Engineer's non-final decision enforced by unanimous ICC arbitral award

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An ICC arbitral tribunal, in an interim award in ICC Case No 10619 (see (2008) 19(2) *ICC Int'l Ct of Arb Bull* 85-90), has unanimously decided that an Engineer's non-final decision on a dispute under Clause 67 of the FIDIC conditions of contract for works of civil engineering construction (the 'FIDIC Conditions'), fourth edition, 1987 should be enforced by an arbitral award.

Since the Dispute Adjudication Board (DAB) has replaced the Engineer as a decider of disputes under the current (1999) editions of the FIDIC forms of contract for major works (the '1999 FIDIC Books'), the author can see no reason why the same principle should not apply to a non-final decision of a DAB under the current editions.

The ICC arbitral tribunal's decision is briefly described below.

As readers of *Construction Law International* will know, FIDIC construction contracts before publication of the 1999 FIDIC Books provided for the referral of disputes between the Contractor and the Employer to the Engineer for decision and that, only if a party expressed dissatisfaction with the decision, in a specified way, could the dispute be referred to arbitration. Unless and until revised in arbitration (or by an amicable settlement), that decision was deemed to be binding on the parties and, thus, settled the matter provisionally at least.

In the 1999 FIDIC Books, FIDIC replaced the Engineer as the decider of disputes by a DAB. But otherwise the pre-arbitral procedure for the settlement of disputes is essentially unchanged.

However, as construction arbitrations frequently take several years and are often not even begun until near the end of a project, an issue of considerable concern and uncertainty under both pre-arbitral procedures has been what value, if any, is to be given to the binding decision of an Engineer or a DAB? If such decision is not respected, are there any means by which it can be enforced?

The recently-published ICC award referred to above expressly addresses the issue and provides a most welcome solution.

By an interim award in ICC Case No 10619, a tribunal of three arbitrators, sitting in Paris, unanimously held, at the request of the claimant (Contractor), that certain decisions of the Engineer under the FIDIC Conditions, fourth edition, 1987 which awarded sums to the claimant Contractor, could be enforced by such an award under the ICC Rules of Arbitration, even though one of the parties (the claimant Contractor, in fact, who was seeking to enforce the decisions) had given a notice of intention to commence arbitration with respect to the decisions.

The arbitrators held that such decisions can be given effect to by such an interim award – which, under the ICC Rules, is final as to the matters decided – because Clause 67 of the FIDIC Conditions expressly provides that a decision of the Engineer under that Clause is binding on the parties notwithstanding that either or both of them have given a notice of intention to commence arbitration. In this connection, the second paragraph of Sub-Clause 67.1 provides:

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

The tribunal stated as follows:

> 'If the above Engineer's decisions have an immediate binding effect on the parties so that the mere fact that any party does not comply with them forthwith is deemed a breach of contract, notwithstanding the possibility that at the end they may be revised or set aside in arbitration or by a further agreement to the contrary, there is no reason why in the face of such a breach the arbitral tribunal should refrain from an immediate judgment giving the Engineer's decisions their full force and effect. *This simply is the law of the contract.*
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> [Para 22, emphasis added]

Thus, an arbitral tribunal may and, when requested to do so, should enforce decisions of the Engineer under Clause 67 by an interim award under the ICC Rules ordering the other party immediately to pay their amount even though one or both parties have given a notice of intention to commence arbitration with respect to them.

As, in this case, one of the parties had given such a notice of intention to commence arbitration, the dispositive section of the interim award expressly reserved the rights of the parties as to the merits of the case until the tribunal's final award. In this author's view, the tribunal's approach is entirely consistent with the way Clause 67 of the FIDIC Conditions was intended to operate.

ICC arbitral tribunals had previously ordered payment of 'final and binding' decisions of the Engineer under Clause 67 of the FIDIC Conditions, second edition (1969), that is, decisions which had not been the subject of any notice of intention to commence arbitration within the contractually stipulated time limit (90 days under the second edition) at all (see ICC Case Nos. 3790/3902/4050/4051/4054 (joined cases), summarised in Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (Kluwer, Deventer, 1990) at 889-891). However, the interim award in Case No 10619 is the first example of a published award of which this author is aware where an arbitral tribunal has ordered payment by an interim award of the amount of an Engineer's decision which is 'binding' but not 'final'; that is,

which had been challenged, within the contractually stipulated time period, by one or other or both of the parties.

The same result should obtain, the author submits, in the case of a decision of a DAB under Clause 20 of the 1999 FIDIC Books as the arbitral tribunal in Case No 10619 found applies in the case of a decision of the Engineer under Clause 67 of the FIDIC Conditions, fourth edition. This should be so because the relevant language of Clause 67 of the fourth edition (quoted above) and of Clause 20 of the 1999 FIDIC Books is to the same effect. Sub-Clause 20.4 of the 1999 FIDIC Books provides as follows:

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

Accordingly, even if one or both parties have given a notice of dissatisfaction (which is equivalent to the notice of intention to commence arbitration under the fourth edition of the FIDIC Conditions) with respect to a decision of a DAB, each party is bound to give effect to that decision (unless and until overturned by a subsequent amicable settlement or arbitral award) and, if that decision calls, for example, for a payment to be made by one party to the other, then that decision may be enforced directly by an interim award pursuant to the ICC Rules of Arbitration. That is the logical conclusion to draw from the interim award in Case No. 10619.

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Twenty-six minutes late tender was properly rejected

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In *J B Leadbitter & Co Ltd v Devon County Council* [2009] EWHC 930 (Ch) [2009] CILL 2713, a judgment delivered on 1 May 2009, the English High Court decided that a contracting entity for the purposes of the public procurement rules was entitled to reject a tender for a framework agreement where part of the tender was submitted 26 minutes late. The Court decided this was neither disproportionate nor was it unequal treatment or discrimination. The judgment gives important guidance on the application of tender rules, particularly timing, and also considers the viability of proportionality arguments in procurement challenges.

The tender in question required at least four case studies to be submitted as part of the tender. The invitation to tender (ITT) clearly stated that each tenderer would have only one opportunity to submit documents to the contracting authority's portal (and thereby submit its bid). The tender documentation also clearly stated the remaining tender rules.

The claimant, J B Leadbitter & Co Ltd, submitted its tender before the 1500 hrs deadline on the relevant date, but before 1500 it realised it had failed to include the case studies with the rest of its tender. It then attempted to submit the case studies to the portal before 1500 but was unable to do so as the system only permitted one loading of documents by each tenderer and the claimant was now on its second attempt. The claimant then e-mailed the case studies at 1526 (ie, 26 minutes after the deadline). The contracting authority (Devon County Council) rejected the claimant's tender on the basis that it had not submitted a complete tender by the deadline.

Important points raised by the judgment include the following.

Equal treatment/ rectifying errors

The ITT provided that tenderers would be given an opportunity, after the deadline, to rectify errors in tenders which were submitted before the deadline and accepted by Devon CC. While the claimant accepted it did not submit its entire tender before the deadline, it argued that Devon CC should have waived strict compliance with the ITT and allowed it to correct its error (by submitting the case studies after the deadline so the tender would not be rejected). It argued that not permitting this would constitute unequal treatment and discrimination against it.

The Court disagreed. The Court did not find that the failure to include the case studies was an 'error' as provided for in the ITT; rather, the claimant's tender was substantially incomplete. The Court's view was that this part of the ITT neither obviated the need to submit a complete tender nor did it provide a means by which tenderers could supply substantial documents or substantial sections of documents after the deadline so as to complete tenders. Devon CC's failure to waive strict compliance with the ITT was applied equally to all tenderers. Indeed, the Court's opinion was that a waiver of terms which are stated as applying without exception carries the very risks of unequal treatment, discrimination and a lack of transparency which the contracting authority is required to avoid.

Proportionality

The claimant further alleged that, as a general principle of European Community law, Devon CC owed an obligation to act proportionately in the treatment of the tender and, in not doing so, it was in breach of this obligation. Proportionality