

BULLETIN

EXTRACT



International Chamber of Commerce
The world business organization

**ICC International Court of Arbitration
Bulletin**

ISSN 1017-284X

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Publisher: ICC SERVICES (wholly-owned
affiliate of the International Chamber of
Commerce), 38, Cours Albert 1er, 75008
Paris, France

Information www.iccbooks.com

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The ICC International Court of Arbitration
Bulletin is intended for all those interested
in international commercial arbitration and
other methods of dispute resolution.
Founded in 1990, it is produced under the
auspices of the International Court of
Arbitration and appears biannually
together with an annual supplement.

The Bulletin contains extracts from awards
rendered in ICC cases, as well as reports
and notes essential to ICC arbitration
practitioners. It also carries articles on
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developments in arbitration law across the
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International Construction Contract Disputes: Third Commentary on ICC Awards Dealing Primarily with FIDIC Contracts

By Christopher R. Seppälä*

This commentary on eight ICC arbitral awards rendered between 2003 and 2006 examines issues that have arisen in disputes relating to international construction contracts based on the FIDIC Conditions of Contract for Works of Civil Engineering Construction (4th ed., 1987) or the FIDIC Conditions of Subcontract for Works of Civil Engineering Construction (1st ed., 1994). It also comments on an award that resolved a dispute related to a non-FIDIC engineering, procurement and commissioning contract. In relation to each award, the author presents the issues facing the arbitral tribunal, the tribunal's decisions on those issues and comments on their significance. The specific questions covered include the following: jurisdictional issues; currency of payment; right to pre-judgment interest; price adjustments; variation orders; termination of contract and subcontract; compliance with notice provisions; extension of time and additional costs; disruption and acceleration claims; late possession of the site; claims for additional costs on account of civil war; claims for non-reimbursement of taxes; claims for future damages; recovery of in-house staff costs as costs of the arbitration; and capping of damages.

Ce commentaire de huit sentences arbitrales de la CCI rendues entre 2003 et 2006 porte sur des questions soulevées lors de litiges nés de contrats de construction internationaux fondés sur les Conditions de contrat applicables aux marchés de travaux de génie civil de la FIDIC (4^e éd., 1987) ou les Conditions de contrat de sous-traitance applicables aux marchés de travaux de génie civil de la FIDIC (1^{re} éd., 1994). On trouvera également dans le lot une sentence tranchant un différend relatif à un contrat d'ingénierie, d'approvisionnement et de mise en service, sans lien avec les conditions de la FIDIC. Pour chaque sentence, l'auteur présente les questions soumises au tribunal arbitral et les décisions de ce dernier,

avec des commentaires sur leur signification. Parmi les sujets abordés figurent la question de la compétence, la devise de paiement, le droit à des intérêts avant jugement, les ajustements de prix, les ordres de modification, la résiliation du contrat principal et du contrat de sous-traitance, le respect des dispositions en matière de notification, la prolongation des délais et les frais supplémentaires, les perturbations et l'accélération des travaux, la prise de possession tardive du chantier, les frais supplémentaires engendrés par une guerre civile, le non remboursement d'impôts, les dommages-intérêts pour préjudice futur, le recouvrement des frais de personnel interne au titre des frais de l'arbitrage et le plafonnement des dommages-intérêts.

En esta exposición de ocho laudos arbitrales de la CCI dictados entre 2003 y 2006 se examinan diversos asuntos surgidos en las controversias relacionadas con contratos de construcción internacionales basados en las condiciones contractuales para trabajos de construcción de ingeniería civil de la FIDIC (4^a ed., 1987) o en las condiciones para subcontratar trabajos de construcción de ingeniería civil de la FIDIC (1^a ed., 1994). También se hace referencia a un laudo que solucionó una controversia relativa a un contrato de ingeniería, suministro y puesta en servicio que no incluía las condiciones de la FIDIC. Para cada laudo, el autor presenta los problemas a los que se ve confrontado el tribunal arbitral y las decisiones del tribunal sobre tales problemas y formula observaciones sobre su significado. Se abordaron cuestiones específicas como los aspectos jurisdiccionales, la moneda de los pagos, el derecho a interés anterior a la resolución de la controversia, los ajustes de precios, las órdenes de modificación, la rescisión de contratos y subcontratos, el cumplimiento de las disposiciones sobre la notificación, las prórrogas y los costes adicionales, las reclamaciones por perturbación

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y aceleración de los trabajos, la posesión tardía del emplazamiento, la reclamación de costes adicionales por causa de guerra civil, las reclamaciones por el no reembolso de impuestos, las reclamaciones por daños y perjuicios futuros, la recuperación de los gastos en concepto del personal de plantilla como costas del arbitraje y la limitación de daños y perjuicios.

I. Introduction

This article is a brief commentary on extracts from eight ICC awards dealing with disputes that have arisen in relation primarily to the FIDIC¹ Conditions of Contract for Works of Civil Engineering Construction, fourth edition, 1987 (the 'Red Book, Fourth Edition') and the FIDIC Conditions of Subcontract for Works of Civil Engineering Construction, first edition, 1994 (the 'Red Book Subcontract, 1994'), published in this issue of the Bulletin.²

The various FIDIC Conditions of Contract are the best known and probably most widely used international standard forms of construction contract conditions. The first edition of the Red Book, published in 1957, was based on an English domestic standard form: the then current edition of the English Institution of Civil Engineers ('ICE') conditions. Even today, the official and authentic text of this form of contract is the version written in the English language. However, in subsequent editions, the FIDIC Conditions have become progressively more 'international' in style and content and are widely used in civil law, as well as common law, jurisdictions.

Due to the long time lag (10 to 20 years or more) between when a new edition of the FIDIC Conditions is introduced and when it comes into general use internationally and is, then, the subject of disputes that go to arbitration, as well as ICC practice with regard to the publication of awards, there are as yet no extracts of awards dealing with the latest suite of FIDIC construction contracts for major works which were published in 1999, namely, the 'Red' (for civil engineering construction), 'Yellow' (for plant and designbuild works) and 'Silver' (for EPC/turnkey construction works) Books (the '1999 FIDIC Books').

At the same time, the precedential value of awards dealing with older editions of the FIDIC Conditions should not be underestimated. First, because the older editions continue to be in use in certain parts of the world (notably, the Arabian Gulf) and, consequently, are likely to be the subject of disputes and arbitrations for years to come. Second, because, while the prearbitral procedure for the resolution of disputes by the Engineer under Clause 67 of those editions was replaced in 1999 by the requirement that disputes be submitted to a Dispute Adjudication Board ('DAB'), the disputes clause in the 1999 FIDIC Books (Clause 20) is similar to that in the older editions (Clause 67) and thus awards relating to the resolution of disputes by the Engineer may well remain relevant to the procedure for the resolution of disputes by the DAB. A good example was the interim award in Case 10619 in 2001 discussed in Volume 19, No. 2 of this Bulletin in 2008, page 52. In that case, the arbitrators' decision in their award to enforce a 'binding'—but not 'final'—decision of the Engineer under Clause 67 of the Red Book, Fourth Edition, is directly applicable to the enforcement of a 'binding'—but not 'final'—decision of a DAB under Clause 20 of the 1999 FIDIC Books. Thus, awards dealing with the earlier editions of the FIDIC Conditions may continue to be instructive in relation to the 1999 FIDIC Books.

A first series of extracts from ICC awards dealing with construction contracts referring to the FIDIC Conditions was published in Volume 2, No. 1, of this Bulletin in 1991; a second series was published in Volume 9, Nos. 1 and 2, of this Bulletin in 1998, accompanied by a commentary by the present author in Volume 9, No. 2; and a third series was published in Volume 19, No. 2 of this Bulletin in 2008, accompanied by a second commentary by the present author in the same volume. Extracts from ICC awards dealing with the FIDIC Conditions have also been published elsewhere.³ However, until the last series of awards dealing with the FIDIC Conditions was published in this Bulletin in 2008, this author had found no more than 40 published arbitral awards interpreting them,⁴ which is a cause for regret—it would be helpful to the industry if more were published.

The awards relating to the various FIDIC Conditions in this commentary will be discussed, first, by reference to the Red Book, Fourth Edition, and, then, by reference to the Red Book Subcontract, 1994. This discussion will be followed by a brief comment on an award under a non-FIDIC engineering, procurement and construction contract.

¹ 'FIDIC' refers to the *Fédération Internationale des Ingénieurs-Conseils* or (in English) the International Federation of Consulting Engineers, whose Secretariat is in Geneva, Switzerland, see FIDIC's website: www.fidic.org.

² The author gratefully acknowledges the assistance of Luka Kristovic Blazevic, a senior associate at White & Case LLP, Paris, in the preparation of this article.

³ e.g. (i) *Collection of ICC Arbitral Awards, 1974–85* (Vol. I), 1986–90 (Vol. II), 1991–95 (Vol. III), 1996–2000 (Vol. IV) and 2001–2007 (Vol. V), prepared by various editors and published by ICC/Kluwer; (ii) *The International Construction Law Review* ('ICLR'), Vols. 1 to 3 (1983–86) and Vol. 6 (1989), published by Lloyds of London Press; and (iii) the *Yearbook Commercial Arbitration*, published by Kluwer.

⁴ See C.R. Seppälä, 'The Development Of A Case Law In Construction Disputes Relating To FIDIC Contracts' in E. Gaillard & Y. Banifatemi, eds., *Precedent in International Arbitration* (Huntington, NY: Juris, 2008). A somewhat revised version of this article was subsequently published in C.R. Seppälä, 'The Development of a Case Law in Construction Disputes Relating to FIDIC Contracts' (2009) 26 ICLR 105.

II. FIDIC Conditions of Contract for Works of Civil Engineering Construction (Red Book) Fourth Edition (1987)

A.1 First Partial Award in Case 12048 (2003)

◆ Relevant FIDIC Clause: 67

The Contractor/Claimant, a European road construction company, entered into a contract with the Employer/Respondent, a State agency in State C, for the provision of an asphaltic concrete overlay of a road in State C. The governing law was the law of an African country (State C) with an English common law legal system and the place of arbitration was in State C.

The Contractor/Claimant commenced an arbitration in order to recover the amounts awarded by the Engineer under Clause 67, which had not been objected to by the Employer/Respondent and were thus 'final and binding', as well as to claim further sums that the Engineer had denied.⁵

The Employer/Respondent applied to a local court in State C to revoke the authority of the Arbitral Tribunal on the basis of the local arbitration statute empowering a court to revoke the authority of an arbitrator where the question of fraud arises (the Employer/Respondent had alleged that the Contractor/Claimant was guilty of fraud).⁶ The local court granted this application and 'revoked the authority of the Arbitral Tribunal in its entirety'.⁷

The Contractor/Claimant argued that the Tribunal continued to have jurisdiction over, at least, its claims and that the arbitration should continue. The Contractor/Claimant also appealed the court's judgment to a higher court of State C and the appeal was still pending at the time of this award.⁸

In a first interim award, the Tribunal considered principally whether it had retained jurisdiction over the dispute, given, among other things, the local court decision.⁹

In this connection, the Tribunal considered four issues, as follows:

- whether the Tribunal retained authority to consider its own jurisdiction (Issue 1 below);

- whether the Tribunal should adhere to the court decision (Issue 2 below);
- whether the Employer/Respondent's allegations of fraud prevented the Tribunal from hearing the case (Issue 3 below); and
- whether the Tribunal could hear counterclaims made by the Employer/Respondent that had not previously been submitted to the Engineer under Clause 67 (Issue 4 below).

Issue 1: Has the Tribunal retained authority to consider its own jurisdiction?

The Tribunal first considered whether it had retained authority to consider its own jurisdiction and decided that, despite the local court's decision, not only did it retain authority to do so but that it had the duty under the ICC Rules of Arbitration (of 1998) to consider and decide the matter of its jurisdiction.¹⁰

The Tribunal noted, among other things, that it had been appointed not by sovereign authority but by the ICC International Court of Arbitration in accordance with the ICC Rules and, thus, derived its authority from those Rules. In accepting his appointment, each of the arbitrators had agreed, by Article 7(5), to perform his duties under and in accordance with the ICC Rules, which include, under Article 6(2), the duty to decide upon the Tribunal's jurisdiction if this were contested by one of the parties (as was the case here). The Tribunal also noted that Article 6(2) did not recognize the authority of a State court to prevent or otherwise release the arbitrators from deciding upon the matter of their own jurisdiction. Thus, the Tribunal concluded that it was 'duty-bound' to rule on its jurisdiction.¹¹

Issue 2: Should the Tribunal adhere to the court decision?

The Tribunal then examined, among other things, whether it should adhere to or was bound by the court judgment in State C revoking its jurisdiction. The Tribunal held that the starting point for considering the issue of its jurisdiction as an 'independent and autonomous international arbitral tribunal' was the agreement of the parties in its entirety, i.e. comprising both the arbitration clause and the agreement on the governing law.¹²

After holding that the parties' arbitration agreement was governed by the law of State C, which included its Arbitration Act,¹³ upon which the local court had relied in purporting to revoke

5 §§ 8–11 of the Award.
6 § 36 of the Award.
7 § 38 of the Award.
8 §§ 38–40 of the Award.
9 §§ 41–42 of the Award.
10 § 43 of the Award.
11 §§ 44–48 of the Award.
12 §§125–127 of the Award.
13 A section of the State C Arbitration Act stated that where an agreement between parties provides that disputes between them shall be referred to arbitration, and a dispute which arises involves the issue of whether a party has been guilty of fraud, the relevant court would have the power to order that the arbitration agreement would cease to have effect and to revoke the authority of any arbitrator by virtue of the arbitration agreement.

this Arbitral Tribunal's authority and the parties' underlying agreement to arbitrate,¹⁴ the Tribunal considered how such law was to be applied, and whether the Tribunal was bound to apply the judgment of a local court applying that law:

in agreeing that the [arbitration statute] should govern the present arbitration proceedings, a majority of the Arbitral Tribunal considers that the Claimant did not give the Respondent license to invoke the provisions of that [statute] arbitrarily for the purpose of subverting the parties' arbitration agreement. Indeed, as a State entity, the Respondent arguably has a special duty not to abuse its position by improperly using the judicial apparatus of the State to avoid arbitrating claims that it freely agreed to arbitrate as part of the bargain that it struck when entering into the Contract.¹⁵

Nor, in the view of the majority of the Tribunal's members, does it follow from the Arbitral Tribunal's finding that the [arbitration statute] applies to the parties' arbitration agreement that this Arbitral Tribunal, which is a creature of that arbitration agreement rather than the emanation of any State authority, is automatically bound to recognize and apply decisions of local judicial authorities that are manifestly unfounded, arbitrary or otherwise contrary to internationally accepted standards of judicial propriety.¹⁶ Were this Arbitral Tribunal to do so, it could well breach the duty that it also has in this case, as discussed further below, to ensure that the parties' arbitration agreement is not improperly subverted and, thus, consecrate a 'denial of justice' as that principle is understood in international law.^{17,18}

A majority of the Tribunal considered that, given the existence of a contract with a State party, as was the case here, it could rely on international arbitral jurisprudence and imperatives of international law to bring the contract within the sphere of protection of international law, as such norms were incorporated into the laws of State C.¹⁹

Thus, by reference to international legal principles, the Tribunal found that the Respondent, as an agency of State C, could not abuse the local law governing the parties' agreement nor the judicial apparatus of the State to subvert the parties' arbitration agreement and to avoid arbitrating disputes it had agreed to arbitrate. The Tribunal further found that therefore, being a creature of that arbitration agreement, it was not automatically bound by the decisions of the local courts.

The Tribunal then examined what international convention, enacted into State C's law, was relevant to the ruling of the local court and found this to be the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) (the 'New York Convention'). The Tribunal then examined Article II of the New York Convention which provides that each Contracting State shall recognize an agreement to arbitrate and that State courts seized of a dispute which the parties had agreed to arbitrate shall refer the parties to arbitration unless the arbitration agreement is null and void. A majority then found that:

in exercising their responsibilities under Article II of the New York Convention, the [State C] courts should be expected to do so in a manner that comports with the applicable rules of customary international law. . . . Indeed, customary international law imposes on States an obligation 'to maintain and make available to aliens a fair and effective system of justice'.²⁰ As a former President of the International Court of Justice has noted:

. . . a State denies justice when its courts are closed to foreign nationals or render judgments against foreign nationals that are *arbitrary*. In modern international law, a State denies justice no less when it refuses or fails to arbitrate with a foreign national when it is legally bound to do so, or when it, whether by executive, legislative or judicial action, frustrates or endeavors to frustrate international arbitral processes in which it is bound to participate.²¹ (Emphasis added)

An international arbitral tribunal, such as the present one, may itself, thus, consecrate a denial of justice by recognizing and giving effect to a State court decision purporting to revoke its authority where that decision does not comport with international standards.²²

A majority of the Tribunal then held that it would consecrate a denial of justice if they were to give effect to a local court decision purporting to revoke its authority contrary to international standards. At the same time, the Tribunal emphasized that this was an exceptional case and that decisions of local courts should only be disregarded when they are manifestly contrary to international standards, as the Tribunal found was true here.²³

¹⁴ § 128 of the Award.

¹⁵ Footnote to the Award: The duty of a State party not to use its own judiciary to subvert improperly a prior agreement to arbitrate has been the subject of recent arbitral jurisprudence. See, e.g., in particular, *Himpurna California Energy Limited (Bermuda) v. PT (Persero) Perusahaan Listrik Negara (Republic of Indonesia)*, (2000) 15 YCA 13, para.21: 'It is one thing for a party to seek to avail itself of such remedies it believes to be at its disposal once an award has been rendered. It is quite another for instrumentalities of a party [under international law] to be used to prevent the implementation of a pending procedure to which it has agreed.'

¹⁶ Footnote to the Award: See, e.g., Partasides, 'Solutions Offered by Transnational Rules in Case of Interference by the Courts of the Seat', OGEI, vol. 1, issue no. 4 (September 2003).

¹⁷ Footnote to the Award: See, e.g., Schwebel, *Three Salient Problems* (Grotius 1987), p.61 *et seq.* See also *The Loewen Group, Inc. and another v. United States of America*, <www.kluwerarbitration.com>, and the authorities cited therein at paras.130–133.

¹⁸ §§ 129–130 of the Award.

¹⁹ §§ 131–132 of the Award.

²⁰ Footnote to the Award: see Loewen, *supra*, note [17] at para. 129.

²¹ Footnote to the Award: See Schwebel, 'Injunction of Arbitral Proceedings and Truncation of the Tribunal', 18 *Mealy's International Arbitration Report*, No. 4 (April 2003), p. 33. Similarly, it was held in *Himpurna, supra.*, note [15], that '... a State is responsible for the actions of its courts, and one of the areas of state liability in this connection is precisely that of a denial of justice', para. 184.

²² §§ 134–135 of the Award.

²³ §§ 133–139 of the Award.

Issue 3: Do the allegations of fraud prevent the Tribunal from hearing the case?

The Employer/Respondent argued that, under the local arbitration statute, the Arbitral Tribunal was without jurisdiction to proceed as the Employer/Respondent had raised allegations of fraud.²⁴ A majority of the Tribunal rejected this argument finding that:

The Respondent has, to be sure, advanced counterclaims against the Claimant that, according to the Respondent, involve questions of 'fraud', but . . . the Arbitral Tribunal has no jurisdiction over any of those claims [as they had not satisfied the requirements of Clause 67²⁵]. Moreover, there has been no showing by the Respondent that, in considering the Claimant's claims, this Arbitral Tribunal will be required to decide any questions of 'fraud', whether of a criminal or civil nature.²⁶

A majority of the Tribunal held that the mere fact that fraud allegations had been made against one party did not prevent the operation of an arbitration agreement that the party has entered into. For the jurisdiction of an arbitral tribunal to be challenged on this basis under the local arbitration statute, the issue of fraud must, according to the majority of the Tribunal, be directly related to the dispute that is the subject of the arbitration and over which the Arbitral Tribunal has jurisdiction, which was not the case here. Hence, the local court's decision was found to be arbitrary.²⁷

Issue 4: Could the Tribunal hear counterclaims that had not previously been submitted to the Engineer under Clause 67?

The Tribunal then considered whether it had jurisdiction over counterclaims of the Employer/Respondent which had not previously been submitted to the Engineer under Clause 67 and concluded that it could not do so:

Although Clause 67 is a broad clause that expressly embraces all disputes 'of any kind whatsoever' arising between the Claimant and the Respondent 'in connection with' the Contract, it is equally explicit that, before such claims may be referred to arbitration, whether they arise 'during the execution of the works or after their completion and whether before or after repudiation or other termination of the Contract', they must 'in the first place, be referred in writing to the Engineer, with a copy to the other party'. Pursuant to the express terms of Clause 67, therefore, this Arbitral Tribunal has no jurisdiction to consider any claims that have not been so referred, and it has neither been shown or even argued that Clause 67 should not be applied in this case in accordance with its terms.²⁸

The Contractor/Claimant offered to permit the Tribunal to hear the Employer/Respondent's counterclaims if the Employer/Respondent submitted itself to the Tribunal's jurisdiction. However, the Employer/Respondent would not do so and, accordingly, the Arbitral Tribunal found that it had no jurisdiction over the Respondent's counterclaims.²⁹

Comment:

The Arbitral Tribunal's ruling in this respect is clearly correct. Under Clause 67 of the Red Book, Fourth Edition, an arbitral tribunal only has jurisdiction over 'disputes' (resulting from claims) that had previously been submitted to the Engineer for decision under that Clause. The same is true of Clause 20 of the 1999 FIDIC Books (which corresponds to Clause 67 of the Red Book, Fourth Edition) except that the DAB has now replaced the Engineer as the decision-maker.³⁰

A.2 Second Partial Award in Case 12048 (2004)

◆ Relevant FIDIC Clauses: 53.1, 60.2, 60.10, 67

In this second partial award, the Tribunal considered:

- (1) whether the Contractor/Claimant was entitled to the sums decided in a final and binding decision of the Engineer (Issue 1 below);
- (2) whether the Contractor/Claimant was entitled to payment of the claimed amount in its preferred currency, euros (Issue 2 below); and
- (3) whether the Contractor/Claimant was entitled to interest after the cut-off date for interest decided in the Engineer's decision (Issue 3 below).

Issue 1: Is the Employer/Respondent entitled to the sums decided in final and binding decisions of the Engineer?

◆ Relevant FIDIC Clauses: 60.2, 67

After the Tribunal found in the preceding partial award that it had jurisdiction over the Contractor/Claimant's claims (but not over the Employer/Respondent's counterclaims as they had not been referred under Clause 67), the Contractor/Claimant requested a partial award in respect of the Engineer's final and binding decision under Clause 67 (that is, one which the Employer/Respondent had not disputed within the time allowed under that Clause), on which the Tribunal had deferred deciding in its first partial award.

²⁴ § 56 of the Award.

²⁵ § 84 of the Award.

²⁶ § 140 of the Award.

²⁷ § 149 of the Award.

²⁸ § 83 of the Award.

²⁹ § 84 of the Award.

³⁰ See the present author's 'The Arbitration Clause in FIDIC Contracts for Major Works' [2005] ICLR 4 at 6-9.

This decision related principally to amounts in interim payment certificates of the Engineer which the Employer/Respondent had failed to pay. By the Engineer's decision under Clause 67, the Engineer had decided that the Contractor/Claimant was entitled to a total sum in German marks 'to be paid as denominated in the currencies certified by the Engineer'.³¹

The Employer/Respondent had resisted the Engineer's decision claiming a right to set off its own claims (which had not been referred under Clause 67) and that the Contractor/Claimant had failed to rectify defects in the contract works and had breached Sub-Clause 53.1 requiring claims to be notified within 28 days.³²

However, the Tribunal dismissed all of the arguments of the Employer/Respondent:

In this regard, it is evident, first of all, that, pursuant to the express terms of Clause 67.1 of the Contract's General Conditions, decisions of the Engineer that have not been disputed by either of the parties within the time stipulated in that provision become 'final and binding' upon the parties and are no longer capable of being opened up or set aside. It is undisputed that neither party has contested the Engineer's determination, in its letter . . . , that the Claimant is entitled to the payment of [amount], including interest as of [date], in respect of overdue certificates (in the currencies certified by the Engineer). It is also not disputed that neither party has contested the Engineer's decision in the same letter that the Claimant is entitled to design fees in respect of the 5-kilometer dual carriageway variation.

The Respondent, meanwhile, has failed to provide any legitimate reason why the Engineer's decision should not be found to be 'final and binding' by the Arbitral Tribunal in respect of the above matters and, accordingly, why the decision should not be ordered to be performed by the Respondent.³³

The Tribunal then rejected the Respondent's argument that it had a right of set-off under Sub-Clause 60.2 and other contractual defenses stating:

Once, as in this case, a decision of the Engineer has become final and binding under Clause 67, an Arbitral Tribunal no longer has any authority under the express terms of that provision to reconsider possible contractual defenses to the claims that were the subject of the decision.³⁴

The Arbitral Tribunal then ordered the Respondent to pay to the Claimant the amounts in the Engineer's final and binding decision.³⁵

Comment:

The Tribunal's decision to order the payment by an arbitral award of a final and binding decision of the Engineer is consistent with established precedent.³⁶

Issue 2: Is the Contractor/Claimant entitled to payment of the claimed amount in euros, its preferred currency?

As indicated above, in his decision the Engineer had found that the Contractor/Claimant was entitled to be paid the full amount of the overdue certificates, together with interest, 'as denominated in the currencies certified by the Engineer'. The certified amount was subdivided into amounts expressed in two currencies: the local State C currency and German marks. The Contractor/Claimant's claim in the arbitration was, however, expressed entirely in euros (which had replaced German marks) presumably because, being based in Europe and the works having been completed, the Contractor/Claimant no longer had any use for the currency of State C.³⁷

The Tribunal held that as the Engineer had decided that the Contractor/Claimant was only entitled to the payment of the German mark amount in euros, whereas the local currency amount had to be paid in local currency, the Tribunal was bound to adhere to this position in its award.³⁸

Comment:

After construction works have been completed, a contractor working in a foreign country may no longer be incurring costs in that country and, hence, may have no need for the local currency of that country. Moreover, if the foreign country is a developing one, its currency may be relatively weak and be subject to relatively rapid depreciation. Nevertheless, unless there is a provision in the arbitration clause or the applicable arbitration law to authorize the arbitral tribunal to order payment to be made in another currency (see, e.g., section 48(4) of the English Arbitration Act 1996), the arbitral tribunal will normally be bound to order payment in the currency or currencies of payment of the relevant contract which will often include a local currency component. For other cases where this same issue arose, see the ICC arbitration award discussed in the English House of Lords decision, *Lesotho Highlands Development Authority v. Impregilo*³⁹ (where the arbitral tribunal, sitting in London, relied on section 48(4) of the English Arbitration Act to make an award in the

³¹ § 10 of the Award.

³² § 26 of the Award.

³³ §§ 30–31 of the Award.

³⁴ § 33 of the Award.

³⁵ § 35 of the Award.

³⁶ See ICC Case 3790/3902/4050/4051/4054 (joined cases), also referred to simply as ICC Case 3790, (1986) XI *ICCA Yearbook Commercial Arbitration* 119, also summarized in A.H. El-Ahdab, *Arbitration with the Arab Countries* (Deventer: Kluwer, 1990) at 889–91.

³⁷ §§ 38–39 of the Award.

³⁸ § 42 of the Award.

³⁹ [2005] UKHL 43, [2006] 1 A.C. 221 and [2005] B.L.R. 351.

contractor's preferred currencies) and the interim award in ICC Case No. 10619 (where the arbitral tribunal, sitting in Paris, denied the contractor's request to make the award in the contractor's preferred currency).⁴⁰

Issue 3: Is the Contractor/Claimant entitled to interest after the cut-off date for interest decided in the Engineer's decision

◆ Relevant FIDIC Clause: 60.10

The Engineer's decision comprised interest until a specific date (approximately four months before the date of the decision) in respect of most of the Contractor/Claimant's claims that had been the subject of its final and binding decision under Clause 67. The Contractor/Claimant also claimed for interest accrued after the specific date in the Engineer's decision to a recent date at the time of the Tribunal's deliberations and then thereafter, based on Sub-Clause 60.10 of the General Conditions of Contract. The Tribunal awarded such interest to the Contractor/Claimant noting that the Engineer had explicitly accepted in its decision that interest continued to accrue after the specific date in the decision.⁴¹

Comment:

This is correct and requires no comment.

A.3 Final Award in Case 12048 (2006)

◆ Relevant FIDIC Clauses: 52.3, 67.3

This final award obliged the Tribunal to consider, among other things:

- (1) whether Sub-Clause 52.3 mandates a price adjustment whenever the 15% threshold provided for therein is exceeded (Issue 1 below); and
- (2) whether the Contractor/Claimant was entitled to pre-judgment interest (Issue 2 below).

Issue 1: Does Sub-Clause 52.3 mandate a price adjustment whenever the 15% threshold provided for therein is exceeded?

The Contractor/Claimant maintained that the 'Effective Contract Price' ('ECP') under Sub-Clause 52.3 of the General Conditions (that is, the estimated value of the works under the bill of quantities or 'BOQ', excluding provisional sums)⁴² exceeded by more than 15% the price for the quantity of work actually performed. Consequently, the Contractor/Claimant

maintained that it was entitled to a price adjustment under Sub-Clause 52.3 to compensate it for unrecovered overhead and equipment costs included in the ECP.⁴³

When the Claimant originally submitted its Sub-Clause 52.3 claim to the Engineer for a determination pursuant to Clause 67, the Engineer rejected the claim on the ground that the Claimant had overstated the amount of the ECP. In the arbitration, the Employer/Respondent endorsed the position of the Engineer⁴⁴ and the Contractor/Claimant characterized the issue presented to the Arbitral Tribunal as one of straightforward interpretation of the figures in the BOQ. However, the Arbitral Tribunal disagreed that the issue was one of contractual interpretation, having regard to the purpose of Sub-Clause 52.3:

the parties are in agreement that the purpose of the price adjustment for which Clause 52.3 provides, when the actual quantities are less than the estimated quantities, is 'to compensate the Contractor for under-recovery of overhead (due to lower than expected quantities)' . . . Thus, Clause 52.3 does not mandate a price adjustment whenever the 15 per cent threshold is exceeded. Rather, in the absence of party agreement on an appropriate adjustment, Clause 52.3 only provides for a 'determin[ation] by the Engineer having regard to the Contractor's Site and general overhead costs'.

It follows, in the view of the Tribunal, that in order to prevail on a claim for a Contract price addition under Clause 52.3, the Claimant must establish that it was prevented from recovering the jobsite and general overhead costs included in the BOQ due to the decrease in the actual quantities of work performed.⁴⁵

However, the Claimant had failed to establish the amount of the jobsite and general overhead costs included in the BOQ. Accordingly, the Claimant's claim was rejected.⁴⁶

Comment:

While the answer may not be obvious from a first reading of SubClause 52.3, the Tribunal's interpretation is undoubtedly correct having regard to the purpose of that provision. Interestingly, there appears to be no counterpart to Sub-Clause 52.3 in the 1999 FIDIC Books.

Issue 2: Is the Contractor/Claimant entitled to pre-judgment interest?

The Contractor/Claimant requested the Tribunal to award it interest on any amounts found to be due to it from the date it submitted its request for a Clause 67 decision to the Engineer.⁴⁷

⁴⁰ See (2008) 19:2 ICC ICarb. Bull. 89, Interim Award, § 24.

⁴¹ §§ 43–45 of the Award.

⁴² See § 155 of the Award.

⁴³ § 156 of the Award.

⁴⁴ § 158 of the Award.

⁴⁵ §§ 160–161 of the Award.

⁴⁶ § 162 of the Award.

⁴⁷ § 163 of the Award.

The Tribunal held that where the contract is silent about pre-judgment interest (as it was in the Red Book, Fourth Edition, with respect to sums not certified by the Engineer), the Tribunal should look to the applicable law, rejecting the Respondent's argument that, as the Contract only provides for interest in respect of the late payment of sums certified by the Engineer, pre-judgment interest is 'flatly barred' under the Contract in respect of sums that have not been certified by the Engineer.⁴⁸

The Tribunal then found that nothing in the law of State C (an African country with a common law legal system) deprived it 'of the power to provide the Claimant with full relief for the losses incurred by it due to the time that has been required for the resolution of the parties' dispute'.⁴⁹

The Tribunal then explained in a well-reasoned decision the basis on which the Contractor/Claimant should be entitled to interest on sums which had not been certified by the Engineer but which a majority of the Tribunal awarded:

in deciding whether to award interest, the Tribunal's majority considers that it should be guided by the question of whether there has been avoidable delay in the payment of the sum awarded herein and, if so, the extent of the Claimant's loss.

In considering whether there has been avoidable delay, the Tribunal's majority has taken into account that, under the Contract, the Respondent is not obligated to make any payments until the corresponding sums have been certified by the Engineer. Moreover, under Clause 67.1 of the Contract's General Conditions, the parties are bound to give effect to every decision of the Engineer unless and until the same shall be revised. In the present case, the Engineer not only did not certify the sums in question but determined that no sums were due.

Nonetheless, under Clause 67.3, the Tribunal has the authority to open up, review and revise any decision on certificates of the Engineer. In deciding that the Claimant is entitled to the sums being awarded herein, the Tribunal is therefore at the same time determining that those sums should have been certified by the Engineer. Although the Respondent cannot be criticized for abiding by the Engineer's Clause 67 determination, it should not procure a benefit either from the Engineer's failure to certify for payment sums to which the Claimant is entitled. Thus, the Tribunal considers that it is appropriate for it to exercise its discretion to award interest on the sums awarded herein as from the date they would have attracted interest under the Contract had they been properly and in due time certified by the Engineer.

Under Clause 60.10 of the Contract, the Respondent was obligated to pay the Claimant within 56 days after the issuance of any certificates. Thus, interest should accrue in this case as from the 57th day following the date upon which the sums awarded

should have been certified by the Engineer. In the Tribunal's view, the Engineer could not have been expected to certify for payment any of the sums awarded herein until the Claimant produced satisfactory evidence in support of its extended overhead costs claim. The Claimant did not do so, however, until July 8, 2005, when it for the first time produced supporting project records. The Tribunal, by a majority of its members, therefore finds that the Claimant is entitled to the pre-judgment interest on the amount awarded as from September 3, 2005 (i.e. 57 days later).

As regards the rate of interest to be applied as from that date, the Tribunal's majority considers that it would be appropriate to apply the rate for late payment set forth in the Contract, given that that is the rate that would have been applied had the sums in question been certified by the Engineer . . .⁵⁰

Comment:

The Tribunal's reasoning leading to the award of pre-judgment interest in respect of amounts which the Engineer failed to certify but should (in the Tribunal's opinion) have certified is correct and consistent, among other things, with Article 7.4.9(1) (Interest for failure to pay money) of the UNIDROIT Principles of International Commercial Contracts, 2010, which provides that:

If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment . . .

B. Partial Award in Case 13258 (2005)

◆ Relevant FIDIC Clauses: 51.1, 63.1

The Contractor/Claimant, a joint venture composed of three companies of different nationalities, entered into a contract for the construction of a portion of the civil works, called Lot I-1, for a hydropower project (the 'Project') with the Employer/Respondent, a company owned by an African State ('F'). The governing substantive law was the law of State F which was based on English common law.

The Project was to be financed by loans from a foreign financial institution.⁵¹ A first loan, which was drawn down, was to cover most of the costs of Lot I-1. A second loan was to cover most of the costs of the remaining lots. Completion of Lot I-1 was dependent upon the completion of the remaining lots which were to be financed by the second loan.⁵²

⁴⁸ §§ 169–171 of the Award.

⁴⁹ §§ 173–175 of the Award.

⁵⁰ §§ 177–181 of the Award.

⁵¹ §§ 62–64 of the Award.

⁵² § 75 of the Award.

While the Contractor/Claimant completed most of Lot I-1, it was unable to complete all its work because, due to the suspension of loans to State F by international funding agencies, the second loan could not be made at this time,⁵³ with the consequence that the contracts for the construction of the remaining lots could not enter into force.⁵⁴

Accordingly, in order to permit Lot I-1 to be completed notwithstanding the unavailability of the financing for the remaining lots, the Engineer issued a variation order no. 4 ('VO4') to omit from Lot I-1 the works which could only be done after the completion of the remaining lots (called the 'interfacing works').⁵⁵ It was envisaged that such omitted works, which represented roughly 3% of the Contract Price,⁵⁶ would be included in the contracts for the remaining lots should they proceed in the future.⁵⁷

However, the Contractor/Claimant considered that the omission of works by VO4 was a breach of General Specification ('GS') 1.5 of the contract and a repudiation of the contract by the Employer/Respondent or, alternatively, a breach of a fundamental term entitling Claimant to rescind the contract, and requested an Engineer's decision under Sub-Clause 67.1.⁵⁸ GS 1.5 provided, in relevant part, as follows:

The Employer will arrange for works necessary for the completion of the Project other than that covered by this Contract to be executed by other contractors. The Contractor shall cooperate with the Employer and other contractors for the following separate contracts to ensure the satisfactory completion of the Project as a whole.⁵⁹

The Engineer decided that there had been no breach of contract as 'the omission of the work was necessary and appropriate and permitted under FIDIC GC 51.1(b) since the Employer had not carried out the work itself or awarded it to another contractor'.⁶⁰

Dissatisfied with the Engineer's decision, the Contractor/Claimant commenced arbitration (the place of arbitration was Geneva, Switzerland) and ceased further work. The Engineer considered the Contractor/Claimant's cessation of work to be a breach of contract and certified under Sub-Clause 63.1 that the Contractor/Claimant had repudiated the contract. The Employer/Respondent subsequently terminated the contract on this ground.⁶¹

In the partial award, the Tribunal considered: (1) whether VO4 was a breach of contract (Issue 1 below); and

(2) whether the Employer/Respondent validly terminated the contract in accordance with Sub-Clause 63.1 (Issue 2 below).

Issue 1: Was VO4 a breach of contract?

The Contractor/Claimant argued that the Engineer was not authorized to omit work by a variation order for the purpose of giving it in due course to another contractor for completion.⁶² On the other hand, the Employer/Respondent argued that VO4 was issued not in order to give the works to another contractor but to allow the contract to be completed.⁶³

The Tribunal held that VO4 was a breach of contract as it was issued without contractual authority but that it did not constitute a fundamental breach amounting to repudiation of the contract:

the Arbitral Tribunal shares the view of the Engineer that the omission of works which could not be completed until after other contractors would complete their own works presented a useful solution to the serious problem created by the lack of the interfacing works due to the unfulfilled contingency of the Phase II financing. For the reasons given below, however, the omission of such works could not in this instance be validly effected without the consent of the Contractor.

The controlling consideration is that the proviso to FIDIC/GC 51.1(b) limited the Engineer's authority to omit works. The fact that the works identified in Variation Order No. 4 were omitted from the Contract but were not intended to be omitted from the Project means that Variation Order No. 4 was given without contractual authority.

.....

The Tribunal therefore concludes that Variation Order No. 4 was a breach of FIDIC/GC 51.1(b). However . . . , Variation Order No. 4 is a breach of contract sounding in damages only; it thus did not constitute a fundamental breach amounting to a repudiation of the Contract or otherwise afford the Contractor with a right of rescission.⁶⁴

Comment:

While this was a close question, the Tribunal's ruling appears sound. Although the decision of the Employer and the Engineer to omit the work concerned was, in the circumstances, understandable, it was nevertheless a breach of contract as it was contemplated that the omitted work would eventually be carried out by another contractor.

⁵³ §§ 79 and 91 of the Award.
⁵⁴ § 83 of the Award.
⁵⁵ § 252 of the Award.
⁵⁶ *Ibid.*
⁵⁷ § 244 of the Award.
⁵⁸ § 153 of the Award.
⁵⁹ § 216 of the Award.
⁶⁰ § 167 of the Award.
⁶¹ §§ 174–198 of the Award.
⁶² § 220(i) of the Award.
⁶³ § 220(i)–(iv) of the Award.
⁶⁴ §§ 274–275 and 278 of the Award.

Issue 2: Did the Employer/Respondent validly terminate the contract in accordance with Sub-Clause 63.1?

While the parties had discussed the demobilization of the Contractor for the period during which interfacing works would be performed by other contractors, the parties had failed to agree on this issue.⁶⁵ Nevertheless, claiming that the contract was rescinded, the Contractor/Claimant demobilized and ceased work.⁶⁶ Accordingly, the Engineer certified to the Employer/Respondent that in his opinion the Contractor/Claimant's demobilization and cessation to work amounted to a repudiation of the Contract.⁶⁷ On the basis of this certificate, the Employer/Respondent terminated the Contractor/Claimant's employment, pursuant to Sub-Clause 63.1, which provides that the Employer may terminate the Contractor's employment, after giving 14 days' notice, if the Engineer certifies that the Contractor has repudiated the Contract.⁶⁸ The Contractor/Claimant claimed that the Engineer's certification of repudiation of the contract was null and void.⁶⁹

The Tribunal held that the Employer had validly terminated the contract under Sub-Clause 63.1 on account of the Contractor's cessation of work as the Contractor 'remained contractually responsible for the works until the issuance of a Taking-Over Certificate' which would trigger the performance of further obligations during the Defects Liability Period:⁷⁰

The trouble with the Contractor's position . . . stems from the view that the improper omission of works operated by Variation Order No. 4 somehow obviated the very possibility of a Taking-Over Certificate ever being issued, thus starting the Defects Liability Period.

.....

the Arbitral Tribunal considers that a reasonable person could come to the conclusion on the basis of the Contractor's conduct . . . that the Contractor did not intend to perform the Contract any further. Accordingly, the contractual repudiation contemplated by FIDIC/GC 63.1 and certified by the Engineer . . . was clearly established and the analysis can stop there . . .⁷¹ [Emphasis in original]

Comment:

Finding that the Contractor was unjustified in rescinding the contract, it was understandable that the Tribunal found that, by manifesting the intention not to perform the contract any further, the Contractor had repudiated the contract as

there remained obligations for the Contractor to perform, specifically during the Defects Liability Period in relation to already completed work.

In the 1999 FIDIC Books, FIDIC dispensed with the term 'repudiat[ion]', as this is a common law legal term whose legal meaning will be unfamiliar to laymen and substituted the words 'plainly demonstrates the intention not to perform his [the Contractor's] obligations under the contract' as this was felt to be more readily understandable to users of the contract (see, e.g., Sub-Clause 15.2(b) of the 1999 Red Book).

C. First Interim Award in Case 10847 (2003)

◆ Relevant FIDIC Clauses: 12.2, 44.1, 44.2, 51, 53.1

The Contractor/Claimant, a joint venture comprising two European construction companies, had entered into a contract for the construction of the main civil engineering works for a hydroelectric project in an African country ('State A') with a company from State A, the Employer/Respondent. The governing substantive law was the law of State A and the place of arbitration was London, UK.

The Claimant alleged that several unforeseen events caused by the Respondent or for which it was liable had delayed the Claimant's progress and caused additional costs, and that the Engineer had wrongly rejected the Claimant's claims for extensions of time and related costs.

In a first interim award, the Tribunal considered:

- (1) the notice provisions of Sub-Clauses 44.2 and 53.1 (Issue 1 below);
- (2) the claims for extensions of time and additional costs (Issue 2 below); and
- (3) the interest to be applied on the sums awarded (Issue 3 below).

⁶⁵ § 342 of the Award.

⁶⁶ § 342 of the Award.

⁶⁷ §§ 180 and 365 of the Award.

⁶⁸ § 198 of the Award.

⁶⁹ §§ 201 and 369 of the Award.

⁷⁰ § 384 of the Award.

⁷¹ §§ 386 and 390 of the Award.

Issue 1: Did the Claimant comply with the notice provisions in Sub-Clause 44.2 and is recovery of additional costs limited in case of failure to comply with the notice provisions of Sub-Clause 53.1?

◆ Relevant FIDIC Clauses: 44.2, 53.1

(a) Did the Claimant have to comply with the notice provisions in Sub-Clause 44.2?

The Claimant argued that, under Sub-Clause 44.2 of the Contract, failure to notify an event for which an extension of time is sought does not result in the forfeiture of the claim.⁷²

Sub-Clause 44.2 provides, in relevant part, as follows:

the Engineer is not bound to make any determination unless the Contractor has

- (a) within 28 days after such event has first arisen notified the Engineer with a copy to the Employer, and
- (b) within 28 days or such other reasonable time as may be agreed by the Engineer after such notification submitted to the Engineer detailed particulars of any extension of time to which he might consider himself entitled in order that such submission may be investigated at the time.

The Claimant argued that the Engineer 'is, by this Clause, given a discretion to allow such claims in the event of a failure to notify' and:

as the Engineer has decided to respond to all the claims put to him by the Claimant without demur, the discretion has thus been exercised in favour of the Claimant and that is the end of the matter. In such circumstances the Tribunal cannot open up this discretion of the Engineer and, accordingly, must determine the claims as advanced.⁷³

The Tribunal agreed stating that it was free to exercise its own discretion over whether to consider the Contractor's claim and was not bound by what the Engineer had done (or not done):

in any case where the Engineer has not exercised his discretion to make a determination (where there is an alleged failure by the Claimant to give due notice) or where the Engineer has, in determining the merits of a Clause 44 claim, chosen to reserve his position on granting discretion, the Tribunal can exercise its own discretion as to whether the claim should be determined.⁷⁴

The Tribunal then held that its discretion would be exercised in favour of the Claimant pursuant to Sub-Clause 44.2 and thus the Tribunal proceeded with the determination of the claim on its merits.

(b) How is recovery of additional costs limited in case of failure to comply with the notice provisions of Sub-Clause 53.1?

The Respondent argued that the Claimant had failed to comply with the notice requirements in respect of its claims for additional costs as required by Sub-Clause 53.1, which provides as follows:

Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.

The Respondent also argued that the Claimant failed to supply any contemporary records in support of its claims as required by Sub-Clause 53.4, which provides as follows:

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

Consequently, the Respondent maintained no payments were contractually due.

The Tribunal considered that the purpose of Sub-Clause 53.1 was to put the Engineer (and the Respondent) on alert insofar as circumstances occurring on site could result in additional costs to the Respondent⁷⁵ and that Sub-Clause 53.1 was not a condition precedent, but in the event of failure by the Claimant to notify properly, Sub-Clause 53.4 limited the recovery by the Claimant to amounts verified by contemporary records.⁷⁶

Comment:

The Tribunal correctly held that Sub-Clause 42.2 gave discretion to the Engineer in respect of claims for an extension of time which have not been properly notified thereunder and that, in any case, where the Engineer had not exercised that discretion, the Tribunal was entitled to do so. Further, under Sub-Clause 53.4, a failure to notify a claim for additional payment does not bar the claim for additional costs but limits the amount that can be decided or awarded by the Engineer or an Arbitral Tribunal, respectively, to sums, if any, which can be verified by 'contemporary records'. 'Contemporary records' have been held

72 § 3.1.2 of the Award.
73 § 3.1.4 of the Award.
74 § 3.1.5 of the Award.
75 § 3.1.9 of the Award.
76 § 3.1.11 of the Award.

to mean records produced or prepared at the time of the event giving rise to the claim, whether by or for the Contractor or the Employer.⁷⁷ As a practical matter, this means that, in such a case, a party cannot rely on witness testimony only to substantiate such a claim but must be able to justify it by means of contemporary records.

Issue 2: Specific entitlements to extensions of time and additional costs

◆ Relevant FIDIC Clauses: 12.2, 44.1, 51, 53

Sub-Clause 44.1 provides, as follows:

In the event of:

- (a) the amount or nature of extra or additional work,
- (b) any cause of delay referred to in these Conditions,
- (c) exceptionally adverse climatic conditions,
- (d) any delay, impediment or prevention by the Employer, or
- (e) other special circumstances which may occur, other than through a default of or breach of contract by the Contractor or for which he is responsible,

being such as fairly to entitle the Contractor to an extension of the Time for Completion of the Works, or any Section or part thereof, the Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of such extension and shall notify the Contractor accordingly, with a copy to the Employer.

Before examining the Claimant's individual claims for extension of time and additional costs, the Tribunal made the following useful 'general comment' on Sub-Clause 44.1:

the Tribunal interprets Clause 44.1 as providing an entitlement only in a situation where the Claimant can demonstrate that the delay caused by the event . . . did actually contribute to a real and unavoidable delay to the critical path activities leading to completion. Thus a direct impact on the Claimant's ability to complete by the contractual Date for Completion would need to be demonstrated in order for Clause 44.1 to operate and for an entitlement to be justified. Delay to an activity or sequence of events that are not critical activities or critical sequences do not fairly entitle the Claimant to an extension of time.⁷⁸

Comment:

The Tribunal interpreted Sub-Clause 44.1, when it referred to circumstances which 'fairly... entitle the Contractor' to a time extension, as providing that the delay must be on the critical path of construction, that is, the delay must cause a delay to completion. Although this was not stated explicitly in Clause 44 of the Red Book, Fourth Edition, this was later done in Sub-Clause 8.4 of the 1999 Red Book.

The Tribunal then considered the Claimant's individual claims, as follows.

(a) Telephone system

The Claimant argued that the Respondent breached its obligation timely to provide a telephone connection and that, when it did provide one, the telephone system rendered poor quality and unreliable service.⁷⁹ The Claimant claimed additional costs and an extension of time on these accounts.

While the Tribunal agreed that the Respondent was late in supplying a telephone system⁸⁰ and that this would have caused disruption to the Claimant,⁸¹ the Tribunal held that the Claimant could not expect service on a par with that in Western Europe or the USA:

In a developing country such as [State A], the Tribunal considers that expectations in the quality of such things as telephone services should be commensurate with the nation's development. In other words, foreign organisations working in [State A] should not expect telephone services to be on a par with Western Europe or the USA. The inevitable differences between systems in developed countries and developing countries should, in the Tribunal's experience, have been taken into account by the contractors during the tendering period.⁸²

Consequently, the Tribunal denied the Claimant an extension of time and costs on account of the quality of the telephone service.⁸³

Comment:

Accordingly, the Contractor should have, at the tender stage, taken account of the particular circumstances in the country where the contract was to be performed. In this case, the Claimant should have taken into account that the telephone system in State A, a developing country, could not be of the same quality as in developed countries by making appropriate allowance for this in its tender price.

(b) Delayed issuance of powerhouse design drawings

The Claimant claimed an extension of time and additional costs due to the alleged late issue of design drawings for the powerhouse. While the Claimant admitted that it was responsible for overlapping delay (in excavating the powerhouse complex), it claimed 'that such concurrency should not affect the Claimant's entitlement to extensions of time arising from delays attributable to the Respondent'.⁸⁴

⁷⁷ See the English case *Attorney General for the Falklands Islands v. Gordon Forbes Construction (Falklands) Limited* (No. 2), [2003] T.C.L.R. 9, [2003] B.L.R. 280.

⁷⁸ § 3.2 of the Award.

⁷⁹ § 3.3.1 of the Award.

⁸⁰ § 3.4.1, first paragraph, of the Award.

⁸¹ § 3.4.1, third paragraph, of the Award.

⁸² § 3.4.2, first paragraph, of the Award.

⁸³ § 3.4.2, second paragraph, of the Award.

⁸⁴ § 3.5.4 of the Award.

The Respondent argued that, due to the Claimant's delayed excavation works, the drawings were supplied in their final state in good time:

Consequently, there was no actual delay caused to the Claimant by reason of alleged late issue of Construction Drawings. The fact that the Engineer made good use of the time during which the Claimant was continuing its excavation to further develop and refine Construction Drawings in light of the electro-mechanical contractors [s/c] ongoing input should not be seen as giving rise to an entitlement for additional time. No critical delay was caused by the alleged delay to drawings issue.⁸⁵

The Tribunal dismissed the Claimant's claim on the basis of the Claimant's 'pre-existing' delay in the powerhouse excavation works which was on the critical path:

The Tribunal, whilst accepting that the issue of drawings was not a model example of how the Contract provisions could operate, holds the view that the Works were not delayed by late drawing issue because of the pre-existing delays in Powerhouse excavation which was on the critical path. It cannot therefore be said that a fair entitlement exists to an extension pursuant to Clause 44. The Tribunal does not subscribe to the view that an event that caused no delay to an activity on the critical path to the date for completion of the Works can be the basis of an extension of time.⁸⁶

Comment:

The Tribunal considered whether the claimed delay (in the issuance of drawings) affected the critical path and concluded that, given the concurrent delay for which the Claimant was responsible (the late excavation of the powerhouse), the critical path was not affected and, therefore, denied a time extension. However, opinion is divided on this issue. Thus, the UK Society of Construction Law's well-respected Delay and Disruption Protocol (October 2002, October 2004 reprint), section 1.4.7, takes a different position:

Where Employer Risk Events and Contractor Risk Events occur sequentially but have concurrent effects, here again any Contractor Delay should not reduce the amount of EOT [extension of time] due to the Contractor as a result of the Employer Delay.

(c) Advance payment claim

The Claimant claimed an extension of time and costs arising from the alleged late payment of the foreign portion of the Advance Payment,⁸⁷ the payment of which was to be made pursuant to a separate certification by the Engineer. The Respondent argued that Sub-Clause 60.8—which appeared to be identical to Sub-Clause 60.10 of

the Red Book, Fourth Edition and obliged the Respondent to pay interest at a specified rate on sums certified but not paid—was the Contractor's sole remedy for late payment (aside from the remedies of termination or suspension under Clause 69).⁸⁸

Sub-Clause 60.10 of the Red Book, Fourth Edition, provides:

The amount due to the Contractor under any Interim Payment Certificate issued by the Engineer pursuant to this Clause, or to any other term of the Contract, shall, subject to Clause 47, be paid by the Employer to the Contractor within 28 days after such Interim Certificate has been delivered to the Employer or, in the case of the Final Payment Certificate referred to in Sub-Clause 60.8, within 56 days after such Final Payment Certificate has been delivered to the Employer. In the event of failure of the Employer to make payment within the times stated, the Employer shall pay to the Contractor interest at the rate stated in the Appendix to Tender upon all sums unpaid from the date by which the same should have been paid . . .

The Tribunal agreed, finding that termination and suspension aside, 'the contractual remedy provided under Sub-Clause 60.8 [Sub-Clause 60.10] is exhaustive insofar as cost recovery is concerned'.⁸⁹

Comment:

This may be a harsh result for the Contractor but was a defensible one under the Red Book, Fourth Edition.

d) Electricity supply claim

The Claimant claimed that, throughout the period of the Works, it suffered power outages which caused disruption and delayed completion. The Claimant alleged that the Respondent was responsible for the same under the contract, including Sub-Clause 12.2 which entitles a Contractor who encounters unforeseeable 'physical obstructions or physical conditions' to an extension of time and recovery of its additional costs:

If, however, during the execution of the Works the Contractor encounters physical obstructions or physical conditions, other than climatic conditions on the Site, which obstructions or conditions were, in his opinion, not foreseeable by an experienced contractor, the Contractor shall forthwith give notice thereof to the Engineer, with a copy to the Employer. On receipt of such notice, the Engineer shall, in his opinion such obstructions or conditions could not have been reasonably foreseen by an experienced contractor, after due consultation with the Employer and the Contractor, determine:

⁸⁵ § 3.5.6 of the Award.

⁸⁶ § 3.6.1 of the Award.

⁸⁷ § 3.7.1 of the Award.

⁸⁸ § 3.7.5 of the Award.

⁸⁹ § 3.8.6 of the Award.

(a) any extension of time to which the Contractor is entitled under Clause 44, and

(b) the amount of any costs which may have been incurred by the Contractor by reason of such obstructions or conditions having been encountered, which shall be added to the Contract Price,

and shall notify the Contractor accordingly, with a copy to the Employer. Such determination shall take account of any instruction which the Engineer may issue to the Contractor in connection therewith, and any proper and reasonable measures acceptable to the Engineer which the Contractor may take in the absence of specific instructions from the Engineer.

The Tribunal first held that, as with respect to the telephone system (see Issue 2(a) above), the standards applied to the quality of service regarding electricity supply depended on the country considered:

The Tribunal's view on this claim is that the level and quality of service in a developing nation such as [State A] should not be equated to that in developed countries in other parts of the world . . . Accordingly, the Tribunal is of the opinion that the obligation placed on the Respondent to provide and maintain power transmission lines imposes no greater an obligation than to provide the level of service that could reasonably be expected at the Site location.⁹⁰

The Tribunal also clarified that Sub-Clause 12.2 related to physical conditions or obstructions found or encountered on the Site and that therefore power outages were outside the scope of this provision:

Sub-Clause 12.2 is concerned with physical conditions or physical obstructions. The Tribunal's interpretation of this sub-clause is that the conditions or obstructions should be of a nature that are to be 'found' or 'encountered' on the Site and this is reflected in the words of the sub-clause. Consequently, power outages would not, in the Tribunal's opinion, be properly classified as physical conditions or physical obstructions pursuant to Sub-Clause 12.2. Consequently, the Tribunal rules out any entitlement for time and costs arising under this sub-clause.⁹¹

However, the Tribunal found that the power outages that occurred were worse than could have reasonably been expected and that, while the Claimant had not shown the actual effect of such outages on the progress of the works, they adversely affected the Claimant's progress and gave rise to an entitlement under Sub-Clause 44.1(e)⁹² and awarded the Claimant an extension of time.⁹³

Comment:

As with its approach to the telephone system, the Tribunal held that the quality of electricity supply in State A should not be expected to be the same as that in developed countries.

As regards Sub-Clause 12.2, the Tribunal adopted the conventional interpretation that power outages could not be considered as 'physical conditions' or 'physical obstructions'. Those terms refer to natural conditions on the Site (hydrological, ground, sub-surface conditions, etc.) and not to industrial conditions such as electricity supply. This interpretation is consistent with the position taken by an ICC arbitral tribunal in relation to the Red Book, Third Edition.⁹⁴

(e) Disruption and acceleration costs

The Claimant claimed for an extension of time and additional costs arising from a significant general increase in quantities which resulted from the Claimant's purported acceleration of the Works. The Claimant claimed the increase in quantities as a variation under Sub-Clause 51.1 and the extension of time pursuant to Sub-Clause 44.1(a).⁹⁵

The Tribunal considered that, while no formal notice of claim had been given, the Employer had adequate notice of the claim under Clauses 44.1, 51 and 53 because:

The Engineer would have been aware of the increase in quantities on a monthly basis because he was certifying payment for them at the Bill of Quantities rates. The Engineer had contemporaneous records of these increases. Finally the Engineer issued Decisions 4 and 5 in relation to claim submissions which expressly notified the general increase in quantities.⁹⁶

Thus, while no actual notice had been given, the Tribunal deemed the notice provision to have been satisfied because the Engineer 'would have been aware of' the increase in quantities at the time they incurred and had contemporary records of them.

The Tribunal then held that for the acceleration claim to succeed, the Claimant had to demonstrate that it had in fact accelerated because it had been denied its entitlement to a time extension and not merely that the Claimant had brought additional resources to the Site.⁹⁷

⁹⁰ § 3.10.1 of the Award.

⁹¹ § 3.10.3 of the Award.

⁹² See quote under Issue 2 above.

⁹³ §§ 3.10.4–3.10.6 of the Award.

⁹⁴ See the present author's 'Second Commentary on ICC Awards Dealing Primarily with FIDIC Contracts' (2008) 19:2 ICC IC Arb. Bull. 41 at 48–51, discussing the Partial Award in ICC Case 11499.

⁹⁵ §§ 3.12.1, 3.12.2 and 3.12.3 of the Award.

⁹⁶ § 3.13.5 of the Award.

⁹⁷ § 3.13.11 of the Award.

Comment:

The Tribunal adopted a pragmatic approach in considering that, while the Claimant had given no notice of claim, the Tribunal deemed the notice provision satisfied as the Engineer 'would have been aware of' the underlying facts. In respect of the Claimant's acceleration claim, unsurprisingly, the Tribunal found that the mere presence of additional resources did not evidence acceleration. This should have been demonstrated by specific records of how the resources were used and permitted acceleration of the progress of the works.

(f) Taking Over Certificate

The Claimant claimed that the Works met the requirements for the issuance of a Taking Over Certificate at a particular date in that 'they were capable of being used for the purpose for which they had been conceived'.⁹⁸ The Engineer had refused to issue the Taking Over Certificate at that date on the basis that certain finishing works were outstanding and that certain items prevented some testing and commissioning operations.⁹⁹

The Tribunal declared that for the issuance of the Taking Over Certificate, the Works must be at a stage so as to allow the 'beneficial use of the facility' being constructed:

The Tribunal holds the view that, for a contractor to be entitled to a certificate of substantial completion, the Works must be in a state of completion that enables the Respondent to enjoy beneficial use of the facility constructed. In the Tribunal's opinion, such use was not available to the Respondent in December 1999. . . . In the Tribunal's opinion, the items of work that can properly be undertaken after issue of the Taking Over Certificate are items that do not interfere with the Respondent's beneficial use, such as architectural finishing works, repair work, fencing, landscaping and demobilisation.¹⁰⁰

On this basis, the Tribunal saw no reason to overturn the Engineer's decision and dismissed the Contractor's claim that the Taking Over Certificate should have been issued on an earlier date.¹⁰¹

Comment:

The Tribunal's 'beneficial use' standard is consistent with the generally accepted 'substantial completion' or 'practical completion' standard for the issuance of Taking Over Certificates.¹⁰²

Issue 3: Should the rate of interest provided in the contract to apply to overdue certified amounts be applied to the sums awarded by the Tribunal?

The parties disagreed over the rate of interest to be applied to the sums awarded by the Tribunal. While the Claimant argued that the Tribunal was bound by the interest rate in the parties' agreement (Sub-Clause 60.8 in this case),¹⁰³ the Respondent argued that the Tribunal had discretion as to the rate and nature of interest to be applied and that the rate of interest established by Sub-Clause 60.8 did not constitute an agreement between the parties under section 49 ('Interest') of the UK Arbitration Act 1996.¹⁰⁴

The Tribunal held that the rate of interest provided in the contract was binding on the Tribunal when awarding interest on sums found due in the award as the Tribunal was effectively acting in the place of the Engineer:

Since the Tribunal [is] effectively acting in the position of the Engineer, the sums awarded should have been certified by the Engineer and, if not paid, would have borne interest at the rate established by Clause 60.8. The Tribunal has concluded that the rate of interest established by Clause 60.8 does constitute an agreement between the parties on the application of interest, which binds the Tribunal.¹⁰⁵

The Tribunal thus considered that the rate of interest established by the contract constituted an agreement under section 49(1) of the UK Arbitration Act 1996, which was binding on the Tribunal. Section 49 ('Interest') of the UK Arbitration Act 1996 provides:

- (1) The parties are free to agree on the powers of the tribunal as regards the award of interest.
- (2) Unless otherwise agreed by the parties the following provisions apply.
- (3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case—
 - (a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;
 - (b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.
- (4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the

⁹⁸ § 3.16.1 of the Award.

⁹⁹ § 3.16.2 of the Award.

¹⁰⁰ § 3.17.1 of the Award.

¹⁰¹ § 3.17.2 of the Award.

¹⁰² See *Hudson's Building and Engineering Contracts*, 12th ed. (London: Sweet and Maxwell, 2010) at para. 3-070.

¹⁰³ This rate was the published overdraft rate for local currency and three per cent above the discount rate of the central bank of the country of foreign currency (see paragraph 3.23.3 of the Award).

¹⁰⁴ § 3.23.2 of the Award.

¹⁰⁵ § 3.23.5 of the First Interim Award.

outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).

(5) References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.

(6) The above provisions do not affect any other power of the tribunal to award interest.

The Tribunal did not find the Sub-Clause 60.8 rate of interest to be unrealistic or unreasonable and would, in any event, have applied this rate as a matter of discretion.¹⁰⁶

Comment:

For a contrary position in relation to interest on uncertified amounts found to be due to a Contractor under the Red Book, Fourth Edition, see the award of the ICC arbitral tribunal which was the subject of the decision of the English House of Lords in *Lesotho Highlands Development Authority v. Impregilo*.¹⁰⁷ In that case, the House of Lords let stand the arbitral tribunal's decision to award interest pursuant to section 49(3) of the English Arbitration Act 1996, the arbitral tribunal finding that the parties had not 'otherwise agreed' on interest on such amounts in their contract.

D. Final Award in Case 12654 (2005)

◆ Relevant FIDIC Clauses: 19.1, 20.3, 20.4, 22.2, 22.3, 42.1, 42.2, 44.1, 53.3, 65.2, 65.5

The Contractor/Claimant, a joint venture of two European companies which was incorporated into a limited liability company of a country in the Balkans, 'State E' (upon being awarded the contract), entered into a contract for the building of a two-lane road with the Employer/Respondent, the Ministry of Transport, General Roads Directorate, of State E. The governing law under the contract was the law of State E. The project was financed by the European Commission by means of a grant awarded to the Respondent.

A dispute arose between the parties regarding delay and disruption on the project and, in this connection, the Tribunal considered:

(1) whether the Employer/Respondent was late in giving possession of the Site, whether the Contractor/Claimant caused the Employer/Respondent to be late, and whether the Contractor/Claimant is entitled to compensation under Sub-Clause 42.2 (Issue 1 below);

(2) whether the Contractor/Claimant was entitled to compensation for the increase of its costs under Sub-Clause 65.5 owing to delays which were the consequence or result of a crisis in a nearby region (Issue 2 below); and

(3) whether the Contractor/Claimant could claim for financial losses arising from the non-reimbursement of taxes that it was not under a duty to pay, including any penalty imposed for the late payment of VAT (Issue 3 below).

Issue 1: Was the Respondent late in giving possession of the Site, did the Claimant cause the Respondent to be late, and is the Claimant entitled to compensation under Sub-Clause 42.2?

The Contractor/Claimant argued that it was not given possession of the site in due time because the Employer was late in expropriating and evacuating the necessary plots of land.¹⁰⁸ On the other hand, the Employer/Respondent argued that the Contractor/Claimant had not submitted the final design for the road on time which prevented the Employer/Respondent from expropriating the land necessary to give the Contractor/Claimant possession.¹⁰⁹

The Arbitral Tribunal began its analysis by setting forth 'some basic rules regarding delay claims, which—although obvious—deserve to be put on record':¹¹⁰

If a contractor is delayed in completing the work, its cost of performance increases simply because those elements of its costs that are dependent on time require an extended period of time. For example, the contractor is likely to have field overhead costs for its field offices, telephones and field supervision, costs which are directly time-related and which represent 'pure' delay costs.

In addition to the purely time-related delay costs, the contractor's cost of performance may increase because delayed work itself is completed in an unproductive manner or may cause subsequent related work to be done out of sequence or on a piecemeal basis instead of an uninterrupted sequence as planned. Labour productivity rates may suffer as a result, causing the contractor's costs to increase. Although these so-called disruption costs may, in the proper circumstances, be compensable elements of delay damages in that they are incurred as the result of delay, they may be caused by factors unrelated to delay.

However, in order to recover its additional costs, it is not enough for the contractor to show that work was completed later than planned and that the contractor experienced coincident cost increases. To demonstrate its entitlement to compensation for delay damages, the contractor must demonstrate that under the governing contractual provisions the

¹⁰⁶ § 3.23.6 of the Award.

¹⁰⁷ [2005] UKHL 43, [2006] 1 A.C. 221, [2005] B.L.R. 351.

¹⁰⁸ § 136 of the Award.

¹⁰⁹ § 139 of the Award.

¹¹⁰ § 149 of the Award.

delay is *excusable*—that is, the delay was of a type for which the contractor is not contractually liable – and that delay is also *compensable*—that is, the delay was of a type which entitles the contractor to compensation and not just an extension of time to perform the work. Having established its entitlement to damages, the contractor must then demonstrate the quantum of its resulting damages.

Stated simply, *excusable delays* are those delays from which the contractor is 'excused' from liability. As a general rule, a contractor is excused from liability for delays that are the result of causes beyond the contractor's control and delays which are the result of causes that were not foreseeable.

The contractor is entitled to compensation if it can show that it did not concurrently cause the delay and if it can quantify its damages with reasonable certainty. Once the contractor has established that the individual delay for which an extension of time is sought is *excusable* and, if compensation is sought, *compensable* as well, it is necessary to determine whether or not the contractor was independently delaying the work. If the contractor would have been delayed in any event by causes within its control, that is, if there was a *concurrent* non-excusable delay, the general rule is that it would be inequitable to grant the contractor either an extension of time or additional compensation, unless the contractor can segregate the portion of the delay which is excusable and/or compensable from that which is not.

The contractor bears the burden of proving the extent of the delays for which it seeks compensation and, in addition, the burden of proving damages incurred as a result of such delays.

For purposes of determining whether the Project was delayed and for purposes of apportioning delay, only delays on the *critical path* of the Project figure in the analysis because, by definition, delays not on the critical path will not delay the completion of the Project.¹¹¹ [Emphasis in original]

Comment:

The foregoing is an excellent summary of the principles applicable to claims for delay. The Tribunal ultimately concluded that part of the delay in giving possession of the site was due to the Employer and awarded the Contractor part of its claimed costs.¹¹² The Tribunal adopted a similar position regarding the Contractor's concurrent delay claim to that of the tribunal in ICC Case 10847 (contrary to the position in the UK Society of Construction Law's Delay and Disruption Protocol) examined above,¹¹³ but in this case the Contractor was able to demonstrate entitlement to some compensation.

Issue 2: Was the Contractor/Claimant entitled to compensation for the increase of its costs under Sub-Clause 65.5 due to delays which were the consequence or result of a crisis in a nearby region?

The Contractor/Claimant argued that a crisis (in fact a civil war) in a neighbouring territory and the Employer/Respondent's invitation to a foreign military authority to allow it to station a major part of its forces in the Employer/Respondent's country fell within the definition of the Employer's risks and entitled the Contractor/Claimant to costs associated with delay resulting from the presence of such military authority's troops in the specific area of the project. The Contractor/Claimant argued that:

The [war] and [State E]'s formal invitation [for foreign military forces to be stationed on its territory] clearly falls within the definition of Employer's Risks provided for by cl. 20.4 (a) and constitutes an unforeseen subsequent special circumstance, which may not be contractually attributed to [Claimant]. Therefore, [Claimant] is entitled to costs associated with the delays in the progress of the Works caused by the presence of the [foreign military] troops in the axis of the Project.¹¹⁴

The Employer/Respondent rejected the Contractor/Claimant's claim arguing that the country of the Employer/Respondent (that is, State E) was not in a state of war nor was it a party to any other risk listed in Sub-Clause 20.4.¹¹⁵ However, the Tribunal held that the crisis in the neighbouring territory fell under both the risks identified in Sub-Clause 20.4(a) and (b) and, consequently, the Contractor/Claimant was entitled to recover its increased costs pursuant to Sub-Clause 65.5:

Cl. 20.4 defines the Employer's Risks. These are in the FIDIC terminology, cl. 65.2 'Special Risks' and include, inter alia, according to cl. 20.4 (a) war, hostilities, invasion, act of foreign enemies, which the Arbitral Tribunal understands is not solely related to the country in which the Works are executed, and, according to cl. 20.4 (b) rebellion, revolution, insurrection or military or usurped power or civil war, insofar as these relate to the country in which the works are to be executed.

The Arbitral Tribunal qualifies the crisis . . . as belonging to both the categories of cl. 20.4 (a) and (b) since it started as a civil war and turned into a state of war, or at least hostilities resulting in the invasion of [foreign military] forces into [the neighbouring territory].

Cl. 65.5 deals with increased costs arising from the Special Risks and allocates the liability for any increase in such cost of the Works to the Employer. In this regard, the wording of cl. 65.5 is extremely wide

111 §§ 150–156 of the Award.

112 §§ 218–221 of the Award.

113 See Section II.C, Issue 2, (b) ('Delayed issuance of powerhouse design drawings') above.

114 § 288 of the Award.

115 §§ 289–291 of the Award.

in that any increase in cost 'consequent on or the result of or in any way whatsoever connected with the said special risks' is allocated to the Employer.

The Arbitral Tribunal concludes that [Claimant] is entitled to be compensated by the Employer for the increase of its costs owing to the delays related to the execution of the Works (other than repair of Works executed) which were a consequence or the result of the [war].¹¹⁶

Comment:

The Tribunal correctly interpreted Sub-Clause 65.5, when read in conjunction with Sub-Clause 20.4. In the 1999 Red Book, Sub-Clause 65.5, when read with Sub-Clause 20.4 of the Red Book, Fourth Edition, have been effectively replaced by Clause 19 (*Force Majeure*) and, specifically, by Sub-Clause 19.4 (*Consequences of Force Majeure*). However, the wording of Clause 19 is not the same as that of Clause 65.

Issue 3: Can the Contractor/Claimant claim for financial losses arising from the non-reimbursement of taxes that it was not under a duty to pay?

The Contractor/Claimant claimed for financial losses arising from the non-reimbursement by the Employer/Respondent of taxes which the Contractor/Claimant argued that it was not under a duty to pay¹¹⁷ because the contract was funded by the European Community and stated that it was free of taxes.¹¹⁸

The Employer/Respondent argued that the Contractor/Claimant should have requested the tax reimbursements from the relevant Ministry in State E (the Ministry of Finances) and that this was not the concern of the Employer/Respondent (the Ministry of Transport, General Roads Directorate).¹¹⁹

The Tribunal upheld the Contractor/Claimant's claim:

The Contract, on its second page, clearly states that the total contract amount is 'FREE OF TAXES' and 'TAXES EXEMPT' . . . In addition, according to the Bill of Quantities, Section 4, the Contractor shall benefit from the tax and other facilities granted pursuant to the General Conditions. Reference is made to Article 13 of the Financial Memorandum, attached to the Bill of Quantities. The tax exemption became a part of the Contract . . .

Despite the repeated queries and requests by [the Contractor/Claimant] to that effect and assurances by the Employer, VAT refunds were made late, imposing a financial burden on [the Contractor/Claimant] which financed the corresponding amounts

out of its own funds for many months to follow. [The Contractor/Claimant]'s cash flow was severely burdened, not only through the VAT payments themselves but also through the imposed penalties and associated interest.

.....

The Arbitral Tribunal cannot accept the Employer's argument . . . that the dispute does not concern the Respondent—the Ministry of Transport, [the Employer's representative]—but is the responsibility of the Ministry of Finance. The Respondent in the present arbitration and the contracting party is [State E] acting through its Ministry of Public Works and Road Transport. The EEC, as a provider of the grant, did not finance the taxes, customs and import duties of the Project. Therefore [State E]—acting through its Ministry of Public Works and Road Transport—as a beneficiary of such a grant, was obliged to finance such taxes, customs and import duties of the Project.

.....

. . . the Respondent has not contested the tax-exempt nature of the Contract. The Employer was obliged to hold [the Contractor/Claimant] 'save and harmless' [*sic*] against any tax payment.¹²⁰

Comment:

In the case of international construction contracts, it is not unusual for the ministry of a State for which construction work is being performed to disclaim responsibility for the actions of other ministries of the same State such as the ministry responsible for tax administration. However, a State is ordinarily regarded as a single (sovereign) legal entity which acts through its ministries with the consequence that one ministry (here the Ministry of Transport) cannot simply disclaim responsibility for the actions of another ministry (here the Ministry of Finance). Moreover, here the contract provision was clear that the Employer (the Ministry of Transport) was bound to save the Contractor harmless from local taxes and, thus, could not avoid that responsibility—indeed, that contractual obligation which it had expressly assumed—by referring the Contractor to another ministry of the same State.

116 §§ 302–305 of the Award.

117 § 586 of the Award.

118 §§ 566–567 of the Award.

119 §§ 578–579 of the Award.

120 §§ 590–591, 593 and 595 of the Award.

III. FIDIC Conditions of Subcontract for Works of Civil Engineering Construction (Red Book Subcontract) First Edition (1994)—Final Award in Case 10951 (2005)

◆ Relevant FIDIC Clause: 18.1

The General Contractor/Respondent, a European construction company, entered into a main contract with an Employer for the construction of a university campus in a Middle-Eastern country ('State B'). The Contractor/Respondent then subcontracted certain work under the main contract to the Subcontractor/Claimant, a construction company from State B. The governing substantive law under the subcontract was Swiss law (the main contract was governed by the law of State B) and the place of arbitration was Bern, Switzerland.

After the termination by the General Contractor/Respondent of the subcontract because of the Subcontractor/Claimant's alleged default, the Subcontractor/Claimant initiated an arbitration claiming, among other things, that the termination of the subcontract was unjustified. The General Contractor/Respondent counterclaimed for damages caused by the Subcontractor/Claimant.

During the proceedings, the Tribunal appointed its own expert to assist it with factual determinations. The parties agreed that this expert could participate in the hearings and write a report, which was shared with both the Tribunal and the parties.

In its award, the Tribunal considered numerous issues including the following:

- (1) whether the termination of the Subcontractor/Claimant for default was justified (Issue 1 below); and
- (2) the costs of the arbitration and whether in-house staff costs were recoverable (Issue 2 below).

Issue 1: Was the termination of the Subcontractor/Claimant for default justified?

◆ Relevant FIDIC Clause: 18.1

The Subcontractor/Claimant argued that the General Contractor/Respondent had not complied with Sub-Clause 18.1 of the Subcontract

and that, under Sub-Clause 18.1, read in conjunction with Swiss law, the termination was unjustified.¹²¹

Sub-Clause 18.1 provides that the Contractor is entitled to terminate the Subcontractor's employment for default in the following situations, among others:

If:

.....

c) the Subcontractor without reasonable excuse has failed to commence or proceed with the Subcontract Works in accordance with [the Subcontract],

d) the Subcontractor refuses or neglects to remove defective materials or remedy defective work after being instructed so to do by the Contractor under this Sub-Clause,

e) the Subcontractor, despite previous warning from the Contractor in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the Subcontract,

.....

g) the Contractor is required by the Engineer to remove the Subcontractor from the Main Works after due notice in writing from the Engineer to the Contractor in accordance with the Main Contract,

then in any such event, and without prejudice to any other rights or remedies, the Contractor may by notice to the Subcontractor forthwith terminate the Subcontractor's employment under the Subcontract and thereupon the Contractor may take possession of all materials, Subcontractor's Equipment and other things whatsoever brought on to the Site by the Subcontractor and may by himself . . . use them for the purpose of executing and completing the Subcontract Works and remedying any defects therein and may, if he thinks fit, sell all or any of them and apply the proceeds in or towards the satisfaction of monies otherwise due to him from the Subcontractor.

The Tribunal held that Swiss law places the burden on the Contractor to prove that it was justified in terminating the Subcontract for cause,¹²² and, on the basis of the Tribunal-appointed expert's conclusions, found that:

(1) the General Contractor/Respondent was responsible, to some extent, for delays in the handover of the site to the Subcontractor/Claimant;¹²³

(2) the General Contractor/Respondent was also partially responsible for delays in the handover of the drawings;¹²⁴

(3) the Subcontractor/Claimant was responsible for the lack of resources and equipment at the site and for slow progress of the works.¹²⁵

121 § 543 of the Award.
122 §§ 457–459 of the Award.
123 § 488 of the Award.
124 §§540-541 of the Award.
125 § 542 of the Award.

As regards the various bases for termination, the Tribunal found that termination was unjustified under each of the following grounds in Sub-Clause 18.1:

(1) Sub-Clause 18.1(c)—as each party was responsible for part of the delays which had occurred.¹²⁶

(2) Sub-Clause 18.1(d)—as the existence of defects is not enough to justify termination: there must be requests to remedy the defects and a showing that those requests went unheeded and this showing was not demonstrated.¹²⁷

(3) Sub-Clause 18.1(e)—as it had not been established that, despite previous warning from the Contractor in writing, the Subcontractor ‘persistently or flagrantly neglect[ts] to comply with [its] obligation under the Subcontract’.¹²⁸

(4) Sub-Clause 18.1(g)—the Engineer’s instruction to the Contractor that the Subcontractor’s employment is to be terminated must be ‘coercive’ in order for Sub-Clause 18.1(g) to be invoked and, in this case, the Engineer’s instructions constituted merely reproaches and could not justify a Sub-Clause 18.1(g) termination.¹²⁹

Having so concluded, the Tribunal held that Article 377 of the Swiss Code of Obligations applied and that the General Contractor/Respondent should be deemed to have exercised its right thereunder to terminate the Subcontract for convenience.¹³⁰ Under that article, the General Contractor/Respondent was obliged to indemnify the Subcontractor/Claimant not only for all the usable work completed to date of termination but also for the lost profits.¹³¹

However, the Tribunal found that the terminating party should not be liable for the total damage without taking into consideration the other party’s liabilities and then apportioned the responsibility for damages between the parties based on the findings of the expert.¹³²

Comment:

This is an example of a case where an arbitral tribunal places reliance on a tribunal-appointed expert to decide the responsibility for delay between the parties—in effect a legal question—which, at least in the common law tradition, would be exclusively for judges or arbitrators to decide. As the expert here found that both parties were substantially responsible for delays, the Tribunal was unable to find that the termination of the

subcontract was justified under any ground in Sub-Clause 18.1 and concluded with a compromise result as to damages applying Swiss substantive law.

Issue 2: Costs of the arbitration and the recoverability of in-house staff costs

Following what the Tribunal referred to as the basic principles of Swiss law, the Tribunal applied the ‘costs follow the event’ rule (as interpreted by the Tribunal).¹³³

As part of the costs incurred by the parties, the Tribunal accepted, in principle, the costs of in-house staff for the Subcontractor/Claimant but did not find them fully substantiated:

Although the ICC Rules [the 1998 Rules] do not contain a definition of the ‘other costs incurred’ by the Parties, it has become more and more accepted over the years that ‘other costs’ may also include the costs which a party incurred for in-house staff specifically appointed to prepare and support proceedings before an arbitral tribunal. In the case at hand, however, the evidence on record does not enable the Arbitral Tribunal to accept the full amount of salaries claimed. The Arbitral Tribunal is neither in a position to find out how much time the above-mentioned persons effectively dedicated to the preparation and support of the proceedings, nor to review whether the salaries claimed correspond to their employment agreements. On the other hand, the Arbitral Tribunal is aware that those persons in fact played a considerable role on [the Subcontractor/Claimant]’s side. All in all, the Arbitral Tribunal finds it appropriate to cut the total amount . . . down to 50% . . .¹³⁴

The Tribunal found the Subcontractor/Claimant’s costs (after reducing its in-house staff costs by 50%, as stated above) to be reasonable in view of the total amount in dispute:

In view of the total amount in dispute . . . , the complexity of the case and the time spent, the Arbitral Tribunal finds that the aforementioned amount . . . represents reasonable legal and other costs incurred by [the Subcontractor/Claimant] in terms of Article 31 al. 1 ICC Rules.¹³⁵

Comment:

It is instructive that the Tribunal found, where a Claimant’s adjusted costs represent approximately four per cent of the amount in dispute, that this was reasonable. This seems to be a fair conclusion.

But, in order to recover its full in-house staff costs, the Subcontractor/Claimant should have provided the appropriate evidence, which in this instance

¹²⁶ § 545 of the Award.

¹²⁷ §§ 554-557 of the Award.

¹²⁸ §§ 575-578 of the Award.

¹²⁹ §§ 583-585 of the Award.

¹³⁰ § 594 of the Award.

¹³¹ § 595 of the Award.

¹³² §§ 597 and 600 of the Award.

¹³³ § 1293 of the Award.

¹³⁴ § 1304 of the Award.

¹³⁵ § 1306 of the Award.

the Tribunal found to be: (i) evidence of the time effectively spent by in-house staff on the preparation and support of the arbitration; and (ii) evidence, such as employment agreements, of the salaries claimed. Thus, this case provides support for the proposition that, in order to permit the full recovery of the costs of in-house staff working on an arbitration, such staff should (like lawyers in outside law firms) keep time sheets and record their time on a daily basis. These should then be submitted, if necessary, to support any claim for the recovery of in-house staff costs.

IV. Non-FIDIC EPC Construction Contract—Final Award in Case 12090 (2004)

The Purchaser/Second Claimant, a company, entered into an engineering, procurement and commissioning ('EPC') contract with the Contractor/Respondent, another company, for 'the supply, installation and commissioning' by the Contractor/Respondent of eighty wind turbine generators ('WTGs') for a wind farm project. The governing substantive law was the law of country 'D', which applies English common law principles, and the place of arbitration was Singapore. The First Claimant, a company, relied on an assignment agreement it entered into with the Purchaser 'for its rights to claim as well as its status as a claimant'.¹³⁶ A Principal, the founder of the First Claimant, was the driving force behind all the entities involved in dealing with the Contractor/Respondent which led to the EPC contract.

Within five years following installation, most of the WTGs ceased functioning due to high wind turbulence and a high rate of grid failures at the site (although designed for a life of 20 years). Consequently, the Claimants commenced an arbitration against the Contractor/Respondent.

In its final award the Tribunal considered:

- (1) whether the Contractor/Respondent was responsible (as the Claimants maintained) for delivering site-appropriate WTGs (Issue 1 below);
- (2) the calculation of future damages (Issue 2 below); and
- (3) the capping of damages (Issue 3 below).

Issue 1: Was the Contractor/Respondent responsible (as the Claimants maintained) for delivering site-appropriate WTGs?

The Contractor/Respondent argued that, based on its past dealings with the Principal (where its responsibility had been limited to the supply of equipment components only), it was only responsible for supplying 'standard' turbines and that it was not responsible for investigating wind conditions at the site:

[The Contractor/Respondent]'s case, to put it simply, is that, in accordance with the *modus operandi* established from past dealings [with the Principal], its responsibility was to supply its 'standard' turbines. It was not [the Contractor/Respondent]'s responsibility to study the site conditions. The site was chosen entirely by [the founder of the First Claimant (Principal) and a company of which he was a partner], who must be taken as having satisfied themselves that the WTGs to be supplied by [the Contractor/Respondent] would be suitable for the site.¹³⁷

However, the Tribunal found that, according to the EPC contract, the Contractor/Respondent was responsible for supplying site-appropriate turbines as the contract referred specifically to the particular conditions at the site, including wind data in several places.¹³⁸

In light of these provisions, the Tribunal found that:

[the Contractor/Respondent] cannot say, in effect, that its responsibility was to supply its 'standard' WTGs, and that the selection of the site suitable for the WTGs was the responsibility of [the founder of the First Claimant (Principal) and a company of which he was a partner] or anyone else. The true position according to the contract is the other way round. It was for [the Contractor/Respondent] to design and supply the WTGs that would suit the site, and it was also for [the Contractor/Respondent] to ensure that it had all the relevant data about the site, and to make appropriate use of the data, in order to ensure that the WTGs supplied would fulfill the requirements of the contract. This applies to the wind conditions, the characteristics of the terrain, the electrical grid characteristics (including the outage frequencies), and everything else about the site that any WTG designer would need to take into account.

[The Contractor/Respondent] clearly failed to fulfill the obligations which it undertook by the contract to supply WTGs of the kind specified in the contract. To say that its obligation was to supply its 'standard' turbines, is to admit a breach of contract of a gross order.¹³⁹

¹³⁶ § 9 of the Award.

¹³⁷ § 75 of the Award.

¹³⁸ §§ 76–80 of the Award.

¹³⁹ §§ 82–83 of the Award.

Comment:

The Contractor/Respondent sought to avoid liability for the failure of its WTGs by referring (1) not only to its past dealings with the same principal (the Principal) where its responsibility had been limited to the supply of equipment components specified by the Principal and where the sites had been chosen by the Principal, but also (2) to an expert report to the effect that the high wind turbulence and high rate of grid failures (incompatible with the WTGs) at the site chosen by the Principal were so extraordinary that the Contractor/Respondent could not have been expected to have provided for them. However, the Sole Arbitrator decided that the allocation of responsibility provided for by the EPC contract (as the Sole Arbitrator interpreted it) prevailed over these considerations.

As the EPC contract was expressly ‘for the supply, installation and commissioning’¹⁴⁰ (emphasis added) of WTGs, it could also be argued that the Contractor/Respondent impliedly accepted responsibility for site conditions although the Sole Arbitrator does not seem to mention this.

Issue 2: Calculation of future damages

The Claimants presented their claim for future loss on the basis of prospective loss of revenue, i.e. how much revenue would have been generated if the WTGs were to produce the total amount projected in the contract over their 20-year design life. The Claimants claimed future loss for a 16-year period (the remaining design life for the WTGs envisaged by the contract).¹⁴¹ The Tribunal attempted to come to a fair conclusion (based on no precise calculation) by making an award for future loss equal to an amount twice as large as past loss. Thus, as the past loss of revenue had been calculated over a 52 month period (four years and four months), the Tribunal made an award for future loss that was equivalent to 104 months (52 months x 2) of revenue calculated on the same basis.¹⁴²

Issue 3: Capping of damages

The contract contained a provision capping damages in case of a defect which could not be remedied at 18.5% of the Contract Price (Clause 49.b). Clause 49 provides:

Where the defect has not been successfully remedied, over and above the rights under this agreement:

a. The Purchaser is entitled to a reduction of the Contract Price in proportion to the reduced value of

the works, provided that under no circumstances shall such reduction exceed 18.5% of the Contract Price.

b. Where the defect is so substantial as to significantly deprive the Purchaser of the benefit of the Contract, the Purchaser may terminate the contract by notice to the contractor in writing. The Purchaser is then entitled to compensation for the loss he has suffered up to a maximum of 18.5% of the contract price.¹⁴³

Notwithstanding the seriousness of the defect (only 35 of the 80 WTGs were functioning after five years of operation),¹⁴⁴ the Tribunal found, on the basis of English common law, that the cap was nevertheless applicable to damages resulting from the Contractor/Respondent’s breach:

Counsel for Claimants submits that the breaches are so serious that they constitute a fundamental breach of the contract, and that for that reason 49(b) is not applicable. Counsel for [the Contractor/Respondent], on the other hand, submits that there is no rule of law that an exception or exclusion clause is nullified by a so-called fundamental breach of contract. In support, he refers to the English cases of *Suisse Atlantique Societe D’Armement Maritime S.A. vs N.V. Rotterdamsche Kolen Centrale* [1996] 2 All E R 61, and *Photo Production Ltd vs Securicor Transport Ltd* [1980] A C 82.

We accept the submission of counsel for [the Contractor/Respondent]. The position in English common law, which has been accepted by the courts in [State D], is that there is no such rule of law, and that the question in all cases is whether an exclusion or limitation clause, on its true construction, extends to cover the obligation or liability which is sought to be excluded or restricted. . . . We accept that Clause 49(b) applies, in that the defects are so substantial as to deprive the purchaser of the benefit of the contract, and the purchaser’s remedy is as provided in the clause. In particular, the purchaser is entitled to claim compensation for the loss it has suffered, but only up to a maximum of 18.5% of the contract price.¹⁴⁵

Comment:

The 1999 FIDIC Books also contain a limitation on each party’s liability, namely Sub-Clause 17.6 which, however, provides for an express exception in the case of ‘fraud, deliberate default or reckless misconduct by the defaulting Party’. Possibly, this exception (notably ‘reckless misconduct’) would have applied in this case. Indeed, according to one authority, unlike the position under English law described in the above case, ‘most legal systems’ would not enforce a clause limiting a party’s liability in case of a breach resulting from fraud or gross negligence.¹⁴⁶

140 § 1 of the Award.

141 § 142 of the Award.

142 §§ 145–146 of the Award.

143 § 112 of the Award.

144 § 47 of the Award.

145 §§ 115–116 of the Award.

146 M. Fontaine & F. De Ly, *Drafting International Contracts: An Analysis of Contract Clauses*, (Transnational, 2006) at 362, last paragraph. The Arbitral Tribunal’s decision is consistent with English law, as illustrated in a more recent case, *Decoma UK v. Haden Drysys International* ([2006] CILL 2303 TCC and [2005] 103 Con LR 54 TCC).