

Multi-Tiered Dispute Resolution Clauses in ICC Arbitration

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¹ This commentary reflects the personal views of the author and should not be interpreted as binding upon ICC. The author wishes to thank María José Poblado Gómez for her research assistance.

² Article 6(2), ICC Rules of Arbitration: '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 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.'

³ Other awards dealing with this and other issues concerning the relationship between ICC ADR and arbitration are summarized in E. Jolivet, 'Chronique de jurisprudence arbitrale de la Chambre de commerce internationale (CCI) : arbitrage CCI et procédure ADR', *Gazette du Palais*, Les cahiers de l'arbitrage, 16-17 November 2001, 3.

⁴ Clause 63 or 67, depending on the edition of the FIDIC Conditions.

Introduction and Commentary

It is not uncommon for dispute resolution clauses to provide for more than one method of settling disputes. Arbitration may be but a second or third step taken when attempts to find an amicable or negotiated settlement are unsuccessful. In this case, the question arises as to whether the parties are obliged to go through the preliminary stages before referring their dispute to arbitration. Failure to do so has led respondents in a number of ICC cases to object to the admissibility of the arbitration request on the grounds that the requirement to seek a settlement by amicable means had been disregarded or not adequately fulfilled.

When such an objection is made, if the ICC International Court of Arbitration is *prima facie* satisfied that an arbitration agreement under the ICC Rules of Arbitration may exist,² it may decide that the case shall proceed and leave it to the arbitral tribunal, once constituted, to decide on the question of the parties' compliance with the provisions of the dispute resolution clause.

The following pages contain extracts from nine ICC arbitral awards dealing with this issue rendered between 1985 and 2000.³ In each case, the relevant part of the dispute resolution clause referring to ICC arbitration is reproduced, followed by the arbitral tribunal's decision on the force of the preliminary provision and the parties' compliance with it.

The cases cited do not include those in which dispute resolution was in accordance with the FIDIC Conditions of Contract for Works of Civil Engineering Construction ('the FIDIC Conditions')⁴ and similar methods, where there is a clear requirement for parties to exhaust preliminary means before proceeding to arbitration. Case 6276, which refers to the FIDIC Conditions, has nonetheless been included because it provides for a prior step of amicable settlement, which is analysed by the arbitral tribunal and contrasted with the provisions concerning recourse to the engineer.

The arbitral tribunals in the nine cases presented hereafter show remarkable consistency in their reasoning. When faced with an objection from a respondent alleging that the claimant has submitted the request for arbitration prematurely, without having completed the necessary steps prior to arbitration, tribunals tend to adopt a two-pronged approach. They first consider whether the parties were under an obligation to attempt amicable dispute resolution before arbitration. If the answer

is yes, they then look at the facts to determine whether or not this obligation has been fulfilled.

Arbitrators have found that where the wording of the dispute resolution clause makes the use of ADR optional, a party is entitled to submit a request for arbitration whenever it wishes. The words 'may' – as used in the arbitration clause in case 10256 – and 'however' – as used in the arbitration clause in case 4229 – leave no doubt that the parties wished to be bound only by the obligation to submit their disputes to arbitration, the second option contemplated in the clause. Vagueness in the wording of clauses has also led arbitral tribunals to decide that parties did not wish to be forced into amicable settlement. On the other hand, when a word expressing obligation is used in connection with amicable dispute resolution techniques, arbitrators have found that this makes the provision binding upon the parties. This is illustrated in case 9984, where the word 'shall' requires the parties first to seek an amicable solution. In cases where the arbitrators found the amicable dispute resolution provisions to be compulsory, before taking jurisdiction they carried out a factual analysis to determine whether appropriate efforts had been made to resolve the dispute amicably.

The award in case 6276 points out the difficulty sometimes encountered when conducting such a factual analysis: 'Everything depends on the circumstances and chiefly the good faith of the parties.' In that case, the clause did not state clearly how and by when the parties had to comply with their obligation to seek an amicable settlement of the dispute. Among other things, the tribunal looked at letters of proposals and actions before authorities to conclude that an effort to resolve the dispute amicably had indeed been made. In other cases the arbitration clause has provided the arbitrators with yardsticks whereby to judge whether the parties have complied with their obligations, e.g. the time limit of 30 days to find an amicable solution laid down in case 8462. In the end, of course, arbitrators have the freedom to make whatever decision is most appropriate in the circumstances. The importance of good will in amicable dispute resolution may in the past sometimes have led arbitrators to believe that refusing to allow a request for arbitration when it was quite obvious that the parties were too divided to entertain an amicable settlement may not have been in the parties' best interests.

When introducing its ADR Rules in July 2001, ICC published four alternative ICC ADR clauses which may be inserted by parties in their contracts. Although there have as yet been no ICC arbitration cases requiring tribunals to decide on the admissibility of an arbitration request based on an arbitration clause incorporating one of the four suggested ICC ADR clauses, one is tempted to speculate how arbitrators might react in such cases. Their response will of course depend on the clause which has been chosen, as these vary as to the obligation placed upon the parties.

The first clause,⁵ entitled 'Optional ADR', simply states that the parties '*may* at any time . . . seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules' (emphasis added). If parties have used this clause, an objection to the admissibility of an arbitration request made without any prior attempt to resolve the dispute amicably is likely to be dismissed, as the parties are under no obligation whatsoever to settle amicably.

The second ICC ADR clause⁶ requires the parties to '*discuss and consider* submitting the matter to settlement proceedings under the ICC ADR Rules' (emphasis added).

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⁵ 'The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules.'

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⁶ 'In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider submitting the matter to settlement proceedings under the ICC ADR Rules.'

Here it may be expected that arbitrators will carry out an analysis of the parties' 'discussions' and 'considerations' in deciding whether or not the arbitration request has been submitted prematurely.

The third⁷ and fourth⁸ ICC ADR clauses lay down a clear obligation to submit the dispute to the ICC ADR Rules. Under the third clause, if the dispute is not settled within a specified time limit, the obligation to use the ICC ADR Rules expires. The fourth clause is similar to the third, but provides for the dispute to be referred to arbitration under the ICC Rules of Arbitration if not settled under the ICC ADR Rules within the set time limit. When faced with either of these two clauses, arbitral tribunals will need to examine the facts to determine whether the obligation to submit the dispute to the ICC ADR Rules was met before the request for arbitration was submitted.

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'In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, the parties shall have no further obligations under this paragraph.'

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'In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.'

Extracts from ICC Arbitral Awards Relating to Multi-Tiered Dispute Resolution Clauses

Case 4229 Interim Award of 26 June 1985

Dispute resolution clause

« Tout différend relatif au présent marché pourra être réglé à l'amiable par trois (3) conciliateurs dont un désigné par chacune des parties et le troisième d'un commun accord par les deux autres.

Toutefois, le Maître de l'ouvrage et l'Entrepreneur auront le droit de soumettre le différend à la Chambre de commerce internationale pour être tranché définitivement pour selon le règlement d'arbitrage.

[...] »

Arbitral tribunal's decision

« La partie défenderesse soutient encore que la demande [du demandeur] serait irrecevable au motif d'abord que le différend ne pourrait être soumis à l'arbitrage que conjointement par le maître de l'ouvrage et l'entrepreneur, au motif ensuite que la demande d'arbitrage devait être précédée d'une procédure préalable de conciliation qui n'a pas été mise en oeuvre en l'espèce.

[...]

Pour soutenir par ailleurs que la clause compromissoire organisait une procédure préalable de conciliation, qui n'aurait pas été respectée en l'espèce, de telle sorte que la demande serait irrecevable, la partie défenderesse tire argument du premier alinéa de la clause compromissoire [...]

Il n'est pas douteux qu'un préalable de conciliation, inséré dans une clause compromissoire, peut être rendu obligatoire par la prévision des parties, et en ce cas la demande d'arbitrage formée sans respect du préalable de conciliation est irrecevable, mais le caractère obligatoire du préalable doit alors être expressément, et certainement indiqué. Or en l'espèce, la rédaction des clauses compromissoires indique, au contraire, que les parties n'ont pas voulu rendre obligatoire la procédure de conciliation, et qu'elles ont prévu deux modes alternatifs et non successifs de solution de leurs litiges éventuels. D'une part l'alinéa premier prévoit que « tout différend [...] pourra être réglé à l'amiable [...] » ce qui semble indiquer

*Details not indispensable
for the intelligibility of
these extracts may have
been expunged from the
original text. Names of
parties have been
replaced in English by
'[Claimant]' and
'[Defendant]' /
'[Respondent]' and the
equivalent in French.
Each text is reproduced
in its original language.*

que la saisine des conciliateurs est une faculté non une obligation. D'autre part et surtout, l'alinéa 2 de la clause compromissoire, organisant le recours à la Cour d'Arbitrage de la CCI est ainsi rédigé: « *Toutefois* l'administration et l'entreprise auront le droit de soumettre [...] » L'emploi du mot « *toutefois* » paraît bien indiquer que les parties ont prévu le recours à l'arbitrage comme une alternative au recours à la conciliation, possible dans tous les cas, et sans recours préalable au mécanisme de conciliation.

Le Tribunal Arbitral peut regretter que la partie demanderesse n'ait pas eu recours à la procédure de conciliation qui eut peut-être permis la solution du conflit. Mais il doit constater qu'aucune disposition contractuelle ne l'y obligeait.

Le Tribunal Arbitral rejettera donc les moyens d'irrecevabilité présentés par la partie défenderesse. »

Case 5872 Interim Award of 25 April 1988

Dispute resolution clause

'This Agreement shall be applied and interpreted in accordance with and shall be governed by Swiss law applicable in Geneva (Canton of Vaud) . . .

For all questions of unresolved dispute or disagreement, which may hereafter arise between the parties concerning this Agreement, the rules of the Arbitration Court of the International Chamber of Commerce in Geneva shall be applied to appoint the Arbitration Board. Seat of arbitration will be Geneva, Switzerland . . .'

[In this case, Defendant alleged that Swiss law provided for binding conciliation prior to arbitration and that a written record of the failure of an amicable settlement was required before recourse could be had to arbitration.]

Arbitral tribunal's decision

'The Concordat does not provide for a preliminary conciliation procedure prior to any recourse to arbitration, unless the Parties provide otherwise.

The Agreement, contrary to [Defendant]'s contention, does not provide for compulsory conciliation and, failing conciliation, for a procès-verbal stating such failure, before any action may be filed with the Arbitrator.

Contrary to the Concordat, the Geneva Code de Procédure (art. 50) does provide for such compulsory conciliation, which is, provided an action is later brought before the State Courts, a starting point of *lis pendens*.

But the Concordat as *lex specialis* relating to arbitration supersedes and takes precedence over the Cantons' procedural laws (art. 1(1) Concordat; art. 457 Geneva Code de Procédure; Jolidon, *op. cit.*¹, page 59; Craig, Park, Paulsson, *op. cit.*², page 80).

¹ P. Jolidon, *Commentaire du Concordat suisse sur l'arbitrage* (Berne, 1984).

² W.L. Craig, W.W. Park, J. Paulsson, *International Chamber of Commerce Arbitration* (Paris 1984).

Is conciliation prior to any recourse to arbitration compulsory under Swiss law?
 Answer: No.'

Case 6276 **Partial Award of 29 January 1990**

Dispute resolution clause

'Any differences arising out of the execution of the Contract shall be settled friendly and according to mutual goodwill between the two parties; if not, it shall be settled in accordance with Clause 63 of the General Conditions of Contract.'

Article 63 of the General Conditions of Contract:

'If any dispute or difference of any kind whatsoever shall arise between the Employer or the Engineer and the Contractor in connection with, or arising out of the Contract, or the carrying out of the Works (whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract) it shall, in the first place be referred to and settled by the Engineer who, within a period of 90 days after being requested by either party to do so, shall give written notice of his decision to the Employer and Contractor. Save as hereafter provided, such decision in respect of every matter so referred shall be final and binding upon Employer and the Contractor until the completion of the Work and shall forthwith be given effect to by the Contractor, who shall proceed with all due diligence whether he or the Employer requires arbitration, as hereinafter provided, or not. If the Engineer has given written notice of his decision to the Employer and the Contractor and no claim to arbitration has been communicated to him by either the Employer or the Contractor within a period of 90 days from receipt of such notice, the said decision shall remain final and binding upon the employer and the Contractor. If the Engineer shall fail to give notice of his decision, as aforesaid, within a period of 90 days after being requested as aforesaid, or if either the Employer or the Contractor be dissatisfied with any such decision, then and in any such case either the Employer or the Contractor may within 90 days of receiving notice of such decision, or within 90 days after the expiration of the first named period of 90 days (as the case may be) require that the matter or matters in dispute be referred to arbitration as hereinafter provided. All disputes or differences in respect of which the decision (if any) of the Engineer has not become final and binding as aforesaid shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. . . .'

Arbitral tribunal's decision

'The Tribunal must ascertain that the claimant has duly satisfied the two preconditions for arbitration, namely first the resort to amicable settlement and secondly the submission of the dispute to the Engineer.

With regard to prior resort to amicable settlement, the Tribunal notes that there are no objective criteria making it possible to declare that the means of amicable settlement have been actually exhausted. These means cannot be identified in absolute terms and do not obey any pre-established and stereotyped rules. Everything depends on the circumstances and chiefly on the good faith of the parties. What matters is that they should have shown their good will by seizing every opportunity to try to settle their dispute in an amicable manner. They will only be discharged of this duty when they arrive in good faith at the conviction that they have reached a persistent deadlock.

On this subject, the Tribunal finds a number of indications in the dossier which warrant the conclusion that the claimant made genuine efforts with a view to an amicable settlement. This can be easily be deduced already from the lengthy waiting period of nearly three years after the completion of the work which the claimant observed before resorting to arbitration. This period was marked by a variety of contacts.

The Tribunal observes that a proposal was even formulated by the claimant to obtain payment of the sums due in the form of petroleum. The Tribunal likewise notes, among other signs of reciprocal good will, the request made in 1986 by the defendant . . . to the Court of Accounts of . . . , for authorization to pay to the claimant the sums due. All these attempts failed.

The defendant claims before the Tribunal that these various contacts or proposals made by the claimant with a view to an amicable settlement were not addressed to the party genuinely entitled to receive them from the legal standpoint. . . .

The Tribunal cannot accept this argument. The . . . legislation invoked concerns the legal personality of the [defendant], its power to submit to arbitration, its composition and its functions. It cannot concern operations (such as control or communication between the operator and the giver of the order) or phases independent of the arbitration and previous to it. All the contacts of the claimant with the various administrative, executive or control organs subordinated to the [defendant] . . . were valid; besides, that validity has never been disputed by the defendant throughout the performance of the contract. The defendant is in no position to dispute at present before the Tribunal the validity, which it has not disputed in the past, of the relations of the claimant with various municipal organs, which moreover contacted it themselves and gave it instructions.

Consequently, the Tribunal is of the view that the prerequisite of the search for an amicable settlement has been satisfied by the claimant in the present case.

With regard to the submission of the dispute to the Engineer prior to arbitration in conformity to article 63 of the "General conditions of contracts" the Tribunal considers that the procedure, which has been voluntarily made detailed, encased within precise time limits and requiring the Engineer to draft a report, is strictly binding upon the parties and governs their conduct before resorting to arbitration.

The Tribunal observes that while the first prerequisite, *i.e.* that relating to amicable settlement, is not subject to any pre-established and rigid rule, the second, *i.e.* that relating to resort to the Engineer, is governed by precise rules which may not be

transgressed. Unlike other functions of the Engineer (control, sundry authorizations, modification of works, etc.) which have been performed by various individual or collective organs (varying according to the circumstances) with the express or tacit consent of the parties, a function of such decisive importance, which triggers the arbitration proceedings, has, for its part, never been exercised by any varying individual or collective organ. In other words, while the functions of the Engineer mentioned in the contract may, in the course of everyday routine and normal relations, have been exercised with the consent of the parties by different technical organs which have varied with the times, the particular function of disputes settlement has never been examined by any of the organs and remains governed by the contract and by the strict modalities of substance and form (time limits, report, etc.) which it sets forth.

The claimant claims that it has been dispensed from this contractual prerequisite by the defendant's failure to notify it in writing of the name of the engineer specially authorized to discharge that particular pre-arbitral function. The Tribunal considers that the claimant cannot thereby be dispensed from this substantive phase and that it was under a duty to put the defendant on notice to indicate to it the name of the engineer to whom the dispute could be submitted. It was only if it had met with a refusal or in the event of the failure to reply on the part of the defendant that the claimant could have been dispensed from complying with this pre-arbitral phase.

The claimant has maintained that because of the completion of the operations and the final receipt of the work it was too late to request the appointment of an engineer. Although this argument is obviously relevant for other technical functions of the Engineer such as the modification of operations and their technical execution or control, or the approval of invoices at their respective due dates, the specific function connected with disputes settlement, for its part, can be exercised according to the circumstances both during the work and after its completion so long as all the legal effects of the contract have not been fully exhausted.

The Tribunal has thus reached the conclusion that the claimant has not satisfied the prerequisite set forth in article 65 of the "General conditions of contracts". Consequently, the request for arbitration concerning the 1981 contract, which is certainly not impossible for the future, is at present premature. It therefore behoves the claimant formally to demand from the defendant the designation of an engineer to whom to submit the present dispute before it comes before the Tribunal.'

Case 7422

Interim Award of 28 June 1996

Dispute resolution provisions

'Loyalty clause

If any circumstances arise during the life of the agreement which materially

influence the economic and/or legal effects of the agreement, but which have not been regulated in the agreement or were not thought of at the time of its conclusion, or if one of the parties cannot be reasonably expected to comply with a provision of this agreement, such circumstances shall be given fair and reasonable consideration, the nature and extent of possible amendments or additions to the agreement depending on if and to what extent the disadvantage to one party is opposed by an advantage to the other.

This Article shall also apply, if during the life of the agreement any laws, regulations or other provisions substantially affecting the contractual relationship and/or its technical implementation are issued by Governmental or Common Market authorities, and if this results directly or indirectly in inappropriate hardships or difficulties to one of the parties in the performance of the agreement.'

'Settlement of disputes

Any disputes which may arise with regard to the present agreement or further agreements resulting therefrom shall be settled, without the right of appeal, in Zurich, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules.'

Arbitral tribunal's decision

'The Defendants submitted that the claim of [Claimant] in this arbitration is premature. . . .

According to the Defendants the Loyalty Clause which in their opinion applies in this case requires the Parties to negotiate on possible amendments and additions to their contract. The Defendants argue that [Claimant] was not prepared to enter into negotiations. [Claimant] did attend a meeting to which it was invited by [one of Defendants] but it refused to discuss the validity of the Second Amendment and therefore did not act in accordance with the principle of good faith which underlies the Clause.

The Arbitrators reject this defence. In their view negotiations did take place. The defendants stated that "(t)he parties entered into negotiations on the 11 July 1991". . . . This was obviously not the only occasion when negotiations took place, since [Claimant] submitted . . . without being contradicted that ". . . negotiations . . . took place, *inter alia*, on 11 July 1991". [Claimant] stated, also without being contradicted, that the Parties agreed to confidentiality so far as the negotiations are concerned . . . Under these circumstances the Arbitrators are of the opinion that they should not evaluate the Parties' conduct in respect of the substance, thoroughness and sincerity of their confidential negotiations and must therefore disregard the Defendants' allegation that [Claimant] did not act in good faith. It may incidentally be observed that since it is in dispute whether the requirements of the Loyalty Clause are fulfilled, [Claimant] would at any rate be entitled to have the question of its applicability decided by the Arbitrators.'

Case 8073

Final Award of 27 November 1995

Dispute resolution clause and commencement of the proceedings

« Clause d'arbitrage (Article 12 de la Convention valant protocole d'accord amiable et transactionnel en date du [...])

« Tout différend découlant de la présente Convention sera tranché définitivement et en dernier ressort par trois arbitres nommés conformément au Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale à Paris, 38 Cours Albert 1^{er}.

Les arbitres doivent statuer conformément au droit suisse. L'arbitrage aura lieu à Genève et sera conduit en langue française. »

Ainsi l'Article 11 de ladite Convention prévoit que « toute question qui surgirait du fait de la réalisation de la présente Convention serait examinée et réglée dans le meilleur esprit de concertation et d'harmonieuse coopération.

A cet effet, les parties soussignées désignent comme mandataires pouvant régler les problèmes pour le cas où ils viendrait à se présenter :

pour la première partie : [X]

pour la seconde partie : [Y] »

En date du [...], [Y] et [X] se sont rencontrés et ont délibéré sur l'objet du litige en vue de trouver une solution à l'amiable conformément à l'Art. 11 de la Convention du 22 septembre 1982. [Y] a pris connaissance de tous les documents et s'est réservé le droit de les étudier en détail et de communiquer son opinion à [X] dans un délai de 30 jours à partir du [...]

Cependant, aucune information sur les résultats de cette tentative de conciliation n'est parvenue au Tribunal à l'échéance du délai indiqué. »

Arbitral tribunal's decision

« La procédure de conciliation prévue par la « Convention valant protocole d'accord amiable et transactionnel » du [...] est-elle obligatoire pour les parties ? Les parties ont-elles utilisé cette procédure ?

En effet, l'Article 11 du protocole d'accord conclu entre les parties le 22 septembre 1982 comporte une clause de conciliation ainsi rédigée :

« Toute question qui surgirait du fait de la réalisation de la présente Convention serait examinée et réglée dans le meilleur esprit de concertation et d'harmonieuse coopération. A cet effet, les parties soussignées désignent comme mandataires pouvant régler les problèmes pour le cas où ils viendrait à se présenter :

pour la première partie : [X]

pour la seconde partie : [Y] »

La question est donc de savoir si cette clause de conciliation revêt un caractère obligatoire ou si elle n'a qu'un caractère facultatif.

Si cette clause est obligatoire, les parties doivent, avant la procédure d'arbitrage, tenter de se concilier en présence des deux mandataires stipulés dans la clause. Dans l'hypothèse où les parties arriveraient à négocier, l'arbitrage n'aurait alors plus d'objet.

A défaut de précision sur le caractère obligatoire ou facultatif de la procédure de conciliation dans la clause elle-même, il convient aux arbitres d'interpréter cette clause.

De plus, la jurisprudence de la Cour Internationale d'Arbitrage de la CCI était claire à ce sujet (voir la Sentence arbitrale No. 2138 rendue en 1974). Il ressort de cette pratique que la conciliation reste entièrement facultative, sauf convention contraire des parties.

Les parties n'ont pas stipulé *expressis verbis* dans leur clause une disposition précisant que le recours à l'arbitrage ne peut avoir lieu que dans le cas où les parties n'aboutissent pas à une solution à l'amiable pendant la procédure de conciliation. Etant donné que la clause ne contient pas cette convention contraire on ne peut exiger des parties d'entreprendre une tentative de conciliation préalable à l'introduction d'une requête d'arbitrage. Les arbitres considèrent que la procédure de conciliation telle que prévue au Protocole d'accord des parties ne revêt pas un caractère obligatoire.

Il peut paraître vain pour des arbitres de rechercher à travers la volonté des parties le caractère obligatoire d'une telle procédure. En effet, l'aspect volontaire qui domine toute procédure de conciliation implique qu'une partie soit toujours libre de s'abstenir de la déclencher ou d'y participer, quelles que soient les dispositions contractuelles applicables. Le refus de recourir à la conciliation de la part de la partie qui a introduit directement la procédure d'arbitrage, en l'espèce, la société [demanderesse], équivaldrait simplement à un échec de celle-ci et de la même façon, ouvrirait l'accès à la procédure arbitrale.

S'il est vrai que l'Article 11 ne renvoie pas au règlement pour régir la procédure de conciliation, il n'en reste pas moins vrai que l'Article 12 du compromis relatif à la procédure d'arbitrage, fait expressément référence au « Règlement de Conciliation et d'Arbitrage de la CCI ». Il semble possible d'en déduire que les parties ont souhaité l'application des règles de la CCI relatives à la procédure de conciliation à titre de règles facultatives. Or, les dispositions du règlement CCI relatives à la conciliation qualifient expressément la procédure de conciliation, de facultative¹.

En suivant cette interprétation, les arbitres sont de l'avis que la procédure de conciliation n'est que facultative.

Les arbitres constatent également que la déclaration de la Défenderesse indiquant que les parties n'ont pas utilisé la procédure de conciliation stipulée dans l'Article 11 de la Convention n'est pas correcte et justifiée. Par contre, les représentants des parties se sont rencontrés le [...] pour trouver une solution à l'amiable. Cependant, cette tentative n'a pas eu de suite. Par conséquent, le recours à l'arbitrage était bien justifié de la part de la Demanderesse qui en voyait le seul moyen pour défendre ses droits et intérêts légaux. »

¹ L'article premier dispose : « Tout différend d'ordre commercial ayant un caractère international peut faire l'objet d'une tentative de règlement amiable par les soins de la Commission Administrative de Conciliation existant auprès de la Chambre de Commerce Internationale. »

Case 8462

Final Award of 27 January 1997

Dispute resolution clause

« Pour tous différends découlant du présent contrat ou s'y rapportant, les parties chercheront une solution à l'amiable.

Si une solution ne peut être obtenue dans les 30 jours après la date qu'une des parties aura notifié par écrit à l'autre partie, le (s) différend(s) sera(ont) soumis à l'arbitrage.

Chaque partie désignera son propre arbitre. La partie souhaitant soumettre le différend à l'arbitrage en informera l'autre partie par lettre recommandée indiquant en même temps le nom et l'adresse de son arbitre ainsi que ses griefs à soumettre à l'arbitrage. L'autre partie devra, dans les 15 jours, par lettre recommandée, informer l'autre partie du nom et de l'adresse de son arbitre ainsi que le cas échéant ses propres griefs.

Les arbitres des deux parties devront désigner dans les 30 jours un troisième arbitre.

Le Tribunal Arbitral devra rendre son jugement par vote majoritaire dans les trois mois suivant la date de la désignation du troisième arbitre, conformément aux conditions du présent contrat et en concordance avec la loi espagnole.

Les parties accepteront la sentence du Tribunal Arbitral comme finale et obligatoire. La répartition des coûts et dépenses de l'arbitrage sera déterminée par le Tribunal Arbitral.

L'arbitrage aura lieu à Bruxelles.

Si le second arbitre et/ou le troisième arbitre n'est (ne sont) désigné(s) dans les 30 jours après la désignation du premier ou second arbitre le(s) différend(s) sera(ont) tranché(s) définitivement suivant le règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale, sans aucun recours aux tribunaux ordinaires par un ou plusieurs arbitres nommés conformément à ce règlement et dont la sentence aura un caractère obligatoire. »

Arbitral tribunal's decision

« Attendu que [la partie défenderesse] soutient que le litige qui l'oppose à [la partie demanderesse] n'est pas de la compétence de la Cour Internationale d'Arbitrage pour deux raisons :

- [la partie demanderesse] n'a pas, préalablement à la saisine de la Cour, notifié à [la partie défenderesse] les points qu'elle estime litigieux, en vue d'aboutir à une solution amiable à défaut de laquelle le litige devra être soumis à l'arbitrage [...]

Attendu que [la partie demanderesse] a souligné qu'elle a « tout fait afin d'essayer d'arriver au préalable à une solution amiable », alors que [la partie défenderesse] est au contraire constamment restée inerte, en sorte que la seule issue était l'application de l'article 9 du contrat du 27 octobre 1989 et la saisine de la Cour

Internationale d'Arbitrage dès lors que [la partie défenderesse] refusait de désigner un arbitre [...]

Attendu, d'une part, qu'il est avéré que [la partie demanderesse] a multiplié les démarches auprès de [la partie défenderesse] afin d'obtenir un règlement amiable du litige, ainsi que le montrent suffisamment les pièces produites ; que [la partie défenderesse] reconnaît d'ailleurs l'existence de ces démarches ; que l'échec de ces diverses tentatives a naturellement conduit [la partie demanderesse] à faire jouer la clause compromissoire, à désigner en conséquence un arbitre et à mettre [la partie défenderesse] en demeure, par lettre recommandée de Maître [S] datée du [...], de désigner un autre arbitre, conformément à cette clause ; que [la partie défenderesse] n'a pas désigné son arbitre dans le délai d'un mois que lui impartissait la clause de l'article 9 ; que [la partie demanderesse] a alors saisi la Chambre de Commerce Internationale et, par voie de conséquence, la Cour Internationale d'Arbitrage ; qu'à la date à laquelle [la partie demanderesse] a demandé à [la partie défenderesse] de désigner un arbitre, cette dernière ne pouvait ignorer les éléments du litige tenant au défaut de paiement des factures correspondant aux produits fournis par [la partie demanderesse].

Attendu, d'autre part, que l'article 9, dernier alinéa, spécifie qu'en cas de difficulté concernant la désignation des arbitres par les parties dans le délai convenu, « le(s) différend(s) sera(ont) tranché(s) définitivement suivant le règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale, sans aucun recours aux tribunaux ordinaires par un ou plusieurs arbitres nommés conformément à ce règlement et dont la sentence aura un caractère obligatoire » ; qu'on ne saurait sans artifice interpréter la clause de l'article 9, dernier alinéa, dans le sens que lui donne [la partie défenderesse], c'est-à-dire seulement comme l'expression de la volonté des parties, si l'une d'elles s'abstient de désigner elle-même le second arbitre, de nommer les second et troisième arbitres selon la procédure du Règlement de la Cour Internationale d'Arbitrage, sans confier à celle-ci tout le soin de trancher le litige conformément à son Règlement [...] ; que les stipulations de l'article 9, dernier alinéa, sont manifestement destinées à apporter une solution à l'ensemble du litige dans le cas où l'une des parties paralyserait la procédure d'arbitrage en s'abstenant de désigner un arbitre comme elle s'était engagée à le faire ; qu'il est clair que, dans ce cas, les parties sont convenues d'avance en l'espèce de confier à la Chambre de Commerce Internationale, c'est-à-dire à la Cour Internationale d'Arbitrage, le soin d'organiser entièrement la procédure d'arbitrage selon son Règlement, afin d'éviter tout blocage ; que la formule de l'article, dernier alinéa, exprime donc à l'évidence la volonté des parties, si elles son confrontées à la difficulté indiquée, d'adhérer au système de règlement des litiges que la Chambre de Commerce Internationale a établi, de s'en remettre à cette dernière du soin d'organiser la procédure d'arbitrage conformément à son Règlement d'arbitrage, dont l'article 1 précise que la Cour Internationale d'Arbitrage siégeant auprès de la Chambre de Commerce Internationale « [...] a pour mission de procurer, de la façon indiquée ci-après, la solution arbitrale des différends ayant un caractère international, intervenant dans le domaine des affaires », ce que les parties ne pouvaient ignorer ;

Attendu en conséquence que le Tribunal arbitral désigné par la Cour Internationale d'Arbitrage dans les conditions sus-énoncées s'estime compétent pour connaître du litige opposant [la partie demanderesse] à [la partie défenderesse]. »

Case 9977

Final Award of 22 June 1999

Dispute resolution clause

'Any controversy that may arise among the parties with respect to the legal relation arising out of this Agreement shall be submitted to senior management representatives of the parties who will attempt to reach an amicable settlement within fourteen (14) calendar days after submission.

If an amicable solution cannot be reached by negotiation, the dispute shall be finally settled by arbitration by a panel of one (1) arbitrator, which shall be appointed by both parties. In the event the parties fail to appoint the arbitrator within the following fifteen (15) days as of the initiation of the arbitration, such arbitrator shall be designated by the International Chamber of Commerce, Paris, who conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris. The site of the arbitration shall be Mexico City, and the language to be used in the arbitration shall be the English Language. The award of the arbitrator shall be final and binding upon both parties, and neither party shall seek recourse to a court of law or other authorities to appeal for revision of such award or any other ruling of the arbitrators. The cost of the arbitration shall be borne by both parties in equal amounts.'

Arbitral tribunal's decision

'Issue number 1 of the Terms of Reference, reads as follows:

1. Has [Claimant] complied with the "amicable solution" procedure set forth in clause Twenty Four (third paragraph) of the Agreement?

The Agreement included the following covenant (clause Twenty Four (third paragraph):

"Controversies in General. Any controversy that may arise among the parties with respect to the legal relation arising out of this agreement shall be submitted to senior management representatives of the parties who will attempt to reach an amicable settlement within fourteen (14) calendar days after submission."

[Defendant] argued [Claimant]'s non-compliance to the aforementioned provision. [Defendant] stated that no senior management representative was involved in said negotiation process, yet only a legal representative (*apoderado*) of [Claimant]. [Defendant] alleged that contacts with such representative were only in the form of requests of payment of the due amount in favor of [Claimant].

[Claimant] alleged that there were several contacts between the parties in order to comply with the aforementioned provision. [Claimant] alleged among other considerations in its favor, the content of various written communications sent from [Claimant] to [Defendant]. Those communications were introduced as [Claimant]'s evidence. Moreover, [Claimant] introduced evidence in support of the foregoing in the form of affidavits rendered by . . . Those affidavits depict various communications involving management representatives.

The sole arbitrator produces the following analysis regarding the issue depicted herein.

The evidence introduced by [Claimant] reflects that there were prior management contacts between the parties. This, in addition to other contacts which involved [Claimant]'s legal representative.

Nevertheless, a prior mandatory process of communication between the parties in conflict cannot be understood as a process wherein a formal description of its contents (such as description of the representatives, timing provisions, formal encounters) is of the essence. A prior process like the one set forth in the Agreement, rather implies an attitude and behavior of the parties inspired in a true and honest purpose of reaching an agreement. Henceforth, if one of the parties considers in good faith that its counterpart is not authentically committed to foster the possibilities of settling the dispute, for instance, because of the quality of its representative, it is expected that the former would express so during the process. So that, the counterpart might be able to put a prompt remedy to said objection.

Applying these ideas to the issue in comment, the sole arbitrator's view is as follows.

- (i) The parties' management officers were in direct contact. This is evidenced by the affidavits rendered by . . . (starting as of November 1997). [Claimant]'s request for arbitration was received at the Court Secretariat on May 14, 1998.
- (ii) [Claimant] delivered to [Defendant] various communications inviting to settle differences among the parties. [Claimant]'s letters in connection with the foregoing dated January 27, 1998 and March 25, 1998, were produced prior to the initiation of these arbitration proceedings.
- (iii) [Defendant]'s allegation objecting the characteristics of [Claimant] representative involved in the process is a post factual argument. If [Defendant] was truly committed to settle the controversy and considered the characteristics of the [Claimant]'s representative as an obstacle in doing so, it would be expected that [Defendant] should have raised such point at that time. It did not occur.
- (iv) The above commented clause which requests for a prior settlement process, does not preclude the intervention of legal representatives. Pursuant to Mexican Law, a legal representative (*apoderado*) can perform a task on behalf of his client unless there is a mandatory prohibition stating the contrary. There is none in this case.'

Case 9984

Preliminary Award of 7 June 1999

Dispute resolution clauses

The terms and conditions relating to civil engineering included the following clause:
'Any differences or disputes arising from this contract or from agreements regarding

its performance shall be settled in an amicable manner by both parties to the Contract. An attempt to arrive at a settlement shall be deemed to have failed as soon as one of the parties to the contract so notifies the other party in writing.

If an attempt at settlement has failed, the disputes shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris by three arbitrators appointed in accordance with the rules.

The place of arbitration shall be Zurich in Switzerland. The procedural law of this city shall apply where the rules are silent.

The Arbitral award shall be substantiated in writing. The court of arbitration shall decide on the matter of costs of the arbitration.'

The terms and conditions relating to construction included the following clause:

'If any differences of opinion or disputes shall arise out of or in connection with this contract, or from any agreements regarding the implementation of this contract, the parties concerned will in the first place make an effort to settle them without recourse to arbitration. The attempt to reach agreement shall be considered as having failed as soon as one of the parties has informed the other party to this effect in writing.

If the conciliation attempt has failed, the disputes shall be finally and bindingly settled, eliminating legal proceedings, under the rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris (ICC) by three arbitrators appointed in accordance with those rules.

The venue of the arbitration proceedings shall be Zurich/Switzerland. The procedural law of this venue shall apply as far as the ICC Rules do not contain any relevant provisions.

The language of the arbitration shall be English.

The arbitration award shall be duly substantiated in writing. The Court of Arbitration shall also decide on the costs and expenses of the procedure and their refund.

An appeal to the Court of Arbitration shall not entitle the Contractor to interrupt or delay any services.'

Arbitral tribunal's decision

'Thus, it results from the two arbitration agreements applicable to the Contract that, before resorting to arbitration, the parties must attempt to settle their dispute amicably. It is only if this attempt has failed that the dispute may be resolved by arbitration. The attempt is deemed to have failed as soon as one of the parties had informed the other party to this effect in writing.

In a nutshell, Respondent no. 1 holds that the Request for Arbitration is inadmissible because the Claimant did not inform it in writing of the failure of the amicable settlement phase before filing the Request for Arbitration. That this phase took place is not disputed. The Arbitral Tribunal cannot share Respondent no. 1's conclusion.

Indeed, in its letter dated April 3rd, 1998, Claimant wrote to both Respondents:

"We hereby invite you to discuss our problems in an amicable way during the next 30 days, *i.e.* until May 04, 1998. In case we cannot reach a solution to our differences within this period, we propose to appoint Chilean arbitrators, and hold the arbitration in Chile.

In the event we do not solve our differences and do not reach an agreement in the proposed, we will proceed according to what was agreed on this matter in the Contract."

Such letter was clearly indicating that, should no amicable settlement take place by May 4, 1998, either on the substantial dispute among the parties or on the organisation of an arbitration in Chile, Claimant would resort to arbitration under the appropriate clauses. Fixing in advance in a letter a date by which the attempt to amicably settle the dispute would be held as having failed in this absence of a settlement was an acceptable substitute to sending a letter notifying Respondents of such failure. Therefore, by May 4, 1998, Claimant was entitled to file a Request for Arbitration without breaching the obligation to attempt to reach an amicable settlement.

The fact that negotiations continued after May 4, 1998, does not modify that conclusion. It is not unusual to find an amicable solution to a dispute in parallel with an arbitration procedure. It is what happened in this case where the parties were still considering the possibility of an amicable settlement several weeks after the filing of the Request for Arbitration as it results from the various correspondence submitted to the Arbitral Tribunal.

Therefore, the Arbitral Tribunal concludes that Respondent no. 1's argumentation in order to establish that the Request for Arbitration is inadmissible is factually wrong. This finding is sufficient to declare the Request for Arbitration admissible.'

Case 10256 **Interim Award of 8 December 2000**

Dispute resolution provisions

'Article XV of the [Power Purchase Agreement] relates to the resolution of disputes. Section 15.1 contains provisions providing for the settlement of disputes by mutual discussions by the parties acting in good faith.

Section 15.2 provides for mediation by an expert. The relevant part of the section provides:

"(a) In the event that the parties are unable to resolve a dispute in accordance with Section 15.1, then either Party, in accordance with this Section 15.2, may refer the dispute to an expert for consideration of the dispute . . ."

The clause contains detailed provisions setting out the procedure to be followed in the event of a mediation under Section 15.2.

Section 15.3 related to arbitration. . . . The relevant part of this section provides:

“(a) Any Dispute arising out of or in connection with this Agreement and not resolved following the procedures described in Sections 15.1 and 15.2 shall, except as hereinafter provided, be settled by arbitration in accordance with the Rules of Procedure for Arbitration Proceedings . . .”

Arbitral tribunal's decision

‘The Respondent submitted that these provisions, read together, should be interpreted to mean that a mediation under Section 15.2 is a prerequisite to an application for an arbitration under Section 15.3. To put it another way, the Respondent contended that a party is not entitled to seek an arbitration under Section 15.3 until there has been a mediation by expert under Section 15.2.

I do not accept the submission in [the preceding paragraph]. It is clear by the use of the word “may” in Section 15.2 that the reference of the dispute to an expert under that section is permissive not mandatory. I do not consider that the provision in Section 15.3 [set out above] affects that conclusion. The reference in the section to the dispute “. . . not resolved following the procedures described in Sections 15.1 and 15.2 . . .” is no more than a reference to those procedures if a party has elected to invoke them. If the party has chosen not to exercise the right to refer the dispute to mediation by an expert under Section 15.2, the only consequence is that the dispute has not been resolved by the procedures described in that section. Either party is free to refer the dispute to arbitration under Section 15.3, whether or not there have been good faith mutual discussions under Section 15.1 or a reference to mediation by an expert under Section 15.2.’