CHAPTER III

DISPUTE RESOLUTION UNDER F.I.D.I.C. CLAUSE 67

When parties adopt a FIDIC contract and there is a dispute between them whether before or after the completion of construction work, Clause 67 of the FIDIC Conditions of Contract is to be considered as to settlement of dispute procedure.

Clause 67 provides as follows:

<u>67.1 - Engineer's Decision</u>

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

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

If either the Employer or the Contractor be dissatisfied with any decision of the Engine, of if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then

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

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notification of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on of before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

67.2 - Amicable Settlement

Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, arbitration of such dispute shall not be commenced unless an attempt has first been made by the parties to settle such dispute amicably. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, whether or not any attempt at amicable settlement thereof has been made.

67.3 - Arbitration

Any dispute in respect of which:

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

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

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

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

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

67.4 - Failure to Comply with the Engineer's Decision

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

The above Clause 67 may be divided into two proceedings, i.e. pre-arbitral proceedings and arbitral proceedings.

The steps concerning pre-arbitral proceedings are as follows:

1. <u>Pre-arbitral Procedures : Settlement of Disputes by the Engineer</u>

Step One	:	A dispute must exist.
Step Two	:	The dispute must be referred to the Engineer.
Step Three	:	The Engineer must give his decision within 84 days. Such decision is final and binding, subject to arbitration.
Step Four	:	Notice of intention to commence arbitration must be given within 70 days.
Step Five	:	Amicable settlement of disputes

<u>Step One : A dispute must exist</u>

The first consideration regarding the settlement of dispute procedure is that there must be a dispute between the contractor and the employer in connection with the construction work. It may be a difficult question of fact whether there is a dispute between the contractor and the employer. In fact, FIDIC Clause 67 which states that "...a *dispute of any kind whatsoever* arises between the Employer

and the Contractor..." is phrased in general terms to cover any dispute between the parties.

The purpose of this condition is to avoid uncertainty as to whether there exists a dispute or not that shall be settled by the engineer and possibly the arbitrators, and also to avoid such uncertainty after the lapse of a fixed time period (Jarvin, 1986 : 284-285).

Seppala (1986 : 320-321) explained that a typical example of a "dispute" will be where the contractor has made a claim which the employer or the engineer has rejected and the contractor contests such rejection. Under English law, where an amount is "indisputably due", the contractor's normal remedy would be to obtain summary judgment from the courts instead of arbitration proceedings. In the absence of a dispute, there will be no valid reference of the matter to the engineer under Clause 67. Seppala also explained that in some countries except England where English law is not a governing law of the contract, there may be some difficulties in seeking remedy for an undisputed amount since courts in such other countries may not be reliable. Therefore, there may be an attempt to create artificially a "dispute" about such amount by, for example, appropriate correspondence with the employer on the basis of which Clause 67 can be invoked.

Sesser (1992 : 399 and 401) commented that the phrases "...a dispute *arising out of or relating to*" a contract may be broader than the phrases "...a dispute *arising under*" a contract. A clause which states that "...arising under" or "...arising out of" a contract may be limited to claims relating to the interpretation or performance of the contract itself. However, Sesser (1992 : 399) also said that in *JJ Ryan & Sons v. Rhone Poulenc Textile (1988)* the court's view was that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

Step Two : The dispute must be referred to the Engineer

Where there is a dispute between the employer and the contractor, Clause 67 requires that the dispute must initially be referred to the engineer for his decision. Clause 67 requires that the reference must be made in writing with a copy to the other party, stating that the reference is made according to Clause 67. However, no particular form of reference is required under this Clause 67.

It should be noted that the reference back to the engineer has been criticized as being an "irritating and time-wasting formality" (Seppala, 1986 : 323). However,

Jarvin, (1986 : 284-285) questioned whether the conditions laid down in Clause 67 regarding how and when a claim can be referred to arbitration, may be waived by parties' agreement. He also mentioned that if this is possible, it will make a change to the fundamental idea laid down in Clause 67. There will also be a question of what rules of evidence will apply to this situation if the parties' waiver of the conditions is possible.

In addition, Frilet (1992 : 137) said that the French courts will confirm that the parties must inform the Engineer of the matter in dispute as a mandatory step prior to conciliation or arbitration notwithstanding the kind of dispute, i.e. either of a technical or legal nature.

However, Lloyd (1986 : 518) explained that it is basically understood that the Engineer is not in a position to give any legal opinion. What he can do is only to form a common sense opinion upon the meaning of the contractual documents. So, it should not be expected that an engineer can resolve questions of pure law.

Step Three : The Engineer must give his decision within 84 days. Such decision is final and binding, subject to arbitration

Clause 67 requires the engineer to give his decision within 84 days after the day on which he received

such reference. The engineer must give a notice of his decision to the employer and the contractor, which also states that the decision is made pursuant to Clause 67.

It should be noted that the engineer must give his decision *impartially* within the terms of the contract and having regard to all the circumstances (Sub-Clause 2.6 of the FIDIC Conditions of Contract provides that the Engineer is required to give decision impartially). This means that the engineer is obliged to act *fairly* without any *unbiased manner* when giving any decision for the employer and the contractor (Seppala, 1986 : 324).

It is worth to know what the I.C.E. Conditions provide for the engineer's role. Seppala (1986 : 325) touched upon this point as follows :

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

When a decision of the engineer is given to the Employer and the Contractor, it is final and binding upon the Employer and the Contractor. Seppala (1986 ; 325) explained the reason why the Engineer's decision must be

final and binding that it is intended to be a means to settle the dispute promptly, at least on an interim basis, so that there will be no cause to interrupt the progress of the construction work and so that costly delays or disturbances may be avoided.

He also described that the engineer's decision which is final and binding has an effect similar to that of an arbitral award (Seppala, 1986 : 329).

Some countries might enforce FIDIC Clause 67 in respect of the Engineer's decisions as *final and binding* in all circumstances, while other countries might consider the same as *part of evidence*, i.e. it being an *expert's opinion* for the purposes of any judicial decision on the matter (Seppala, 1986 : 333).

Step Four : Notice of intention to commence arbitration must be given within 70 days

After the Engineer's decision is given to the Employer and the Contractor, any party who is not satisfied with the Engineer's decision may commence arbitration within 70 days after the day on which he received notice of such decision. Where no Engineer's decision is given, a notice to commence arbitration must be given within 70 days after the day on which the period of 84 days expired. It is also required that the notice of intention to commence

arbitration must be given to the other party with a copy to the Engineer.

The result for failing to refer the disputes within the said 70 day-period is quite clear that no arbitration can take place, while the parties are not barred to commence litigation within the prescription period (see section 9 of the Thai Arbitration Act). However, in order to have more flexible time schedule, the parties may amend this time limit in FIDIC Clause 67, for example by saying that "...disputes can be referred to the arbitrators within same period of time as that of the prescription period required by law."

Step Five : Amicable Settlement of Disputes

It should be noted that when the Engineer fails to settle the dispute, Sub-Clause 67.2 provides for any reference of the dispute to a third neutral party. Therefore, the parties attempt to reach a negotiated settlement.

The 6th Edition of the ICE Conditions for Civil Engineering Works provides that an Alternative Dispute Resolution is a condition precedent of commencing arbitration (Ludlow and Rees, 1992 : 532). While Sub-Clause 67.2 does not provide so and does not require the parties to choose any form of ADR. So, this is still open to the

parties to choose one of their own.

Sub-Clause 67.2 is a reminder and an encouragement for the parties to resolve the dispute amicably prior to arbitration process, using any of alternative dispute resolution which may be appropriate in certain circumstances. This clause is very general and leaves to the parties the need to select a procedure on a cost sharing basis by themselves. In such a case, the parties should first get together and attempt to negotiate directly. If this fails, the parties may agree to use mediation or conciliation process to resolve the dispute (Hollands, 1989 : 33 and 43). The mediation is usually a face-to-face discussion, having a mediator to assist them to negotiate with each other. While in the conciliation process, the conciliator may also suggest terms of settlement or a decision that the parties may elect to be bound by. The conciliation process is optional and may be viewed as an alternative to arbitration or as a preliminary step to arbitration in the event that conciliation procedures fail. (Hollands, 1989 : 38-39) .

In connection with the time bar stated in FIDIC Sub-Clause 67.2, Goedel (1988 : 64) commented that this is contrary to the flexible arbitration proceedings and the powers of the arbitrators can not be limited in such

important fields as to the relevance of certain evidence and to the limitation of contemporary records.

Where the disputes are settled by the parties, lawyers will have an important role in ensuring that any settlement agreement reached between the parties is reduced to writing for evidentiary and enforcement purposes (Tyrril, 1992 :382).

According to section 850 of the CCC, the settlement agreement between the parties must be evidenced in writing, otherwise it is unenforceable. It is also suggested that the settlement agreement should include all past, present and future disputes of all particular issues which have been disputed between the parties in construction work, in order to avoid second or third time of disputes between the parties.

2. Arbitral Procedures : Settlement by ICC Arbitration of Disputes not Settled by the Engineer

Sub-Clause 67.3 of the FIDIC Conditions of Contract provides that any dispute in respect of which the decision of the engineer has not become final and binding pursuant to Sub-Clause 67.1 and amicable settlement has not been reached within the period stated in Sub-Clause 67.2, it shall be finally settled, unless otherwise specified in the contract, under the Rules of the Conciliation and

Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules.

The International Chamber of Commerce or ICC was established in 1919 with 114 countries and 7164 enterprises and organizations as members. The objective of the ICC is to promote international commercial worldwide (Craig, Park and Paulson, 1990 : 25). There have been over 6,000 cases involving international commercial disputes since the ICC Court of Arbitration was established in 1923. The current ICC Rules came into force on 1 January 1988 (Arbitration Office, 1992 : 237) consisting of 26 Articles together with the appendices, i.e. Statutes of the Court, International Rules of the Court of Arbitration and Schedule of Conciliation and Arbitration Costs.

The ICC Rules were designed for use in any country where the law allows arbitration, providing an institutional framework for private resolution of disputes. The purpose is to establish and supervise separate arbitral tribunals on a case-by-case basis as provided in specific contracts between the parties. the ICC arbitration is not intended for non-business matters, e.g. family law or labor matters, etc. because these fields of laws are normally protected by specific mandatory legislation and specially designated jurisdictions (Craig, Park and Paulsson, 1990 : 169-172).

According to Ludlow and Rees (1992 : 530), all decisions which have been made by the Engineer should be open to be reviewed by arbitrators and nothing will be hidden. In addition, the Engineer himself may be called as one of the witnesses in arbitral proceedings in which situation he must be able to explain his decisions.

The ICC Court of Arbitration was originally established in 1923. It provides international arbitration services. This is to promote the flow of international commerce and investment (Jarvin, 1986 : 139). The term "Court of Arbitration" could be misleading on the real function of the ICC Court of Arbitration. In fact, the ICC Court of Arbitration is an *administrative agency* which provides an institutional supervision of international arbitration. The ICC Court of Arbitration has its headquarters located in Paris, France (Jarvin, 1986 : 140). It has no authority to render any arbitral awards (Article 2 of the ICC Rules of Arbitration provides that the Court of Arbitration does not itself settle disputes).

The functions of the Court are governed by the "Internal Rules of the Court". The work of the Court is handled in a strictly confidential manner. This requirement applies to all persons involved in the work of the Court according to Article 2 of the Internal Rules of the Court. In addition, those who are researchers working in the ICC

Court of Arbitration are required to sign agreement to protect confidentiality and to submit any proposed publication for prior approval by the Director and the General Counsel according to Articles 3 and 4 of the Internal Rules of the Court (Jarvin, 1986 : 141-142).

According to the ICC Rules of Arbitration (see **Appendix** C), the Arbitral Tribunal consists of a sole arbitrator or three arbitrators, as the case may be, who have been nominated by the parties or have been appointed by the ICC Court of Arbitration (Article 2). The arbitrators have the authority to consider any disputes submitted to the Court of Arbitration and finally render arbitral awards.

The conditions of the Arbitral Tribunal as to the decision making are as follows:

1. Both parties have an opportunity to independently use the ICC Rules, provided they comply with the Rules.
2. The parties must have a clear agreement that the ICC Rules are to apply, e.g. FIDIC Sub-Clause 67.3 clearly specifies that the ICC Rules apply.
3. The dispute must involve international commercial transactions (see Article 1).
4. If the parties select the arbitrators, the arbitrators must have the following

qualifications, i.e. be natural persons and have legal capacity which means they are not minors or incompetent persons or quasi-incompetent persons or not controlled by a either party (see Article 2).

5. The parties have a right to fix the number of the arbitrators. Where the number of the arbitrators has not been fixed, there will be a sole arbitrator, except where it is a complicated matter in which case there can be three arbitrators (see Article 2).

Jurisdiction of Arbitration

It is very important for the ICC Court of Arbitration to decide in the first place whether it has jurisdiction over a construction dispute referred to it. In order to ensure about the jurisdiction the Court must determine whether the dispute is an international dispute required by Article 1 of the ICC Rules. Article 1 provides that "...The function of the Court is to provide for the settlement by arbitration of business disputes of an international character in accordance with these Rules." From this Article 1, the disputes must be business disputes with international character.

In practice, where an arbitration states that the ICC Court of Arbitration has jurisdiction over business disputes, the Court may accept the jurisdiction even though they are not of an international character (Jarvin, 1985 : 143).

Choice of Arbitrators

In general, construction work which involves large sums of money, lengths of time, different types of personnel are considered to have specific characteristics that arbitration in this field should have particular requirements. Because any disputes which arise frequently involve technical problems which require arbitrators who have special knowledge to resolve the problems.

As regards the number of arbitrators, the parties are free to fix the number by themselves (see Article 2 (5) of the Rules). The advantages of having a single arbitrator may be the speed and cost cutting. While three arbitrators may assure a more thorough consideration of all the issues from different points of view, especially in major arbitrations having parties from different culture, politics, and economic development, in which case a single arbitrator may not be appropriate. Where the number of arbitrators have not been agreed by the parties, Article 2 (5) provides a single arbitrator is to be appointed.

Place of Arbitration

In principle, the parties have a free choice to determine the place of arbitration (see Article 12 of the Rules). This subject involves the principle of *lex arbitri* which is discussed in detail in Chapter IV. In brief, the law governing the arbitration is the law of the place of arbitration or *lex loci arbitri*. The parties normally do not choose the *lex arbitri* directly but they can do it indirectly by adopting the arbitration law of any country where they wish to hold arbitration.

Terms of Reference

According to Article 13 of the ICC Rules of Arbitration, there must be an instrument defining and limiting the legal relationship between the parties and the arbitrators. Said instrument is called "Terms of Reference" in English and "Acte de Mission" in French (Jarvin, 1986 : 149).

Article 13 (1) of the ICC Rules provides that the Terms of Reference must contain the following particulars:

(a) the full names and description of the parties,

(b) the addresses of the parties to which notifications or communications arising in the course of the arbitration may validly be made,

(c) a summary of the parties' respective claims,

(d) definition of the issues to be determined,

(e) the arbitrator's full name, description and address,

(f) the place of arbitration,

(g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitrator to act as amiable compositeur,

(h) such other particulars as may be required to make the arbitral award enforceable under the law, or may be regarded as helpful by the Court of Arbitration or the arbitrator.

The Terms of Reference would normally help the arbitrator and the parties in terms of planning the arbitral proceedings and would also assist the Court in ensuring the arbitral award has been rendered only for the particular issues determined (Jarvin, 1986 : 150). The Terms of Reference usually finalized during the first meeting between the arbitrators and the parties (Craig, Park and Paulsson, 1990 : 252).

The Terms of Reference must be signed by the parties and the arbitrators. Where any party refuses to draw up or to sign the Terms of Reference, the Court may set up a time limit for signature of the defaulting party, on the expiry of which limit the arbitration shall proceed,

regardless of whether the defaulting party has placed his signature on the same (See Article 13 of the ICC Rules of Arbitration).

Although the drafting of the Terms of Reference may be somewhat time consuming, it is helpful to arbitration process because the discussions leading to the agreement on issues may also lead to settlement of disputes (Craig, Park and Paulsson, 1990 : 253).

Rendering of Awards

Generally, arbitral awards can be made not only after all hearings of the parties have been completed, but also during the arbitral proceedings where an agreement or settlement is reached between them. According to Article 17 of the ICC Rules of Arbitration, where a settlement is reached after a dispute has been filed with the arbitrator, the same shall be recorded in the form of an *arbitral award* made by the consent of the parties. Otherwise, an arbitral award must be rendered within six months from the date of the last signature by the arbitrator or of the parties of the Terms of Reference, etc. (see Article 18 of the ICC Rules).

The six-month rule is also specified under section 21 of the Thai Arbitration Act 1987 which provides that "...an award shall be rendered within one hundred and eighty days from the day on which the last arbitrator or umpire was

appointed". This period may be extended by the court when a petition is filed by either party under section 21 of the Act. However, the Act is silent as to whether the parties can settle the case during the arbitral proceedings. While there is no provision in the Act prohibiting this, it is possible that an agreement or settlement of the parties concerning the disputes between them can be made during the arbitral proceedings.