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THE ARBITRATION CLAUSE IN FIDIC CONTRACTS FOR MAJOR WORKS

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I. INTRODUCTION

While the arbitration clause in the 1999 edition of the *Fédération Internationale des Ingénieurs-Conseils* ("FIDIC")[1] contracts for major works[2] only comprises, on a literal reading, sub-clauses 20.6 to 20.8 of the contracts, one cannot understand the clause without considering the conditions which must or should be satisfied before any claim may be submitted to arbitration. This is because if a party does not satisfy such conditions, it may have no right to arbitration. Accordingly, for the arbitration clause to be fully intelligible, it needs to be considered together with sub-clause 20.1, the provision for claims,[3] sub-clauses 20.2 to 20.4, the provisions for a Dispute Adjudication Board, and sub-clause 20.5, the provision for amicable settlement. In short, the provisions of clause 20 ("Claim, Disputes and Arbitration") need to be read together.

This article will review the main features of clause 20 of the FIDIC contracts.

II. MAIN FEATURES OF THE ARBITRATION CLAUSE

1. Clause 20 (like the corresponding provisions of FIDIC's earlier books) provides for a multi-step procedure for the resolution of disputes

Under the FIDIC contracts for major works, the traditional "two-tier" procedure for the resolution of disputes contained in the FIDIC Red Book, fourth edition (1987) has been maintained, except that the role of the

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[1] FIDIC means in English the International Federation of Consulting Engineers, whose address is World Trade Center II, Geneva Airport, 29 Route de Pré-Bois, Cointrin, CH-1215 Geneva 15, Switzerland. Its e-mail address is *fidic@fidic.org* and its website is www.fidic.org.

[2] FIDIC's contracts for major works are: the Conditions of Contract for Construction or "Red Book", the Conditions of Contract for Plant and Design-Build or "Yellow Book" and the Conditions of Contract for EPC/Turnkey Projects or "Silver Book".

[3] However, sub-clause 20.1 ("Contractor's Claims") will not be reviewed in this paper as it has already been examined in another paper by the author, "Contractor's Claims under the FIDIC Contracts for Major Works", which is due to be published in the *Construction Law Journal*, London, shortly.

engineer as a decider of disputes has been replaced by a Dispute Adjudication Board ("Board" or "DAB"). Under the current contracts for major works, the procedure for settlement of disputes by the Board may be broken down into six steps, as follows:

Step 1

For the Board procedure to apply, there must be a "dispute" between the contractor and the employer—not just a claim under the contract, but a claim that has been rejected by the engineer and which the contractor—as he is usually the claiming party—wishes to pursue.[4]

A typical example would be a case where the contractor claims that the employer delayed in giving access to the site and requests the reimbursement of its additional costs, profit and an extension of time. If the engineer rejected this claim, saying that the contractor had sought possession of the site earlier than he was entitled to under the contract, and if the contractor disagreed, there would then be a dispute that could be referred to the Board under clause 20.

Step 2

Once there is a dispute, one party—usually the claiming party will be the contractor—refers such dispute to the Board in writing for its decision under clause 20.[5]

Step 3

The Board, acting as a panel of expert(s) and not as arbitrator(s), must ordinarily give notice of its decision to the parties within 84 days.

Step 4

If either party is dissatisfied with the Board's decision (or it fails to give a decision within 84 days) then either may, within 28 days, notify the other of its dissatisfaction; otherwise, *the decision becomes "final and binding".*

[4] See ICC Case No 6535 [1992] in the author's "International Construction Disputes: Commentary on ICC Awards Dealing with the FIDIC International Conditions of Contract" [1999] ICLR 343 (hereafter: "International Construction Disputes: Commentary"), which deals with this issue in the analogous case (under former editions of the FIDIC conditions) of where a party had to request a decision from the engineer under clause 67 (of the former editions) before beginning arbitration. For a relatively recent English case discussing the requirement for a "dispute" (to found the jurisdiction of an adjudicator under the English Housing Grants, Construction and Regeneration Act 1996), see *Fastrack Contractors* v. *Morrison* [2003] BLR 168, especially pp. 176–178.

[5] See ICC Case No 6238 [1989] in the author's "International Construction Disputes: Commentary" [1999] ICLR 343.

Step 5

Where a party has been given a notice of dissatisfaction, both parties have 56 days thereafter to attempt amicable settlement.

Step 6

Any dispute, which has neither become final and binding, nor been amicably settled, under the previous steps, is to be finally settled by international arbitration.[6]

2. Clause 20 may result in the forfeiture of legal rights

If no notice of dissatisfaction is given within 28 days of receipt of the decision, the decision is "final and binding" (see Step 4 in subsection 1, above). There is, in principle, no legal recourse against the decision whether by arbitration or otherwise. The rights of the claimant demanding the decision would be cut off completely.[7] This is the *negative* side.

The *positive* side of this forfeitary aspect is, of course, that it may cut down on or reduce the number of disputes that need to go to arbitration.

3. The scope of the arbitration clause is narrow

The scope of the arbitration clause is a narrow one as no dispute under the contracts may ordinarily go to arbitration unless it has run the gauntlet, so to speak, of clause 20 (that is, has passed through the six steps described in subsection 1, above). When a dispute is referred to the Board under the clause, the Board gives a decision *on that dispute* and, thereafter, if a party is dissatisfied with that decision, it gives a notice of dissatisfaction as to *that same dispute*. Whatever other disputes there may be between parties, none may be arbitrated unless it has gone through the Board procedure in clause 20. This can clearly be seen from the wording of the first sentence of the arbitration clause (in sub-clause 20.6):

> "Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration."

It follows from this sentence that *the only matter that may be submitted to arbitration* is a "dispute" which:

[6] For further details about these steps, see the author's "The New FIDIC Provision for a Dispute Adjudication Board" [1997] ICLR 443. But note that this article is a commentary on the DAB procedure as it appeared in a FIDIC Supplement to the old Red Book, published in 1996, which is slightly different from the DAB procedure in the new books, published in 1999.

[7] However, in England and in jurisdictions whose law is derived from and very similar to that of England, where it is common for construction and other types of contract to contain a time limit for commencing arbitration proceedings (as in the FIDIC contracts), there are statutes that permit the time limit to be extended in exceptional circumstances by a court or arbitral tribunal. See, e.g., s.12 of the English Arbitration Act 1996 (the successor to s.27 of the English Arbitration Act 1950) and s.2GD of the Hong Kong Arbitration Ordinance (Cap. 341).

(1) has been referred to the DAB for decision under clause 20, and
(2) has not become the subject of a final and binding decision of the DAB because, typically, a party has given a notice of dissatisfaction with the decision of the DAB on that dispute within 28 days (Step 4 in subsection 1, above).

Accordingly, if the arbitrators embark on any other matters, without the parties' consent, they will be exceeding their jurisdiction and, hence, their award may be set aside or refused recognition and enforcement by a competent court.[8]

This point is important because, on a large project, there may be dozens of disputes. In this case, each dispute must have passed through the six-step procedure described in subsection 1, above, to be admissible to arbitration. The fact, for example, that the parties are already in arbitration with respect to certain disputes will not relieve the claimant (or respondent) from having to refer through this six-step procedure any other dispute.

Once an ICC arbitration, as provided for in the contracts, is underway and the terms of reference in the arbitration have been signed,[9] it is not unusual for the claimant (usually the contractor) to discover other claims that it would like to advance in the arbitration. Nevertheless, it cannot do so unless these claims have passed, as disputes, through the Board procedure in clause 20 except with the other party's consent and, once the terms of reference have been signed, the arbitrators' authorisation.[10]

What about counterclaims? Where, for example, the contractor has complied with the procedure in clause 20 and commenced an arbitration with respect to certain disputes, must the employer, if it wants to introduce counterclaims in the same arbitration, follow this same procedure with respect to its counterclaims?

In the author's view, the employer must follow this procedure unless the employer can demonstrate that the counterclaim was effectively included in a dispute which had already been referred to the DAB for decision under clause 20 and which is already in arbitration.

A purpose of the pre-arbitral DAB procedure is for both parties and, subsequently, any arbitral tribunal that may be constituted, to have the benefit of a decision of the DAB on any dispute. A decision of the DAB may increase the chance of a settlement and avoid the need to arbitrate the dispute. That purpose is subverted if a party is relieved from complying with clause 20 in respect of a dispute merely because the other party has done so with respect to another dispute.

The test of whether, for example, a counterclaim raised by the employer must be submitted to the DAB for decision should be whether the contractor

[8] This court may be a court in the country where the arbitration is held or the court or courts of any country where recognition and enforcement of the award is sought.
[9] Pursuant to Art 18 of the ICC Rules of Arbitration (the "ICC Rules").
[10] See Art 19 of the ICC Rules.

had previously requested the DAB to decide a dispute *which necessarily would have resulted in a decision on that counterclaim.* If the contractor had made such a request, then the employer should be able to raise the counterclaim in the arbitration without having to make an independent referral of the matter to the DAB under clause 20. On the other hand, if the contractor had not done so, and the issue raised by the counterclaim had not been encompassed in an earlier dispute, then the employer should submit that issue to the DAB for decision before submitting it as a counterclaim in the arbitration.[11]

An example of a dispute that the contractor might refer to a DAB which includes another dispute might be where the contractor claims that it has been wrongfully denied an extension of time by the engineer. Such a dispute might be considered to include the employer's claim (or potential claim) for liquidated damages (called "delay damages" in the FIDIC contracts) for the same time period. Therefore, the employer should not have to (although it may) submit such claim, as a dispute, to the DAB in order to be able to assert it as a counterclaim in the arbitration.

Consequently, when the contractor starts submitting disputes to the DAB for decision, the employer should be submitting disputes (that is, unresolved claims) which the employer may then have to the DAB at the same time. Unless the employer submits its unresolved claims to the DAB at about the same time as the contractor does so, the employer may find that it is unable (notably, because of the requirement under the ICC Rules that counterclaims be filed with the Answer (to a Request for Arbitration)[12] and the requirement that, at the beginning of a case, the arbitral tribunal draw up terms of reference (defining the scope of the arbitration[13])) to include its unresolved claims in any arbitration begun by the contractor. If the employer is unable to do so, the employer would then need to begin a new arbitration, with the additional expense and time this would entail. The employer could no longer then be assured that any amounts awarded to it on its claims could be offset against any amounts awarded to the contractor on its claims (in the first arbitration).

It can take 168 days from the time of referral of a dispute to the DAB under clause 20 before a party can begin arbitration (84 days for the DAB to make a decision, plus 28 days for the giving of a notice of dissatisfaction plus 56 days for amicable settlement). Therefore, a well advised employer should plan to be ready to refer its claims to arbitration under clause 20 at about the same

[11] The Arbitration Rules of the International Centre for the Settlement of Investment Disputes ("ICSID") unlike the ICC Rules, see Arts 5(5) and 19, contain a provision which is somewhat similar in effect (although, of course, they envision no prior DAB decision) to this test. Art 46 of the ICSID Rules provides as follows:

> "Except as the parties otherwise agree, *the Tribunal shall,* if requested by a party, *determine any incidental or additional claim arising directly out of the subject matter of the dispute* ..." [Emphasis added.]

[12] ICC Rules, Art 5(5).

[13] *Ibid.* Arts 18 and 19.

time that the contractor is ready. To ensure that it will be in this position, the employer must be proactive as to any claims it may have against the contractor so that, when the contractor begins to refer disputes to the DAB under clause 20, the employer will be ready to refer its claims as disputes to the DAB at about the same time.

4. On the other hand, the arbitration clause is fully self-sufficient

In a standard form of contract like the FIDIC contracts, one possibility would have been to leave the arbitration clause blank for such matters as:

(1) the rules of arbitration to be applied,
(2) the number of arbitrators, and
(3) the place of arbitration.

The parties would then be entirely free to complete and adapt the clause to the specific needs and requirements of each project.

However, the reality is that international construction contracts are often the result of international competitive bidding. In that context, the form of the contract will typically have been prepared, on behalf of the employer, by an independent consulting engineer, with little or no involvement of lawyers (or, at least, lawyers familiar with arbitration). Accordingly, as arbitration clauses can be difficult for a non-specialist lawyer to draft, it was felt best to provide in the contracts themselves for *a completely self-sufficient* arbitration clause, providing for *international* arbitration in keeping with the *international* character of the FIDIC contracts. Thus, sub-clause 20.6 provides that:

(1) any dispute shall be settled *under the ICC Rules of Arbitration* (the "ICC Rules"), the arbitration rules which have been provided for in the Red Book consistently since its first edition,[14] and
(2) by *three* arbitrators (instead of one), as any arbitration under the FIDIC contracts for major works is likely to be of a size that will justify the need for three arbitrators.

There was no need to make any mention of the place for arbitration (which would depend, in any event, on the circumstances of each contract) as, where the parties do not specify this in their arbitration clause, the ICC's

[14] The ICC Rules of Arbitration have been drafted to deal with commercial disputes generally, and not just construction disputes. However, the ICC Commission on International Arbitration has published a study entitled *Final Report on Construction Industry Arbitrations* (prepared by a working group under the joint leadership of Dr Nael G Bunni and Judge Humphrey LLoyd, QC) which contains useful practical guidance to parties and arbitrators engaged in a construction arbitration. This report is published at [2001] ICLR 644.

Many construction contracts based on the FIDIC conditions are with states or their constituent subdivisions or agencies. In this connection, there is authority to the effect that a state, by agreeing to submit to arbitration under the ICC Rules, waives not just immunity from jurisdiction (which a sovereign normally enjoys in law) but also, implicitly, immunity from execution against its commercial assets. This position was taken by the French Court of Cassation (Supreme Court) in *Creighton* v. *Qatar*, on 6 July 2000, Rev Arb 2001, p. 114. See also the subsequent decision of 12 December 2001 of the Paris Court of Appeal in the same case, Rev Arb 2003, p. 417.

International Court of Arbitration can be relied upon to select a suitable place for arbitration, which is neutral as between the parties.[15]

In any event, if the parties wish to depart from the arbitration solutions proposed by FIDIC, they are free to do so.[16] But, if they do not, the parties have a perfectly workable arbitration clause. No additions are necessary.

5. Other specific provisions of the arbitration clause

(a) "The arbitrators have full power to open up, review and revise any certificate, determination of the Engineer, and any decision of the DAB, relevant to the dispute"

It follows from this language that the arbitrators are not bound in any way by any action or decision of the engineer (in the case of the new Red and Yellow Books, which are administered by an engineer) or the DAB. The arbitrators have complete liberty to decide each dispute submitted to them as they think fit, *de novo*, that is, regardless of whatever the engineer or the DAB may have decided.

(b) "Nothing shall disqualify the Engineer from being called as a witness [in the arbitration]"

The FIDIC Red Book has always provided that the engineer may be called as a witness and give evidence before the arbitrators in any arbitration. Before the 1999 edition of the FIDIC Red Book (when the DAB replaced the engineer as a decider of disputes between the parties), in the case of any arbitration brought by the contractor, the engineer's decisions under clause 67 (the disputes clause in prior editions) of the FIDIC Red Book were often the employer's first line of defence to the contractor's claims.

Clause 20 does not state expressly that the members of the DAB may be called as witnesses in the arbitration. This is because the primary role of the members of the DAB is to decide disputes which are submitted to them and, unlike the engineer, they would not normally have first-hand knowledge of the execution of the works. For this reason, there is no provision that members of the DAB may be called as witnesses in the arbitration.[17] But, of course, the FIDIC contracts are only standard forms and the parties are free to provide otherwise if they wish.

(c) "Neither party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB . . ."

The earlier editions of the Red Book, which had provided that disputes be decided by the engineer (pursuant to clause 67), had expressly provided that

[15] See Art 14.1 of the ICC Rules.

[16] In this connection, see the discussion of clause 20 in the *Guidance for the Preparation of Particular Conditions* at the back of each FIDIC contract for major works.

[17] As mentioned in point (d), below, the decision of the DAB is admissible in arbitration.

neither party was limited in any arbitration to the evidence or arguments put before the engineer. Accordingly, the current provision is to the same effect now that a DAB is in place. The principle is that in arbitration either party is entirely free to present new arguments or evidence in relation to disputes (which, as mentioned in subsection 1, above, have passed through the six-step procedure) and is in no way limited by what it may have said previously. In arbitration, the parties will normally be represented by lawyers, which may not have been the case when submissions were made to the DAB. Accordingly, legal arguments or evidence which had not been presented to the DAB may be presented for the first time at the arbitration stage.

At the same time, the jurisdiction of the arbitrators is limited (as discussed in section II.3, above) to the disputes which have been previously referred to the Board and otherwise passed through the six-step procedure described in subsection 1, above.

Moreover, under the ICC Rules, after the terms of reference in a case are signed, new claims or disputes may not be introduced into the arbitration except with the authorisation of the tribunal.[18]

(d) "Any decision of the DAB shall be admissible in evidence in the arbitration"

It is normally sensible that any decision of a DAB be admissible in arbitration. As a DAB will consist of construction professionals or lawyers who are independent of the parties and who have been chosen with their consent, its decisions are likely to be more fair than those of the engineer, e.g. under clause 67 of the old FIDIC Red Book (which were also admissible in arbitration). As the decisions of the DAB are likely to be fairer, they are more likely to be of assistance to an arbitral tribunal than the decisions of the engineer used to be.

(e) "Arbitration may be commenced prior to or after the completion of the works"

As some will recall, under the first and second editions of the FIDIC Red Book, the contractor was not entitled to commence arbitration until after the completion or alleged completion of the works except in certain very limited instances. This restriction was removed with the third edition of the Red Book in 1977 and since then either party is entirely free to commence arbitration at any time provided, of course, the conditions precedent to arbitration have been satisfied.[19]

Now that under the 1999 edition of the FIDIC Books disputes are to be settled by a neutral decision-maker, the DAB, instead of by an engineer hired and paid by the employer, some may argue that there is again a case for

[18] Art 19 of the ICC Rules.
[19] See subsection 1, above.

limiting the ability of the contractor to begin arbitration before completion of the works. However, FIDIC concluded that each party should remain free to begin arbitration at any time and this is the solution provided for in clause 20.

At the same time, sub-clause 20.6 provides (as is usual in arbitration clauses in construction contracts) that the obligations of the parties, the engineer and the DAB "shall not be altered by reason of any arbitration being conducted during the progress of the works". Accordingly, the parties remain bound to perform their obligations fully, regardless of whether an arbitration has begun or not. The contractor may not suspend or slow down work on the ground that he has brought an arbitration, and the employer may not withhold payment from the contractor on this ground either.

As a practical matter, it may be very difficult for a contractor simultaneously both to build the works and engage in arbitration. Each activity can demand a great deal of attention from his management and staff. For this reason, among others, contractors tend in practice to wait, when they can, until after completion of the works before beginning an arbitration.

6. A party may obtain an arbitration award in respect of a final and binding decision of a DAB without having to comply with the preconditions to arbitration in clause 20

Under clause 67 of the old Red Book, if a party had obtained a final and binding decision of the engineer (that is, a decision which had not been the subject of a notice of dissatisfaction within the relevant time period) and if that decision was not honoured by the other party, it was unclear what a party could do with such a decision, as it normally could not (like an arbitration award) be enforced, as such, before national courts.[20] On the other hand, if a party wished to obtain an arbitration award in respect of that decision, it made little sense for it to have to refer the same matter back again to the engineer (just as, under the new contracts, it would make little sense to have to refer the matter back to the DAB).

Accordingly, in the 1999 edition of the FIDIC Books, FIDIC decided to specify that where a party wished to obtain an award in respect of a final and binding decision of the DAB, it could take the matter directly to arbitration to obtain the award without having to comply with the conditions to arbitration a second time (by obtaining a second decision from the DAB and complying with the procedure for amicable settlement) before taking the matter to arbitration. This subject is dealt with in sub-clause 20.7.

[20] See ICC Case No 7910 [1996] in the author's "International Construction Disputes: Commentary" [1999] ICLR 345.

7. After expiry of the DAB's appointment, the parties can proceed directly to arbitration

In the past, a contractor had sometimes wanted to begin arbitration well after the contract had been completed, the defects liability period (or its equivalent) had expired and the employer's contract with the engineer terminated. Sometimes this was because all of the staff who had worked on the project had left the company. This was the situation in one case of which the author is aware where the contractor only decided to begin (and, in fact, only began) arbitration six years after the works under a contract based on the FIDIC conditions were completed. In such a case, under the old FIDIC Red Book, the question arose: did the contractor still have to submit disputes to the engineer, although he would almost certainly no longer be in office?

The situation was unclear as the arbitration clause in the old FIDIC Red Book was written on the basis that there had always to be a prior reference to the engineer even though in fact his work would normally cease at the end of the defects liability period (referred to as the "Defects Notification Period" in the 1999 edition of the books). The new sub-clause 20.8 has corrected this problem as it provides that, where there is no DAB in place, a party may take the matter to arbitration directly.[21]

8. Whether, where the FIDIC conditions are incorporated into a subcontract, the parties to the subcontract are bound by the pre-arbitral and arbitration provisions of clause 20

It is not unusual for a subcontract to provide that provisions of the corresponding main contract are incorporated by reference in some manner into the subcontract. However, such incorporation by reference is often not skilfully done, as it needs to be, with the result that, when a dispute arises under the subcontract, which has implications under the main contract, it is unclear to what extent the provisions of the main contract are in fact incorporated into the subcontract.

To the author's knowledge, there have been no reported arbitral awards on this issue under the 1999 edition of the FIDIC books. However, there were several arbitral awards which dealt with this issue under previous editions of the FIDIC conditions providing for the referral of disputes to the engineer as a condition to arbitration.

These decisions generally held that the arbitration provisions of the main

[21] While the author believes the language of sub-clause 20.8 is satisfactory in the new Red Book, he believes that under the Yellow and Silver Books, which provide for an *ad hoc* DAB (and not a permanent DAB, as under the new Red Book), the language is unsatisfactory as it could be interpreted as entitling a party to go directly to arbitration and bypass the DAB, which was certainly not the intention (see, e.g., sub-clause 20.2: "Disputes *shall be adjudicated by a DAB* in accordance with sub-clause 20.4" (emphasis added)). Accordingly, to eliminate any uncertainty in this regard, he believes that this point should be clarified when new editions of the FIDIC Books are issued.

contract applied *except for the requirement for adjudication by the engineer* (as, among other things, the engineer was not appointed to act under the subcontract).[22] Consequently, a subcontractor could refer a dispute with the main contractor directly to arbitration without having to refer it first to the engineer for decision. There would seem to be no reason why arbitral tribunals should not rule the same way now that the engineer has been replaced by the DAB.

9. Whether clause 20 will be an immediate bar to state court litigation

Ordinarily, when an arbitration clause is contained in a contract between two parties, this will serve as a bar to litigation before state courts. Thus, by virtue of Article II(3) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), where a court of a contracting state[23] is seised of a matter that is governed by an arbitration clause then, at the request of one of the parties, the court must normally refer the parties to arbitration. However, in the FIDIC contracts, the arbitration clause is preceded by a DAB clause. The New York Convention does not expressly provide that a DAB clause or an arbitration clause preceded by a DAB clause is a bar to litigation. Accordingly, can an action in a state court be stayed when the court is referred to a clause like clause 20?

English law, at least, gives a positive answer to this question. Section 9 of the English Arbitration Act 1996 deals with the stay of court proceedings. Section 9(2) provides that:

> "An application [to stay court proceedings] may be made notwithstanding that the matter is to be referred to arbitration *only after the exhaustion of other dispute resolution procedures.*" [Emphasis added.]

Therefore, even though any arbitration proceeding will be preceded by a DAB proceeding, the courts in England will nevertheless normally, at the request of a party, have to stay litigation in the presence of a clause like clause 20.

However, because the DAB procedure is required to be observed before arbitration may be begun, clause 20 may not serve as a ground to stay (or dismiss) court proceedings in all countries which have ratified the New York Convention.

III. CONCLUSION

The arbitration clause in the FIDIC contracts for major works attempts to deal with a number of complex contractual and legal matters, sometimes in a

[22] ICC Case No 6230 [1990], ICC Ct of Arb Bull, Vol. 2, No 1, June 1991, p. 25, and ICC Case No 7423 [no year given] in the author's "International Construction Disputes: Commentary" [1999] ICLR 347. For summaries of US cases on the same topic (although not under a FIDIC contract), see (2004) 26 *Construction Claims Monthly* (Business Publishers Inc, Silver Spring, Maryland), August, Nos 8, 1 and 7.

[23] The New York Convention has been ratified by more than 130 contracting states.

very harsh way, e.g. by cutting off a party's rights. It has never been an easy clause to understand or to observe. Nevertheless, the author hopes he has been able in this article to clarify for the reader some of the issues raised by it.