AGRICULTURAL TRADE

U.S. Agricultural Exports Are Making Strong Gains In Middle East Markets

Part I: Common Markets Offer Opportunities For Circumventing Some Import Barriers

by John B. Parker

U.S. agricultural exports to the Mideast and North Africa reached an estimated record $4.1 billion last year, up eight percent from $3.8 billion in 1988 and 41 percent from $2.9 billion in 1987. It appears that U.S. agricultural exports to the region will continue to make strong gains in the early 1990s.

Several factors have contributed to this growth in U.S. agricultural exports to the region:

- Demand for food in the region is increasing rapidly because of urbanization, improvements in diet, and a population growth of 2.8 percent annually.
- Consumer subsidies are still extensively provided for cereals and animal feed, although they are being reduced in many countries.
- In the last two years, some countries in the area—especially Iraq, Turkey, Syria, Tunisia and Algeria—suffered crop production shortfalls. In contrast, remarkable gains occurred in Saudi Arabia and Morocco.
- Government policies aimed at rapidly increasing the output of livestock products—especially in Iraq, Egypt, Algeria, Jordan and Turkey—are boosting feed imports and demand for U.S. feed grains, oil cake and protein concentrates.
- U.S. Department of Agriculture Commodity Credit Corporation credit and other export programs are making U.S. products more attractive to public-sector importers looking for the lowest unit prices available.
- Reduced supplies of bulk commodities available for export from U.S. competitors have caused more importers to turn to the United States, usually the reliable residual supplier.
- Higher prices for many commodities in Europe, related to reductions in export restitution payments and subsidies, have made U.S. farm products more competitive in the last two years.

Most of the countries in the region were more dependent on imports for food in 1989 than in the early 1980s—the exceptions are Saudi Arabia, North Yemen, the U.A.E. and Morocco. Although consumers in the Gulf Cooperation Council countries have enjoyed stable food prices in the last two years, those in Egypt, Algeria and Tunisia have faced higher prices. National leaders are increasingly concerned with developments related to food prices, subsidy costs, and progress in total agricultural production and food self-sufficiency.

(Continued on page 16)

John B. Parker is an agricultural economist with the Economic Research Service of the U.S. Department of Agriculture.

INTERNATIONAL CONSTRUCTION

New FIDIC Contract For Civil Engineering

Principal Changes In Procedure For Settlement Of Disputes[1]

by Christopher R. Seppala, Esq.

Few, if any, disputes have arisen under the new fourth edition of the FIDIC Conditions of Contract for Works of Civil Engineering Construction (the Conditions), which was published in September 1987.[2] But undoubtedly they will do so in the future.

I. Changes From The Third Edition

Under the fourth edition, much in Clause 67 (Settlement of Disputes) remains the same. The mandatory reference of disputes to the decision of the Engineer as a condition to arbitration has been retained. The Rules of Arbitration of the International Chamber of Commerce (ICC) remain the preferred, though no longer the exclusive, arbitration rules provided for by the Clause (see Section II.6 below). And the arbitrator or arbitrators continue to have the power to open up, review and revise any decision or other action of the Engineer.

However, a number of changes have been made to the third edition Clause 67. These concern principally:

- the manner of referring a dispute to the Engineer;
- the time periods both for the Engineer to give a decision and for the parties to challenge one;
- the limitation of the Engineer's (and arbitrator's(s')) freedom of decision where the Contractor has failed to observe the new procedure, established by the fourth edition, for the making of claims;
- the manner of reserving the right to arbitrate;
- the amicable settlement of disputes;
- the option to use arbitration rules other than those of the ICC; and
- the scope of the arbitration clause.

The third edition's Clause 67 was subject to considerable criticism. Those dissatisfied with the mandatory reference of disputes to the engineer as a condition of arbitration are unlikely to view Clause 67 in the new fourth edition much more favorably. Moreover, in the new Clause there are, undoubtedly, several issues left unresolved.[3]

However, the major problems that arose under the prior Clause, and in particular, the uncertainty about the action necessary to reserve the right to arbitrate, have been addressed, and the new Clause is, in the author's view, a considerable improvement over the prior one. (The author cannot plead complete objectivity, however,

(Continued on page 18)

Christopher R. Seppala is a Partner with White & Case, Paris. He was Chairman of the Subcommittee on the FIDIC (Civil Engineering) Conditions of Contract of Committee T (International Construction Contracts) of the Section on Business Law of the International Bar Association (1985 to 1989).

Kuwait, Bahrain and the U.A.E. apparently welcome greater imports of Saudi food, which provide consumers with more fresh produce at lower prices, while Oman is concerned about competition for some local producers. Subsidies and a larger local market give Saudi food manufacturers and wholesalers an edge over most of the agribusiness firms in other GCC markets. In January 1988, Saudi Arabia raised the duty for most food imports from outside the GCC from less than five percent to a standard 12 percent. Yet, food traders in other GCC member states have not been able to take advantage of duty-free entry into the Saudi market because they lack sufficient economies of scale to quote unit prices below those already provided by Saudi wholesalers.

While yielding to Saudi Arabia on food trade, Kuwait, the U.A.E. and Bahrain have gained advantages in banking, investments, and services for Saudi customers. The causeway between Saudi Arabia and Bahrain provided a tremendous boost for tourism, commerce, and banking in Bahrain. It also contributed to the striking rise in the Saudi share of Bahrain's food imports from less than four percent during 1983-85 to over 20 percent during 1987-89.

Kuwait, Qatar and Bahrain have virtually no agricultural surplus for export. Their food exports to other GCC members consist of transit trade. During fiscal 1989 (October 1988 through September 1989), U.S. agricultural exports to Kuwait increased 47 percent to $54 million, including 53,794 tons of wheat for $9.1 million, and a doubling of corn shipments to 106,183 tons for $12.7 million. Kuwait also bought more U.S. apples, prunes, orange juice, frozen poultry, milk, lettuce and potatoes, but no soybeans.

During fiscal 1989, U.S. agricultural exports to the U.A.E, increased 32 percent to $58 million. This included $13 million for 1,038 tons of leaf tobacco. Rice exports jumped 246 percent to 21,084 tons, and the value rose 177 percent to $7.8 million. Some major items suffered setbacks during this period. Corn exports declined 35 percent to 32,058 tons, but higher prices left the decline in value at only 15 percent to $3.8 million. Apple exports declined 61 percent to 3,534 tons for $1.5 million, and almond exports fell one percent to 1,638 tons for $5.7 million.

The U.A.E. is a major transit trade center for other GCC members and Iran, and it exports small amounts of local vegetables, dates, and eggs. Trade in food and manufactures between Oman and the U.A.E. is extensive, resembling the frequent movement of goods between countries within the EC. The U.A.E. provides about a fifth of Oman's food imports and buys two-thirds of Oman's food exports.

Arab Maghreb Union

The new Arab Maghreb Union (AMU)—formed in January 1989 and including Algeria, Morocco, Tunisia, Libya, and Mauritania—has already resulted in striking gains in trade between members.

- Exports by Tunisia and Morocco to Libya were up sharply in 1988 and 1989. In addition, the new textile industries of other AMU members have found a welcome market in Libya.
- A joint venture between Libya and Tunisia for petroleum extraction and petrochemicals production was started in 1988.
- Algeria will be able to reduce transport costs for its natural gas exports to Europe via a pipeline through northern Morocco to Spain.
- AMU arrangements also contributed to greater Moroccan exports of barley and pulses to Algeria and Tunisia in the last year.

Trade Agreements Provide Opportunities

The formation of active common markets in the region should create opportunities for exporters in Europe and the United States to circumvent some of the barriers now impeding farm exports to the region. While greater intraregional trade and lower consumer prices are major goals of the new trade plans, they have already opened trading opportunities for countries outside the region.

For example, Egypt's ban on imports of a long list of high-value products, including frozen poultry, does not apply to ACC members. This allows Jordan to import feed and rapidly expand its output of poultry meat and eggs for delivery to Egyptian consumers via the improved highways of the Sinai. The trading blocks may mean that barriers for U.S. exports erected in one country can be circumvented through expanding trade with that country's trading partners within the region.

In 1989, the largest market for U.S. agricultural exports in the region was Iraq, but the fastest growing market was Jordan. Jordan is experiencing a boom in poultry operations, cattle feedlots, and food processing. In turn, striking gains in food exports by Jordan to ACC members Iraq and Egypt are expected in response to serious food shortages in Baghdad and Cairo.

INTERNATIONAL CONSTRUCTION

New FIDIC Contract For Civil Engineering

(Continued from page 8)

as he was among those invited to comment on FIDIC's new version of Clause 67 in draft form.)

Each of the changes listed above is discussed in a numbered subsection below, under three subheadings: first, the relevant provision of the third edition is summarized; second, the change made by the fourth edition is described; and third, the change is commented upon briefly. (For reference, the texts of both the old Clause 67 (FIDIC third edition) and the new Clause 67 (FIDIC fourth edition) are printed at the end of this article.)

II. Discussion Of Changes From The Third Edition

1. Manner Of Referring Dispute To Engineer

Third Edition

This edition simply stated that if a "dispute or difference"[4] shall arise: "it shall, in the first place, be referred to and settled by the Engineer. . . ."

Fourth Edition

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

Comment

As the third edition did not state that the reference had to be in writing, or that it had to mention Clause 67 or be sent to the other party, a party could in theory invoke the Clause without the other party, or the Engineer, being aware of this fact. Thus, it was once argued, based upon the similar wording of Clause 66 of the English Institution of Civil Engineers Conditions of Contract (ICE Conditions),[5] that a letter to the Engineer merely enclosing claims was, in fact, a reference to the Engineer under that Clause.[6] The new wording should overcome this difficulty.

2. Time Periods For Decision And Challenge

Third Edition

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

Fourth Edition

The Engineer is required under the fourth edition to give notice of his decision within 84 days after receiving a reference of a dispute (instead of 90 days after a request therefor): "No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor." The fourth edition further provides, unlike the third edition, that the decision must state that it is made pursuant to Clause 67.

Assuming the Engineer gives notice of his decision within the required period, each party has a period of 70 days after the day on which he received notice of that decision (instead of 90 days after receiving notice of such decision) to give "notice of his intention to commence arbitration" (see Subsection 4 below). If the Engineer does not give notice of his decision within the required period, such 70-day period begins to run the day after the day on which the period of 84 days expired. In the fourth edition, a "day" is defined as a calendar day.[7] The third edition contained no definition of this term.

Comment

The change from periods of 90 days to periods of 84 and 70 days is the result of a new policy of FIDIC to make divisible by seven (that is, divisible into weeks) all time periods measured in days under the Conditions.[8]

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

3. Engineer's And Arbitrator(s') Freedom Of Decision

Third Edition

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

Fourth Edition

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

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

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

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

Comment

New Sub-Clause 53.4 is intended to promote greater discipline in the notification and substantiation of claims. It is designed, among other things, to limit the practice, frequent in international arbitrations applying English rules of evidence, for Contractors' claims to be advanced years after the event, supported by little more than the oral testimony of the Contractor's own employees.

4. Method Of Reserving Right To Arbitrate

Third Edition

Under the former Clause 67, it was unclear what action a party was required to take within 90 days of receiving the Engineer's decision (or, if the Engineer had rendered no decision, within 90 days of the 90-day period allowed to him to render his decision) in order to reserve the right to arbitrate a dispute. Some ICC arbitral tribunals interpreted the Clause to require the submission of a Request for Arbitration to the ICC, thereby commencing an ICC arbitration, and the communication of a copy thereof to the Engineer, whereas others held that the sending of an appropriate notice to the Engineer and the other party was sufficient.[9] The consequences of this uncertainty were serious, as a failure to take the right action would bar the claim.

Fourth Edition

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

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

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

Comment

The new edition has removed the earlier uncertainty as to the steps necessary to reserve the right to arbitrate.[10]

5. Amicable Settlement

Third Edition

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

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

Fourth Edition

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

Comment

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

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

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

6. Arbitration Rules To Be Applied

Third Edition

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

Fourth Edition

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

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

Comment

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

However, the UNCITRAL arbitration rules, which are referred to in Part II of the Conditions and which provide for a system of *ad hoc* arbitration (as opposed to institutional arbitration provided for by the ICC Rules), may be an appropriate alternative in some cases.

7. The Scope Of Arbitration Clause

Third Edition

Only "disputes or differences in respect of which the decision, if any, of the Engineer had not become final and binding" could be submitted to arbitration under the old edition. This in turn implied, or could imply, that disputes which had become the subject of "final and binding" decisions (that is, disputes concerning which neither party had required arbitration within 90 days of the Engineer's decision) were not subject to arbitration, even if such decisions were not respected, but were instead to be remitted to the local courts. Such an implication could cause difficulty in countries where "final and binding" decisions (for example, against the Employer) could not be readily enforced in the local courts.

Fourth Edition

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

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

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

Comment

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

Text Of Clause 67 Third And Fourth Editions

Third Edition

Settlement of Disputes—Arbitration

67. If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor or the Engineer and the Contractor in connection with, or arising out of the Contract, or the execution of the Works, whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of ninety days after being requested by either party to do so, give written notice of his decision to the Employer and the Contractor. Subject to arbitration, as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor and shall forthwith be given effect to by the Employer and by the Contractor, who shall proceed with the execution of the Works with all due diligence whether he or the Employer requires arbitration, as hereinafter provided, or not. If the Engineer has given written notice of his decision to the Employer and the Contractor and no claim to arbitration has been communicated to him by either the Employer or the Contractor within a period of ninety days from receipt of such notice, the said decision shall remain final and binding upon the Employer and the Contractor. If the Engineer shall fail to give notice 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 ninety days after receiving notice of such decision, or within ninety days after the expiration of the first-named period of ninety days, as the case may be, require that the matter or matters in dispute be referred to arbitration as hereinafter provided. All disputes or differences in respect of which the decision, if any, of the Engineer has not become final and binding as aforesaid shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, revise and review any decision, opinion, direction, certificate or valuation of the Engineer. Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute or difference referred to the arbitrator/s as aforesaid. The reference to arbitration may proceed notwithstanding that the Works shall not then be or be alleged to be complete, provided always that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

Fourth Edition

Engineer's Decision

67.1. If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

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 notification 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.

Amicable Settlement

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. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, whether or not any attempt at amicable settlement thereof has been made.

Arbitration

67.3. Any dispute in respect of which:

(a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

(b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2

shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.

Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

Failure to Comply with Engineer's Decision

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

Footnotes

[1]This article is a revised version of a paper given in London, Amsterdam and Paris in September and October 1987 to seminars arranged by the *Fédération Internationale des Ingénieurs-Conseils* (FIDIC) and certain other organizations to introduce the fourth edition. An earlier version of this article appeared in the *International Construction Law Review*, Vol. 6, Part 2 (April 1989) at 177-85. The views expressed herein are the author's own and do not necessarily reflect those of any other person.

[2]In an earlier four-part series of articles in *Middle East Executive Reports (MEER)*, the author described in some detail the procedure for the settlement of disputes under Clause 67 of the third edition. That series described briefly the FIDIC Conditions, disputes under the Conditions and, at greater length, the five-step procedure for dealing with them laid down in Clause 67 of that edition. Though much of that article remains relevant to the Clause in the fourth edition, the author does not repeat in this article what was stated there. See Seppala, "The Pre-Arbitral Procedure for Dispute Settlement in the FIDIC Civil Engineering Contract," *MEER*, July, August, September and October 1987 issues (hereinafter "Pre-Arbitral Procedure"); see also Seppala, "Contractors' Claims Under The FIDIC International Civil Engineering Contract," *MEER*, February, March, April and May 1987 issues.

[3]In the author's view, these include points 1, 4, 7 and 8 in "Pre-Arbitral Procedure," *supra*, note 2, at October 1987 MEER, p. 21, which concerned the third edition. In point 1, the author noted that to invoke the Clause there must, first of all, be a "dispute or difference" between the parties. The author criticized such "dispute or difference" language as being too narrow in scope, inasmuch as it might not encompass uncontested—but steadfastly unpaid—debts. See *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, London, 10th ed., 1979), p. 854 (*Grant* v. *Trocadero* (1938) 60 C.L.R. 1 (Australia) and *Plucis* v. *Fryer* (1967) 41 A.L.J.R. 192) and the first supplement (1979) 854, footnote 79 (*L.N.W.R.* v. *Billington* [1899] A.C. 79). In this connection, Dr. Albert Jan van den Berg, the well-known authority on international arbitration, has drawn the author's attention to a fairly recent decision of the United States Court of Appeals, Second Circuit, *Shaheen Natural Resources* v. *Sonatrach*, which addressed this issue, where the court concluded: "Shaheen's failure to honour its debt, constitutes a dispute subject to resolution through arbitration." 733 Fed. 2d 260 (1984) cited in the *Yearbook of Commercial Arbitration*, Vol. X, 1985, 540, at p. 545. With respect to this case, Dr. van den Berg commented: "If it were to be allowed that a dispute is non-arbitrable because a party admits the debt due, the door to chicanery would be wide open. A claimant should be entitled to obtain an internationally enforceable title in the form of an arbitral award." If arbitral tribunals could be relied on to show the same good sense in interpreting the "dispute" requirement in the fourth edition, there would be no need to broaden the language of the Clause in this respect.

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

[5]The Institution of Civil Engineers Conditions of Contract (ICE Conditions) (5th ed. London 1973).

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

[7]*See* Sub-Clause 1.1 (g)(ii).

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

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

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

TEXTS

SAUDI ARABIA—Section A

Finance Ministry Statement On New Saudi Budget

Statement of the Ministry of Finance and National Economy highlighting economic indicators for fiscal year 1409/1410 (1989) and analyzing appropriations for the new fiscal year which started 3/6/1410 H (December 31, 1989). Reprinted from *Saudi Economic Survey*.

First: Economic Indicators for Fiscal 1409/1410:

Preliminary estimates for economic growth in the just-ended fiscal 1409/1410 indicate continued revival and development of the national economy for the third year in a row. Gross domestic product registered a rise of 4.6 percent in current values in the just-ended year 1409/1410 compared to 1.9-percent growth realized in the year before, 1408/1409.

Noteworthy among the signs of economic revival in 1409/1410 was the high growth rate scored by the private sector, which stood at 4.4 percent in current values compared to 2.8 percent in 1408/1409.

Preliminary data show that certain local economic sectors scored high growth rates, with the agricultural sector achieving a growth of 11.3 percent, and the industrial sector developing at a rate of 10.4 percent.