CHAPTER IV

LEGAL PROBLEMS WHICH MAY ARISE UNDER FIDIC CLAUSE 67

1. Pre-arbitral Proceedings Stage

1.1 Validity of FIDIC Clause 67 when FIDIC Contract is void

There is a problem whether FIDIC Clause 67 is still valid where a FIDIC contract is void for any reasons.

A theory which directly relates to this issue is the theory of "autonomy of the arbitration clause" or sometimes is called "separability" or "severability" doctrine which is widely accepted by national legal systems, especially with respect to international commercial arbitration (Redfern and Hunter, 1990 : 176). According to this theory, It can be explained that an arbitration clause is considered as being separated from and independent of the contract of which it forms part (Redfern and Hunter, 1990 : 174 and Phijaisakdi Horayankura : 10). The legal analysis of this theory is that a construction contract which is the main or primary contract deals with the rights and duties between the Employer and the Contractor, while an arbitration clause which is the secondary or collateral contract deals with the jurisdiction of the arbitration (see Redfern and Hunter, 1990 : 175).

The concept of the autonomy of the arbitration clause has also been endorsed by the International Chamber of Commerce in Article 8 (4) of its Rules.

Article 8 (4) of the ICC Rules of Arbitration states:

> "Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas."

1.2 Change of the Parties' Agreement concerning the Proceedings for Dispute Resolution

There are some questions which may be raised when the Employer and the Contractor change their mind in connection with the proceedings for dispute resolution. For example, in a situation where the Employer and the Contractor are dissatisfied with the Engineer's decisions given under FIDIC Clause 67. There is a problem whether the parties can cancel FIDIC Clause 67, ignore the Engineer's decisions and then commence litigation. Or in a situation where the parties would like to use an ad hoc arbitration instead of ICC arbitration before the arbitration takes place. Can the parties do like this?

In the first situation, as has been discussed in Chapters II and III that the pre-arbitral proceedings whereby the Engineer's

decisions must be given is considered to be a non-binding process. Although, the Engineer's decision has been given under FIDIC Clause 67, the Employer and the Contractor should be allowed to cancel the FIDIC Clause 67 and file a lawsuit to the ordinary court. Craig, Park and Paulsson (1990 : 49) seem to agree with this solution by saying that "...the parties could at any time agree to cancel the arbitration clause and bring the matter before an ordinary court". However, the answer would be the opposite if a compromise agreement between the parties to reflect the Engineer's decision has been evidenced in writing according to section 850 of the CCC.

In the second situation, a question, not in practice but probably in theory, may arise as to whether the parties can change their mind not to pursue the ICC Rules on arbitral proceedings which have been chosen by them under FIDIC Clause 67 and establish an ad hoc (non-administered) arbitration.

First of all, it must be remembered that the parties have freedom in choosing any rules of procedure (see Craig, Park and Paulsson, 1990 : 133) which can, at any time, be canceled, modified or otherwise adapted according to the wish of the parties. The parties therefore are free to refer their disputes to an ad hoc arbitration irrespective of whether they adopt the ICC Rules as procedural rules for arbitration, instead of referring the same to the ICC Court of Arbitration.

1.3 Failure of a Party to Appoint Arbitrators

What happens if a party fails to perform his duty to appoint an arbitrator? How can the ICC Court of Arbitration deal with this problem?

Basically, it is understood that a default by a party at any stage of the proceedings is not allowed to frustrate the arbitral process (Craig, Park and Paulsson, 1990 : 213). However, Article 2(6) of the ICC Rules which deals with this problem provides as follows:

> "Where the Court is to appoint an arbitrator on behalf of a party which has failed to nominate one, it shall make the appointment after having requested a proposal from the National Committee of the country of which the said party is a national."

According to Craig, Park and Paulsson (1990 : 26), the "National Committees" referred to in Article 2 (6) above, are normally created by the ICC members and serve as an interface between the members and the ICC headquarters in Paris. The National Committees appoint the members of the Council of the ICC which is its supreme organ.

It is understood from Article 2(6) of the ICC Rules of Arbitration that the parties can choose and appoint at liberty their own arbitrators, failing which the appointment can be made by the ICC Court of Arbitration on behalf of the parties as proposed

by the National Committee of the country of which the parties are nationals. The ICC solution in this matter is in line with section 13 of the Thai Arbitration Act 1987, whereby a competent court may, upon a petition by a party, order an appointment of arbitrator where the appointment is not made within the period of time specified in the arbitration agreement or within a reasonable time.

1.4 To What Extent do the Arbitrators Can Make Use of the Engineer's Decisions?

It is interesting to survey how arbitrators make use of the Engineer's decisions in deciding disputes which have been referred to the arbitrators under the ICC Rules of Arbitration.

As aforesaid in Chapter III that the Engineer's decisions are basically not binding on the parties and the parties may go another step by referring their disputes to the arbitrators. According to Article 14 (1) of the ICC Rules of Arbitration, the arbitrators can establish the facts of the case by "all appropriate means". In such a case, arbitrators should be free to take into consideration the Engineer's decisions as part of their support in deciding the disputes. In fact, this issue involves a fact finding of the arbitrators. The Engineer's decisions may be one source of facts of the matter in disputes. The Engineer's decisions may be useful to the arbitrators in reviewing some back ground information of the disputes. The arbitrators are not compelled to follow the

Engineer's decisions either in whole or in part. Otherwise, the procedures provided in FIDIC Clause 67 as a mechanism of resolving the disputes would be a non-sense. Therefore, the Engineer's decisions do not create any influence over the arbitrators in deciding the disputes between the Employer and the Contractor. In addition, Redfern and Hunter (1990 : 342) said that the Engineer himself may be called upon to make any reports or give evidence in relation to disputes where the quality of the construction work, the performance of the plant and equipment is in issue.

2. Arbitral Proceedings Stage

2.1 Withdrawal of Request for Arbitration

Supposing a request to arbitrate has been made to the ICC Court of Arbitration which already declared that the dispute is in its jurisdiction. There is a question whether the claimant party can withdraw his request from the ICC Court. One may argue that this question may never happen in practice. However, it is interesting to analyze it for the academic exercise.

The ICC Rules do not deal with this issue. Therefore, the best we can do is to analyze an impact of this matter when it occurs.

It is accepted that an arbitration is not possible if without an agreement to arbitrate between the parties concerned.

A question may arise whether a consent from the respondent party is required when the claimant party would like to withdraw his request to arbitrate. Although the ICC Rules are silent on this matter, the basic principle of arbitration is that the arbitration is based on the agreement between the parties, the parties' will and the parties' consent (Arbitration Office, 1992 : 145 and 152). Or, in other words, this principle may be called the principle of "party autonomy" (Redfern and Hunter, 1991 : 290). This principle is evidenced by the ICC Rules itself as follows:

(1) The parties have a choice to determine the number of arbitrators (see Article 2 (5)).

(2) The parties may set up the rules governing the proceedings where the ICC Rules are silent (see Article 11).

(3) The parties may choose the place of arbitration (see Article 12).

(4) The parties are free to determine the law governing the merits of the dispute (see Article 13 (3)).

(5) The parties may agree that the arbitrator decides the case on the relevant documents alone without having to hear any witnesses (see Article 14 (3)).

(6) The parties may agree to allow any persons who are not involved in the proceedings to be present at any hearings of arbitration (see Article 15 (4)).

From the above, the writer is of the opinion that the claimant party may withdraw his request to arbitrate from the ICC Court only with a consent of the respondent party.

2.2 Rules and Law Governing Arbitral Proceedings

There is a question what applies in the first place and what applies as supplement between the "rules" or the "law" on arbitral proceedings.

Generally, the parties are allowed to choose the rules of arbitral proceedings. They can employ several methods. They can establish their own rules or adopt the rules sponsored by a trade association or an institution or they may refer to the procedure prevailing in a particular country (see Mann, 1967 : 164-166). In principle, the rules governing arbitral proceedings would applies in the first place. The law governing arbitral proceedings apply as supplement where an issue is silent under the rules; for example, rules for providing for the appointment of an arbitrator where the parties cannot agree; or for the removal of an arbitrator who has failed in his duty of impartiality (Redfern and Hunter, 1991 : 83). In other words, the procedural law would apply as a "gap-filling" tool where the rules cannot deal with a particular issue. Where the parties adopt an arbitration law of any country as "rules" for arbitral proceedings, said law is to be considered as "rules" for conducting the arbitration. It should be noted that

this concept is based on the parties' freedom of choice. However, Redfern and Hunter (1991 : 92) recommended that in case of adopting the procedural law of other country, the parties should locate their arbitration in that country as well. Otherwise, they may encounter some difficulties, for example, "...in obtaining a subpoena to realize the problems inherent in a choice of foreign procedural law because in many countries an arbitrator has no power to issue a subpoena and the parties must rely on the offices of the [ordinary] court for such process".

The law which will govern the arbitration proceedings will be the law of the place of arbitration according to the "*lex loci arbitri*" or "*lex arbitri*" principle (Redfern, 1985 : 259). This principle is sometimes called the "seat" or "forum" of the arbitration which is well established in both the theory and practice of international arbitration (Redfern and Hunter, 1991 : 81). The parties normally do not choose the law governing arbitral proceedings but they can do it indirectly through a choice of arbitral seat (Craig, Park and Paulsson, 1990 : 450). As regards the arbitral seat, it is possible that "a Stockholm arbitrator, when called upon to arbitrate between parties in Paris and Hamburg respectively, decides to hold the arbitration in Zurich". He argued that the existence of a seat does not mean that all hearings will necessarily have to be held in the country of such seat. In

practice, it could be held in different places for convenience of the arbitral tribunal (Mann, 1967 : 163). For example, an arbitrator in an international construction disputes sitting in one country may visit the site of the project in another country for the purpose of an inspection (Redfern and Hunter, 1991 : 94).

The *lex arbitri* is traditionally fixed by the country where the arbitral proceedings first take place (Craig, Park and Paulsson , 1990 : 443). It cannot be the law of any country other than that of the arbitral seat; there is only one country qualified to create the lex arbitri (Mann, 1967 : 161). *Lex arbitri* is different from (Craig, Park and Paulsson , 1990 : 443) :

(1) the law governing the validity or interpretation of the contract (the law of the merits of the dispute);

(2) the procedural rules applied by the arbitrator to issues such as the admissibility of evidence, keeping transcripts, or appointing experts (the internal procedural law of the arbitral routine);

(3) the choice of law principles that determine the proper law to govern the contract;

(4) the law and treaties applicable to the recognition and enforcement of the award; or

(5) the law determining the validity of the agreement to submit a dispute to arbitration in the first place.

The arguments considered

Although the parties have freedom to choose "rules" governing arbitral proceedings, one school take the view that in case the rules chosen by the parties are contrary to "*lex arbitri*", *lex arbitri* would always apply (cf. Yut Sangoudhai, 1984 : 85). Further, *lex arbitri* may include some provisions allowing the parties to make certain choices. The purpose of this freedom of choice is probably to promote arbitration to be held in such country. Examples for this discussion can be found in section 11 of the Thai Arbitration Act 1987 which allows the parties to determine the number of arbitrators or in section 12 of the Act which allows the parties to fix a period of time to appoint arbitrators, etc. The reason why some sections in the Act, for example section 16 of the Act which provides that an arbitral award must be rendered by a "majority of votes", is closed for the parties to agree otherwise is probably against the "public policy".

In the writer's opinion, the *lex arbitri* or the law on arbitration is a procedural law which concerns the public policy (see Yut Sangoudhai, 1984 :85). No rules can override the public policy. As a result, no rules can replace the *lex arbitri*. The *lex arbitri* always apply where the rules and *lex arbitri* are in conflict.

2.3 Multi-Party Arbitration

Generally, there are more than two parties involved in large construction works, i.e. employer, main contractor, sub-contractors, designers, consultant, etc. Where there is a dispute between the employer and the contractor, it frequently affects other parties to the construction works. For example, if the employer has any complaints regarding work done, he must arbitrate against his main contractor. If the employer wins, the contractor will then go after or seek to recover from the sub-contractors or suppliers concerned with the defective work, by way of separate arbitration (Lew, ,1987 : 184). Because the fact findings made by one arbitral tribunal will not bind the other (Mustill and Boyd, 1989 : 142).

Where there are two separate arbitrations or more, there is a possibility that the arbitral awards rendered in various arbitrations may be inconsistent with each other. Further, it is also more time consuming and costly where same parties have to join in various arbitrations for the same old issues.

In order to save time and expense and also to avoid the risk of inconsistent awards, it is suggested that all the parties join in the same arbitration. However, there may be some difficulties and limitations in consolidating the arbitration of all the parties in order to have only one arbitration since

arbitration is based on consent or agreement between the parties concerned (Lew, 1987 : 184). And no one can be made a party to an arbitration unless he is bound by an enforceable arbitration clause (Kaufmann, 1990 : 350).

Part of the reasons that multi-party arbitration may be rejected by any party involved in the construction is to avoid disclosing commercial information to others, e.g. cost of goods supplied, cost of labour, etc. These make it more difficult for the parties concerned to join in the same arbitration, so called "multi-party arbitration".

Where a dispute involves more than two parties under arbitration clauses embodied in different contracts and separate arbitral tribunals have been set up in a domestic arbitration, it is not possible for Thai courts (while the ICC Rules are silent on this point) which are not given any authority to consolidate the two arbitrations under the Thai Arbitration Act 1987. The only way to solve this is that all the parties concerned in the disputes give consent to this matter or establish a multi-party arbitration clause.

Although, the ICC "Rules of Arbitration" does not deal with the multi-party arbitrations but Redfern and Hunter (1991 : 184) said that the ICC has published a booklet containing advice to parties who would like to have multi-party arbitration clause in

their agreement. Redfern and Hunter (1991 : 188) mentioned that one of the major problems about the multi-party arbitration is that of establishing arbitral tribunal. In other words, it is not practical for all parties involved in the construction disputes to nominate their own arbitral tribunals or arbitrators since the number of arbitrators may be more than it should be or the number could be unidentified. In order to avoid this problem, it is suggested by the ICC that the arbitrators should all be appointed by the ICC Court of Arbitration, in stead of the parties.

Disputes involving more than two parties tend to end up before the courts for technical reasons (Rowland, 1988 : 20). One party who is involved in construction work may prefer consolidation of separate construction arbitration proceedings, while other parties may not. For example, a homeowner may be faced with separate proceedings in trying to allocate blame for a defective building between his architect and his builder (Gray, 1992 : 279). For one thing, arbitration proceedings normally arise pursuant to a clause in a contract between two parties and neither they nor the arbitrator have any power to force a third party (or parties) to join in. Similarly, however close a third party's involvement with the facts, unless every party concerned agrees he has no means of participating or otherwise intervening - even if he actually knows

the arbitration is taking place, which may well not be the case (Rowland, 1988 : 20-21).

Arbitrators can hear all disputes which have been referred to him, and on the application of a party, to join any third party or parties who have given written consent to be joined. There has been some reluctance to press for a change in the law permitting the court to order consolidation - as Hong Kong legislation has done - amongst other reasons because it would involve overriding the intention of the parties and could cause difficulty in enforcing the award internationally. Compared to litigation, there is usually no problem in consolidating two or more actions, or in joining other persons by means of third party proceedings (Rowland, 1988 : 21-22).

However, Sub-Article 15(4) clearly blocks any third party who is not involved in the arbitral proceedings to join the proceedings without the approval of the arbitrator and of the parties.

Sub-Article 15(4) of the ICC Rules provides:

> "Save with the approval of the arbitrator and of the parties, <u>persons not involved</u> in the proceedings shall not be admitted."

In conclusion, it is possible to have a multi-arbitration only when all the parties concerned, i.e. the employer, the

contractor, the sub-contractors, the engineer, the suppliers, etc. have agreed to do so. Otherwise, multi-party arbitration is not possible.

2.4 To What Extent do the ICC Rules Have to Conform to the Thai Arbitration Act 1987?

There may be a problem in a situation where the ICC Rules are adopted as procedural rules as specified in FIDIC Clause 67, but the ICC Rules and the Thai Arbitration Act 1987 are in conflict on certain issues. There is a question as to what prevails between the ICC Rules and the Act.

In analyzing this question, an example must be given in order to have a clear picture on the issue. For example, the issue on the number of arbitrators where there is no agreement between the parties. In such a case, the ICC Rules provides that a "sole" arbitrator shall be appointed (see Article 5 (2) of the Rules). While the Thai Arbitration Act 1987 provides that "three" arbitrators shall be appointed. Section 11 of the Act provides that:

> "There may be one or several arbitrators. In case there are several arbitrators, each party shall appoint an equal number, In case the arbitration agreement does not specify the number of arbitrator, the parties shall each appoint one arbitrator, and the said arbitrators shall jointly appoint a third person as additional arbitrator."

From the above discussion, it can be seen that the ICC Rules and the Act are clearly in conflict on the number of arbitrators where the parties' agreement is silent, i.e. the ICC Rules provide for "sole arbitrator" but the Act provides for "three arbitrators".

There are three schools of thought on this issue as follows:

(1) Free school - This school believes that arbitration is based on an agreement between the parties without having to refer to any legal system (see Paulsson, 1981 : 30), and the parties are free to choose methods of conducting the arbitration (Redfern and Hunter, 1991 :292).

(2) The second school respects the party autonomy which must be restricted by the principle of "public policy". This means that "...the arbitrators may not cause the arbitration to be conducted in a manner contrary to the public policy of the state in which the arbitration is held" (Redfern and Hunter, 1991 : 292-293).

The explanation about the public policy has been given by Professor Berthold Goldman as follows (Craig, Park and Paulsson, 1990 : 276):

> "The details of mandatory public policy requirements concerning the arbitral hearing and related procedures are so obvious. They lay down that each party's right to

> present its case and to discuss the position of the other party must be respected... these two requirements are not identical, since the first implies that every party must have the opportunity to develop fully its claims and arguments in defence, whilst the second ordains that no question shall be decided by the arbitrator until each party has been afforded the opportunity of discussing it."

Four classes of provision which have been considered contrary to the public policy are as follows (Mustill and Boyd, 1989 : 283-284) :

> "1. Terms which affect the substantive content of the award, including (i) those which entitle the arbitrator to decide otherwise than in accordance with the substantive law governing the underlying contract; for example those which require or empower him to decide ex aequo et bono, (ii) Those which require the arbitrator to enforce an illegal contract, and (iii) certain terms which prescribe in advance what the terms of the award shall be.
>
> 2. Terms which purport to exclude or restrict the supervisory jurisdiction of the Court, including (i) those which exclude or restrict to an unacceptable degree the right of a party to appeal to the High Court on a question of law, and (ii) those which exclude or restrict to an unacceptable degree the right of a party to invoke the powers of the High Court to intervene if the reference has been conducted in an improper manner.
>
> 3. Terms which require the arbitrator to conduct the reference in an unacceptable manner, including (i) those which require the arbitrator to perform an illegal act in conducting the reference, and (ii) those which require or permit the arbitrator to conduct the reference in a manner inconsistent with the basic procedural requirements of English arbitration law.

> 4. Terms which purport to empower the arbitrator to carry out procedures or exercise powers which lie exclusively within the jurisdiction of the courts."

(3) The third school believes that arbitration law which is a public law concerns the public order or good morals and cannot be changed by private parties' agreement (see Yut Sangoudhai, 1984 : 85).

It should be noted that in practice, the free school of thought mentioned above is impossible. The reason is that even though the Belgium which is claimed to be extremely free on arbitration. Namely, foreign arbitral awards are not subject to review by the Belgian courts in respect of "public policy" but not including the "international public policy". This implies that arbitration in Belgium is still being controlled by the Belgian arbitration law (Lamber, 1986 : 60).

While it is not clear which school Thailand would follow, it is believed that the free school will not be chosen for Thai arbitration as far as the concept of public order and good morals are still laid down in the Thai Civil and Commercial Code. And a procedural law always concern the public order and good morals.

Going back to the issue above, it is interesting to consider whether the Thai Arbitration Act 1987 which is a national law is to be taken into consideration in the situation discussed above. In other words, whether it is necessary to consider the conformity to the Act regarding the number of arbitrators.

The answer would depend on the school of thought we apply. For example, if the second thought (the party autonomy is restricted by the public policy) is applied, the ICC Rules which fix the number of arbitrators for a "sole" arbitrator would apply.