



**RECENT TREATMENT OF
CONSTRUCTION AWARDS BY
THE ICC INTERNATIONAL
COURT OF ARBITRATION**

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The ICC Court

The International Chamber of Commerce (ICC) International Court of Arbitration remains one of the world's foremost venues for the settlement of international construction disputes. Whilst the ascendancy of the UNCITRAL Rules¹ has meant that a number of construction arbitrations are *ad hoc* UNCITRAL ones, the ICC caseload has continued to grow. The ICC Court has continued to scrutinise a growing number of international construction awards rendered either as a result of the use of the FIDIC standard clauses² or through ICC arbitration clauses in bespoke construction contracts. There are also a number of US related construction cases which are settled by ICC arbitration, but on contract forms that do not have much resemblance at all to FIDIC. I estimate that about 70% of the ICC references are through bespoke rather than standard form clauses, which suggests that the parties have actively considered the choices, and decided upon ICC arbitration. Having said that, construction arbitrations are a sub-set of a larger group, currently being described under the newly vogue description of 'complex arbitrations', and share their characteristics with this larger group.

So where are the cases?

The jurisprudence resulting from ICC awards remains relatively inaccessible, although extracts are published in the ICC Bulletin,³ the Yearbook of Commercial Arbitration,⁴ International Legal Materials,⁵ Mealey's⁶ (US) and in the ICC's own volumes of decisions published every three to five years.⁷ There is also a relatively well known, albeit informal, trade in awards – particularly in Paris. As the Canadian member of the ICC Court, I am of course bound by my duty of confidentiality. Accordingly I will not delve too deeply into specific cases but rather speak more generally (and probably

1 UNCITRAL Model Law on International Commercial Arbitration (1985).

2 From the standard forms of contract published by the Fédération Internationale des Ingénieurs-conseils (FIDIC).

3 ICC International Court of Arbitration Bulletin, see www.iccwbo.org/court.

4 Yearbook of Commercial Arbitration, Kluwer.

5 *International Legal Materials*, published bi-monthly by the American Society of International Law, obtainable from www.asil.org.

6 Mealey's International Arbitration Reports, see www.mealeys.com.

7 Collection of ICC Arbitral Awards, see www.iccbooks.com.

therefore slightly more accurately) about the recent treatment of construction awards by the International Court.⁸

Jurisdictional disputes

Jurisdictional exceptions of some kind are almost always taken by respondents to construction arbitration. They range from allegations that Mr/Ms 'XXX' is not qualified to represent a party at the seat of arbitration because he/she is not a member of the local bar, through to allegations that the entire contract was vitiated by fraud. It is not uncommon to see both arguments and everything in between. There are a few basic points.

Jurisdictional objections based on alleged pre-conditions to arbitration

The dispute resolution provisions in FIDIC contracts are 'multi-tier' and require either prior references to an engineer or dispute adjudication board (DAB) or both before the arbitration tribunal can become empowered to determine the matters still in dispute. In ICC arbitration, it is very common to see objections taken to the determination by an arbitral tribunal of one or more issues because they were not previously passed before the engineer and/or a DAB (which was or should have been constituted under the contract).

One also sees objections taken on the basis that the contract required a prior mediation or amicable dispute settlement procedure before proceeding to arbitration. This objection is easier to deal with if it is a civil law country acting as the seat of the arbitration, or such a country is otherwise engaged. Jurisprudence seems pretty uniform in these countries: this type of provision is 'facultative' only and a failure to wholly implement a mediation or prior amicable settlement procedure prior to arbitration will not be fatal to the efficacy of the arbitral procedure.

It is noticeable that in recent years (since the publication of the 1995 Orange Book⁹ and particularly since the publication of the 1999 suite of contracts), FIDIC have strongly reinforced the provisions relating to the use of their dispute procedures to settle disputes. In parallel, national courts (including those in England) have been confirming the efficacy of such provisions in keeping disputes out of court and providing the path by which the parties are obliged to seek resolution of disputes.

Practitioners in nations around the world analyse these decisions in great detail but fail to recognise that they are taking part in a phenomenon which is worldwide in scope. One sees, at the court level, citations of national cases, and cases from other countries, but it takes the compilers of the international arbitration text books to point out that the whole world seems to be moving in a similar direction. The jurisdictional debates about adjudication in the UK

8 For a good text on FIDIC see Edward Corbett, *FIDIC Fourth: A Practical Legal Guide*, Sweet and Maxwell, London, 1991.

9 Conditions of Contract for Design-Build and Turnkey, FIDIC, 1995, the 'Orange Book'.

are particularly complex and at times nothing more than a rehashing of themes that were largely won in respect of arbitration some time ago, or laid to death by the Arbitration Act 1996.

Definitional issues

*It does not matter what colour the cat is, as long as it catches the mouse....*¹⁰

Is it an issue of jurisdiction, competence, time bar, contractual time bar, capacity, or something else?

Depending on their national traditions, lawyers tend to characterise similar arguments in different ways. So what I would call ‘estoppel’ is frequently cited as an incidence of good faith, and so on. These definitional points are frequently seen in relation to jurisdictional arguments, and the answer might simply be to put your argument into the lexicon of your tribunal, so that the tribunal feels comfortable with it.

Administrative law arguments are a good example in this area. If you are dealing with a civil law tribunal, it would be best to use the denationalised concepts favoured by French influenced jurisprudence. So for example, my French qualified assistant recently sent me a note of an unreported French language ICC construction/administrative law case which decided as follows:

Some contracts, which do not provide under which law they must be executed, are submitted to the administrative [*African country with French links*] law, because of their nature, object and the quality of the Employer [*no more explanations are given, no case law cited!*]. However, the arbitration clause is valid because of the international nature of these contracts.

One of the best ways to defeat an incorrect administrative law argument (if you recognise it as one) is to point out that the contract is an international one, because, for example, it is funded by an international organisation.

What the court will do when faced with jurisdictional points

It is important to recall in this context that the relatively abstract concepts of *Kompetenz-Kompetenz* and the severability of the arbitration clause are given absolute expression in the ICC Court.

Typically, in the invocation of Article 6.2 of the ICC Rules,¹¹ the Court (almost always as a committee composed of three people) will look at whether or not there *may* be an arbitration clause in place which may involve the parties before them. This gives rise to certain additional considerations which deserve a mention. Article 6.2 provides:

If the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or

10 Ascribed to Deng Xiaoping at <http://whosecapitalism.typepad.com/about.html>.

11 ICC Rules of Arbitration, in force as from 1st January 1998.

scope of the arbitration agreement, *the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed.* In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement. [*emphasis added*]

The implications of this wording are obvious for practitioners. Nonetheless you would be amazed at how many lawyers continue to expect the ICC Court to make summary jurisdictional findings in favour of respondents. Parties are sometimes notified that the arbitration can not proceed, but it would have to be a pretty clear case.

String arbitration clauses

Arbitration clauses involving the importation of additional parties, perhaps through a clause in the subcontract or supply contract binding the subcontractor or supplier to take part in arbitrations between the main contractor and the owner, are well known in England and are seen in the ICC Court. The efficacy of such clauses may very well depend on local legislation at the seat of the arbitration, and other factors such as the views and habits of the lawyers running the case.

It is important to bear in mind the broad wording of Article 6.2. The Court would normally require the tribunal to determine objections of this nature and would constitute the tribunal and require payments of the advances on costs, so that the tribunal is compensated against making these determinations.

Group of companies doctrine

Fundamentally, the ‘group of companies doctrine’ is based, amongst other things, on an article of the French new Code of Civil Procedure¹² and is an established part of European jurisprudence. As long ago as 1994 the Swiss Arbitration Association devoted its annual general meeting to learned papers on the content and extent of this doctrine. It remains relatively unknown by most common law lawyers and as a result causes a certain amount of controversy.

Basically the doctrine provides that when the exact identities of co-contractants is unknown or, when dealing with a group, thought to be relatively unimportant (since in the performance of the contract more than one member of the group contributed to the project), one or more members of the group may be added to the arbitration – despite not having been a signatory to the agreement containing the arbitration clause.

¹² Code Civile Article 1998, which codifies the principle of ‘apparent’ or ‘ostensible’ authority.

Some interesting issues arise from the purported application of this theory, particularly in England, Germany and other jurisdictions where its validity is not automatically accepted and work has to be done to determine whether or not it applies. Needless to say, again this is an area where the Court will leave it to the tribunal to determine the validity of the institution of proceedings against parties who are not signatories to the arbitration agreement. The doctrine is however not uncontroversial and there are some Court members who are not at all happy about the idea of non-signatories being forced to take part in an arbitration, even if only in the preliminary stages, whilst this issue is determined.

Multiple parties

Two or three years ago, under the guidance of the President of the Court, Dr Robert Briner from Switzerland, the Court saw the first applications of the multiple parties rules found in Article 10 of the ICC Rules, which states:

(1) Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9.

(2) In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate.

It seems to me that this Article effectively means that where the parties are unable to agree how arbitrators will be nominated, the Court will nominate all the arbitrators forming the tribunal.

As an off-shoot, and development, of this there have also been cases recently where more than one party has been compelled to take part in the arbitration, *as a result of being named as a respondent to the counterclaim*. So here the basic matrix is that the claimant commences arbitration against the respondent, the respondent counterclaims against the claimant and A N Other. Provided there is an arbitration clause binding all three parties (see the discussion above about string arbitrations), the Court would be expected to administer this larger arbitration involving all three parties.

In the context of the competition amongst international arbitration institutions to prove their efficacy in settling disputes, it should be noted that this is a relatively novel and (so far as I know) unique feature of ICC arbitration.

Pre-arbitration court proceedings and their effect on the arbitration clause

A great many jurisdictions around the world, both civil and common law, have legislation in place in procedural or other codes which provides that if parties

‘take steps from the proceedings’, or otherwise ignore the arbitration clause, they will eventually be deemed to have waived it. Further, most jurisdictions provide that their state judges cannot take jurisdiction in a case unless there are pleas on the merits. This combination provides a potentially fatal formula for people who wish to obtain immediate injunctive relief and then go on to arbitration. If they want an injunction they have to make a plea on the merits; if they make a plea on the merits without the appropriate qualifications, they will then be deemed to have waived the arbitration clause. This unfortunate combination can then leave them at the mercy of local courts – the very situation they wished to avoid in the first place. This was the situation in the *Colon Containers* case, an ICC case now reported in the Swiss Federal Courts.¹³

The ICC Rules provide for the possibility of relief being obtained in local courts without thereby waiving the arbitration clause.

Article 23 **Conservatory and Interim Measures**

1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

2. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. *The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal.* Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof. [*emphasis added*]

However, these rules cannot be said to state an absolute rule which will be valid for all time. There have been cases where arbitral tribunals have found that they do not have jurisdiction (I am thinking of a case involving a Middle Eastern arbitration venue in particular) as a result of the application of these local laws.

All one can say about this area, by way of generalisation, is that each jurisdiction should be considered on its own merits. If it is an UNCITRAL jurisdiction, the chances are better that the arbitration clause will be preserved. If it is not an UNCITRAL jurisdiction, and there are relatively dated versions of English, French, Spanish or other laws in place, then there is a reasonable

¹³ *Fomento de Construcciones y contratas vs Colon Containers Terminal SA*, ASA Bulletin 3, 2001, page 555, Swiss Federal Tribunal, 1st Civil Court, 14th May 2001.

chance that the parties will be considered to have waived the arbitration clause. This was one of the considerations which no doubt won the Swiss Federal Court's determination of the *Colon Containers* case.¹⁴

Article 23 'and' or 'or'

As far as I recall, I suggested the change from 'and' to 'or' found in the text of Article 23. I certainly supported it. This has had the interesting effect of breaking years worth of jurisprudence, confining interim and conservatory measures to awards or orders requiring the situation to be 'unforeseeable, irresistible, urgent' and so on. Reams of jurisprudence can be dredged up from around the world to the effect that such measures require all sorts of pre-conditions. This wording does and has broken that link and given tribunals the simple text of the Article to rely on.

One interesting consequence has been the assertion of the right to award what the English would recognise as security for costs.¹⁵ Another has been a tendency recently to award the value of a defaulting respondent's share of the advance on costs against them as a monetary award early in the arbitration. I personally awarded the third of these a couple of years ago,¹⁶ and such awards are now quite routine, although not particularly welcomed in some quarters.

***Pacta sunt servanda* rules ok**

Every jurisdiction in the world requires parties to observe their contracts. It would be wrong to give any impression other than that the majority of ICC arbitrators and tribunals in the end require parties to observe their contracts. In civil law jurisdictions there is a slightly greater emphasis on the parties' intention than on the literal wording of the contract; but it is surprising how infrequently this allegedly important distinction seems to make any difference in practice.

Lawyers seem to have continual problems in accepting that the contracts which are their 'babies' actually mean what they say, and that some other greater consideration exists in the legal ether. As English lawyers, we can see that our antique dichotomy between courts of common law and courts of equity remains alive and well. My own view remains that it falls to the individual predilections of individual arbitrators to determine which way tribunals, whether allegedly civil or common, will go on this issue. To list a few examples, I note the following points arising from decisions I have read recently in relation to allegations of incompetence on the part of the tribunal due to non-observance of alleged pre-conditions.

1. The use of the word 'may' in clause 67 of the 4th edition (and earlier editions) of the FIDIC Red Book¹⁷ seems to provide a textual escape

14 See note 13.

15 In a case with a Belgian seat.

16 As sole arbitrator of a dispute about a power plant overseas.

17 Conditions of Contract for Works of Civil Engineering Construction, FIDIC, 1987; see Appendix, page 11.

route for tribunals that do not want to find that they have no ability to determine disputes referred to them which were not referred to the engineer beforehand.

2. One finds even in the latest versions of FIDIC a reference to the parties not being restricted to prior arguments before the engineer or DAB in their arguments before the arbitration tribunal. Sometimes this wording is taken as removing any constraints on the jurisdiction of the tribunal, although my own view is that this approach is entirely unfounded. The historical reasons relating to pleadings for the use of this wording are relatively clear – it is a fold-over from 19th century jurisdictional considerations.
3. The notion that pre-conditions are facultative is sometimes usefully employed by tribunals to find that they have jurisdiction.
4. Good faith, when it applies, does sometimes find expression in this area. The tribunal finds that it would be a breach of the obligation of good faith to take the benefit of the additional runway or whatever, and then insist on a lengthy set of pre-conditions before the arbitration tribunal could determine whether or not the runway should be paid for.

Having noted these points, I should state that in the (relatively few) cases where tribunals have held that parties are barred from bringing claims as a result of failing to fulfil the pre-conditions to arbitration, these decisions have normally barred claims by employers rather than contractors.

No free rides

At its most general level it has to be said that ICC awards in the construction field do not support the notion that there is a ‘free ride’. The concepts of unjust enrichment and allied notions normally seem to ensure that justice will be done, even if only roughly, at the level of the international arbitration panel.

One slightly worrying case in this field however is *Bridas*, recently reported in the Texas District Court.¹⁸ This was another case I was involved in at the ICC level, and shows some of the elements that can cause doubters of international arbitration to wring their hands in horror.

First the tribunal in question added a third party (the Government of Turkmenistan) on the basis that it was the parties real intention that it be a party, even though the contract was deliberately not signed by the Government.¹⁹

Then, applying breach of contract theory, rather than some other notions it might have taken in as well, the tribunal awarded the discounted cash value of the concession, with a discount for the whole life of the concession. This is the Anglo-American view, which was firmly rebutted in the oil expropriation

18 *Bridas et al v Government of Turkmenistan*, US Court of Appeals for the 5th Circuit, 9th September 2003.

19 This is a gross oversimplification and no insult is intended. Please refer to the text of the report.

cases of the 1960s and 1970s, and in the United Nations. The result was that the poor Government of Turkmenistan was burdened with an award of a couple of hundreds of millions US\$ for breach of a contract it never signed. Luckily the US District Court remitted, and slapped some sense into the parties.

In any event, the case is a warning that the risks in concessions run far further than the costs of the concrete may indicate.

Conclusion

Actori incumbit onus probandi – He who asserts must prove.²⁰ Normally the contract will determine the rights of the parties. However, in international construction arbitrations, the recent records seem to indicate that some of the time, some people seem able to convince some tribunals of some pretty interesting propositions.

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20 From a website originating in Quebec: www.obiter2.ca/B109AH.html - Locutions latines utilisées en droit positif québécois. ‘Actori incumbit probatio’ (‘The burden of proving lies upon the prosecutor’): variante ‘Actori incumbit onus probandi’ (‘Le fardeau ou la charge de la preuve incombe au demandeur’).

Appendix

From

FIDIC Conditions of Contract for Works of Civil Engineering Construction (Red Book), 4th edition, 1987

67.1 Engineer's Decision

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 Engineer, or 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 notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or 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, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. 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, even if no 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 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 object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry’*

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