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**A comparison between selected topics in AB 04 and
in FIDIC - Short Form of Contract and CONS**

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Preface

I would like to thank my friends Kristian Brink,
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helpful with this *Work*.

Abbreviations

AB 04	General Conditions of contract, for building, civil engineering and installation works
CONS	Conditions of Contract for Construction
DAB	Dispute Adjudication Board
FIDIC	International Federation of Consulting Engineers (La Fédération Internationale des Ingénieurs-Conseils)
VAT	Value Added Tax

NJA	Nytt Juridiskt Arkiv
JT	Juridisk Tidskrift
SvJT	Svensk Juristtidning

Keywords (as they appear below in the text)

Adjudicator
Arbitrator
Contract
Contract Period
Contract Price
Contract Works
Contractor
Dispute Settlement
Defects Liability Period
Employer
Engineer
Force Majeure
Prescribed Variations and Additions
Site
Total Works Period
Variations
Work
Work occasioned

1 Introduction

1.1 Background and purpose

In October 2004 there was a new agreed document in the Swedish construction sector. General conditions of contract - AB 92 - was replaced by AB 04. The purpose of this thesis is to compare some of the novelties in AB 04 with correspondent conditions of contract of FIDIC - Short Form of Contract and CONS. I have examined the topic Variations and Additions and the topic Dispute Settlement.

1.2 Method and Material

In this thesis I have used a legal dogmatic method by examining, describing, interpreting and, not least, comparing the different conditions of contract.

The investigation of AB 04 has been more thorough compared to the investigations of Short form of Contract and CONS. One of the reasons for this variation in balance was the possibility of access to literature of legal doctrine and to case-law with regard to the AB-system.

AB 04 is divided into 10 chapters and every chapter covers a number of clauses. The terminology of the FIDIC-system is different. Short Form of Contract is divided into 15 clauses and CONS is divided into 20 clauses. Every clause in Short Form of Contract and CONS has its sub-clauses. Some of the provisions in AB 04, Short Form of Contract and CONS are provided with commentaries. In AB 04 these are called commentaries, and the commentaries form an integral part of the contract and shall be used as a guide in connection with the interpretation and the application of the provisions. In Short Form of Contract the commentaries are called Notes for Guidance, and in CONS they are called comments. Notes for Guidance do not constitute a part of Short Form of Contract and the comments in CONS are not exhaustive.

The book "Motiv AB 72" is the only existing commentary to all the provisions in AB 72 (predecessor of AB 04 and published in 1972). There

are no such commentaries concerning AB 92 and AB 04. However, most of the provisions in AB 04 are still exactly the same as the provisions in AB 72. Therefore, the book "Motiv AB 72" is frequently used in this thesis. "Motiv AB 72" might be considered as the official commentary to AB 72, since the authors of the book were also members of the AB 72 Contracts Committee.

Regarding the language and the use of judicial terms it has been my intention to use the terms in the English version of AB 92 as often as possible. I used the English version of AB 92, since AB 04 had not been translated into English when I wrote my thesis. The dictionary "Ordlista för domstolsväsendet"¹ has been of great value concerning judicial terms other than construction law terms.

The official and authentic text of the FIDIC contracts is the version in English.

Why choose the topic Variations and Additions and the topic Dispute Settlement? One of the most common issues for me when working with construction law - in practical life - has been the one of Variations and Additions. The novelty in AB 04 concerning Dispute Settlement by the change from arbitration to litigation will mean a very important change. The Swedish courts will have to deal with a lot of construction law cases in the future.

1.3 Delimitations

Chapter 3 concerning Variations and Additions is focused on the Contractor's possibilities to get financial compensation from the Employer for the costs incurred by Variations and Additions. Another possible consequence of Variations and Additions is the Contractor's entitlement to extension of the Contract Period. However, the matters concerning extension of time are not scrutinized in this thesis.

¹ Dictionary for the Swedish court organisation

1.4 Disposition

The thesis is divided into two main parts. The first part (chapter 3) examines Variations and Additions and the second part (chapter 4) examines Dispute Settlement. Both chapters have the same structure. The basis is always novelties in AB 04. Thus, at first there is always an examination of some selected novelties in AB 04. These selected topics are then examined in Short Form of Contract and CONS.

The chapter regarding Variations and Additions is divided into two sub-topics - prescribed Variations and Work occasioned. In both sub-topics I examine certain requirements of communication and also the lack of communication.

The chapter dealing with Dispute Settlement distinguishes between, on one hand, adjudication and, on the other hand, litigation and arbitration. Litigation is not known to the FIDIC contracts. The provisions in AB 04 concerning Dispute Settlement offer litigation as well as arbitration. Therefore there is also a discussion - with regard to AB 04 - concerning the advantages of litigation and the advantages of arbitration.

2 Background

2.1 Agreed documents

In Sweden there is no specific legislation concerning construction issues. Instead, for almost 100 years the construction sector in Sweden has been regulated by agreed documents.

Agreed documents are general conditions negotiated through a process of consent, since the sector that is regulated includes parties representing different sides of interest. In the sector of construction there are representatives from the Employer side and the Contractor side when negotiating the documents. The agreed documents are considered to be more solid in comparison with general conditions, which are created unilaterally by only one of the parties.² Thus, the provisions in agreed documents constitute an ultimate balance between the interests of the parties, which also leads to a financial spreading of risks.

At present the Construction Contracts Committee³ is in charge as the negotiating body to create agreed documents concerning the Swedish construction sector.

2.2 The Construction Contracts Committee

The Construction Contracts Committee is a Swedish association consisting of authorities, associations and organisations of the construction sector. The non-profit making association consists of representatives from the Contractor side⁴ as well

² Gorton, Lars, Nationell rätt och internationella köpavtal, Studentlitteratur, Lund, 1999, p 41.

² "Byggandets Kontraktskommitté" (BKK).

⁴ The Swedish Association of Construction Clients (Byggherreföreningen), The Swedish Federation of Rental Property Owners (Sveriges Fastighetsägareförbund), The HSB National Federation (HSBs Riksförbund), The Co-operative Housing Organization (Riksbyggen), The Swedish Association of Municipal Housing Companies (SABO, Sveriges allmännyttiga bostadsföretag), The Swedish Association of Local Authorities (Svenska Kommunförbundet), The Federation of County Councils (Landstingsförbundet), and The Government via The Swedish National Rail Administration (Banverket), The Fortifications Administration (Fortifikationsverket), The Swedish Civil Aviation Administration (Luftfartsverket), The Swedish

as from the Employer side⁵. The members of the Committee have jointly worked out the agreed documents, including its commentaries and forms of agreement. The two most important documents are the General Conditions of Contract for Building, Civil Engineering and Installation Work (AB 04) and the General Conditions of Contract for Building, Civil Engineering and Installation Work performed on a package deal basis (ABT 94). The Committee has also been represented by the work of the agreed document concerning consultants: The General Rules for Consulting Works in Architectural and Engineering Activities (ABK 96).

Within its organisation the Committee also provides a Legal Matter Board for Disputes in connection to the agreed documents and other publications published by the Committee. At the request of the parties the Board will submit statements of opinions. The opinions are by the Committee considered to be a guide for the application of the agreed documents. At the request of the parties, The Board also has the possibility to mediate between the parties, or act as a Dispute Settlement board.⁶

2.3 Agreed documents in the Swedish construction sector

The construction sector distinguish between two types of contract, on one hand, performance contracts, and on the other hand, design and construct contracts. AB 04 is a performance contract. In a performance contract the Contractor is responsible for the execution of work. The Employer is responsible for design and planning and therefore the Employer is responsible for the intended function of the object.

National Road Administration (Vägverket), National Property Board (Statens Fastighetsverk).

⁵ The Swedish Construction Federation (Sveriges Byggindustrier), The Swedish Association of Heating, Water, Sanitation and Cooling System Contractors (VVS-Installatörerna), The Swedish Electrical Contractor's Association (Elektriska Installatörsorganisationen, EIO), The Swedish Association of Air Handling (Föreningen Ventilation-Klimat-Miljö, V), The Association of Insulation Contractors of Sweden (Isolerfirmornas Förening), Refrigerating Contractor's Association (Kylentreprenörernas Förening).

⁶ <http://www.foreningenbkk.org>

The Contractor is responsible for design, planning and execution in a design and construct contract. ABT 94 is a design and construct contract.

2.3.1 History

By continental influence, the Swedish legislator in 1893 adopted a Regulation of Public Procurement. The Regulation was replaced in 1920 by another Regulation of Public Procurement.⁷

The Regulations of Public Procurement of 1893 and of 1920 in practice divided the use of general conditions in two systems. There was one system if the state was the Employer and another system if someone else rather than the state was the Employer.⁸

The Swedish Association of Technology⁹ worked out general conditions in the years 1924, 1936 and 1940. These conditions were made in consultation with the relevant government administrations. In 1954 The Contracts Committee of The Swedish Association of Technology worked out the general condition of AB 54. The Committee consisted of representatives from the Contractor side, the Employer side and from the consultant side. The agreed document, AB 54, was replaced by the documents, AB 65, AB 72 and AB 92.¹⁰

2.4 Some important novelties in AB 04

Apart from the novelties I shall below scrutinize concerning Variations and Additions, and concerning Dispute Settlement, other novelties are as follows.

More clarity

The parties can agree upon the fact that some of the clauses in AB 04 shall not be in force. These clauses are known as optional clauses¹¹ and are in

⁷ Motiv AB 72, andra utgåvan, AB Svensk Byggtjänst, 1988, p 15.

⁸ Samuelsson, Per; FIDIC och svensk entreprenadrätt, Kommersiell avtalsrätt, Studiematerial Del 1, Vårterminen 2003, Juridiska Fakulteten vid Lunds universitet, p 317.

⁹ "Svenska Teknologföreningen".

¹⁰ Motiv AB 72, fn 7, p 15 ff.

¹¹ "täck bestämmelser"

AB 04 marked in the contract with an asterisk (*). If a non-optional clause is agreed not to be in force, this clause has to be noted in the administrative instructions.¹²

Defects Liability Period

According to AB 92 the Defects Liability Period (Guarantee Period) was two years. The Defects Liability Period is extended in AB 04 to five years in respect of liability for the labour. The two years Defects Liability Period concerning materials and goods was not changed.¹³

Inspections

An important legal effect of the inspection is the possibility for the Employer to argue defects not noted in the inspection report. According to AB 92 the Employer had the possibility to argue the existence of a defect, which was brought to the notice of the Contractor within three months from the expiry of the Total Works Period. In AB 04 this period is extended to six months regarding ordinary defects and 18 months regarding substantial defects.¹⁴

2.5 FIDIC¹⁵

FIDIC is the International Federation of Consulting Engineers, comprising of national Member Associations. FIDIC was originally founded in Belgium in 1913 by the national associations of Belgium, France and Switzerland. At present there are Member Associations from 67 countries, including the US. Companies and organizations may join FIDIC as Affiliate Members. The FIDIC secretariat is placed in Geneva, Switzerland. FIDIC is now best known as the organisation, which publishes standard forms of contract documents related to the construction-works. The FIDIC contract documents are commonly used in

¹² AB 04, Preface, Chapter 1, Clause 3 and AB 92, Chapter 1, Clause 3.

¹³ AB 04, Chapter 4, Clause 7 and AB 92, Chapter 4, Clause 7.

¹⁴ AB 04, Chapter 7, Clause 11 and AB 92, Chapter 7, Clause 13.

¹⁵ "Fédération Internationale des Ingénieurs-Conseils"

international business concerning construction. The FIDIC contract documents are not agreed documents in the same sense as AB 04 - which is created by representatives from Employer and Contractor sides. FIDIC is an Engineer organisation, therefore the contract documents are prepared by Engineers.¹⁶

2.3.1 Short Form of Contract

Short Form of Contract and CONS are performance contracts (se above, 2.3 Agreed documents in the Swedish construction sector).

Short Form of Contract is recommended for building or engineering works of relatively small capital value. Depending on the type of work and the circumstances, this form may also be appropriate for contracts of greater value, particularly for relatively simple or repetitive work or work of short duration. Under the usual arrangements for this type of contract, the Contractor constructs the works in accordance with a design provided by the Employer.¹⁷

2.3.2 CONS

Conditions of Contract for Construction (CONS) were published in 1999. CONS replaced Conditions of Contract for Works of Civil Engineering Construction, which was commonly referred to as the Red Book (RB). CONS are recommended for building or engineering works designed by the Employer or by the Employer's representative, the Engineer. Under the common activities for this type of contract, the Contractor constructs the works in line with a design provided by the Employer. However, the works may include some elements of design by the Contractor, such as civil, mechanical, electrical and/or construction works.¹⁸

¹⁶ <http://www.fidic.org/> (051019)

¹⁷ Short Form of Contract, FIDIC, first edition, 1999, foreword.

¹⁸ The FIDIC Contracts Guide - with detailed guidance on using the first editions of FIDIC's Conditions of contract for construction, Conditions of contracts for plant and design-build, Conditions of contract for EPC/turnkey projects, 2000, p 1.

3 Variations and Additions

3.1 Introduction to the right to vary

The expressions "Variations" and "Additions" are used in AB 04. In Short Form of Contract and in CONS the expression "Variations" is used.

AB 04, Short Form of Contract and CONS allow the Employer a wide possibility to order Variations.¹⁹

Because of the Engineer's position in CONS, the provisions in CONS concerning matters related to the Engineer differ from AB 04 and Short Form of Contract. In CONS the Engineer is empowered to instruct Variations or request the Constructor to submit a proposal. The Constructor may only refuse the execution of a Variation on the ground that he cannot readily obtain the goods required for the Variation. CONS also include a list of the specific kind of Variations, such as quantity, quality and omission of work.²⁰

3.2 Variations and Additions according to AB 04

AB 92 used the words Variations and Additions. There has been a modification in AB 04 by the addition of Omissions.²¹ A question of relevance is how to define the difference between Variations and Additions. One explanation is that a Variation would imply that a Work should be done in a different way compared to the original contract. An Addition, on the other side, would imply that there is a supplement Work without any Omission.²² Another explanation is that a Variation cannot comprise too much extra work and resources in relation to the Contract Works. This compared to an

¹⁹ AB 04, Chapter 2, Clause 3, Short Form of Contract 10.1 and CONS 13.1

²⁰ CONS 3.3, second paragraph, *Instructions of the Engineer*, CONS 13.1, first and second paragraphs, *Right to Vary*.

²¹ AB 04 use the shortening "ÄTA-arbete" ("Ändrings- tilläggs- och avgående arbete", which means Variations, Additions and Omissions).

²² Andersson, Eilert & Söderlund, Johan; Entreprenörens rätt till ersättning för ändringar och tilläggsarbeten - särskilt om rätten till ersättning för en entreprenör som inte efterlevt formaliakraven, *Juridisk Tidskrift* 2002-03, p 4.

Addition, which can be more extensive.²³ Nevertheless, most Commentators agree that the borderline between Variations and Additions is not clear.²⁴

AB 92 as well as AB 04 distinguish between, on one hand, prescribed Variations and Additions, and on the other hand, Variations and Additions occasioned, or Work occasioned.²⁵

3.2.1 Prescribed Variations and Additions

As stated above the Employer has a wide possibility to prescribe Variations.

Prescribed work, which is not of a substantially different character and also directly connected with the Contract Works, is considered to be *Additions* according to AB 04.²⁶ As the Variations the Employer also has the possibility to order such *Additions*. The expression "directly connected" means that the work shall be so closely connected with the Contract Works that they together form a technical whole. Such a connection cannot exist if there would be no disadvantage for the Employer to have the execution of the Works postponed until the completion of the Contract Works.²⁷ The obligation means that the Contractor has no right to refuse to carry out the *Additions*, even if the Contractor, for example, has no personnel available, has not got the time, or if the parties cannot agree about the payment. The Contractor has to calculate and to be prepared to execute the *Additions* when signing the Contract.²⁸

One example would be the construction of a road. The Contractor is probably not obliged to carry out the next stage of the road as an *Addition*. On the other hand, the Contractor is probably obliged to carry out an extension comprising the construction of parking lots and the raising of the roadway by

²³ Schelin, Johan; *Ändring av entreprenörens arbete*, SvJT 1992 p 741.

²⁴ see for example Ossmer, Per; *Ändring av entreprenörens arbete - några synpunkter*, SvJT 1993 p 278.

²⁵ AB 04, Chapter 2, Clause 3 (prescribed) and Chapter 2, Clause 4 (occasioned).

²⁶ AB 04, Chapter 2, Clause 3.

²⁷ See AB 04, Definitions: "ÄTA-arbete" (Variations, Additions and Omissions), Chapter 2 Clause 3 and its Commentaries).

²⁸ Hedberg, Stig; *Kommentarer till AB 72, Rörfirmornas Förlags- & Handels AB*, 1981, p 19.

adding masses. The latter would hence be an *Addition* according to AB 04.²⁹ The interpretation of *Additions* according to the AB-system is therefore restrictive.³⁰

The Contractor is not obliged to carry out other kinds of *Additions*, at least not during the Contract Period.³¹ Nevertheless, in practical life it is probably very uncommon that the Contractor is unwilling to carry out any kinds of *Additions*.³² If there would still be a dispute between the Employer and the Contractor concerning the obligation of the Contractor to carry out an *Addition*, the provision prohibiting the Contractor from suspending the work because of the fact that a dispute has been referred to judicial settlement³³, is probably not applicable.³⁴

It is not merely an obligation of the Contractor to carry out these kinds of *Additions*, it is also considered to be a right of the Contractor.³⁵ If the Employer should engage anyone else rather than the Contractor to carry out the *Additions*, the Contractor shall be entitled to compensation for incurred expenses as well as compensation for lost profit.³⁶ The reason why the Contractor is obliged to carry out the *Additions* is his establishment at the Site. According to this circumstance it is considered to be the most economic solution that the Contractor carries out the *Additions*. On the other hand, the reason why it is the right for the Contractor to carry out the *Additions* is the fact that the Contractor shall be entitled to avoid the inconvenience of the presence of another Contractor at the Site. Another reason would be issues related to the Defects Liability Period.³⁷

3.2.1.1 Requirements of communication in writing

Before the commencement of prescribed Variations and *Additions* these have to be ordered by the

²⁹ AB 04, Chapter 2, Clause 3.

³⁰ Motiv AB 72, fn 7, p 82 f.

³¹ Motiv AB 72, fn 7, p 80 ff.

³² Liman, Lars-Otto; Entreprenad- och konsulträtt, AB Svensk Byggtjänst, sjätte, reviderade utgåvan, p 85 and Ossmer, Per; fn 24, p 283.

³³ AB 04, Chapter 9, Clause 2.

³⁴ Schelin, Johan; fn 23, p 743 and Ossmer, Per; fn 24, p 283

³⁵ See AB 04, Chapter 2, Clause 3.

³⁶ See AB 04, Chapter 6, Clause 2.

³⁷ Liman, Lars-Otto; fn 32, p 86.

Employer in writing³⁸. The demand for orders to be in writing is also satisfied if a drawing or any other document³⁹, comprising a Variation or an *Addition*, is delivered by the Employer to the Contractor.⁴⁰ If the order is not made in writing the Contractor may not have any right to special payment, unless such a consequence would be unreasonable.⁴¹

This kind of formal requirement - that the order has to be in writing - is quite uncommon in Swedish civil law legislation, and it was introduced in AB 92 according to this situation. Before AB 92 there had been discussions going on introducing a writing demand when preparing AB 65 and AB 72, but it was considered to be inappropriate and was therefore not introduced. Thus, before the introduction of a requirement for notices in writing it was for the parties to secure evidence that an order had been placed.⁴² Actually, almost the only situations in Swedish civil law legislation when writing is demanded is the transfer of real estate⁴³ and the draw up of collective agreements⁴⁴. It is also known as a requirement in situations of testifying, for example testifying a will.

3.2.1.2 Employer's lack of communication in writing

AB 92 introduced the wording "unless such a consequence would be unreasonable" related to the circumstances when the Contractor would not have any right to special payment if the order of Variations and *Additions* was not made in writing.

The introduction of this provision was logic, since the Swedish Contracts Act in 1976 was amended by a "general clause"⁴⁵ concerning modification and

³⁸ That means information that can be read and be saved, examples are information by post, fax and e-mail (AB 04, Definitions).

³⁹ The expression document also includes orders noted in the records from Site meetings, see AB 04 Chapter 3 Clause 3.

⁴⁰ See AB 04 Chapter 2 Clause 6.

⁴¹ See AB 04 Chapter 2 Clause 8.

⁴² Motiv AB 72, fn 7, p 85.

⁴³ Jordabalken 4:1

⁴⁴ Lag (1976:580) om medbestämmande i arbetslivet, 23 §.

⁴⁵ The Act on Contracts and other Legal Acts in the General Field of Obligations (1915:218), Section 36:

"A contract term or condition may be modified or set aside if such term or condition is unconscionable having regard to the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent

setting aside of contract terms that are deemed by a court to be unreasonable.⁴⁶

The understanding about the "unreasonableness-provision" in accordance with AB 92 among reviewers was, however, that its interpretation should be restrictive. Some reviewers were "talking about" situations of catastrophe for the provision to be applicable⁴⁷ and others suggested that the burden of proof for the Contractor made it impossible to be successful referring to the provision⁴⁸. It is for example very difficult for the Contractor to be successful referring to the provision in a situation of bad faith. If the Employer understands that the Contractor is under the delusion that he has received an order of Variations and *Additions*, the Employer has to inform the Contractor without delay about the delusion. Otherwise the Contractor will be entitled to special payment.⁴⁹

As stated above, the "unreasonableness-provision" about payment was first introduced in AB 92. There is no court judgement or arbitration award concerning this novelty in AB 92. That is also the situation regarding the demand in writing. Nevertheless, there is a Swedish arbitration case from 1982 (AB 72 was applicable) where it is possible to trace some reasoning resembling "unreasonableness-provision" about payment. In the case the Contractor - a painter - found out that he had to remove old nails before commencing his work. The Contractor gave notice to the Employer about the *Additions*, but the Employer did not make any

circumstances, and circumstances in general. Where a term is of such significance for the agreement that it would be unreasonable to demand the continued enforceability of the remainder of the agreement with its terms unchanged, the agreement may be modified in other respects, or may be set aside in its entirety.

Upon the determination of the applicability of the provisions of the first paragraph, particular attention shall be paid to the need to protect those parties who, in their capacity as consumers or otherwise, hold an inferior bargaining position in the contractual relationship.

The provisions of the first and second paragraphs shall apply *mutatis mutandis* to questions relating to the terms of legal acts other than contracts..."

⁴⁶ von Post, Claes-Robert; Studier kring 36 § avtalslagen med inriktning på rent kommersiella förhållanden, Jure AB, Stockholm, 1999, p 295 f.

⁴⁷ Andersson, Eilert & Söderlund, Johan; fn 22, p 7.

⁴⁸ Linander, Bo och Ossmer, Per; Anm. av Alf G. Lindahl, Östen Malmberg, Alf-Erik Norén, Entreprenad AB 92, SvJT 1996 p 487.

⁴⁹ Andersson, Eilert & Söderlund, Johan; fn 22, p 12 ff.

⁴⁹ AB 04, Chapter 2, Clause 8.

comments about the notice. The Contractor proceeded and carried out the *Additions*. Since the Employer rejected to pay, claiming i.a. that he had not ordered the *Additions*, there was an arbitration procedure. The Arbitrators held that the *Additions* were not ordered. Further, the Arbitrators regarded eliminating old nails as a non-typical work for a painter and it was also an action that had to be done immediately not to stop the entire project. It was therefore not unreasonable for the Contractor to demand the Employer to communicate the Contractor an opinion considering the *Additions*. According to the arbitrators the passiveness of the Employer was one of the reasons why the Contractor was successful to get compensation for the *Additions*.⁵⁰ It is possible that this case might have influenced the introduction of the "unreasonableness-provision" concerning payment in AB 92. The "unreasonableness-provision" is now also important in AB 04.

Another possibility for the Contractor to get special payment if the order is not made in writing might be to invoke the principle of unjustified enrichment. This principle is, however, probably not accepted as a general principle of law in Swedish jurisprudence.

3.2.2 Work occasioned

In general it can be held that Work occasioned is Variations and Additions that the Employer is responsible for. Therefore the Contractor is entitled to be financially compensated for these kinds of Works. AB 04 points out three different situations when Work occasioned can appear.⁵¹ Firstly, the situation of not correct: data, results of investigations, technical solutions and documents for which the Employer is responsible.⁵² Secondly, the situation that there is a difference from what is assumed according to the Site or other circumstances of importance.⁵³ Thirdly, circumstances according to an expert opinion are not such as they shall be assumed to be⁵⁴.

⁵⁰ Så gick det. Domar och beslut i entreprenadvister, AB Svensk Byggtjänst, 1995, p 25 f.

⁵¹ AB 04, Chapter 2, Clause 4.

⁵² AB 04, Chapter 2, Clause 4 and Chapter 1, Clause 6.

⁵³ AB 04, Chapter 2, Clause 4 and Chapter 1, Clause 7.

⁵⁴ AB 04, Chapter 2, Clause 4 and Chapter 1, Clause 8.

3.2.2.1 Requirements of communication

In AB 04 there is a change of standard compared to AB 92 for the Contractor to give the Employer notice of Work occasioned.

According to AB 04 the Contractor has to consult the Employer without delay regarding Work occasioned, if the Contractor estimates Work occasioned to exceed the costs of half a Base Amount. If the Contractor rejects this procedure he might not be entitled to special payment over and above the Contract Price, unless such a consequence would be unreasonable.⁵⁵

If the Contractor estimates Work occasioned not to exceed the costs of half a Base Amount, the Contractor is entitled to commence the work without delay. The Contractor is, however, subsequently obliged to give the Employer notice without delay about the Work occasioned.⁵⁶

At first sight when assessing these rules it is easy to get the impression that there is a big difference in time, i.e. when the communication has to be made by the Contractor.

But since the Contractor has to communicate with the Employer, regardless of exceeding the costs of half a Base Amount or not, the difference regarding the time - according to my opinion - would not be that big in real life. The difference between the two situations would rather be if to commence the work or not, since the wording "subsequently without delay" - according to my interpretation - means as soon as possible⁵⁷ and that should most likely, in real life, be the same day as the work has started.

Consistent with my opinion the big difference between the two occasions - whether exceeding the costs of half a Base Amount or not - would be to distinguish the expressions "consult" and "give notice", rather than to decide when the communication has to be done. To give notice sounds certainly much more like one-way communication and

⁵⁵ AB 04, Chapter 2, Clause 7, the Base Amount for 2005 is fixed to 39.400 SEK and half a Base Amount is thus 19.700 SEK.

⁵⁶ AB 04 Chapter 2, Clause 7, second paragraph.

⁵⁷ Compare Motiv AB 72, fn 7, p 72.

easier for the Constructor compared to the procedure when the Constructor has to consult the Employer. According to the latter procedure it is possible to imagine that the Employer could have opinions of how to proceed with the work. However, the intention of the rule probably is to force the parties to solve their Disputes before commencing the work and not after.

If the Contractor's estimation is wrong and the costs in fact exceed half a Base Amount - contrary to his assessment - the Contractor still may have a right to payment. He may have this right if there were circumstances he could not have known about, or if his original assessment can be considered to have been done in a professional manner.⁵⁸

According to my view, the advice to the Contractor should therefore be that there has to be an immediate communication by the Contractor, since the Contractor has either to consult or to give notice.

Provisions in AB 04, regarding the communication of the Contractor with the Employer, are new compared to the rules in AB 92. The rules are also optional. I therefore assume that these rules will in several cases in the future be agreed upon as not being part of the contract.

It is also possible to consider the situation that the Contractor finds circumstances that should be taken care of, i.e. Work occasioned that the Contractor would like to neglect. In that situation the Contractor has to notify the Employer without delay, otherwise the Contractor may have to compensate for the loss caused.⁵⁹

3.2.2.2 Contractor's lack of communication

As stated above, if the Contractor does not communicate with the Employer he might not be entitled to special payment over and above the Contract Price, unless such a consequence would be unreasonable. One example of a situation, where it could be unreasonable for the Contractor not to get paid, would be if the Contractor only when carrying out the Work realises that the Work actually is this kind of Work. Another possibility would be if

⁵⁸ Commentary to AB 04, Chapter 2, Clause 7 and 8.

⁵⁹ AB 04, Chapter 2, Clause 9.

there is need of urgent measures and there is little time for advance communication to be done.⁶⁰

3.3 Variations according to Short Form of Contract

The Employer can order Variations according to Short Form of Contract. The separation between the expressions Variations and Additions is not as clear according to Short Form of Contract, as it is according to the AB-system. The same indistinctness would apply concerning the expressions prescribed Variations and Variations occasioned.

3.3.1 Prescribed Variations

According to Short Form of Contract the Employer may order Variations.⁶¹ Variation is defined to include any change to the specification of drawings included in the contract.⁶²

3.3.1.1 Requirements of communication and Contractor's lack of communication

The Contractor is required to notify the Employer of events promptly. The Contractor's right of additional payment is to be limited to the payment which would have been due if he had given prompt notice and had taken all reasonable steps.⁶³ If the Employer's ability to verify any claim is affected by the failure to notify, then the Employer is protected.⁶⁴

Within 28 days of the instruction the Contractor is to submit an itemised make-up of the value of the Variations to the Employer.⁶⁵

⁶⁰ Commentary to AB 04, Chapter 2, Clause 7 and 8.

⁶¹ Short Form of Contract 10.1, *Right to Vary*, compare with Short Form of Contract 2.3 *Employer's Instructions*: "The Contractor shall comply with all instructions given by the Employer in respect of the Works including the suspension of all or part of the Works".

⁶² Short Form of Contract 10.3, *Early Warning* and Notes for Guidance, 10.1, *Variations and Claims*. Yet, it should be observed that the Notes for Guidance are not forming part of the Contract.

⁶³ Short Form of Contract 10.3, *Early Warning*.

⁶⁴ Short Form of Contract, Notes for Guidance, 10.3, *Variations and Claims*, see fn 83.

⁶⁵ Short Form of Contract 10.5, *Variation and Claim Procedure*.

A requirement that the instruction has to be in writing does exist, but there is no provision regulating what happens if the instruction is not made in writing.⁶⁶ There is nothing in Short Form of Contract to indicate that the Contractor does not have the right to payment if he carries out an instruction not ordered in writing (compare the AB-system).

3.3.2 Work occasioned

The expression "Variations occasioned" or a similar expression is not used in Short Form of Contract. Instead Short Form of Contract offers two different solutions, which lead to similar consequences as the expression "Variation occasioned" in AB 04 does.

Firstly, Short Form of Contract in this matter refers to the provision 10.4, *Right to Claim*:

If the Contractor incurs Cost as a result of any of the Employer's Liabilities, the Contractor shall be entitled to the amount of such Cost. If as a result of any of the Employer's Liabilities, it is necessary to change the Works, this shall be dealt with as a Variation.

The Clause regulating the *Employer's Liabilities* consists of a comprehensive list of liabilities.⁶⁷ This leads to the fact that Short Form of Contract is much more generous compared to AB 04 concerning financial compensation for Work occasioned, since all the liabilities in this list ensures compensation. As stated above (3.2.2 Work occasioned) AB 04 only points out three different circumstances when Work occasioned can appear. The circumstance in AB 04 of not correct: data, results of investigations, technical solutions and documents for which the Employer is responsible⁶⁸, correspond in some situations in Short Form of Contract to the Employer's Liabilities of design⁶⁹

⁶⁶ Short Form of Contract 1.5, *Communications*: "Wherever provisions is made for the giving or issue of any notice, instruction, or other communication by any person, unless otherwise specified such communication shall be written in the language stated in the Appendix and shall not be unreasonable withheld or delayed."

⁶⁷ Short Form of Contract 6.1 a) - p), *Employer's Liabilities*.

⁶⁸ AB 04, Chapter 2, Clause 4 and Chapter 1, Clause 6

⁶⁹ Short Form of Contract 6.1 g), *Employer's Liabilities*.

and the Employer's failures⁷⁰. The second circumstance concerning Work occasioned in AB 04 with correspondence to Short Form of Contract is the one that there is a difference from what is assumed according to the Site or other situations of importance.⁷¹ This provision can be compared to the provision in Short Form of Contract concerning physical obstructions or physical conditions other than climatic conditions, which were not reasonably foreseeable by an experienced Contractor.⁷²

Apart from the three circumstances when Work occasioned can appear in AB 04, there is also a provision in AB 04 entitling the Contractor in certain situations to necessary extension of the Contract Period.⁷³ In some situations the Contractor's right of extension of the Contract Period is supplemented by the Contractor's right to compensation for the costs thereby incurred. The Contractor has to show that he could not have been expected to anticipate the circumstances and also that he could not reasonably have been able to avoid or overcome the consequences of the circumstances.⁷⁴ The Contractor is, however, only entitled to compensation for half of the costs. In Short Form of Contract, on the other hand, the Contractor is entitled to full financial compensation in similar situations.⁷⁵ This provision in AB 04 also consists of the typical Force Majeure-situations⁷⁶, i.e. the category of war and terrorism and the category of natural disasters.⁷⁷ These typical Force Majeure-situations are represented in the list of *Employer's Liabilities* in Short Form of Contract.⁷⁸ One provision is simply named Force Majeure.⁷⁹ However, in AB 04 these typical Force Majeure-situations do not give the Contractor the right to compensation

⁷⁰ Short Form of Contract 6.1 k), *Employer's Liabilities*.

⁷¹ AB 04, Chapter 2, Clause 4 and Chapter 1, Clause 7.

⁷² Short Form of Contract 6.1 l), *Employer's Liabilities*.

⁷³ AB 04, Chapter 4, Clause 3.

⁷⁴ AB 04, Chapter 5, Clause 4.

⁷⁵ Short Form of Contract 6.1 f), j), m) and o), *Employer's Liabilities*.

⁷⁶ Also compare the definition of Force Majeure in CONS 19.1, *Force Majeure*.

⁷⁷ AB 04, Chapter 4, Clause 3, Items 3 and 4.

⁷⁸ War and terrorism: Short Form of Contract 6.1 a) - c), *Employer's Liabilities*; natural disasters: Short Form of Contract 6.1 d) - e), h), *Employer's Liabilities*. Also compare the definition of Force Majeure in Short Form of Contract 1.1.14, *General Provisions*.

⁷⁹ Short Form of Contract 6.1 i), *Employer's Liabilities*.

from the Employer for the costs incurred.⁸⁰ Furthermore, in Short Form of Contract there are another two provisions with no correspondence to AB 04. These provisions concern, firstly, the change to the law of the Contract and, secondly, damage, which is an unavoidable result of the Contractor's obligations to execute the Works and to remedy any defects.⁸¹

Secondly, Short Form of Contract also refers to the provision 9.1 *Remedying Defects*, second section, with regard to the expression "Variations occasioned" in AB 04. This provision states that the cost of remedying defects attributable to any other causes than defects due to the Contractor's design, materials, plant or workmanship not being in accordance with the Contract, shall be valued as a Variation.

3.3.2.1 Requirements of communication and Contractor's lack of communication

It is stipulated that a party shall notify the other party as soon as he is aware of any circumstance, which may give rise to a claim for additional payment.⁸² Oddly, but in the same provision, it is also held that the Contractor shall take all reasonable steps to minimise the effects. According to my opinion it would be more appropriate for the latter provision to be stipulated in Sub-Clause 10.4 *Right to Claim*, since Sub-Clause 10.3 *Early warning*, deals with communication.

The additional payment is in fact limited to the payment which would have been due if the Contractor had given prompt notice and had taken all reasonable steps.⁸³ (compare 3.3.1.1 Requirements of communication and Contractor's lack of communication)

Regarding the formal requirement about the instruction in writing, the same provisions will apply as those concerning Prescribed Variations

⁸⁰ AB 04, Chapter 5, Clause 4.

⁸¹ Short Form of Contract 6.1 n) and p), *Employer's Liabilities*.

⁸² Short Form of Contract 10.3, first paragraph, *Early Warning*. The same will also apply regarding delays or disruption of the work.

⁸³ Short Form of Contract 10.3, second paragraph, *Early Warning*.

(3.3.1.1 Requirements of communication and Contractor's lack of communication).

One interesting requirement is the Contractor's immediate notification to the Employer regarding the physical obstructions or physical conditions other than climatic conditions, which were not reasonably foreseeable by an experienced Contractor.⁸⁴ This is the only liability in Short Form of Contract, 6.1 *Employer's Liabilities*, where there is an express demand for notification.

3.4 Variations according to CONS

When analysing the issues of Variations and Additions according to AB 04 almost all the information necessary is to be found in Chapter 2 of AB 04 (also compare Short Form of Contract, Clause 10). When analysing these issues in CONS there are however several relevant Clauses to be considered:

CONS Clause 3, *The Engineer*
CONS Clause 4, *The Contractor*
CONS Clause 13, *Variations and Adjustments*
CONS Clause 17, *Risk and Responsibility*
CONS Clause 19, *Force Majeure*
CONS Clause 20, *Claims, Disputes and Arbitration*

What is designated "prescribed Variations and Additions" according to AB 04 is in CONS designated as "Variations"⁸⁵. The expression "Works occasioned" in AB 04 is in CONS referred to as "Unforeseeable Physical Conditions", "Employer's Risks" and "Force Majeure".

3.4.1 Prescribed Variations

During a construction project, there is often a debate as to whether communication of the Engineer, on behalf of the Employer, to the Contractor constitutes purely an instruction or also a Variation (CONS 3.3). Variations are work that is

⁸⁴ Short Form of Contract 6.1 1), *Employer's Liabilities*, compare footnote 72.

⁸⁵ The expression "Variation" is also used in Short Form of Contract (3.3.1 Prescribed Variations).

not expressly or impliedly included in the work for which the contract price is payable.⁸⁶

In accordance with the general rule of the Engineer's right to issue instructions to the Contractor in Clause 3, it is stipulated:

If an instruction constitutes a Variation, Clause 13, *Variations and Adjustments*, shall apply.⁸⁷

Clause 13 holds that it is possible to bring forth three kinds of Variations. Firstly, the one that may be instructed by the Engineer without prior agreement as to feasibility, or price. This may be appropriate, for example, for urgent Works or Works designed by the Employer (see below, 3.4.1.1 Prescribed Variations by the Engineer).⁸⁸ Secondly, the Contractor's own proposal (see below, 3.4.1.2 Contractor's proposal).⁸⁹ Thirdly, a requested proposal from the Engineer for the Contractor to respond can also be considered as a Variation aiming to reach prior agreements and minimise disputes. However, this request would typically not constitute a Variation, unless it is an instruction.⁹⁰

For the two latter to constitute Variations, they have to be approved by the Engineer.

3.4.1.1 Prescribed Variations by the Engineer

Different categories of Variations - prescribed by the Engineer - are listed in *Right to Vary*⁹¹, and since there are six different categories, and since they are also described in detail, one gets the impression that the list is exhaustive. The different six categories are:

- a) *changes to the quantities of any item of work included in the Contract (however, such changes do not necessarily constitute a Variation),*

⁸⁶ Huse, Joseph A; *Understanding and Negotiating Turnkey EPC Contracts*, Sweet & Maxwell Ltd, London, second edition, 2002, p 370.

⁸⁷ CONS 3.3, second paragraph, *Instructions of the Engineer*.

⁸⁸ CONS 13.1, first paragraph, *Right to Vary*.

⁸⁹ CONS 13.2, *Value Engineering*.

⁹⁰ CONS 13.1, first paragraph, *Right to Vary*, refers to CONS 13.3, *Variation Procedure*.

⁹¹ CONS 13.1, third paragraph, *Right to Vary*.

- b) changes to the quality and other characteristics of any item of work,
- c) changes to the levels, positions and/or dimensions of any party of the Works,
- d) omission of any work unless it is to be carried out by others,
- e) any additional work, Plant, Materials or services necessary for the Permanent works, including any associated Tests on completion, boreholes and other testing and exploratory work, or
- f) changes to the sequence or timing of the execution of works.⁹²

The conclusion would be, according to my interpretation, that if a work would fall outside the scope of these categories - which have an exhaustive character - it is not considered to be a Variation and therefore cannot be prescribed by the Engineer.

The definition of "Variations" in CONS are much more specific compared to the definition of "Prescribed Variations and Additions" in AB 04. According to AB 04 it is stipulated that the Contractor has to carry out the Variations prescribed by the Employer⁹³, and the Additions have to be directly connected to the Contract Works so that they together form a technical whole⁹⁴.

3.4.1.1.1 Contractor's possibilities to reject Variation

According to both *Instructions of the Engineer*⁹⁵ and *Right to Vary*⁹⁶ in CONS the Contractor shall comply with the instructions by the Engineer and execute the Variations.

Nevertheless, if the Contractor cannot readily obtain the goods required for the Variation, the Contractor immediately has to give the Engineer notice. After having received this notice, it is up to the Engineer to cancel, confirm or vary the instruction.⁹⁷ If an instruction is confirmed, this should be in writing, and the confirmation should

⁹² CONS 13.1, third paragraph, *Right to Vary*.

⁹³ AB 04, Chapter 2, Clause 3.

⁹⁴ AB 04, Chapter 2, Clause 3 and its Commentary.

⁹⁵ CONS 3.3, second paragraph, *Instructions of the Engineer*.

⁹⁶ CONS 13.1, second paragraph, *Right to Vary*.

⁹⁷ CONS 13.1, second paragraph, *Right to Vary*.

address the issues raised in the Contractor's notice. If the Variation is itself varied, it may also be a new Variation and the Contractor may have to respond by giving a new notice.⁹⁸

3.4.1.2 Contractor's proposal (Value Engineering)

The Contractor can propose changes when the changes will lead to an acceleration of completion, a reduction of the costs to the Employer of executing, the maintaining or operating of the works, an improvement of efficiency or Value to the Employer of the completed work, or otherwise being for the benefit of the Employer.⁹⁹

3.4.1.3 Requirements of communication and Employer's lack of communication

General Provisions in CONS stipulate that communications as approvals, certificates, consents, determinations, notices and requests shall be in writing, and shall not be unreasonably withheld or delayed.¹⁰⁰

According to *Instructions of the Engineer* it is held that whenever practicable, the instructions shall be given in writing by the Engineer.¹⁰¹ Thus, this demand in writing is not absolute.

If, in spite of this, there is an oral instruction given by the Engineer and the Engineer then within two working days receives a written confirmation regarding the instruction from the Contractor, the Engineer has to respond with a written rejection within two working days. This respond is to be made if the Engineer will avoid the Contractor's confirmation as to constitute a written instruction from the Engineer.¹⁰²

⁹⁸ Commentary to CONS 13.1.

⁹⁹ CONS 13.2, *Value Engineering*.

¹⁰⁰ CONS 1.3, *Communications*.

¹⁰¹ CONS 3.3, second paragraph, *Instructions of the Engineer*.

¹⁰² CONS 3.3, second paragraph, *Instructions of the Engineer*.

3.4.2 Work occasioned

The provisions in CONS 17.3 a) - h), *Employer's Risks*, correspond with the provisions in Short Form of Contract 6.1 a) - h), *Employer's Liabilities*, and they are also almost identical in the wording. The name of CONS, Clause 19, is *Force Majeure*¹⁰³ (3.3.2 Variations occasioned).

Also CONS *Unforeseeable Physical Conditions*¹⁰⁴ deals with Works occasioned. The definition of "Unforeseeable" is laid down in the general provisions and says:

*Not reasonably foreseeable by an experienced Contractor by the date for submission of the Tender.*¹⁰⁵

The expression "Physical Conditions" is defined in *Unforeseeable Physical Conditions* and stipulates:

*Natural physical conditions and man-made and other physical obstructions and pollutants, which the Contractor encounters at the Site when executing the Works, including sub-surface and hydrological conditions but excluding climatic conditions.*¹⁰⁶

3.4.2.1 Requirements of communication and Contractor's lack of communication

The Contractor shall as soon as practicable give notice to the Engineer, if the Contractor encounters physical conditions which he considers to be both unfavourable and unforeseeable.¹⁰⁷ It is not expressly prescribed that the notice shall be in writing.¹⁰⁸ The notice can also serve as the notice stipulated in CONS 20, *Claims, Disputes and Arbitration* regulating the Period of limitation,

¹⁰³ Compare Short Form of Contract 6.1 i), *Employer's Liabilities*.

¹⁰⁴ CONS 4.12, *Unforeseeable Physical Conditions*, compare Short Form of Contract 6.1 l), *Employer's Liabilities* (3.3.2 Variations occasioned), fn 72 and 84.

¹⁰⁵ CONS 1.1.6.8, *General Provisions*.

¹⁰⁶ CONS 4.12, first paragraph, *Unforeseeable Physical Conditions*.

¹⁰⁷ CONS 4.12, second paragraph, *Unforeseeable Physical Conditions* and its commentary.

¹⁰⁸ But compare CONS *General Provisions*, that communications shall be in writing, see above 3.4.1.3 Requirements of communication and Contractor's lack of communication.

i.e. 28 days after the Contractor became aware, or should have become aware, of the circumstance.¹⁰⁹ Therefore a failure to give notice within the limit will deprive him of his right to financial compensation and to an extension of time.¹¹⁰

Almost the same procedure will apply concerning *Employer's Risks*¹¹¹ and *Force Majeure*¹¹² (see above, 3.4.2 Work occasioned), even though the provisions of *Force Majeure* are more specific and complicated.

3.5 Conclusion

In AB 04 there is an important novelty concerning the Contractor's obligation to communicate Work occasioned with the Employer. Depending on the circumstances, the Contractor either has, as communication, to "consult" or to "give notice". The parties can also agree that the communication has to be in writing. If the Contractor lacks in his communication with the Employer, there is a considerable risk that the Contractor will not get any financial compensation concerning the executed Work occasioned.

In Short Form of Contract and in CONS there are corresponding provisions of communication. However, if the Contractor lacks in his communication with the Employer, his possibilities of getting financial compensation concerning the executed Work occasioned are better compared to AB 04.

Even before AB 04 there was a requirement of a written order by the Employer concerning prescribed Variations and Additions. If a prescribed Variation or Addition is executed without a written order, it is very difficult for the Contractor to get financial compensation.

In Short Form of contract and CONS there is no absolute writing demand concerning prescribed Variations and Additions. The provisions in AB 04

¹⁰⁹ CONS 20.1, *Contractor's Claims*, compare AB 04, Chapter 6, Clause 19.

¹¹⁰ CONS 4.12, second paragraph, *Unforeseeable Physical Conditions* and its commentary.

¹¹¹ CONS 17.3, *Employer's Risks*, and 17.4, *Consequences of Employer's Risks*.

¹¹² CONS 19.1, *Definition of Force Majeure*, 19.2, *Notice of Force Majeure*, and 19.4, *Consequences of Force Majeure*.

regulating this matter are very clear, and one important consequence of the provisions is probably the avoidance of a lot of disputes between the parties. However, the provisions might also lead to unreasonable consequences. If there is no written order by the Employer, the Contractor will probably not get any financial compensation. There is always a risk that the Employer uses this circumstance in bad faith. These circumstances together with the novelties concerning the Contractor's obligation to communicate Work occasioned with the Employer, lead to the consequence of far-reaching obligations for the Contractor in AB 04. Moreover, AB 04 also prescribe a writing demand concerning acceleration.¹¹³ It would have been fairer, if there had been an equal division of the obligations between the Contractor and the Employer.

¹¹³ AB 04, Chapter 4, Clause 6.

4 Dispute settlement

4.1 Dispute settlement according to AB 04

4.1.1 Adjudication

With regard to Dispute Settlement the first important novelty in AB 04 is the introduction of an Adjudicator. The name of the new chapter in AB 04 is "Simplified Resolution of Disputes"¹¹⁴. The novelty is probably influenced by English tradition.¹¹⁵

The parties have to agree about adjudication and the parties also have to agree about the appointment of the specific Adjudicator. Within a week the parties have to submit their opinions to the Adjudicator. The parties have the right - at least once - to comment on the opinion of the other party. There might as well be possibilities to a hearing with the Adjudicator. Within four weeks from the reception of all the opinions, the Adjudicator has to make a decision in writing. The Adjudicator decides which of the parties is obliged to pay the costs of the Adjudicator. The decision of the Adjudicator is not enforceable, but the decision is considered to be binding for the parties until the dispute is submitted to litigation or arbitration.¹¹⁶

The main difference between AB 04 and the FIDIC-contracts with regard to adjudication is the fact that the parties according to AB 04 have to agree about adjudication.¹¹⁷ According to Short Form of Contract it is enough that one Party refers the matter to adjudication.¹¹⁸ This regulation of the Short Form of Contract will also apply according to CONS, but the Adjudicator is in CONS replaced by a Dispute Adjudication Board (DAB).¹¹⁹

¹¹⁴ "Förenklad Tvistlösning", AB 04, Chapter 10.

¹¹⁵ Liman, Lars-Otto; ABC om AB 04, AB Svensk Byggtjänst, 2004, p 56.

¹¹⁶ AB 04, Chapter 10, Clause 1, Section 7.

¹¹⁷ AB 04, Chapter 10, Clause 1, Section 1.

¹¹⁸ Short Form of Contract 15.1, *Adjudication*.

¹¹⁹ CONS 20.4, first paragraph, *Obtaining Dispute Adjudication Board's Decision*.

4.1.2 Litigation instead of arbitration

The second important novelty in AB 04 with regard to Dispute Settlement is the change from arbitration to litigation – as the main rule. The provision is of course optional and the parties have the right to agree upon whatever procedure they prefer.¹²⁰

As to be seen below litigation is unknown to the FIDIC-contracts as a Dispute Settlement model.

The provision in AB 92 concerning Dispute Settlement was also optional. The main rule in AB 92 stipulated arbitration in accordance with the Swedish Arbitration Act.¹²¹ If the matter manifestly did not relate to a sum larger than ten Base Amounts, i.e. approximately 390.000 SEK, either party had the right to refer the matter to a General Court.¹²²

According to AB 04 Disputes are to be settled by General Courts¹²³, unless the capital value of the Dispute does not manifestly exceed onehundredfifty (150) Base Amounts¹²⁴, i.e. approximately SEK 5.8 million. VAT is not included in this amount. If the capital value exceeds the limit disputes shall be settled according to the Swedish Arbitration Act.

AB 72 and AB 92 stipulated arbitration as the main proceeding concerning Dispute Settlement.¹²⁵ According to the Commentary of AB 72¹²⁶, the reason for choosing arbitration was that the handling of a case would be much faster with arbitration in comparison with litigation. The Commentary also held the facts of the lower costs in favour of arbitration instead of litigation, at least when all the three courts were used in the litigation-proceedings.¹²⁷

¹²⁰ AB 04, Chapter 9, Clause 1.

¹²¹ AB 92, Chapter 9, Clause 1.

¹²² AB 92, Chapter 9, Clause 2.

¹²³ "Allmän domstol" and that will be the district courts (tingsrätt) followed by courts of Appeal (hovrätt) and the Supreme Court (Högsta domstolen).

¹²⁴ "Prisbasbelopp", according to the National Insurance Act.

¹²⁵ Disputes arising from the Contract Agreement shall be settled by arbitration in accordance with the Swedish Arbitration Act unless otherwise stipulated in other Contract Documents (AB 92, Chapter 9, Clause 1).

¹²⁶ "Motiv AB 72", fn 7.

¹²⁷ Motiv AB 72, fn 7, p 252.

The conclusion concerning the costs is differently evaluated today. During recent years the arbitration costs in some cases have been very high.¹²⁸ This is probably the most important reason why AB 04 has changed from arbitration to litigation.

Especially small companies were most likely following the same routines - without any careful consideration - and therefore they agreed to the AB system, without bearing in mind that they probably could not even afford to pay the starting costs in an arbitration procedure.

In 1979 the Swedish Supreme Court¹²⁹ held that a clause in a contract, that stipulated arbitration as Dispute Settlement, was unreasonable and the clause was therefore not valid.¹³⁰ Two companies had made an agreement about supply. The buyer was a small and new company and the supplier was a market leader. The clause stipulating arbitration was printed as general conditions on the back of the tender and on the back of the confirmation. Furthermore, the parties had not discussed the clause. Consequently the Supreme Court held that since there was a big discrepancy between the financial strength of the parties, and since the placing of the clause was not prominent, the clause stipulating arbitration was not valid.

4.1.2.1 Other advantages of litigation

In Sweden only judgements of the Swedish Supreme Court have the power to become really important precedents. Arbitrations can never become formal precedents. The fact that arbitrations hardly ever are official, naturally also makes the importance of an arbitration low as an informal precedent. At present in Sweden there are very few precedents concerning construction law. Hopefully the change to litigation in AB 04 will lead to more precedents regarding construction law.

The Commentary of AB 72 also asserted that legal security would be better fulfilled with litigation compared to arbitration. Particularly, in Disputes concerning interpretation of contracts this would

¹²⁸ Liman, Lars-Otto; fn 115, p 55.

¹²⁹ "Högsta domstolen"

¹³⁰ NJA 1979 s 666, (published in "Så gick det domar och beslut i entreprenadtvister", fn 50, p 109 ff).

be relevant.¹³¹ According to my opinion this statement is doubtful. Albeit some Arbitrators are Engineers and not lawyers, the Arbitrators are mainly lawyers that are very experienced with construction law. It is most likely very common that, at least, the chairman of the arbitration tribunal is a judge.

4.1.2.2 Other advantages of arbitration

Apart from - in general - a fast proceeding, which is not possible to appeal, there are also other advantages to choose arbitration.

Another advantage to choose arbitration is the fact that the parties can choose persons as Arbitrators who have specific knowledge about construction and construction law. Obviously, this is above all the fact in Disputes with a lot of technical matters. In these kinds of Disputes there will be a big gap with regard to expert knowledge in comparison to the ordinary judges in a court. The fact of better expert knowledge leads to wider possibilities of valuing of evidence.¹³² The arbitration proceedings are not official, implying that the proceedings and the outcome are secret. The arbitration proceedings might also increase the opportunities of reaching an amicable settlement - because of more contacts between the parties - compared to litigation.¹³³ The possibilities for the parties to enjoy a good cooperation after an arbitration proceeding are better compared to the possibilities after litigation. To be brought before a court is by many considered to be most hostile.¹³⁴

Apart from the very high costs, the disadvantages of arbitration are the problems of the access to independent Arbitrators, in relationship to the parties as well as in the relationship to a specific section of the construction sector. The real challenge is to find an Arbitrator independent of the Employer and Contractor sides.¹³⁵ The parties are also jointly and severally responsible for the arbitration costs, which might lead to the negative result of being obliged to pay the costs even as a

¹³¹ Motiv AB 72, fn 7, p 254 f.

¹³² Motiv AB 72, fn 7, p 256.

¹³³ Hedberg, Stig; Kommentar till AB 92, AB Svensk Byggtjänst, 1992, p 169.

¹³⁴ Motiv AB 72, fn 7, p 257.

¹³⁵ Hedberg, Stig; Entreprenadkontrakt. Fällor och fel, 1996, p 284.

winning party. On some occasions it could also be negative not to have the opportunity to appeal the arbitration. Furthermore, it is not possible to take the oath of a witness in an arbitration proceeding.¹³⁶

4.2 Dispute settlement according to FIDIC

Short Form of Contract is basically intended to be used for contracts of less than USD 0.5 million.¹³⁷ That would approximately be in accordance with the limit of AB 92 - i.e. ten Base Amounts - regulating if the Disputes are to be settled as litigation or arbitration.

4.2.1 Short Form of Contract

Dispute Settlement in Short Form of Contract is regulated in Clause 15, *Resolution of Disputes*. To Short Form of Contract there is also attached Rules for adjudication.

According to Short form of Contract the difference between adjudication and arbitration is that the Adjudicator shall act as an impartial expert not as an Arbitrator.¹³⁸

4.2.1.1 Adjudication

The main difference between AB 04 and Short Form of Contract with regard to adjudication is that adjudication according to Short form of Contract is a mandatory step before commencing Arbitration proceedings.¹³⁹ This fact leads to a big difference between the contracts. According to AB 04 the parties need consensus to use Adjudication.¹⁴⁰ It is

¹³⁶ Hedberg, Stig; fn 133, p 170.

¹³⁷ Booen; Peter L, FIDIC's Conditions of Contract for the Next Century: 1998 Test Editions, International Construction Law Review: Vol 16 (1999, p 10), http://www1.fidic.org/resources/contracts/icla_v16/booen.html (051019), Mr Booen was the principal drafter of the three forms of main contracts from 1999, and he also participated in the discussions of the task group responsible for preparing the Short Form of Contracts.

¹³⁸ Short Form of Contract, Rules for Adjudication, Sub-Clause 21 (referred to in 15.1, *Adjudication*).

¹³⁹ Short Form of Contract, Notes for Guidance 15.3, *Arbitration*.

¹⁴⁰ AB 04, Chapter 10, Clause 1, Section 1.

enough that one Party refers the matter to adjudication according to Short Form of Contract.¹⁴¹

Another consequence of the fact that adjudication is mandatory according to Short Form of Contract is the difference in appointing the Adjudicator. Initially the parties have the opportunity to agree about the appointment of the Adjudicator.¹⁴² If the parties have not agreed within 14 days of the reference of a dispute, the President of FIDIC or his nominee - in the absence of agreement - is empowered to appoint an Adjudicator.¹⁴³ This kind of regulations naturally does not exist in AB 04, where the parties have to agree about the appointment.

If none of the parties is dissatisfied with the decision of the Adjudicator, the decision is final and binding. If dissatisfaction exists, the dissatisfied party has to give a notice within 28 days of the reception of the decision. The same will apply if no decision is given. The notice must then be given within 28 days of the expiry of the time for decision.¹⁴⁴ According to AB 04, if a correct notice of dissatisfaction is given, the decision of the Arbitrator is binding until an arbitration has changed the decision of the Adjudicator.¹⁴⁵

The Contractor is obliged to pay the costs to the Adjudicator. The Employer is obliged to pay half of the costs to the Contractor.¹⁴⁶ According to AB 04 the Adjudicator has to decide which of the parties is obliged to pay the costs of the Adjudicator.¹⁴⁷

The Adjudicator is prohibited from giving advice to the parties concerning the conduct of the project.¹⁴⁸ For that reason it would not be possible for the Adjudicator to act as a mediator. A mediator does not give any decision. Instead the mediator tries to guide the parties towards an acceptable solution.

¹⁴¹ Short Form of Contract 15.1, *Adjudication*.

¹⁴² Short Form of Contract 15.1, *Adjudication*.

¹⁴³ Short Form of Contract, Rules for Adjudication, Sub-Clause 2 (referred to in 15.1, *Adjudication*).

¹⁴⁴ Short Form of Contract 15.2, *Notice of Dissatisfaction*.

¹⁴⁵ Short Form of Contract 15.2, *Notice of Dissatisfaction*.

¹⁴⁶ Short Form of Contract, Rules for Adjudication, Sub-Clause 17, (referred to in 15.1, *Adjudication*).

¹⁴⁷ AB 04, Chapter 10, Clause 1, Section 5.

¹⁴⁸ Short Form of Contract, Rules for Adjudication, Sub-Clause 7 (referred to in 15.1, *Adjudication*).

The parties cannot call the Adjudicator as a witness to give evidence.¹⁴⁹

4.2.1.2 Arbitration

The arbitration shall be settled by a single Arbitrator.¹⁵⁰ The UNCITRAL rules are recommended.¹⁵¹ If no Arbitrator is appointed, according to the contract the President of FIDIC or his nominee is to designate the Arbitrator.

4.2.2 CONS

With regard to Dispute Settlement CONS - yet regulated in more detail - more or less follow the same structure as Short Form of Contract.¹⁵² In the following I will for that reason only present what mainly differs CONS from Short Form of Contract.

However, there is one very important difference between Short Form of Contract and CONS. Before confronting adjudication in CONS, the Engineer shall consult with each party in an endeavour to reach an agreement.¹⁵³ Consequently it is possible to say that the Engineer has a dual role as both the agent of the Employer and as a quasi-judicial dispute resolver.¹⁵⁴

The Contractor has to give notice to the Engineer if he considers himself to be entitled to extension of time or additional payment.¹⁵⁵

¹⁴⁹ Short Form of Contract, Rules for Adjudication, Sub-Clause 8, (referred to in 15.1, *Adjudication*).

¹⁵⁰ Short Form of Contract 15.3, *Arbitration*.

¹⁵¹ Short Form of Contract, Notes for Guidance 15.3, *Arbitration*.

¹⁵² The structure of CONS, Clause 20: 20.1 *Contractor's claims*, 20.2 *Appointment of the Dispute Adjudication Board*, 20.3 *Failure to Agree Dispute Adjudication Board*, 20.4 *Obtaining Dispute Adjudication Board's Decision*, 20.5 *Amicable Settlement*, 20.6 *Arbitration*, 20.7 *Failure to Comply with Dispute Adjudication Board's Decision*, 20.8 *Expiry of Dispute Adjudication Board's Appointment*.

¹⁵³ CONS 3.5, *Determinations* and CONS 20.1, eight paragraph, *Contractor's Claims*.

¹⁵⁴ Huse, Joseph A; fn 86, p 557.

¹⁵⁵ CONS 20.1, first paragraph, *Contractor's Claims*, further according to CONS 20.1, first and fifth paragraph, *Contractor's Claims*, The Contractor has to give the notice as soon as possible and not later than 28 days after he became aware of, or should have become aware of the circumstance.

4.2.2.1 Adjudication

If the Engineer fails to reach an agreement between the parties, CONS prescribe a Dispute Adjudication Board (DAB). The main rule stipulates three members of the board, but it is also possible for the parties to agree about one person.¹⁵⁶ The decision of the board is not generally binding. The first two members of a three-person DAB are each nominated by one party and approved by the other.¹⁵⁷ The DAB is to give its decision within 84 days, i.e. three months.

4.2.2.2 Arbitration

Where notice of dissatisfaction has been given¹⁵⁸, both Parties have to attempt to settle the dispute amicably before the commencement of arbitration.¹⁵⁹ The Dispute shall finally be settled under the Rules of Arbitration of the International Chamber of Commerce.¹⁶⁰

4.3 Conclusion

The change from arbitration to litigation in AB 04 will certainly increase the construction Disputes in the Swedish courts. It is more uncertain what the effects will be by the introduction of an Adjudicator in AB 04. The increase of construction Disputes in the courts will make heavy demands on the courts concerning competence in construction law. This will particularly be the fact the first years to come, before precedents and other important court judgements exist. The parties will probably also demand faster procedures in construction Disputes.

In international transactions the parties prefer arbitration to litigation, since one or both

The Contractor has then another 14 days - in all 42 days - to present for the Engineer the fully detailed claim.

¹⁵⁶ CONS 20.2, second paragraph, *Appointment of the Dispute Adjudication Board*.

¹⁵⁷ CONS 20.2, third paragraph, *Appointment of the Dispute Adjudication Board*.

¹⁵⁸ CONS 20.4, fifth paragraph, *Obtaining Dispute Adjudication Board's Decision*.

¹⁵⁹ CONS 20.5, *Amicable Settlement*

¹⁶⁰ CONS 20.6, *Arbitration*

parties desire not to be brought before the courts of a foreign jurisdiction. The reason for this arbitration preference is that mostly the language, the procedure and the law are unfamiliar in a foreign country. This may lead to the fact that the parties - when consisting of a Swedish Employer and a foreign Contractor - will choose one of the FIDIC-contracts instead of AB 04, despite the fact that the rules concerning litigation in AB 04 are optional. Mostly it is probably the Employer who suggests which contract to use and if the Site is situated in Sweden, the Swedish Employer will suggest AB 04. The foreign Contractor might in the future be more unwilling to accept AB 04 because of the litigation rules.

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