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THE PRE-ARBITRAL PROCEDURE FOR THE SETTLEMENT OF DISPUTES IN THE F.I.D.I.C. (CIVIL ENGINEERING) CONDITIONS OF CONTRACT

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The purpose of this article is to review critically, from a practising lawyer's perspective, the functioning of the pre-arbitral procedure for the settlement of disputes prescribed by the F.I.D.I.C. Conditions of Contract (International) for Works of Civil Engineering Construction (the "Conditions"). It is not the purpose of this article to discuss or question the basic policy considerations underlying this procedure or the Conditions generally. This is not because they cannot, or should not, be discussed or questioned, but rather because the policy area is controversial and is not one where the author can pretend to any particular competence or authority. Instead, the intention here is to call attention to certain practical problems that have arisen or may arise in the implementation of this procedure and to suggest some solutions to such problems.

This article is divided into four parts, as follows: a brief description of the Conditions (Section I), a description of disputes under the Conditions (Section II), a critical examination of the pre-arbitral procedure for the settlement of such disputes (Section III), and, in a conclusion, some suggested changes to this procedure (Section IV).

I. THE CONDITIONS

The Conditions are standard conditions of contract[1] which have been prepared by the Fédération Internationale des Ingénieurs-Conseil (F.I.D.I.C.) and the Fédération Internationale Européenne de la Construction (F.I.E.C.)[2] for use internationally in connection with works of civil engineering construction. They are the only standard conditions issued at the

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[1] The F.I.D.I.C. Conditions derive from, and remain closely modelled on, an English set of standard conditions, the Conditions of Contract of the English Institution of Civil Engineers. *See The Institution of Civil Engineers Conditions of Contract* (I.C.E., 5th ed., London 1973) (hereinafter cited as I.C.E. Conditions).

[2] They have also been approved by various other organisations of contractors, e.g., the Associated General Contractors of America.

international level specifically for civil engineering construction and are the most widely used standard conditions of contract in the field of international construction.[3] The current edition of the Conditions is the third edition, which was issued in 1977.[4]

The Conditions presuppose that three parties will be involved in an international civil engineering project: the owner, or employer, for whom the works are to be constructed (herein and in the Conditions called the "Employer"); an engineer, who has been appointed by the Employer under a prior and separate contract to assist it and to act on its behalf in connection with the works to be constructed (herein and in the Conditions called the "Engineer"); and the Contractor, who will be responsible for the actual execution of the works under the supervision of the Engineer (herein and in the Conditions called the "Contractor").

In practice, the Conditions are most often employed in connection with construction projects in lesser developed countries. Where this is the case, the Employer is usually the state, or a state-owned entity, of the country concerned; the Engineer is often a firm of independent consulting engineers from a developed country, though it may be a local firm or even an employee of the Employer; and the Contractor is usually a general contractor, or a consortium of contractors, from a developed country or countries.

As mentioned above, under the contract system envisaged by the Conditions, the Engineer is generally assumed to be a party to a prior contract with the Employer. Under this contract,[5] the Engineer typically undertakes, among other things, to design the works, to prepare the tender documents, including the construction contract, and, after the Contractor has been selected, to supervise the execution of the works by the Contractor. When designing the works and preparing the tender documents, the Engineer acts as an independent contractor of the Employer. On the other hand, when supervising the execution of the works by the Contractor under the construction contract for purposes of ensuring that the latter carries out the works in conformity with the design, the Engineer acts as the agent of the Employer.

Although the contract between the Engineer and the Employer usually refers generally to the construction contract which is to be entered into later between the Employer and the Contractor, the Engineer is not a party to the construction contract. Nevertheless, where the Conditions are incorporated into a construction contract, their effect is to confer a third role on the Engineer: in addition to being an independent contractor and the Employer's agent, he becomes the administrator of the construction contract and, for this

[3] The term "international construction" is taken to mean the construction of works where tenders are invited on an international basis.

[4] It is anticipated that F.I.D.I.C. will issue a new, fourth, edition soon, possibly in 1987.

[5] F.I.D.I.C. has also prepared a model form of agreement for this contract. *See* F.I.D.I.C., *International Model Form of Agreement Between Client and Consulting Engineer and International General Rules of Agreement Between Client and Consulting Engineer for Design and Supervision of Construction of Works* (F.I.D.I.C., 3rd ed., Lausanne 1979).

purpose, is given certain quasi-judicial powers and duties which extend beyond his other relationships with the Employer.[6] These powers and duties include, among others: periodically certifying to the Employer that the Contractor is entitled to payment for work done; settling the Contractor's claims for additional monies or for extensions of time; and deciding, in the first instance, any disputes or differences between the Contractor and the Employer or the Engineer, as discussed below. In performing these quasi-judicial (commonly referred to as "discretionary") duties, the Engineer is not expected to act only in the Employer's interest. Instead, as discussed more fully below,[7] he is regarded as having an implied duty to "act fairly between the Employer and the Contractor and interpret the contract in a completely unbiased manner".[8]

II. DISPUTES UNDER THE CONDITIONS

Under the Conditions, disputes usually arise as a result of claims made by the Contractor against the Employer, usually through the Engineer. More than 30 different clauses provide that the Contractor may, in specified circumstances, be entitled to claim from the Employer additional money or an extension of time for completion of the works, or both.[9] For example, the Contractor may claim its additional costs for having encountered unforeseeable site conditions[10]; it may claim for changes or variations in the works ordered by the Engineer[11]; or it may claim for an extension of time for delays caused by the Employer.[12] The Contractor also may assert claims for additional costs if specified political[13] and economic[14] risks should materialise.

Disputes may also arise as a result of claims made by the Employer against the Contractor. But the Employer has less need to assert claims than the Contractor. First, the Employer can, as the contract paymaster, satisfy its claims by set-offs against, or reductions in, amounts due or to become due to the Contractor. In addition, the Employer will ordinarily hold security for its claims in the form of performance bonds or guarantees,[15] which are

[6] There is no equivalent to the administrative, quasi-judicial role of the Engineer, which is derived from English law, under contract practices in the continental European countries.

[7] *See* Section III(C)(1) *infra*.

[8] F.I.D.I.C., *Notes on Documents For Civil Engineering Contracts*, p. 7 (F.I.D.I.C., Lausanne 1977) (hereinafter cited as F.I.D.I.C. Notes).

[9] *See* Seppala, "Contractor's Claims Under the F.I.D.I.C. International Civil Engineering Contract" (1986) 14 *International Business Lawyer* 179.

[10] F.I.D.I.C. *Conditions of Contract (International) for Works of Civil Engineering Construction* (F.I.D.I.C., 3rd ed., Lausanne 1977) (hereinafter cited as *Conditions*), Clause 12.

[11] *Idem*, Clause 51.

[12] *Idem*, Clause 44.

[13] *Idem*, Clause 65 (e.g., revolution and civil war).

[14] E.g., *idem*, Clause 71 (currency fluctuation and exchange controls).

[15] *Idem*, Clause 10.

customarily in "first demand" form, and retention monies[16] of the Contractor.

On the other hand, the Contractor has no alternative, if it is to be paid its due, but to observe the claim and dispute settlement procedures laid down in the contract. Consequently, for convenience, it will be generally hereinafter assumed that the claimant in the dispute is the Contractor.

Under the Conditions, the Contractor must ordinarily submit all of its claims to the Engineer.[17] This must be done on at least a monthly basis,[18] usually with the Contractor's monthly payment application. Typically, if the Engineer allows a claim, he will certify the amount thereof on the Contractor's monthly payment application and such amount will, pursuant to the contract, thereupon become a payment obligation of the Employer. On the other hand, if the Engineer rejects the claim or allows it for an amount less than the amount claimed, then, unless the Contractor acquiesces in the position of the Engineer, the matter will be ripe for reference as a "dispute" under the procedure for the settlement of disputes prescribed by Clause 67.[19]

While claims must be presented at least monthly, where a dispute has arisen, there is no particular time limit for invoking the dispute settlement procedure. However, with respect to disputes that arise during the execution of the works, it will ordinarily be advisable for the Contractor to invoke such procedure before the delivery of the Maintenance Certificate and the submission of the statement of final account, if any.[20]

III. THE PRE-ARBITRAL PROCEDURE FOR THE SETTLEMENT OF DISPUTES UNDER THE CONDITIONS: CLAUSE 67

For a proper understanding of the pre-arbitral procedure for the settlement of disputes under the Conditions, it is essential to examine carefully the exact wording of Clause 67. Clause 67 provides as follows:

> "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,

[16] *Idem*, Part II, Clause 60.

[17] F.I.D.I.C. Notes, *supra* note 8, at p. 15.

[18] Strictly speaking, the claim must be submitted to the Engineer's Representative. *Conditions*, *supra* note 10, Clause 52(5). This is in addition to any notice of claim which the Contractor may be obliged to give by virtue of an applicable contract clause.

[19] If the decision on the Contractor's claim was taken by the Engineer's Representative, instead of by the Engineer, then the Contractor should first refer the matter to the Engineer, who may confirm, reverse or vary such decision. *Idem*, Clause 2(2)(b).

[20] *Idem*, Clause 62(2) and Part II, Clause 60.

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 dissatisified 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."

To make it easier to understand and analyse the complex procedure prescribed by Clause 67, it is necessary to break it down into five steps, as follows:

Step 1: There must exist a "dispute or difference" between the Employer and the Contractor or between the Engineer and the Contractor (first sentence).

Step 2: The "dispute or difference" must be referred to the Engineer for settlement (first sentence).

Step 3: The Engineer must, within 90 days of a reference, give his written decision to the Employer and the Contractor (first sentence). If he does so, then the decision is "final and binding" on the Employer and the Contractor subject only to arbitration (second sentence).

Step 4: If the Employer or the Contractor wishes to challenge the Engineer's decision, it must "require" arbitration, within 90 days of receiving the decision; if neither does so, the decision is (definitively) "final and binding"[21] (fourth sentence).

If, within 90 days of a reference, the Engineer fails to give his

[21] "Final and binding" decisions are initially subject to arbitration. *See* Step 3 *supra*. To distinguish these "final and binding" decisions from "final and binding" decisions which are no longer subject to arbitration because neither party has "require(d)" arbitration within the second 90-day period (*see* Steps 4–5), the latter are referred to herein as "(definitive)" or "(definitively)" "final and binding" decisions.

decision, then either party may elect to arbitrate the matter by, during the next succeeding 90 days, "requiring" arbitration; if neither does so, both may lose their rights to have the matter arbitrated (fourth sentence).

Step 5: Disputes or differences which are not the subject of any (definitive) "final and binding" decision may be settled under the Rules of Conciliation and Arbitration of the I.C.C. (fifth sentence).

In order to see how this elaborate process works and, in particular, to point out certain practical problems to which it can give rise, it is advisable to examine each of these five steps separately.

A. Step one—a dispute or difference must exist

1. The requirement of the Clause

To invoke the dispute settlement procedure prescribed by Clause 67, it is not ordinarily sufficient for the Employer or the Contractor to have a claim to assert against the other. As mentioned above,[22] claims are dealt with under other clauses of the Conditions. Instead, it is necessary that: (a) a "dispute or difference"[23] exist, (b) between the Employer and the Contractor or the Engineer and the Contractor.

(a) "dispute or difference". Whether or not a "dispute or difference"[24] exists in a given case may be a difficult question of fact. An English commentator has interpreted this requirement, as follows:

> "The dispute or difference may not arise out of what might be termed the ordinary badinage between contractor and engineer (not, be it noted, the resident engineer for the dispute must be with the engineer himself), but by the evolution of a definite issue between the contractor and the engineer or the employer. The submission of a claim does not necessarily (although it may) cause a dispute to arise; the rejection of a claim will probably do so, but not always, for the contractor might accept either wholly or in part the views expressed by the engineer. If the claim is not one which is met with a clear rejection, but with a request for further information or even with only a stalling reply, then no dispute may arise."[25]

Thus, a typical example of a "dispute or difference" will be where the Contractor has made a claim which the Employer or the Engineer has rejected and the Contractor contests such rejection. If, however, no "dispute or difference" exists, then there can be no valid reference to the Engineer under Clause 67.

[22] *See* Section II *supra*.

[23] In England, arbitration clauses usually define the arbitrator's jurisdiction in terms of "disputes" and "differences". Mustill and Boyd, *Commercial Arbitration*, p. 90 (Butterworth, London 1982) (hereinafter cited as Mustill and Boyd).

[24] In practice, the words "dispute" and "difference" appear to have been used interchangeably in England. *Idem*, at p. 97.

[25] Comment on *Monmouthshire CC* v. *Costelloe & Kemple*, (1965) 5 *Building Law Reports* 83 at pp. 84–85 (comment made in relation to Clause 66 of the English I.C.E. Conditions).

(b) "between the Employer and the Contractor or the Engineer and the Contractor". The reference in Clause 67 to a dispute "between the Engineer and the Contractor" is to a dispute in relation to a matter as to which the Engineer has been empowered to deal in the first instance by the Conditions, e.g., a claim by the Contractor under a clause in the Conditions.[26] On the other hand, the reference to a dispute "between the Employer and the Contractor" is to a dispute over which no initial jurisdiction is vested in the Engineer by the Conditions,[27] e.g., where the claim by the Contractor is for breach of contract and not based on a clause in the Conditions.

2. Comment

(a) "dispute or difference". Inasmuch as Clause 67 is intended to provide a procedure for the resolution of controversies related to the contract or the works, it is fitting that its ambit be limited to those controversies which are connected in some manner to the contract or the works. Yet the language of Clause 67 used to describe controversies, that is, "dispute or difference", creates another limitation on the ambit of Clause 67. In view of the legal environment that prevails in some countries where the Conditions are employed, this latter limitation may, in some cases, prove unfortunate.

To take an example, consider a situation that has arisen frequently in recent years in certain lesser developed countries, especially in the Middle East. The Contractor is entitled to receive a sum of money under the contract, for example, an amount certified by the Engineer as due to the Contractor by the Employer. Despite the fact that the Employer does not contest that such amount is due, it does not pay because of alleged cash flow problems, alleged delays in the completion of administrative formalities or even for no reason at all.

In such a situation, it may be contended, under the laws of some countries, that there is no "dispute or difference" in relation to such amount.[28] This may arguably be the case under English law where, when an amount is "indisputably due", the Contractor's normal remedy would be to obtain summary judgment from the courts instead of proceeding to arbitration.[29] But, if there is no "dispute or difference" in such a situation, then Clause 67, as literally read, may not be invoked: consequently, there may be no valid reference of the matter to the Engineer, nor later to international arbitration, under the clause.

[26] The Contractor's claims under clauses in the Conditions must generally be submitted to the attention of the Engineer in the first instance. *See* Section II *supra*.

[27] Abrahamson, *Engineering Law and the I.C.E. Contracts*, p. 291 (Applied Science Publishers, 4th ed. London 1979) (hereinafter cited as Abrahamson).

[28] Under English law, for example, the question of whether or not a dispute or difference exists could arise under the statutory provision relevant to domestic disputes, Arbitration Act of 1950, 14 Geo. 6, c. 27, s.27 (England) (hereinafter cited as Arbitration Act of 1950). As the Conditions derive from the English I.C.E. Conditions, English law may be relevant in construing the terms of the Conditions.

[29] *See* Mustill and Boyd, *supra* note 23, at pp. 90–91; *see also* Abrahamson, *supra* note 27, at pp. 270 and 291.

This may be an acceptable situation as regards a contract relating to works to be performed in a country like England and governed by English law because the English courts enjoy a high reputation and can be expected to afford the parties satisfactory relief. But where the contract relates to works in certain other countries, in which the courts are not so reliable, and is governed by their laws, such an interpretation of the "dispute or difference" requirement may have quite different results. If the Contractor's sole remedy for an undisputed amount will be before the courts of such countries, this may, in some cases, be tantamount to no remedy at all.

To be sure, the Contractor can, in order to avoid this difficulty, attempt to create artificially a "dispute" about such amount by, for example, appropriate correspondence with the Employer on the basis of which Clause 67 can be invoked.[30] But, by doing so, the Contractor is obliged to acknowledge that its entitlement to such amount is in dispute. This naturally permits, if it does not incite, an Employer to contest entitlement to an amount which it had not previously questioned. Thus, a real dispute may arise where none would otherwise exist.

As an evident purpose of Clause 67 is to cut down and reduce disputes,[31] such a result cannot, presumably, have been intended. But, unless the clause is redrafted and broadened (e.g., to encompass "questions, claims and disputes"), this result may, in some cases, inevitably follow from the present narrow "dispute or difference" requirement.[32]

(b) "between the Employer and the Contractor or the Engineer and the Contractor". As the Engineer is not a party to the construction contract, but instead acts as the Employer's agent thereunder (albeit sometimes also in a quasi-judicial role), it would be more accurate for Clause 67 to refer only to disputes between the Employer and the Contractor. The English I.C.E. Conditions have been amended in this respect.[33]

B. Step two—the dispute or difference must be referred to the Engineer

1. The requirement of the Clause

All "dispute(s) or difference(s)" between the parties arising in connection with the contract or the works must initially be referred to the Engineer for settlement under Clause 67. This is clear from the opening words of the

[30] The Contractor can, for example, take the position in correspondence with the Employer or the Engineer that if the Employer does not pay the certified amount by a certain date, the Contractor will consider such amount to be in "dispute" by the Employer.

[31] *See* Section III(D) *infra* (Step 4).

[32] The same potential difficulty besets certain standard arbitration clauses. *Compare* the I.C.C. clause in Clause 67 ("All disputes or differences in respect of . . .") *with* the I.C.C.'s standard clause ("All disputes arising . . .") *and* the more modern U.N.C.I.T.R.A.L. standard clause ("Any dispute, *controversy or claim* arising . . ." (emphasis added)).

[33] I.C.E. Conditions, *supra* note 1, Clause 66; *see* Abrahamson, *supra* note 27, at p. 291.

Clause: "If any dispute or difference . . . shall arise . . . *it shall, in the first place,* be referred to . . ." the Engineer (emphasis added). Clause 67 is therefore the exclusive method for settling such disputes.

The reference to the Engineer may be made by either the Contractor or the Employer. Moreover, in view of the impersonal "*it* shall . . . be referred" (emphasis added), even the Engineer, acting for the Employer, may arguably refer a dispute to himself.[34]

A reference to the Engineer under Clause 67 does not have to be in any particular form. The clause does not even require the reference to be made in writing.

2. Comment

In the United Kingdom and the United States, it is common practice for disputes under construction contracts to be referred initially for decision to the Engineer or other design professional supervising the execution of the works on the Employer's behalf.[35] Inasmuch as the Engineer will, in the usual case, already have considered the matter (e.g., in the case of an ordinary Contractor's claim), the reference back to the Engineer has been criticised as being often an "irritating and time-wasting formality".[36] But it does provide an opportunity for the Engineer to reconsider an earlier position which may have been taken hastily and before all relevant facts were known. Moreover, if his decision is reasoned, as, the author submits, it should be, it may induce settlement of the dispute or, at least, assist any arbitrators called upon subsequently to review the dispute. In any event, it is clear that it is only after the Engineer has been requested to render a decision under Clause 67 that a dispute may, if still unresolved by the Engineer's decision, if any, be submitted to international arbitration.[37]

In practice, there may be uncertainty as to the duration of the requirement that all disputes be submitted initially to the Engineer before they can be submitted to international arbitration. Clause 67 requires that disputes be referred initially to the Engineer: ". . . whether during the progress of the Works or after completion and whether before or after the termination, abandonment or breach of the Contract. . . ." This obligation is not expressly limited in time.

[34] In one I.C.C. arbitration, an Engineer appears to have been held to have rendered a valid decision under Clause 67 even though neither party had requested it. *See* "Award Rendered in 1984" (1984) 2 I.C.L.R. 298.

[35] *See* I. N. Duncan Wallace Q.C., *Hudson's Building and Engineering Contracts*, p. 159 (Sweet & Maxwell, 10th ed. London 1970) (hereinafter cited as Hudson's) (English practice); *see also* Justin Sweet, *Legal Aspects of Architecture, Engineering and the Construction Process*, p. 758 (West Publishing Co., 3rd ed. St. Paul 1985) (hereinafter cited as Sweet) (United States practice).

[36] I. N. Duncan Wallace, Q.C., *The International Civil Engineering Contract*, p. 169 (Sweet & Maxwell, London 1974).

[37] *See* Section III(D) *infra* (Step 4). The parties are, of course, free to waive the requirement that disputes be referred to the Engineer in the first instance. For an example of where parties were held to have waived this requirement, see "Partial Award Rendered in *Case No. 4650 in 1986*" (1986) 3 I.C.L.R. 277.

On the other hand, this obligation cannot reasonably extend beyond the duration of the Engineer's own appointment. While this will depend upon the Engineer's separate contract with the Employer, the contents of which will not ordinarily be known to the Contractor, one would expect the Engineer's appointment to last at least until the delivery of the Maintenance Certificate[38] and the issue of the Engineer's final certificate in relation to the Contractor's statement of final account, if any.[39]

The Contractor should be informed in some manner of the duration of the Engineer's appointment. Furthermore, it should be made clear that, once the Engineer's appointment has ceased, a party should be free to refer any new dispute that arises to international arbitration directly, without there being question of prior reference to the Engineer.

It is also suggested that Clause 67 be revised to require that any reference to the Engineer thereunder be in writing and refer specifically to the clause. This is necessary in order to ensure that the time periods under the clause[40] do not begin to run without the parties and the Engineer being clearly forewarned of this fact.

C. Step three—the Engineer must give his decision within 90 days—such decision is final and binding subject to arbitration

1. The requirement of the Clause

Once either party refers a dispute to the Engineer, Clause 67 requires the Engineer to give his decision thereon within 90 days. The decision must be given by a written notice[41] to the Employer and the Contractor.

Clause 67 does not state how the Engineer should go about making his decisions. However, F.I.D.I.C. states (as mentioned previously) that, when performing his duties under the Conditions: ". . . the Engineer will act fairly between the Employer and the Contractor and interpret the Contract in a completely unbiased manner. . ."[42] and that this stipulation is "equally essential if the Engineer is a member of the Employer's staff".[43]

In the United Kingdom and the United States, it has been common practice in the context of government contracts for the Engineer, or other design professional who is administering the contract and deciding disputes thereunder, to be an employee of the government or other public authority which is the Employer.[44] Consistent with this tradition in the United Kingdom and the United States, governments in lesser developed countries,

[38] *Conditions*, *supra* note 10, Clause 62.

[39] *Idem*, Part II, Clause 60.

[40] *See* Sections III(C) (Step 3) and III(D) (Step 4) *infra*.

[41] The notice must comply with the requirements prescribed by the Conditions for notices. *See Conditions*, *supra* note 10, Clause 68.

[42] F.I.D.I.C. Notes, *supra* note 7, at p. 7.

[43] *Idem*.

[44] *See* J. B. Wikely, *Municipal Engineering Law and Administration*, 25–29 (C. R. Books Ltd., London 1964); *see also* Sweet, *supra* note 35, at p. 758.

as the administrative and technical competence of their staff improves, are increasingly appointing their own employees to act as the Engineer under their construction contracts with foreign contractors.[45] While some persons challenge the suitability of government staff or civil servants in certain lesser developed countries to fill this role, the Conditions clearly presuppose that, regardless of the country concerned, the Engineer must act impartially, whether he is an agent of the Employer or the latter's employee.

Though not directly applicable to the Conditions, a commentary of the English Institution of Civil Engineers on the Engineer's duties under the I.C.E. Conditions is more explicit about the Engineer's role:

> "In carrying out his functions under the I.C.E. Conditions of Contract the Engineer must act impartially. . . . He must consider any representations of the Employer and the Contractor. He must be free to consult and to seek advice on any matters before reaching decisions. It is good practice for the Engineer to record the principles forming the basis of his decisions so that these are available if required in due course for the purposes of internal management or arbitration."[46]

Once a decision has been given, it is "final and binding" upon the Employer and the Contractor and must be given effect by them whether or not either of them subsequently requires arbitration. The Engineer's decision is intended as a means to settle the dispute promptly, at least on an interim basis, so that there will be no cause to interrupt the progress of the works and so that costly delays or disturbances may be avoided.

2. *Comment*

It is not the aim here to engage in the policy debate over whether it is appropriate for the Conditions to provide that the Engineer, an agent (or even, sometimes, an employee) of the Employer, render interim decisions on matters in dispute between the Employer and the Contractor.[47] Suffice it to say that this method of settling disputes, though certainly imperfect and subject, at times, to abuse, enjoys a long tradition in domestic construction contracts in the United Kingdom and the United States.[48] Moreover, at the

[45] However, in one I.C.C. arbitration, where the Employer (an African state) replaced an independent consulting engineer originally appointed as the Engineer under a F.I.D.I.C. contract by the Employer's own supervisory staff, the Employer was found to have "frustrated" the contract; consequently, the Contractor was held to be relieved of any requirement to submit a claim notice to the Engineer under Clause 52(5). *See* "Award Rendered in 1985" (1985) 3 I.C.L.R. 67.

[46] *I.C.E. Conditions of Contract Standing Committee. Guidance Note 2A: Functions of the Engineer Under the I.C.E. Conditions of Contract*, para. 3.2.1. (Sept. 1977). Since the decision in *Sutcliffe* v. *Thackrah* [1974] A.C. 727; (1977) 4 *Building Law Reports* 16, it is possible, under English law at least, that the Engineer, unlike an arbitrator, may be liable to the Employer or the Contractor for loss due to a negligent decision under Clause 66 of the English I.C.E. Conditions.

[47] *See* Goedel, "Aspects Concerning the Prevention and Settlement of Disputes in International Construction Contracts and the Arbitral Referee Procedure", pp. 33, 55–57 in *Contracts and Dispute Settlement in Civil Engineering and Construction of Plants* (Böckstiegel ed., Carl Heymanns Verlag K.G., Cologne 1984).

[48] Several reasons have been given for the development and continuation of the Engineer's quasi-judicial role in the common law countries: (1) the stature and integrity of his profession, (2) his role in design before construction makes him especially qualified to implement the project objectives during construction, (3) the Employer may be unsophisticated in construction and need the assistance and protection of the Engineer, (4) the alternative consisting of having matters resolved by the Employer and

present time, no other method of settling construction disputes rapidly, on an interim basis, appears to have gained wide international acceptance.

As this method is still accepted internationally, it seems more appropriate here to explore the scope of the Engineer's decision-making power. In this connection, two questions frequently arise in practice which have not been the subject of much recent attention: (a) may the Engineer decide the parties' purely legal rights, and (b) may the Engineer decide disputes which call directly into question his own conduct?

(a) May the Engineer decide the purely legal rights of the parties? While most disputes are likely to involve claims based on a clause or clauses of the Conditions,[49] disputes may also sometimes concern purely legal questions. For example, as there is no general clause in the Conditions entitling the Contractor to claim compensation for a delay in completion caused by the Employer or by those for whom the latter is responsible,[50] a claim of this type must normally be based on a provision of law. Similarly, other claims, such as claims for breach of contract, repudiation or misrepresentation, must usually have a legal foundation.

The wording of Clause 67 requires that all disputes which arise in connection with the contract or the works be referred to the Engineer:

> "If *any* difference or dispute *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* . . . it shall . . . be referred to . . . the Engineer." (Emphasis added.)

It does not distinguish between disputes relating to clauses of the Conditions and those that may raise questions of law.

The implication is that even disputes involving purely legal questions are to be referred to the Engineer for settlement. But how is the Engineer to settle them? He is usually neither competent nor qualified to decide purely legal questions. Clearly, the Engineer can only do so upon the basis of professional advice from a lawyer qualified to advise on the law of the country which governs the contract. If he seeks such advice, then there is no reason why the Engineer cannot, or should not, resolve such disputes on the basis of such advice.

Nevertheless, in its commentary on the Conditions, F.I.D.I.C. states that the Engineer is not to determine the parties' legal rights: "The Engineer's task is to interpret the Contract as written *and not to determine the legal rights of either*

the Contractor may be worse, and (5) a quick decision that may at times be unfair is better than a more costly or cumbersome system that might give better and more impartial decisions. Sweet, *supra* note 35, at pp. 758–759. It is also often insufficiently appreciated that, in any arbitration where the Engineer's actions or decisions are reviewed, the Engineer's links to the Employer will tend to operate to the advantage of the Contractor. As it is obvious that those links may have predisposed the Engineer to act favourably to the Employer, arbitrators will be especially alert to any sign of bias by the Engineer in favour of the Employer. If an instance of bias is found, it may undermine the credibility of all of the Engineer's actions or decisions.

[49] *See* Section II *supra*.

[50] For example, Clause 44 of the Conditions deals only with extension of time for completion.

party." (Emphasis added.)[51] Is F.I.D.I.C. saying that, when a party refers a purely legal dispute (e.g., a breach of contract) to the Engineer, the Engineer should refrain from deciding the dispute (a possibility envisaged in Clause 67)? If so, then why do the opening words of Clause 67 oblige a party to refer such a dispute to the Engineer "in the first place"?

F.I.D.I.C. should make clear in its commentary on the Conditions that the Engineer is entitled, upon the basis of independent legal advice from an appropriate source,[52] to settle purely legal disputes, e.g., disputes concerning whether (i) an event of *force majeure* has occurred, (ii) the contract has been frustrated, or (iii) a party is entitled to interest for a late payment in the absence of a contractual provision therefor and, if so, at what rate.

(b) May the Engineer decide disputes that call directly into question his own conduct? As we have seen,[53] the Conditions presuppose that the Engineer has designed the works and will supervise their construction by the Contractor. As the work of the Engineer and the Contractor is often closely inter-related, the claims of the Contractor may, not infrequently, call directly into question the Engineer's own conduct. For example, the Contractor may claim that it has suffered damage because of the Engineer's faulty designs, his failure to approve drawings promptly, or his wrongful denial of the Contractor's requests for extensions of time, or because the Engineer has required the Contractor to attain excessively high standards of completion.

As we have also seen, the Engineer's duty is to act fairly between the Employer and the Contractor. On the other hand, if the Engineer decides such a dispute favourably to the Contractor, he may expose himself to liability to the Employer. Therefore, when presented with such a dispute, the Engineer is confronted with a conflict of interest between his duty to the parties to act fairly and his interest in limiting his own liability.

In such a case, should the Contractor or Employer be obliged to refer the dispute to the Engineer "in the first place"? If the dispute is referred to the Engineer for decision under Clause 67, should he be obliged to decide it?

The wording of Clause 67 evinces no recognition of this problem. As we have seen,[54] the clause requires *all* disputes, including disputes between "the Engineer and the Contractor", in connection with the contract or the works to be referred to the Engineer for decision. No exceptions are envisaged.

Clause 67 is derived from the corresponding provision of the Engish I.C.E. Conditions.[55] The lack of attention to this matter in Clause 66 appears to be explained by a curious English legal doctrine which, like much of English building law, is more than one hundred years old.[56] According to this

[51] F.I.D.I.C. Notes, *supra* note 8, at p. 16.

[52] This source should be selected independently by the Engineer. It would, for example, be wrong for the Engineer to consult a lawyer retained by the Employer.

[53] *See* Section I *supra*.

[54] *See* Section III(A) *supra*.

[55] I.C.E. Conditions, *supra* note 1, Clause 66.

[56] *See* Hudson's, *supra* note 35, at pp. 451–453 (cases cited).

doctrine, the Contractor is taken to have known at the time of contracting, and to have accepted, that the Engineer may be called upon to decide certain matters that will place him in a position of conflict between his duty to be fair to the Contractor and his own self interest. One commentator describes this doctrine as follows:

> "Known interests do not disqualify the engineer from deciding between the contractor and employer. The contractor is in particular *taken to know* that the engineer will generally have prepared the contract; will have estimated the cost of the work and so will want to avoid extras; may have made mistakes in the plans involving extra cost which again he will want to keep down; and may wish to minimise the extension of time for any delay which he causes the contractor, for which he may be liable to the employer." (Emphasis added.)[57]

As, under this theory, the Contractor is taken to have known, and accepted, most of the potential conflict of interest situations likely to arise for the Engineer under the contract, the Contractor is, in effect, foreclosed from objecting to them when they do arise.[58] This apparently explains why Clause 66 of the English I.C.E. Conditions, and Clause 67 of the Conditions modelled upon it, evince no concern with the situation where the Engineer may be placed in a conflict of interest.

It is interesting to contrast this traditional English view with that of an American court which was recently faced with the question of whether a contract which provided that disputes would be initially submitted to the architect/engineer for decision authorised the architect to pass upon its own alleged misconduct. The court stated:

> "While paragraph 35 of the General Conditions . . . does give the architect the power . . . to adjust and determine disputes between the contractor and other contractors, it does not in our considered opinion, give the architect the power to pass upon his own errors and omissions . . . . *To permit this would be an outrageous result not contemplated by the parties*, and one not compelled by the language of the contract." (Emphasis added.)[59]

What the Contractor is apparently assumed to know in England is something which, at least on the facts of this case,[60] in the United States, it could not have contemplated.[61] Which view is correct?

[57] Abrahamson, *supra* note 27, at p. 411.

[58] As an example of the type of dispute that will disqualify the Engineer, it has been stated: "The engineer will be disqualified if he has any exceptional interest which the contractor did not know of when he made the contract—e.g., where the engineer had actually promised the employer (not merely estimated) that the works would not cost more than a certain figure". *Idem.*

[59] *Paschen Contractors, Inc.* v. *John J. Calnan Co.*, 13 Ill. App. 3d 485, 300 N.E. 2d 795 (App. Ct., 1st Dist., 1st Div. (an intermediate appellate court of the State of Illinois) 1973) (hereinafter cited as *Paschen*); *Methodist Church of Babylon* v. *Glen-Rich Const. Corp.*, 27 N.Y. 2d 357, 318 N.Y.S. 2d 297 (Ct. App. (the highest court of the State of New York) 1971).

[60] *Paschen* involved a demand for arbitration by a subcontractor against a main contractor under a subcontract. By its demand for arbitration, the subcontractor sought to be compensated, among other things, for certain engineering and draftsmen's fees incurred to correct certain alleged errors and omissions in the architect's drawings. The main contractor moved to stay the arbitration on the ground that, under a paragraph in the subcontract (analogous to Clause 67), all disputes had first to be submitted to the architect for decision before they could be referred to arbitration and the subcontractor had failed to refer this dispute to the architect. The court denied the stay, holding that the subcontractor was not bound to submit this dispute to the architect as such paragraph did not, according to the court, give the architect power to pass upon his own alleged errors and omissions. *Paschen*, *supra* note 59.

[61] Other U.S. cases are consistent with the *Paschen* and *Methodist Church* decisions, *supra* note 59, in

Clearly, the English view is based on a fiction with respect to the Contractor's assumed knowledge at the time of contracting. This fiction was developed by the English courts in the mid-nineteenth century, when more importance may have been attached by the English courts to upholding the authority of the Engineer than should be true today.[62] In the international context at least, it may be seriously questioned whether resort to this fiction is still appropriate.

The American view may, however, be more difficult to apply in practice. As a relatively wide range of disputes may implicate the Engineer, at least to some extent, it may be difficult to ascertain when the Engineer should be disqualified. On the other hand, by present day international standards, it seems certainly fairer and more appropriate for the Engineer not to decide disputes which call directly into question his own conduct.

It is true that if a party considers that it has been treated unfairly by a decision rendered by an Engineer who was in a position of conflict of interest, it can refer the matter to arbitration, as is true of any decision of the Engineer.[63] Nevertheless, under the wording of Clause 67, the decision is immediately "final and binding" and must be given effect until an arbitration award is made. Even where reference of the matter to arbitration can be justified, the proceedings will, in practice, often not commence until after completion of the works. Once commenced, years will ordinarily ensue before an award is rendered. Consequently, the Contractor may be seriously prejudiced by a decision made by an Engineer in a position of conflict of interest before it can ultimately be rectified.

There is also the possibility that the Contractor may have failed or omitted, inadvertently, to refer the decision to arbitration within 90 days. In this event, the decision will, under Clause 67, be definitively "final and binding" on the Contractor and have an effect similar to that of an arbitral award. Such a result cannot be admitted, it is suggested, where the Engineer who made the decision was subject to a conflict of interest.

(c) Form of Engineer's decision. A further problem may arise from the lack of formality required of the Engineer's decision. As the only formal requirement for a decision is that "written notice" of it must be given, it is always possible

proscribing an architect or engineer from deciding a dispute which calls directly into question his own conduct. *See* Kent, "The Architect's Duty: Owner-Constructor Disputes Involving Allegations of Contractor's Fault" published in *Construction Arbitration: Selected Readings*, p. 133 (American Arbitration Association, New York 1981); *see also* Myers, "Finality of Decisions of Design Professionals Where the Contract Provides the Decision Will Be Final" (1985) 2 I.C.L.R. 330.

[62] For example, in the nineteenth century, it was accepted practice in England for the Engineer also to be appointed as arbitrator with power to settle finally disputes under a construction contract. As the result of legislation introduced in 1934, this practice is relatively rare in England today. Hudson's, *supra* note 35, at pp. 847–848. However, a recent English decision indicates that the English courts may, in appropriate circumstances, consider that an architect or engineer has powers and authority which are not amenable to review by the courts, except in limited cases, and which can only be reviewed by an arbitrator if he has been given appropriate power. *Northern Regional Health Authority* v. *Derek Crouch Const. Co. Ltd.* [1984] 1 Q.B. 644, (1984) 26 *Building Law Reports* 15.

[63] *See* Section III(D) *infra* (Step 4).

for the Employer or Contractor to contend at a later point in time that any letter of the Engineer commenting on a dispute should be treated as an Engineer's decision under Clause 67 which, assuming neither party reserved the right to arbitrate the matter within 90 days, is definitively "final and binding". This can lead to a situation in which the party who is adversely affected by the "decision" is unknowingly deprived of any right to arbitrate or otherwise litigate the matter.[64] Such a situation is obviously unacceptable.

D. Step four—the procedure for challenging an Engineer's decision, if any

1. The requirement of the Clause

The procedure for challenging an Engineer's decision, if any, is contained in the third and fourth sentences of Clause 67. These sentences provide essentially that where the Engineer has given a decision, the Employer or the Contractor must take certain action within 90 days if it wishes to refer the matter to arbitration. On the other hand, where the Engineer has failed to give a decision within 90 days of a request therefor, the Employer or the Contractor must take the necessary action within the next succeeding period of 90 days if it wishes to refer the matter to arbitration. As the particular action required to be taken is not clearly specified in Clause 67, it is discussed in the comment below.

The effect of Clause 67 is that, once a dispute has been referred to the Engineer, then, irrespective of whether or not the Engineer gives a decision within 90 days, if neither party "requires" arbitration within the next relevant 90-day period, further legal recourse with respect to the dispute is foreclosed. Thereafter, neither party can submit the dispute to arbitration; moreover, neither can submit it to the courts because each is bound by the provisions of a clause which gave it a right to arbitrate the dispute, exercisable within a reasonable time period, which it did not exercise. Thus, Clause 67 can have very harsh consequences for a party who omits, for some reason, to act in time to protect its rights.

2. Comment

In light of these requirements of Clause 67, two questions seem especially pertinent: (a) what steps must a party take to reserve the right to arbitrate a dispute; and (b) assuming the parties[65] fail to take such steps, how final is a (definitive) "final and binding" decision of the Engineer?

[64] Fear of such a result was expressed by the English Court of Appeal in relation to Clause 66 of the English I.C.E. Conditions. *Monmouthshire CC v. Costelloe and Kemple* (1965) 5 *Building Law Reports* 87 at p. 93. Lord Justice Harman stated: ". . . I think it would require very clear words and a very clear decision by the appointed person, namely, the engineer, to shut the defendants out of their rights." *Idem*, at p. 91. Unfortunately there can be no assurance that other tribunals would be as cautious.

[65] If one party takes the steps necessary to reserve the right to arbitrate a dispute, then, even though the other party does nothing, this would be sufficient to prevent the decision, if any, from becoming (definitively) "final and binding" for either of them.

(a) What steps must a party take to reserve the right to arbitrate a dispute? In view of the crucial importance of properly reserving the right to arbitrate a dispute, it is surprising to find Clause 67 so obscure on this issue. The relevant portion of the clause, with the particular words bearing directly on this issue italicised, is as follows:

> "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.*" (Emphasis added.)

This passage gives rise to a number of questions. First, what exactly is a 'claim to arbitration" and how does a party communicate it to the Engineer? This is not explained. Second, how, and to whom, does a party "require" arbitration? This is not stated. Third, is the need to communicate a "claim to arbitration" to the Engineer independent of the need to "require" arbitration? This is not clear.

The term "require arbitration" suggests that the other party must be forced or obliged to arbitrate. Does it, therefore, necessitate the commencement of an I.C.C. arbitration, which is accomplished by the submission of a Request for Arbitration to the I.C.C.?[66] Is this suggested by "require . . . arbitration *as hereinafter provided*", inasmuch as the next sentence provides that: "All disputes . . . shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce"? If so, then, under this reading, a party may require arbitration only by filing a Request for Arbitration with the I.C.C.

After a lengthy analysis of Clause 67, an English author has concluded that the filing of a Request for Arbitration is not necessary. According to this author, it is sufficient to secure or preserve the right to arbitrate that a party give "a serious notification of [its] intention to claim or require arbitration" to the Engineer and the opposing party.[67] This is apparently also all that would be necessary, according to this author, under English law.[68]

However, apart from the difficulties inherent in determining when a notification is "serious", this interpretation takes no account of the stipulations in Clause 67 that arbitration (i) must be "require[d]" within 90 days, (ii) "as hereinafter provided", which may suggest, as provided in the

[66] *Rules for the I.C.C. Court of Arbitration*, art. 3(1) (International Chamber of Commerce, Paris 1975) (hereafter cited as I.C.C. Rules).

[67] Duncan Wallace, Q.C., "The Time Bar in F.I.D.I.C. Clause 67" (1985) 2 I.C.L.R. 330.

[68] *Idem*, at p. 333. Several earlier unpublished I.C.C. awards, relying on English law and practice, and betraying little evidence of having analysed the particular wording of Clause 67, are to the same effect. E.g., *I.C.C. Case No. 1896* (1976) (partial award) and *I.C.C. Case No. 2145* (1973) (final award).

I.C.C. Rules.[69] Moreover, under this interpretation, there would, in principle, be no time limit at all for the commencement of arbitration.

A recent decision of an I.C.C. tribunal has addressed this issue.[70] In that case, which involved a situation where the Engineer had rendered a decision under Clause 67 within 90 days of a request therefor, the tribunal held that: "Should one of the parties be dissatisfied with the decision, or wish to object thereto, then *a request for arbitration is to be made to the I.C.C. Court of Arbitration and such request should be communicated to the Engineer.*" (Emphasis added.) In light of this decision, which has been followed in at least one other recent case,[71] and irrespective of one's opinion as to the correct interpretation of this part of Clause 67, a party wishing to reserve its rights under the clause would be imprudent not to submit a Request for Arbitration to the I.C.C., thereby formally commencing an arbitration, and to communicate a copy of the same at least to the Engineer. The cost of commencing an I.C.C. arbitration is small.[72] If it is not desired to proceed with the arbitration immediately, then, once a Request for Arbitration has been filed, proceedings can usually be stayed without difficulty.

These practical considerations apart, however, the language of Clause 67 remains unclear on this issue and should be redrafted at the first opportunity.

(b) How final is a (definitive) "final and binding" decision of the engineer? In the common law countries, construction contracts frequently contain provisions authorising an engineer (or architect) to decide disputes thereunder. It is also frequent for them to provide that the engineer's decision on the dispute will, in certain circumstances, be final and conclusive on the parties. Such contractual provisions are regarded as perfectly valid.[73]

However, under the laws of the different common law countries, there are also well established exceptions to the finality of an engineer's decision. For example, under American law, a party may successfully challenge such a decision where he can demonstrate:

> ". . . (1) fraud in making the decision; (2) bad faith on the part of the design professional; (3) such gross mistake as to imply bad faith; (4) failure on the part of the design

[69] English forms do not provide for arbitration under the I.C.C. Rules but rather under English law. E.g., I.C.E. Conditions, *supra* note 1, Clause 66. This difference may make an analogy to English law here especially hazardous.

[70] *I.C.C. Case No. 3790* (1984) 1 I.C.L.R. 372.

[71] *I.C.C. Case No. 4707* (1986). However there has been a recent decision to the contrary, I.C.C. Case No. 5029 (1986). Extracts from both cases will be published in the next issue of this Review.

[72] The only out of pocket cost is a U.S.$500 non-refundable advance on administrative expenses; as of 1 July 1986, the amount of this advance is increased to U.S.$2,000. I.C.C. Rules, *supra* note 66, app. II, art. 1.

[73] Arthur Linton Corbin, 3A *Corbin on Contracts*, p. 652 (West Publishing Co., St Paul 1960). The Engineer's decision is to be distinguished from an arbitration award. The Engineer is similar to an arbitrator in that a dispute is submitted to him for decision and he is bound to act fairly and impartially. The Engineer is unlike an arbitrator in that he is not jointly engaged by the parties and the parties are not expected to submit (though they are not precluded from submitting) evidence or contentions to him but, instead, he makes his own investigations before coming to a decision. See *Sutcliffe* v. *Thackrah* [1974] A.C. 727; (1977) 4 *Building Law Reports* 76 for a discussion of these differences.

> professional to exercise honest judgment; (5) that the decision was made arbitrarily and capriciously, or (6) that the decision involves the fault of the design professional responsible for making such decision."[74]

In England, several exceptions may arise. According to one authority, if the decision contains a patent error or embodies a point of law, it may be challenged in the English courts.[75] In addition, a contractual time limit for the commencement of arbitration, such as the 90-day time limit prescribed by Clause 67, may be extended by the English courts if "undue hardship" would otherwise be caused.[76]

On the other hand, outside the common law countries, contractual provisions authorising an engineer (or architect) to settle disputes in a final manner are rare or unknown. Consequently, how they would be enforced outside the common law countries is difficult to foresee. Some countries might enforce such provisions literally and give definitive final and binding effect to engineer's decisions in all or virtually all circumstances, whereas other countries might regard the decision as no more than evidence, like an expert's opinion, to be taken into account, with other evidence, for purposes of any judicial decision on the matter.

Inasmuch as such provisions (i) may have drastic consequences for a party, (ii) are peculiar to construction contracts in the common law countries, and (iii) may have unintended or anomalous results elsewhere depending upon local law, it is questionable, in the author's opinion, whether their use is really appropriate in an international form of contract.

E. Step five—the settlement by I.C.C. arbitration of disputes not settled by the Engineer

1. The requirement of the Clause

Clause 67 provides that disputes "in respect of which the decision, if any, of the Engineer has not become (*sic*)[77] final and binding" will be finally settled by I.C.C. arbitration. In any arbitration, the scope of proceedings is limited to the particular disputes or differences that have previously been referred to the Engineer under such clause. If, during the arbitration, a party changes the grounds or arguments on the basis of which he is making a claim with respect to any "dispute or difference", this should not ordinarily result in a new "dispute or difference". If, however, he raises a new claim (e.g., one based on a new set of facts), this would ordinarily give rise to a new "dispute or

[74] Myers, "Finality of Decisions of Design Professionals Where the Contract Provides the Decision Will Be Final" (1985) 2 I.C.L.R. 319 at p. 320.

[75] Donald Keating, *Building Contracts*, p. 546 (Sweet & Maxwell, 4th ed. London 1978).

[76] Arbitration Act of 1950, *supra* note 28, § 27. See *International Tank & Pipe S.A.K.* v. *Kuwait Aviation Fuelling* [1975] Q.B. 224; (1977) 5 *Building Law Reports* 147 for a case where such an extension was granted in relation to the Conditions (2nd edition).

[77] All decisions of the Engineer "become" "final and binding" under the second sentence of Clause 67 irrespective of whether or not they are later referred to arbitration. Accordingly, the word "remained" (the third sentence uses "remain") would be more appropriate here than "become".

difference" which, as such, would first have to be referred to the Engineer under Clause 67 before it could be submitted to arbitration (unless, of course, the other party agreed to the waiver of this requirement).

The arbitrators have full power to "open up, revise and review"[78] the Engineer's decision(s)[79] and neither party to the arbitration is limited to the evidence or arguments put before the Engineer. Although the Engineer will not be a party to the arbitration, he may be a witness in the proceedings. Arbitration may proceed although the works have not yet been completed.

2. Comment

The basic question raised by this step is why are only disputes in respect of which one party, at least, has required arbitration subject to arbitration? Why are disputes which are the subject of (definitive) "final and binding" decisions of the Engineer not also arbitrable, at least to the extent necessary to permit such decisions to be confirmed by an arbitral award, if necessary?

In some countries where the Conditions are employed, the courts cannot be wholly relied upon to be fair or impartial to, for example, a foreign Contractor. In such countries, if a "final and binding" decision of the Engineer is not paid voluntarily, then, unless international arbitration is still available, there may be no effective means to induce the Employer to pay it.[80] To take account of this situation, should not the Contractor, for example, enjoy the right to have the amount of a favourable decision confirmed, if necessary, by way of an I.C.C. arbitration award which can be internationally enforced? If not, then how can the Contractor obtain effective legal recognition of its entitlement to such amount in such countries?

Again, as in the case of the requirement of a "dispute or difference",[81] it seems to have been assumed that, where an amount is "indisputably due", or where a decision becomes "final and binding",[82] then, as would be the case in England, the local judiciary will be available to provide dependable relief. No account seems to have been taken of the very different legal environment that may prevail in some countries where the Conditions are used.

Consequently, when a Contractor is working in countries where it is not confident that the local courts will enforce any "final and binding" decisions in its favour, it may be imprudent to allow such decisions to become (definitively) "final and binding" as, by so doing, the Contractor will be

[78] "... [O]pen up, *review and revise*" would be the more logical sequence (Emphasis added).

[79] Other opinions or certificates of the Engineer may also be opened up, revised and reviewed. *Conditions*, *supra* note 10, Clause 67.

[80] To be sure, it may be necessary to have recourse to the courts of the Employer's country to enforce even an international arbitration award. But international arbitral awards are usually paid or settled voluntarily, especially perhaps where the defendant is a government. Enforcement of awards is also facilitated, as a legal matter, in the many countries which have ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 June 1958, 330 U.N.T.S. 38 (1959).

[81] *See* Section III(A) *supra* (Step One).

[82] *Idem.*

depriving itself of the right to refer the decisions to international arbitration later, if necessary. In view of the manner in which Clause 67 is drafted, the Contractor may be better advised, in such countries, to require arbitration of all decisions of the Engineer, as only by this means can it be assured of being entitled to seek an international arbitration award in respect of all amounts that may be due to it.

Thus, while it may have been the intention of F.I.D.I.C. that, to the extent possible, all disputes be settled at the level of the Engineer instead of by international arbitration, the manner in which Clause 67 is presently drafted may, unfortunately, actually achieve the opposite result.

As the procedure for the arbitration of disputes by the I.C.C. is beyond the scope of this article, no comment will be made upon it here.

IV. CONCLUSION

As stated at the outset, it has not been the purpose of this article to discuss the policy issues underlying Clause 67. Instead, its aim has been to call attention to certain practical problems to which the clause, as presently drafted, has given or may give rise. In light of the problems described above, it is suggested that the following points should be taken into account when any new version of Clause 67 is drafted:

1. The requirement that only "disputes or differences" may be referred under Clause 67 should be broadened. For example, the comparable provision of the F.I.D.I.C. Electrical and Mechanical form refers to "question, dispute or difference".[83] Similarly, the comparable provision of the American Institute of Architect's form refers to "claims, disputes and other matters in question between the Contractor and the Owner".[84]

   If this requirement is broadened in this manner, however, it is also necessary to make clear that recourse to Clause 67 is a form of "appeal" procedure and that, for example, Contractor's claims must first be presented to the Engineer under the applicable clauses of the Conditions before they can be referred to the Engineer under Clause 67.
2. A party who refers a matter to the Engineer under Clause 67 should be required to do so in a writing which states expressly that the clause is being invoked. Similarly, when rendering a decision under Clause 67, the Engineer should be required to state in the written notice of decision that it is being rendered thereunder. The Engineer should also be required, in his decision, to state his reasons therefor in order, among other things, to assist arbitrators who may be called upon to review the matter.

[83] *F.I.D.I.C. Conditions of Contract (International) for Electrical and Mechanical Works*, Clause 49 (F.I.D.I.C., 2nd ed., Lausanne 1980).

[84] *General Conditions of the Contract for Construction* (American Institute of Architects Document No. A 201), Art. 2.2.9 (A.I.A., 13th ed., Washington D.C. 1976).

3. F.I.D.I.C. should make clear in its commentary on the Conditions that the Engineer should be empowered to settle, with the advice of independent legal counsel, disputes of a purely legal nature. The distinction made by F.I.D.I.C. at present between "interpret[ing] the Contract as written" and "determining the legal rights" of the parties is artificial, as both involve legal determinations. Moreover, if F.I.D.I.C. considers it desirable that all claims in relation to the contract be settled at the level of the Engineer instead of by international arbitration, then, logically, the Engineer should also be entitled, after obtaining independent legal advice, to settle purely legal claims.
4. In the author's view, it would be more in keeping with current notions of fairness, especially in the international context, if the Engineer were relieved of any duty to decide disputes which call directly into question his own conduct. If this viewpoint is accepted, then it should be made clear in the Conditions that a party is not obliged to refer these types of disputes to the Engineer for decision but can, instead, refer them directly to arbitration. The arbitrators can then decide, if requested to do so, whether they are competent (i.e., whether a party was justified in not first referring the dispute to the Engineer) or whether there should have been a prior reference to the Engineer.
5. It is essential that F.I.D.I.C. clarify the action a party must take in order to secure its right to arbitrate a dispute. The changes that will be necessary in Clause 67 in this respect will depend upon whether F.I.D.I.C. decides that it is sufficient for a party to send a mere notice of intention to arbitrate to the Engineer and/or the other party (in which case the form of the notice should be specified) or whether, instead, a party should be required to submit a Request for Arbitration to the I.C.C. and a copy thereof to the Engineer and/or the other party.
6. Clause 67 should be amended to make clear that a dispute which is the subject of a (definitive) "final and binding" decision of the Engineer may, nevertheless, be submitted to arbitration for certain purposes, such as to obtain an arbitral award confirming a party's entitlement to the amount of the "final and binding" decision.
7. The question of whether the common law concept of the "final and binding" decision, with its potential guillotine effect, is appropriate in a contract for international use should be reconsidered. If the concept is retained, Clause 67, or F.I.D.I.C.'s notes to the Conditions, should be modified to incorporate, or refer to, some of the well-established exceptions to the finality of an Engineer's decision recognised in the common law countries where this type of provision is commonplace. This should limit the risk that Clause 67 may be applied unfairly and, possibly, contribute to making its enforcement less unpredictable in the many countries where this type of clause is unknown or little used.
8. There should be a procedure for ensuring that the Contractor is informed in some manner of the duration of the Engineer's appointment. Moreover,

the Conditions should make clear at what point in time the parties are relieved of their obligation to refer a dispute to the Engineer as a condition to being able to refer it to international arbitration.

In conclusion, if Clause 67 is to operate effectively in the context of the widely varying legal conditions which prevail internationally (and in conjunction with the I.C.C. arbitration rules), then, in the author's opinion, it should be substantially revised.*

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