temporarily deprived. But the Claimant is entitled to frame its claim, not for loss of the market value of the right to use such a sum for 202 days, but for the consequential losses suffered by it by reason of its inability to spend such money 202 days earlier in furthering the Contract works. It cannot have both, for if the money had thus been spent at once it would have earned no interest, and if the full amount of the money had been borrowed at interest from a third party by the Claimant there would (interest apart) have been no consequential loss. Hence the alternative approach (B) would recognize that such capital would in any case have had to be spent without delay by the Claimant in performance of the contract, and focus on any revenue lost, or expenditures increased, by reason of the breach. No revenues were lost — the Claimant's right to payments under the Contract was in no way diminished by the Defendant's late payment of the Advance Payment. As to expenditures, some may even have been reduced.

17. Nevertheless in principle, and consistently with the law of obligations of the Employer's State, the Claimant should be able to recover any net extra expenditures and liabilities incurred by it which

(1) were caused by the breach of Contract (i.e. were rendered abortive by the lateness of the Advance Payment or would not have been incurred at all but for that lateness); and

(2) were a reasonably foreseeable consequence of that breach.

18. We have referred above to extra "liabilities incurred" by the Claimant by reason of the breach. These would include liabilities of the Claimant to its Subcontractors (as adjudged or reasonably compromised) satisfying Para 17 (i) and (ii) above. But the Claimant in this arbitration is the Claimant alone, and there can be no question of the Claimant recovering alleged losses of third parties as some kind of trustee or agent. It must be established that the Claimant itself has suffered losses or incurred liabilities falling within headings Para 17 (i) and (ii) above.

19. We are satisfied that the Claimant was throughout largely dependent upon the prompt effectuation of Contract payment obligations by the Defendant to enable the work to be funded and proceed in accordance with the programme. We find that it was from the outset reasonably foreseeable, and in truth foreseen, by the Defendant that any failure on its part to make payments when legally due was quite likely to result in delay to the work, and in increased outlays by the Claimant arising from the consequent need to devote resources to their task over a lengthier duration and with impaired economic efficiency. There is no doubt that this is what, to an appreciable extent, occurred.

20-24. But the burden is on the Claimant to establish with reasonable particularity the nature and extent of the losses it claims to have suffered. The Arbitral Tribunal cannot simply assume that the Claimant was

unable to do any productive work at all during the 202 days, or that a 202 day delay in effecting the Advance Payment caused as much loss to the Claimant as if every subsequent contractual payment had also been deferred by 202 days. Moreover on any view the amount recoverable as damages would not include the value of work performed which earned remuneration under the Contract.

We have approached the evaluation of Claim 1 on the following lines: Firstly, we have assessed the total costs incurred over the period of 202 days. Secondly, from that amount we have deducted our assessment of costs allocable to productive work, performed in that period. The balance forms the basis for our Award for Claim 1.

[...]

As previously stated, we find that the length of the compensable period is 202 days and our computations will be made accordingly. Moreover we believe that The Claimant did achieve some productive work during the delay period of 202 days between 4 August 1982 and 22 February 1983 and that an appropriate deduction for this productive work should be made from the costs incurred during that delay period (Para 25 below).

The Arbitral Tribunal turns to the determination of the quantum of Claim 1 under the following sub-heads with respect to the Contractor (Claimant): (a) home office overheads — yes, (b) staff salaries — yes, (c) medical insurance — yes, (d) staff expenses — yes, (e) postage & DHL — yes, (f) air fares — yes, (g) sundry expenses — yes, (h) hotel accounts — yes, (i) visa fees — yes, (j) bonds — yes, (k) insurance — yes, (l) site electricity — yes, (m) telephone and telex — yes, (n) depreciation of capital assets — no, (o) underutilization of capital — yes, (p) late release of retention money — yes. The Tribunal then goes on to reject the sub-heads of claim made on behalf of the sub-contractors:

The Claimant has advanced monetary claims additional to the foregoing for losses suggested to have been suffered by these two Subcontractors. It submitted that such losses could be recovered by the Claimant on behalf of those Subcontractors in the present arbitration. We had no testimony from those Subcontractors, and the Claimant in the circumstances necessarily was severely handicapped in discharging the burden of proof resting upon it in respect of these items. Even if such alleged losses could as a matter of law afford a possible cause of action to the Claimant, we are totally unable on the material before us to make any satisfactory findings either as to the quantum of any such losses or the liability of the Claimant in respect thereof.

Deduction for productive work done

25. In respect of the subheads of Claim relating to the Claimant's losses the Defendant advanced the argument that not all the costs claimed by the Claimant were abortive and that productive work was achieved during the Advance Payment delay period. While the Claimant accepted this argument, the parties differ as to the basis and the percentage to be applied for productive work.

The Claimant considers that a credit for productive work should be based on the mobilization portion of the work, 15 % of which was allegedly completed as of the week ending 24 February 1983 and that the value of the productive work should not exceed XXX. Depreciation, underutilization of capital and late release of retention should be excluded from any such calculation of the value of non-abortive work.

The Defendant claims that the major part of the costs claimed by the Claimant were productive.

No evidence was presented by either party in respect of any calculation for the value of productive work. Thus any finding in this respect can be based on the custom in the industry (*according to the Law of the Employer's State*). Such custom is the following:

Upon the Award of a Contract, the main activities of a contractor concern preparatory work. These are not limited to mobilization only, but also comprise the logistics for the entire project whereby special emphasis lies on the site installation, the recruitment of personnel, the purchasing of plant, equipment and materials and their transport to the site.

Although the preparatory work as such can be used when the project starts at a later date, the costs of such activities become abortive to the extent that the personnel in charge of the project is no longer in a position to achieve productive work, but cannot be dismissed or directed to other projects in view of the expectation that the works may actually continue at any time.

The period of the Advance Payment delay was ultimately of such length that most of the personnel and other time-related costs became abortive.

In view of these considerations we find that a percentage of 20 % of the allowable costs for home office overheads, staff salaries, medical insurance, staff expenses, postage and DHL, air fares, sundry expenses, hotel accounts, visa fees, site electricity and telephone/telex was not abortive and 20 % thereof should be deducted as the value of productive work.

[...]

CLAIM 2 — Applicable Principle

27. Unlike Claim 1, this Claim is not a claim for alleged breach of Contract. The Claimant in its 28 April 1985 letter requested an extension "with all the cost implications" to 31 October 1985, based upon changes to the works ordered up to 28 April 1985 (Bulletins 1 - 168).

By letter dated 4 November 1985 the Claimant, after having received a request for 13 additional changes (Bulletin Nos. 169 - 181), requested an extension of time until 31 January 1986 to complete the works. On 6 November 1985, the Claimant again wrote to the Defendant and requested, pursuant to Clause 44 of the Contract, a time extension to 31 January 1986. In response the Defendant wrote a letter on 6 November 1985 to the Claimant and stated that based upon an analysis of the time implications of the Bulletins issued to date, the Claimant was entitled to a 193-day time extension until 31 October 1985.

We view Claim 2 as a claim for the time-related costs of the matters giving rise to the extension of 193 days granted by the Defendant's 6 November 1985 letter, extending the date for completion from 21 April 1985 to 31 October 1985.

We find that the extension thus granted was appropriate. It appears to be common ground that the direct costs with respect to these changes have been agreed by the parties but that the time-related costs for the 193 days have not. The Claimant accordingly seeks to recover the latter as the unpaid balance of value due by reason of Bulletins Nos. 1 - 181.

Viewing the matter broadly, we have approached the evaluation of Claim 2 by seeking to assess the Claimant's time-related costs for the 193 days.

This approach effectively revalues the sums already certified for the relevant variations in the works, so as to include an element to cover the extra time-related costs of executing such variations. This assessment is the basis for our Award under Claim 2.

Claim 2 — Quantum

[...]

Unlike Claim 1 Claim 2 is not a Claim for breach of Contract. The method of calculation adopted by using the alleged time-related costs over the entire contract period is not correct for a Claim under Clause 51 of the Contract concerning the time-related cost of the extended Contract period.

We find that only the cost of the extended Contract period can be taken into account. Therefore, whenever costs for the period between 22 April 1985 and 31 October 1985 are available and such costs do not exceed the amount claimed, such costs are taken as the basis of our calculation.

The objection raised by the Defendant in respect of most heads of claim concerns the point that 57 % of the amounts claimed should be treated as productive ("job-related") cost and that the Claimant has not established any costs in respect of overheads.

In respect of this argument we note that the total value of the direct costs of all variations i.e. the value of the additions to and omissions from the works reached about 50 % of the original Contract price. Yet the net value of the Contract at the end of October 1985 was approximately the same as the original contract price.

The disruptive effect of the total of these variations throughout the period from 22 February 1983 until 31 October 1985 had the consequence that although productive and varied work was performed during the entire period, the respective time-related cost and overheads could not be recovered in full through the productive work achieved. Instead of additional costs for the under-recovery of time-related costs and overheads during the (revised) original Contract period and deducting cost for productive work during the extended Contract period we find it justified to allow the full time-related costs of the extended Contract period (including overheads both on and off-site) and to make no further deduction therefrom for productive work performed during the extended Contract period. "

Majority Interim Award on Jurisdiction in Case No. 5898 (1989)

FIDIC Conditions, 2d ed., Main Contract/ ICE/FCEC Conditions, Sub-Contract/ Dispute between Sub-Contractor and Contractor/ Reference in Sub-Contract to "arbitrator/s to whom the dispute under the Main Contract is referred"/ Request for ICC Court to join proceedings with Case no 5948 denied/ Conditions for Sub-Contract disputes to be resolved in Main Contract arbitration not fulfilled/ Jurisdiction of Arbitral Tribunal with respect to Sub-Contract dispute, yes.

This case arises out of the same facts as Case No. 5948, above, in which the dispute under the Main Contract was arbitrated. This dispute is between the Sub-Contractor (here Claimant) and the Contractor (here Defendant), and raises, inter alia, the issue of consolidation and the relation between Main Contract and Sub-Contract.

" Facts

On November 30, 1986, the Employer gave notice to the Defendant (the Contractor) that it considered that it was not performing the contract according to its terms as amended by the Memorandum of Agreement permitting the Defendant to recommence the works, and accordingly gave it 14 days notice of its second expulsion from the project. On December 11, 1986, the Defendant informed the Claimant (the Sub-Contractor) that it considered the expulsion not to be in accordance with the Contract.

Subsequently, on December 24, 1986, the Defendant's attorneys protested to the Minister of Public Works concerning the allegedly unjustified expulsion by the Engineer of the Defendant from the project and advised that it intended to "make demand for arbitration under Clause 67 of the Contract".

[...]

On February 24, 1987, the Defendant's attorneys advised the Engineer that the Defendant "makes claim to arbitrate certain disputes and differences, arising under the Contract and under the Memorandum of Agreement of June 28, 1986." Neither of these communications were addressed to the Claimant.

In the meantime, in response to the Defendant's letter to the Claimant requesting that the Claimant continue under the Sub-Contract and alleging that the Defendant had not legally been expelled from the project, the Claimant replied to the Defendant on December 20, 1986, advising that the Defendant's representative had left the site, and had turned the keys of the Defendant's building and site office over to the Employer. The Claimant advised that it considered itself free to enter into a new contract with the Employer for the completion of the hospital. The telex concluded, "we are awaiting yr. last decision about yr. demand for arbitration" (the Defendant did not thereafter advise the Claimant of any steps that it was taking with the Employer or of an intention to request arbitration with the Employer until after the Claimant had commenced arbitration against the Defendant some months thereafter).

1. Arbitral procedure

On March 17, 1987, the Claimant filed a Request for Arbitration against the Defendant. In that Request, the Claimant asked, in view of the size of the claims in arbitration, that the arbitration be heard by a panel of three arbitrators and nominated his arbitrator.

[...]

On April 10, 1987, the Defendant telexed the Claimant advising that the Defendant considered that a dispute had arisen in connection with the Main Contract, which the Defendant was of the opinion touched or concerned the Sub-Contract works. The Defendant stated that it would require that any dispute arising under the Sub-Contract should be referred to the arbitrators to whom the dispute under the Main Contract would be referred and claimed that, in accordance with Clause 18(2) of the Sub-Contract, the Claimant had no right to an arbitration pursuant to Clause 18(1) because there was no *prima facie* agreement to arbitrate under the circumstances.

[...]

On May 18, 1987, Counsel for the Defendant filed with the Secretariat of the ICC a Request for Arbitration against the Employer. This Request, subsequently registered as ICC arbitration n° 5948, contains the following claims against the Employer:

Claim 1: Relating to an initial delay of 247 days advance payment for itself and its Sub-Contractors submitted on June 28, 1984 and neither approved nor paid by the Employer to date;

Claim 2: Requested on December 9, 1985, relating to Employer caused delays following recommencement of work in February 1983 and having given rise to a request of an extension of time through March 31, 1986, which the Employer had granted only through October 31. 1985. The Employer had failed to process and pay this delay related claim.

Claim 3: Covering the period when the Employer expelled the Contractor for the first time from the site in April 1986, the execution of a memorandum of agreement dated June 28, 1986, and various interventions by the Employer leading to the definitive expulsion of the Contractor on November 30, 1986. In respect to this period of time, the Defendant specified "damages sustained from the Employer's breach of the Memorandum of Agreement".

In respect to the period of time following the Memorandum of Agreement, the Defendant alleged in its Request for Arbitration against the Employer that "there is substantial reason to believe that the Employer's expulsion of the Contractor in April, 1986 and the expulsion on November 30, 1986 resulted from a scheme on the part of the Employer to force the Contractor off the project and to employ the Claimant to complete the works. In implementing this scheme, the Employer interjected itself into the Contractor's management and supervision of Sub-Contractors and issued instructions directly to Sub-Contractors, principally the Claimant." The Defendant further alleged "as further evidence of this scheme and conspiracy, following the Contractor's

final expulsion in January 1987, the Employer entered into a contract with the Claimant to complete the works at a cost at least four times the reasonable value of the remaining work to be done".

In its Request for Arbitration under the Main Contract, the Defendant nominated its arbitrator.

By letter of May 19, 1987, with respect to ICC Arbitration N° 5898, counsel for the Defendant requested the Secretariat of the ICC Court of Arbitration to join that arbitration with the arbitration under the Main Contract commenced by the Defendant (ICC Arbitration N° 5948) referring to a similar request made by it on May 18, 1987, in the latter arbitration. The letter of May 19 also conditionally nominated an arbitrator which has been previously nominated as arbitrator in arbitration n° 5948, as arbitrator in arbitration n° 5898.

By letter of May 29, 1987, to the Secretariat, counsel for the Defendant once again requested that arbitrations No. 5898 and 5948 be joined and heard by the tribunal to be appointed in arbitration No. 5948 under the Main Contract.

On June 4, 1987, the Secretariat of the ICC, acting in respect to ICC arbitration n° 5898, informed counsel to the Defendant and the Claimant that *"the Court, duly informed of respondent's submissions, confirmed that the arbitration may proceed in accordance with Article 8(3) of the Rules. The conditions of Article 18 of the Internal Rules being not met, the Court decided not to join case n° 5948 with the present case"*.

On July 8, 1987, the Secretariat of the ICC informed the parties that the Court had appointed the Chairman of the arbitral tribunal.

Without prejudice to its defense that this arbitral tribunal does not have jurisdiction over the claims set forth in the Claimant's Request for Arbitration, the Defendant filed an Answer and Counterclaim on November 25, 1987.

2. Preliminary issue

As set forth in the Terms of Reference and arising out of the pleadings and correspondence, as further developed in hearing on the subject, there was raised as a preliminary issue: "Does the Arbitral Tribunal have jurisdiction over the dispute?"

3. Applicable contractual clause

The contractual provision in issue, and upon which the Defendant bases its claim for dismissal of the Request for Arbitration due to lack of jurisdiction of this arbitral tribunal, is found in Clause 18 of the Sub-Contract which provides as follows:

"(1) If any dispute arises between the Contractor and the Sub-Contractor in connection with this Sub-Contract, it shall, subject to the provisions of this clause, be referred to arbitration and shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

"(2) If any dispute arises in connection with the Main Contract and the Contractor is of the opinion that such dispute touches or concerns the Sub-Contract Works, then provided that an arbitrator/s has not already been agreed or appointed in pursuance of the preceding sub-clause, the Contractor may by notice in writing to the Sub-Contractor require that any dispute under this Sub-Contract shall be referred to the arbitrator/s to whom the dispute under the Main Contract is referred and if such arbitrator/s (hereinafter called the joint arbitrator/s) be willing so to act, such dispute under this Sub-Contract shall be so referred. In such event the joint arbitrator/s may, subject to the consent of the Employer, give such direction for the determination of the two said disputes either concurrently or consecutively as he may think just and convenient and provided that the Sub-Contractor is allowed to act as a party to the dispute between the Employer and the Contractor, the joint arbitrator/s may in determining the dispute under this Sub-Contract take account of all material facts proved before him in the dispute under the Main Contract."

"(3) If at any time before an arbitrator/s has been agreed or appointed in pursuance of sub-clause (1) of this clause any dispute arising in connection with the Main Contract is made the subject of proceedings in any court between the Employer and the Contractor and the Contractor is of the opinion that such dispute touches or concerns the Sub-Contract Works, he may by notice in writing to the Sub-contractor abrogate the provisions of sub-clause (1) of this clause and thereafter no dispute under this Sub-Contract shall be referable to arbitration without further submission by the Contractor and Sub-Contractor,"

4. Origins of Clause 18(2)

As both parties have pointed out, the arbitration clause found in the Claimant-Defendant Sub-Contract is an adaptation of the FCEC form of Sub-Contract which entered into effect as of March 1973 (and which was intended to be used with the ICE Conditions of Contract of June 1973). Under the ICE/FCEC conditions it is useful to note that what is provided for is arbitration by a sole arbitrator. Under the Main Contract governed by the ICE conditions the arbitration will be by "a person to be agreed upon

between the parties" or if they fail to agree by "a person to be appointed on the application of either party by the President at the time being of the Institution of Civil Engineers." The same kind of sole arbitrator arbitration (with the president of the ICE as a reserved appointing authority) was provided under Clause 18(1) of the FCEC Sub-Contract form. Arbitration was to take place according to an ad hoc procedure and the arbitration was neither administered nor supervised.

The corresponding Clause 18(2) of the FCEC form of Sub-Contract provides that if the conditions are met the contractor may require that any dispute under the Sub-Contract "shall be referred to the arbitrator to whom the dispute under the main contract is referred." Hence, the mechanism for the appointment of the sole arbitrator assured that, while the sub-contractor might not have the right to participate in agreeing with the contractor who the sole arbitrator should be, nevertheless the sole arbitrator was to be a neutral and impartial arbitrator appointed either by the common agreement of the employer and the contractor, or, failing their agreement, by the President of the International Civil Engineers Association.

The Clause as originally conceived in the FCEC model clause is one that is made principally for the benefit of the Contractor. Where the conditions have been realized, the Contractor may, if he so desires, ensure that the Sub-Contract dispute will be determined by the same sole arbitrator which is to determine the merits of any dispute between the Contractor and the Employer.

Clause 18(2) of the FCEC form of subcontract also provides that the joint arbitrator shall have the right to "give such directions for the determination of the two said disputes either concurrently or consecutively as he may think just and convenient" which, under certain circumstances, to be discussed below, would permit the arbitrator to consolidate the Sub-Contract and Main Contract arbitrations and determine the rights of all the parties in a single procedure and hearings.

5. Purpose of Clause 18 of the Sub-Contract

In the instant Claimant-Defendant Contract Clause 18 thereof is modelled on the same 1973 FCEC form of Sub-Contract but the Main Contract is modelled upon the FIDIC form contract and not the ICE contract. Clause 67 of the FIDIC form, like Clause 67 of the general conditions of the Main Contract, calls for ICC arbitration. Accordingly, for there to be a concordance between the arbitration procedure in the Claimant Sub-Contract with the arbitration procedure in the Main Contract, it was necessary to provide for ICC arbitration in Clause 18(1) and to provide in Clause 18(2) that the arbitral tribunal to hear both Main Contract and Sub-Contract disputes would be referred to as the "joint arbitrator/s" indicating an ICC tribunal of one or three members as the case might be. As we will see this causes a number of problems which go beyond the technical level. Not the least of these is the fact that the mode of selecting ICC arbitrators for a three man tribunal is dramatically different from the method of appointing a sole arbitrator in the FCEC/ICE clauses.

Nevertheless, the purpose of Clause 18(2) of the Sub-Contract is the same as that described above. As restated in a recent ICC arbitration interpreting a nearly identical FCEC based clause:

> "The purpose of Clause 18(2) of the sub-contract conditions is quite clear: the Contractor is given a unilateral right to require certain disputes between himself and the sub-contractor to be referred to the decision of the arbitral tribunal appointed under the main contract. Provided that the machinery of Clause 18(2) is operated properly the sub-contractor has agreed to submit those disputes to that tribunal." (ICC arbitration No. 5333 published in *4 International Construction Law Review* 321, at p. 327 (1987)).

As noted above, Clause 18 however does far more than to promote the determination by the same arbitral tribunal of disputes under the Sub-Contract and the Main Contract. It favours joinder of the two arbitrations. The Sub-Contract provision gives specific power, consented by the parties to the Sub-Contract, to the joint arbitrator/s to "give such directions for the determination of the two said disputes either concurrently or consecutively as he may think just and convenient." This intention however may be effectuated only with the consent of a third party, the Employer, since Clause 18(2) provides that the powers of the joint arbitrator to give the above directions are "subject to the consent of the Employer." In any event, it is an established principle of law that, except if provided otherwise by statute, a multi-party arbitration may be held in consolidated proceedings only with the consent of all parties.

6. No Multi-Party arbitration without the consent of all parties

While both parties have submitted considerable materials regarding multi-party arbitrations, it cannot seriously be disputed that a multi-party arbitration in which all three parties (the Employer, the Contractor and the Sub-Contractor) will participate and present their cases before the same tribunal (in the nature of third party proceedings) is not possible without the specific consent of all parties concerned. It is clear that the Employer has not given any advance

consent to joinder in Clause 67 of the Main Contract. Furthermore, Clause 18(2) of the Sub-Contract, which constitutes consent by the Contractor and the Sub-Contractor to the joint arbitrator/s power to give directions for the determination of the two disputes "either concurrently or consecutively" is expressly made "subject to the consent of the Employer." The Employer, in its response in the Main Contract arbitration, has refused any such consent.

[...]

It is apparent that on the facts of the present case, and based on express limitations in the arbitration clause as well as implied limitations based on elementary arbitral principles and persuasive authority, the issue of multi-party arbitration stricto sensu does not arise. Rather, the issue is whether the Claimant may be required to have its dispute with the Defendant determined by the same arbitral tribunal competent to determine the Employer-Contractor dispute and, if so, according to what rules and on what conditions. The starting point of this investigation is to determine the rights which the Claimant is accorded by Clause 18(1) of the Contract, and then to determine to what extent these rights may be modified by the application of Clause 18(2).

7. The Claimant's right to ICC arbitration

Clause 18(1) standing alone constitutes a broad ICC arbitration clause covering "any dispute" between the Contractor and the Sub-Contractor "in connection with this subcontract."

On its face, therefore, the Claimant can claim the right to have any dispute with the Defendant to be governed by an ICC arbitration procedure which provides a supervised and administered arbitration having many specific characteristics which assure arbitral due process, and which may be considered contractually bargained for protection. Included in the characteristics of ICC arbitration are the facts that remuneration of the arbitral tribunal and the administrative expenses of the arbitration are to be determined by the Court of Arbitration as provided by those Rules. The Claimant's right to ICC arbitration should be made clear not only by the fact that Clause 18(1) is the principal dispute resolution clause in the Sub-Contract but also because the dispute resolution mechanism governing the operation of the Main Contract arbitral tribunal to which reference is made in Article 18(2) is also the ICC Arbitration Rules. Hence reference of the Sub-Contract dispute to the "arbitrator/s to whom the dispute under the Main Contract is referred" logically implies reference to an ICC arbitral tribunal.

The Claimant's Clause 18(1) procedural rights were made "subject to the provisions of this clause," thus subject to the provisions of Clause 18(2). This Clause may deprive the Claimant of a specific right ordinarily guaranteed to a party to an ICC arbitration, to wit the right to nominate an arbitrator for appointment on a three man arbitral tribunal.

It does not deprive it of the right to an ICC arbitration procedure, in general. Accordingly, even if the application of Clause 18(2) should result in the reference of Sub-Contract disputes to the Main Contract arbitrators, there is nothing which would permit that arbitration to be anything other than an ICC arbitration.

8. Clause 18(2) as an exception: burden of proof

Examination of the text of Clauses 18(2) and 18(3)[2] indicates that while Clause 18(3) provides for abrogation of the ICC arbitral jurisdiction provided in Article 18(1), Article 18(2) does not do so. It merely provides that if the conditions contained in Clause 18(2) are realized, then any disputes under the subcontract shall be referred to other ICC arbitrators, that is "the arbitrator/s to whom the dispute under the Main Contract is referred".

Seeking to maintain this distinction between Clause 18(2) and Clause 18(3) and at the same time to find an effect for Clause 18(2) — and we are constrained to find that the parties did mean to give some effect to this Clause — we are led to conclude that the Contractor has a conditional right to determine the make-up of the tribunal which will adjudge a dispute under the Sub-Contract. In this regard, we can only agree with the holding of the ICC arbitral tribunal in ICC case 5333 (*supra*) that where the conditions are fulfilled the Contractor is given a unilateral right to require certain disputes between himself and the Sub-Contractor to be referred to the decision of the arbitral tribunal appointed under the Main Contract.[3]

Since Clause 18(2) is an exception to the generality of Clause 18(1) providing that the Sub-Contractor has the right to submit any dispute arising in connection with the Sub-Contract to ICC arbitration, the conditions pursuant to which Sub-Contractor may be deprived of these rights under Clause 18(2) must be construed narrowly. Another reason for construing

[2] Under Clause 18(3), if a dispute between the Employer and the Contractor is made the subject of court proceedings, and the Contractor is of the opinion that the dispute touches or concerns the sub-contract works, the Contractor may by notice "abrogate the provisions of sub-clause 18(1)" and thereafter the sub-contractor shall have no right to arbitration.

[3] However, in that case by limiting the scope of the word "dispute" under the main contract, the tribunal found that the conditions for the operation of Clause 18(2) had not been fulfilled and did not require the sub-contract dispute to be submitted to the main contract arbitrators.

narrowly the Clause 18(2) exception is that its exercise affects the Claimant's due process rights.

By agreeing to Clause 18(1) of the Agreement, both parties accepted as a general rule that the ICC arbitration regime would govern the resolution of disputes between them. This regime means, *inter alia*, that where a three man tribunal is called for, each party shall have the right to nominate an arbitrator. If the Defendant were to succeed in its plea that Clause 18(2) applies to the Claimant's claim against it, the effect would be that the Claimant would not have a right to nominate an arbitrator, but that the tribunal adjudging its dispute would be made up of an arbitrator nominated by the Contractor, an arbitrator nominated by the Employer, and a president of the tribunal, appointed by the ICC.[4] There is no way that an accommodation can be found between the Defendant's contractual right to have the Sub-Contract dispute referred to the Main Contract arbitrators and the Claimant's ICC procedural right to nominate an arbitrator for a three man tribunal. As Humprey Lloyd has put it:[5]

> "How therefore is the desire to have an arbitrator of one's own choice to be accommodated in a multi-party arbitration system? The answer is quite simply that it cannot be done. Either parties to a multi-party arbitration clause must agree to accept a sole arbitrator or they must agree that if a panel of three is appointed, all must be treated as having been selected independently even though, as must happen on occasions, one or more may have been an original nominee of one of the parties".

However, there is nothing which prevents a party from bargaining away a right to nominate an arbitrator, and indeed, the text of Clause 18(2) can only be interpreted to have such an effect. Nevertheless, because the effect would be to deprive one of the parties of a general right, its application will be construed restrictively. By this, we mean that since Clause 18(2) must be meant to constitute an exception to the general rule established by Clause 18(1), it is the burden of the party alleging the application of such an exception to prove the applicability of that exception. As we will see, Clause 18(2) only applies when a certain number of conditions have been fulfilled, and it is the Defendant's burden to prove the fulfilment of such conditions.

[4] As Sigvard Jarvin says, commenting on this clause in a note under ICC Arbitration No. 5333, *supra* : "The way the clause is written, it does not give equal rights to all parties involved", 4 ICLR 321 at p. 331.

[5] Humphrey Lloyd, Q.C., "Concurrent Arbitrations", Exhibit 2 to the Claimant Response of 30 September 1988 to Questions raised by the Tribunal.

10. Conditions required for Sub-Contract disputes to be referred to Main Contract arbitrators

In view of the fact that Clause 18(2) must be considered a specific exception to the general arbitration regime under the Sub-Contract established by Clause 18(1), it is necessary to consider in detail the conditions precedent which must be fulfilled for the exceptional regime to apply. These exceptions are either found explicitly in the language of Clause 18(2) or must be implied for that clause to be applied in a reasonable manner. There are six of these conditions:

(i) A dispute must have arisen under the Main Contract (Clause 18(2), line 1) ;

(ii) The Contractor must be of the opinion that the Main Contract dispute touches or concerns the Sub-Contract works;

(iii) The Main Contract dispute must be one which is referred to arbitration;

(iv) The Contractor must have given written notice that any Sub-Contract dispute shall be referred to the arbitrator/s "to whom the dispute under the Main Contract is referred";

(v) The written notice must have been given to the Sub-Contractor before an arbitrator/s has been agreed or appointed in pursuance of Clause 18(1);

(vi) The Main Contract arbitrators/s is willing to act in the Sub-Contract dispute (in which case the arbitrator/s would act as "joint arbitrator/s");

We will take up, in order, whether these conditions have been fulfilled in the present case.

11. Dispute under the Main Contract

On April 10, 1987, the Defendant gave the Claimant notice that a dispute had arisen under the Main Contract. It is on the basis of this notice that the Defendant claims the right to have the Sub-Contract dispute referred to the Main Contract arbitrators. There must first be addressed the issue of whether in fact a Main Contract dispute existed when the notice was given because if not the notice would be unauthorized and the date upon which it was given could not serve as the cut-off date under Clause 18(2), preventing the Claimant from proceeding under Clause 18(1), as argued by the Defendant.

In determining whether as of April 10, 1987, a dispute had arisen under the Main Contract we must take into account that Clause 67, the arbitration clause in the Main Contract, is derived directly from the FIDIC Model Contract and that the issue of when a dispute

arises under the FIDIC clause has been the subject of both arbitration awards and decisions by English courts since the clause is extensively used in international construction contracts where English parties are involved. We find that the decision of experienced English commercial courts, interpreting standard clauses drafted in the English language, have persuasive authority in many instances but do not bind this tribunal in any way, all the less so since the law governing the Sub-Contract and the Main Contract is the law of the Employer's State. While neither party has relied on any specific provision of that law relevant to the present issues we take note that that country has both a Civil and a Commercial Code, and that the directions given therein as to interpretation of contracts are not unfamiliar to arbitrators having a civil law background.

Clause 67 of the Main Contract, like FIDIC Clause 67, provides for a four step procedure before a dispute or difference may be submitted to arbitration under the Main Contract clause:

(i) In order to constitute a dispute, a claim must have been made which has been rejected;

(ii) The dispute of difference must be referred to the Engineer for decision;

(iii) The Engineer must have decided the dispute, or failed to take a decision, within 90 days of the submission;

(iv) Within 90 days of the Engineer's decision, or of the expiry of the 90 days period to act, the Main Contractor may require the dispute to be referred to ICC arbitration.

The Employer has taken the position in the Main Contract arbitration brought by the Defendant that there was either no dispute or difference between the parties or that no dispute had been referred to the Engineer for his decision.

In ICC arbitration n° 5333 (*supra*), a Sub-Contract arbitral tribunal composed of three arbitrators of British nationality, determined, contrary to the request of the Contractor, that a Sub-Contract dispute under an FCEC derived arbitration clause identical to Clause 18 in the present Sub-Contract should not be referred to arbitration by Main Contract arbitrators. The ICC tribunal reasoned that the condition precedent for the Main Contractor's notice under Article 18(2) of the Sub-Contract "if any dispute arises in connection with the Main Contract" required that each of the four steps listed above should have been accomplished. Otherwise, there would be no dispute in the sense of Article 67 of the FIDIC conditions.

As the tribunal stated:

> "We therefore consider that the word "dispute" in the first line of Clause 18(2) of the Sub-Contract conditions must be read as referring not to a dispute which is in existence or has been referred to the architect for his decision but one in respect of which dissatisfaction has been expressed and which has been required to be referred to arbitration. Otherwise, the normal method of resolving disputes under the contract by means of Clause 18(1) could easily be blocked by reference to a supposed dispute or dispute in respect of which there was no need or intention to seek arbitration".

We do not wish prematurely to pronounce upon an issue which is primarily within the competence of the Main Contract arbitration tribunal, that is whether a "dispute" within the of the Main Contract exists between the employer and the Main Contractor and whether the necessary prerequisite conditions have been fulfilled by the Contractor so that it now presents to that tribunal an arbitrable dispute for adjudication.

However, it is certain that the word "dispute" or "difference" as used in the ICE/FIDIC Clause upon which the Main Contract Clause 67 is modelled have been interpreted to require something more than a dispute in the generic sense. It will be the burden of the Defendant in the Main Contract arbitration to prove that the procedural steps taken by it satisfy the contractual prerequisites for arbitral jurisdiction.

It is also the case that the Defendant has the burden of proof in the Sub-Contract arbitration to sustain that the notice given by it was effective to cut off the rights of the Claimant under Clause 18(1) to bring a separate ICC arbitration. That the burden should lie in the Defendant is just not only because Clause 18(2) is drafted as an exception to the ordinary ICC clause, but also because of the injury which may be caused to the Sub-Contractor if it is required to await the outcome of lengthy proceedings in the Main Contract arbitration on the issue of jurisdiction, the results of which are entirely conjectural, before it can even commence to present its own case on the merits against the Contractor, or be required to wait until the Defendant has commenced *de novo* proceedings before the Engineer to obtain a decision which it can attack in arbitration. In these circumstances, it is entirely correct that the Defendant must offer substantial proof that on April 10, 1987, when it gave its Clause 18(2) notice to the Claimant, there existed an arbitrable dispute between it and the Employer.

The record before us is doubtful. While there undoubtedly had existed for a long time a dispute, in generic terms, between the Defendant and the Employer, the evidence of compliance with the specific requirements of Clause 67 is slight. The letter of the attorney of the Defendant to the Employer on

December 24, 1986, protests the Defendant's expulsion from the site in the most general terms and the communication of February 24, 1987, on behalf of the Defendant to the Engineer, contains no definite or quantified claim, nor specific decision by the Engineer, but only a list of grievances which the Defendant threatened to take to arbitration.

While the Defendant may prove in the Main Contract arbitration by these documents, supplemented by additional evidence, that it in fact has complied with the requirement of Clause 67 to present an arbitrable dispute, we must deal with the evidence before us. On the record we are unable to find that there is sufficient evidence that an arbitrable dispute existed at the time notice was given by the Defendant under Clause 18(2) to satisfy the conditions required to oust this tribunal of its Clause 18(1) jurisdiction.

Even if there were such an arbitrable dispute under the Main Contract, the conditions for the application of Clause 18(2) would not be fulfilled, because at the time notice hereof was given, it was not a dispute which "is referred" to arbitration as the clause further requires (see para. 13. infra).

12. Contractor's opinion that the Main Contract dispute touches or concerns the Sub-Contract works

This condition in fact may be divided into three sub-conditions:

- The Contractor must express the opinion that the dispute under the Main Contract touches or concerns the Sub-Contract works;

- This implies that the Contractor's opinion must be determined in good faith and that his exercise of the corresponding option under Clause 18(2) is not abusive;

- The Contractor's opinion, thus expressed in good faith, must be that the dispute under the Main Contract is not only related to the Sub-Contract but "touches or concerns the Sub-Contract works."

In other words, the dispute under the Main Contract must in some way touch or concern the manner in which the Sub-Contract works were to be performed and were actually performed. It is clear that, according to the terms of Clause 18(2), the Contractor's opinion is conclusive, irrespective of whether it is actually justified or not. It is no less clear, however, that this opinion has to be *prima facie* founded.

Clause 18(2) is expressly directed at situations in which a dispute has arisen under the Main Contract before a dispute under the Sub-Contract, if any, has arisen or at least before an arbitrator/s has been agreed or designated in respect of a dispute under the Sub-Contract in pursuance of Clause 18(1).

Its purpose and effect are to permit the Contractor, who has grounds to consider that the dispute under the Main Contract touches or concerns the performance of the Sub-Contract works, to have the whole case, thus embracing the Contract and the Sub-Contract, tried by a single arbitrator or arbitration panel in accordance with the ICC Rules. It is not to offer the Contractor a general option to tie up the two disputes, for instance in a case where the performance of the Sub-Contract works is not really at stake but rather the payment due by the Contractor to the Sub-Contractor in relation to the payments due by the Employer to the Contractor.

The existence of Clause 18(2) is not sufficient to destroy the direct right of action of the Sub-Contractor against the Contractor, nor does it create a privity of contract between the Employer and the Sub-Contractor. Where, for example, the Employer was not to deny liability but simply was unwilling or unable to pay (for instance in bankruptcy), the Contractor might be forced to take its payment dispute to arbitration to obtain an award subject to execution, but it would not be a dispute which touches or concerns the Sub-Contract works. When the Defendant first outlined the basis of its claim against the Employer by telex of February 24, 1987, the greatest number of those claims related to failure to make payments alleged to be due. Another claim related to an alleged contractual default caused by the Employer reletting the contract to the Claimant. Neither type of claim would necessarily involve the Sub-Contract works. It is interesting to note that no copy of this communication was sent to the Claimant. It was only on April 10, 1987, well after the Sub-Contract arbitration had been initiated that the Defendant gave notice of a Main Contract dispute which it opined "touches or concerns the Sub-Contract works".

In all the circumstances we have some doubts as to whether, and to what extent, the Main Contract disputes in fact touch or concern the Sub-Contract works. Nevertheless, in view of the provision of Clause 18(2) that the "opinion" of the Contractor is the determinative criterion, and the fact that the Sub-Contractor has acceded to contract language giving effect to such an opinion, we are not prepared to go behind that opinion when there is at least some evidence that part of the Main Contract dispute may touch or concern the Sub-Contract works. Accordingly, we are not willing to find that the second condition was not fulfilled.

13. The Main Contract dispute must be one which "is referred" to arbitration

The mere existence of a dispute under the Main Contract is not sufficient to give the Contractor the right to cut off the Sub-Contractor from his ordinary right to arbitration under Clause 18(1).

Since the notice will "require that any dispute under this Sub-Contract shall be referred to the arbitrator/s to whom the Main Contract is referred" it is implicit that there shall have been a referral of the Main Contract dispute to arbitration at the time the Clause 18(2) notice is given. This is clearly expressed by the use of the present tense ("is referred") in this connection in the Clause.

The Sub-Contractor may not be left in limbo, following the giving of a Clause 18(2) notice, while the Contractor debates what remedy it intends to pursue.

This was the opinion held in the ICC partial award rendered in the case n° 5333, to which reference has already been made above:

> "Reading Clause 18 as a whole, the word "dispute" must for these reasons therefore mean a dispute which is not only capable of being referred to arbitration but which is being referred to arbitration.... In our judgement, no dispute or difference under the Main Contract had been referred or was in the course of being referred to arbitration at the time when any of the notices relied on by the Contractor under Clause 18(2) of the Sub-Contract conditions were given".

That requirement appears to be the key to a proper application of Clause 18(2). If it is respected, the clause works fairly, however hard it may be for the Sub-Contractor. The mechanics of the operation of the clause are quite simple under the FCEC contract form on which the present clause is modelled; they become more complicated when ICC arbitration is substituted for the arbitration procedures envisaged under the FCEC form.

Under the arbitration Clause of the FCEC model of Sub-Contract, from which Clause 18 of the Sub-Contract derives, if the Main Contract dispute's reference to arbitration under the FCEC arbitration Clause comes first which, as above-noted, is in fact the basic situation which is contemplated in Clause 18(2) — the Clause does not raise any problem. The Contractor may, as long as no arbitrator under the Sub-contract dispute has been designated, exercise his option under 18(2). If an arbitrator has already been designated under the Main Contract dispute when the Sub-Contractor gives the Contractor notice of his reference to arbitration, the Sub-Contractor has to bow to that "*fait accompli*."

If the Sub-Contract dispute's reference under Clause 18(1) comes first, the Contractor will immediately be advised since, precisely, the FCEC arbitration commences with an attempt of the two parties in dispute to designate the sole arbitrator. If the Main Contract dispute has already arisen, the Contractor may (a) refer that dispute to arbitration, starting with the required attempt to appoint the arbitrator by mutual consent with the Employer, and (b) then give the Sub-Contractor notice that the Sub-Contract dispute should be referred to the same arbitrator/s to whom the main dispute contract is referred, provided that no arbitrator has been agreed or appointed yet on the Sub-Contractor's request for arbitration.

Under an ICC arbitration procedure, as in the instant case, the situation is also clear and the operation of Clause 18(2) satisfactory, provided that the Main Contract dispute has been actually referred to arbitration when the Contractor gives notice to the Sub-Contractor in pursuance of Clause 18(2).

If the Sub-Contract dispute has been referred first, the Contractor is advised and may in turn *bona fide* refer the Main Contract case to arbitration and validly give notice to the Sub-Contractor under Clause 18(2). The Contractor should file a request to that effect with the ICC. This is not a matter of jurisdiction of the arbitrators but of operation of the Clause 18(2) as this is set-out below.

If the Main Contract dispute is the first to be referred to the ICC for arbitration, the position is absolutely limpid: there is no choice for the ICC Court of Arbitration than to conform with Clause 18(2), because the parties will be held to this special agreement for the nomination of the arbitrators. While the ICC Rules provide for each party to nominate an arbitrator, the parties may agree in advance to another mode of appointment. However, the conditions for the applicability of such an agreement must have entered into effect, and this must have been brought to the attention of the Court, prior to the exercise of appointing powers of the ICC Court.

Where the Main Contract dispute is not actually referred to arbitration at the time notice is given by the Contractor to the Sub-Contractor under Clause 18(2), and where the Sub-Contractor has already filed his Request for Arbitration under 18(1), the situation becomes confused and confusing. Indeed, the Court of Arbitration is then faced with only one Request for Arbitration which the Court, based on its *prima facie* right and duty of appraisal, cannot reasonably refrain from processing, notwithstanding any attempt by the Contractor to stop it.

This is actually what happened in the instant case. When the Court of Arbitration, on April 22, 1987 had

to decide on the Defendant's plea, the Defendant's Request for Arbitration was still not filed.

The position was made still worse by the fact that, instead of just exercising its option under Clause 18(2) and requesting the Court of Arbitration to refer the Sub-Contract dispute to the "joint arbitrators," the Defendant, on the basis of that clause, elected to deny the Claimant its right to arbitration under 18(1) by challenging the *prima facie* existence of an agreement to arbitrate and alleging accordingly that the arbitration initiated by the Claimant could not proceed.

The Court therefore had to decide, by reference to Article 8.3 of the ICC Rules of Arbitration regarding challenges of jurisdiction and, on that basis, could hardly do otherwise than to find the *prima facie* existence of an agreement to arbitrate.

The consequence was that two separate arbitration panels were set up, one in respect of the Sub-Contract dispute and the other regarding the Main Contract dispute.

A review of the chronology and the documents indicates that the Claimant was not at fault in its pursuit of an ICC arbitration remedy, and that the Defendant has not timely acted to exercise the Clause 18 (2) option.

17 March 1987 Claimant request for Arbitration filed with ICC. Nomination by the Claimant of arbitrator.

10 April 1987 Telex sent by the Defendant to the Claimant:

> "As we have previously advised you and as your Request for Arbitration makes it explicitly clear, a dispute has arisen in connection with the Main Contract. The Defendant is of the opinion that such dispute touches or concerns the Sub-Contract works and since arbitrator/s have not already been agreed or appointed pursuant to Clause 18 (1) of the subject Sub-Contract, the Defendant exercises its option to require that any dispute arising under the said Sub-Contract shall be referred to the arbitrator/s to whom the dispute under the Main Contract is referred."

29 April 1987 Defendant's attorneys letter to ICC:

> "We note that Counsel for the Claimant has apparently misunderstood our last communication to the ICC and that of our client to the Claimant. We have not stated that litigation is pending. We did state that a dispute has arisen under the Main Contract which touches and concerns the Sub-Contract works and that such dispute is pending."

30 April 1987: Defendant files letter with ICC in Sub-Contract arbitration (ICC No. 5898) requesting consolidation with Main Contract arbitration.

30 April 1987: ICC Secretariat communicates Court's decision that ICC arbitration No. 5898 may proceed in accordance with Article 8.3 and confirms the Claimant-nominated arbitrator as arbitrator.

4 June 1987: ICC Secretariat communicates Court's decision confirming that arbitration may proceed under Article 8.3, denying consolidation, and confirming nomination of the Defendant-nominated arbitrator.

12 August 1988: Submission in arbitration on behalf of the Defendant of 12 August (p. 14):

> "The Defendant understood that it had to notify the Claimant after an arbitration had begun under the Main Contract. The Defendant sent the April 10, 1987 notice to the Claimant while it was preparing its Request for Arbitration against the Employer. It thereafter followed up this notice with two additional notices under Clause 18 (2), including the May 19, 1987, notice which the Defendant sent after filing its Request for Arbitration against the Employer."

Thus, the Defendant admits that (a) the dispute under the Main Contract should have been referred to arbitration at the time notice was given under Clause 18(2) and (b) this requirement was not met by the notice of April 10, 1987. In that same submission of August 12, 1988, the Defendant submitted that its May 19, 1987 letter to the ICC copied to the Claimant, satisfied the requirement. But clearly, that "submission" was made without much conviction. Indeed, the letter of May 19, 1987, addressed to the Secretariat of the ICC Court of Arbitration was clearly not a notice in pursuance of Clause 18(2) but a submission to the ICC in support of the Defendant's plea that the Claimant's request for arbitration should not be further processed for lack of an agreement to arbitrate and that the two arbitrations should be consolidated, both of which requests were denied.

The same remark applies to the letter, also addressed to the ICC Court of Arbitration's Secretariat on April 29, 1987 on behalf of the Defendant. A notice under Clause 18(2) should, like the one of April 10, 1987, be addressed to the Claimant and be to the effect of exercising the option offered under that Clause.

It may be further noted that neither of the two Defendant's letters of April 29 and May 19, 1987

made any reference to, nor renewed, the April 10, 1987 notice to the Claimant. It is not surprising that in June 1987, the Court of Arbitration "duly informed of respondent's submission" confirmed that the arbitration initiated by the Claimant should proceed.

The text of Clause 18 (2) permits the Contractor by proper notice given to the Sub-Contractor to require that the Sub-Contract dispute be referred to the joint arbitrators to whom the "dispute under the Main Contract is referred." Without investigating here whether the appointment of each of the Main Contract arbitrators should have been completed in order to permit the giving of a valid Clause 18 (2) notice, it seems obvious that at the minimum there must have been a referral of the Main Contract dispute to arbitration. There must accordingly have been a commencement of the arbitration that is the result of the use of the present tense ("is referred") in Clause 18 (2), a grammatical interpretation which coincides with the practical needs of the situation — a Sub-Contractor may not be left in limbo while the Main Contractor decides at leisure the course of action it will take.

To be sure, the term "referral" to arbitration is not precise, and when used in respect to ad hoc arbitration, as in the FCEC form, may designate as early a referral as when a request has been made by one party to the other to agree to the appointment of an arbitrator, or as late as when an arbitrator has accepted his appointment. For ICC arbitration, the applicable date is made clear by the Rules. Article 3 provides:

> "The date when the Request is received by the Court shall, for all purposes, be deemed to be the date of commencement of arbitral proceedings."

In the present case, the Main Contract arbitration was commenced only on May 18, 1987. The Defendant's notice of April 10, 1987, did not have the effect of preventing the Claimant from commencing arbitration pursuant to Clause 18 (1) nor from seeking the appointment by the ICC Court of Arbitration of arbitrator/s thereunder. The notice was not renewed nor did the Defendant take any effective or timely steps to assure the appointment of joint arbitrators in the Sub-Contract arbitration, which would have required timely assertion of a prior agreement among the parties to nominate in Arbitration No. 5898 those persons appointed as arbitrators in Arbitration No. 5948. As we will see, the Defendant's commencement of the Main Contract arbitration in fact took place only after the present arbitration proceeding was underway and at least one arbitrator had been nominated, and appointed by the Court of Arbitration.

14. Notice requiring referral of the Sub-Contract dispute to "the arbitrator/s to whom the dispute under the Main Contract is referred"

We have concluded above that the "is referred" requirement had not been satisfied by the Defendant. Accordingly, it is not essential for us to determine further at what point of time the appointment of the Main Contract tribunal must be completed in order to complete the exercise by the Contractor of its Clause 18 (2) right. To avoid any misunderstanding, however, we express the view that where the Main Contractor has taken the initial step of commencing an arbitration and nominating at least one arbitrator, that it is in a position to give notice under Clause 18 (2) or to give a new notice validating a prior Clause 18 (2) notice. As it was stated in the above-mentioned award in ICC Case No. 5333, Clause 18 (2) requires that "an arbitral tribunal has already been constituted or is in the process of being constituted to decide the dispute under the Main Contract" at the time notice is given to the Sub-Contractor under Clause 18 (2).

15. Clause 18(2) notice prior to the Sub-Contract arbitrators having been agreed or appointed

The option offered to the Contractor under Clause 18(2) must be exercised only "provided that an arbitrator/s has not already been agreed or appointed" in the Sub-Contract dispute.

Several interpretations of that condition are permitted:[11]

- The first interpretation, which is supported by the Defendant, is that the word "appointed" should be taken strictly to designate the actual appointment of the three arbitrators by the Court of Arbitration, that is the confirmation of the nomination of the first two arbitrators and the designation of the Chairman of the arbitral tribunal.

That interpretation is supported by the argument that, were it otherwise, the Sub-Contractor could at any time deprive the Contractor from his option under Clause 18(2) by filing with the ICC a request for arbitration which, under the ICC Rules, has to contain the nomination of an arbitrator by the plaintiff.

- The second interpretation, which is set forth by the Claimant, is that the date of such a nomination, which is also the date of the request for arbitration, should be retained.

[11] Although lengthy grammatical explanations of the term arbitration/s have been presented by both parties, we do not find them conclusive.

That interpretation is supported by the argument, that were it otherwise, the Contractor could, at any time, deprive the Sub-Contractor of his right to arbitration under Clause 18(1) by himself filing a request for arbitration and exercising his option under Clause 18(2).

- A third interpretation which is set forth by none of the two parties is that the date to be retained is that of the confirmation by the Court of Arbitration of the arbitrator nominated by the Sub-Contractor.

That interpretation is supported by the argument that (a) the date retained is that of a designation, not of a nomination and, (b) the date corresponds to a decision of the Court of Arbitration, which, in the circumstances of this case, was made and confirmed upon full consideration of the Defendant's plea and, (c) the date was also that of the decision of the Court that the Claimant's arbitration should proceed, which decision triggered, without possibility of return, the pursuit of the process which was to lead to the full designation of the arbitral tribunal. Accordingly, for the purposes of Clause 18(2), the cut-off date should be found to be the date of that first full designation.

Since the decision of the Court of Arbitration to confirm the designation of the Claimant-nominated arbitrator and to order that the arbitration should proceed was made on April 22, 1987, while the Defendant's Request for Arbitration was not filed until May 18, 1987, the condition which is considered in this paragraph was not satisfied.

To be sure, the non fulfilment of that condition is redundant since the requirement of the existence of a dispute which is referred to arbitration was itself not met. It is nevertheless of interest to consider it, in view of the overall relationship between the parties.

16. Willingness of the Main Contract arbitrator/s to act in the Sub-Contract dispute

Clause 18 (2) provides that where the Contractor gives proper notice, it may require that the Sub-Contractor refer any Sub-Contract dispute to the arbitrators appointed under the Main Contract and "if such arbitrator/s... be willing so to act, such dispute under this Sub-Contract shall be so referred."

Under the FCEC clause upon which Clause 18 (2) is modelled, it can be argued that there is an obligation to make an *ad hoc* referral to the designated Main Contract arbitrators which obligation will be effaced by a condition subsequent if those arbitrators are not willing to serve. Under the FCEC procedure the question is moot because the contractor is necessarily contacted by the Sub-Contractor to agree arbitrators, and hence is in a position to block the referral to any other arbitrators, *ab initio*.

In the ICC procedure in which we find ourselves, the situation is somewhat different, and we must take a realistic view of where we stand. This tribunal has been appointed by the ICC Court of Arbitration, and undoubtedly has jurisdiction under Clause 18 (1) of the Sub-Contract. The issue is whether this tribunal should exercise that jurisdiction, and whether the Claimant's claim is "receivable", or whether its receivability has been cut-off, so as to require that it recommence ICC proceedings before a different tribunal. It cannot be avoided that this decision takes place approximately one year after arbitration has been commenced, with attendant costs of arbitration already incurred. Referral to another tribunal would require recommencement of another ICC proceeding, and referral of the dispute by the Court of Arbitration to joint arbitrators, based on a finding by this tribunal that that is what the parties intended and was required under the Sub-Contract. In the circumstances, this tribunal is permitted to look at the situation as it is now.

No evidence of the willingness of the Main Contract arbitrators (a three-man ICC tribunal) to act and to adjudicate the Sub-Contract dispute has been produced by the Defendant, which seeks to have this tribunal divest itself of the responsibility to make such determination. Yet the willingness of the tribunal to accept to adjudicate the dispute is surely a condition to any action by this tribunal to refrain from exercising the general arbitral jurisdiction which it has under Clause 18(1) of the Sub-Contract.[12] It cannot be seriously argued that this tribunal should take any action which might result in the Claimant being left without any effective remedy at all. At the present stage of the proceedings we can only take notice that no evidence has been produced which would assure us that the application of the extraordinary procedure of Clause 18(2), which we have found to be an exception to the general arbitral remedy provided in Clause 18(1), would lead to an effective adjudication of the dispute presently before us. The failure of evidence on this point is particularly relevant since there are a number of considerations present in this case which might well lead the Main Contract arbitrators, in the exercise of their discretion, to refuse to accept to act "as joint arbitrator/s", as that term is used in Clause 18, since in the circumstances, few of the advantages usually associated with joint or consolidated arbitration could be obtained and at the same time the due process rights of the parties may be jeopardised. These considerations include the following:

[12] In a recent case interpreting a provision of the NFTBE sub-contract form with an arbitration clause similar to the FCEC form an English court found that it was an implied term of the sub-contract that "... the arbitrator appointed under the main contract would give his consent to acting also as arbitrator under the proviso within a reasonable time." *Multi-Construction v. Stent Foundations*, 21 April 1988, *Queen's Bench Division*, 41 BLR 98.

(i) The ICC Court of Arbitration has refused to consolidate the two arbitrations;

(ii) Two of the three potential participants are entirely hostile to the Main Contract tribunal accepting the reference: both the Employer and the Sub-Contractor oppose that tribunal taking jurisdiction over the Sub-Contract dispute in any form;

(iii) The Employer has refused to give the consent required by Clause 18(2) to any consolidation or any admixture of the two proceedings;

(iv) Case law interpreting FCEC and similar clauses is persuasive authority that the arbitrators are disabled from dealing with the two disputes concurrently in the absence of express approval by the Employer;

(v) A proviso of Clause 18(2) appears to indicate that where, as here, the Sub-Contractor cannot act as a party in the Main Contract arbitration the joint arbitrators may not take into account in the Sub-Contract arbitration material fact proved in the Main Contract dispute;

(vi) Dealing with the disputes consecutively would delay consideration of the Sub-Contractor's claims, some of which are not related to the Contractor's claims against the Employer, for a very long period of time;

(vii) The Sub-Contractor objects strenuously to presenting its claim before a tribunal in which it has enjoyed no power of arbitrator nomination, while its adversary, the Defendant, has had such a right; while this situation may not contravene Clause 18(2), there is no reason for the Main Contract arbitrators to accept the situation, which one of the parties contests vigorously, if there is no corresponding advantage in respect to the speedy and equitable resolution of the disputes.

In these conditions, we can only take note that an essential condition for the full and effective operation of Clause 18(2) has not been fulfilled and must express doubt that it ever will be fulfilled.

Findings of the Tribunal

Based on the above *ratio decidendi*, the Arbitral Tribunal finds that the conditions required for application of Clause 18(2) of the Sub-Contract in the circumstances of the case were not satisfied by the Defendant and accordingly renders the following interim Award.

AWARD

1. The Arbitral Tribunal, on the basis of Clause 18(1) of the Sub-Contract between the Claimant and the Defendant, has jurisdiction on the merits of the dispute referred to arbitration by the Claimant under case No. 5898.

2. The Tribunal rejects any other issues, pleas or contentions raised by either of the two parties in relation to the challenge by the Defendant of the right of the Claimant to have case No. 5898 proceed on the merits and to be decided by this Arbitral Tribunal.

3. The matter of costs related to this Award is postponed to be settled in the final award to be rendered on the merits of the case. "