

CHAPTER I
INTRODUCTION



1. Background Information and Importance of the Issues

One widely recognized form of international construction contract is the FIDIC "Red Book" which includes dispute resolution provisions. It is likely that the FIDIC form of construction contract will be more frequently used in major construction projects in Thailand and Indochina. Although the FIDIC dispute settlement provisions have proven to be effective in many foreign jurisdictions, it is worth to analyze their effectiveness under Thai law.

Generally, there are several parties involved in construction work, i.e. employers ("owners"), contractors (which can be classified into structural engineers and architect, interior designers, mechanical and electrical engineers, etc.), supervising engineers, etc. Frequently, there will be disputes during construction. Part of the reasons for disputes to arise is a lack of good co-ordination among the parties concerned or insufficient experiences of contractors, etc. Where it is unlikely that the disputes can be settled amicably, the parties concerned may bring lawsuits to courts.

Presently, it is widely accepted that direct negotiation between the parties or various forms of

alternative dispute resolution, which can be conducted outside the court prior to bringing a lawsuit to the court, is one way or the other better than litigation . The alternative methods of settlement of disputes include mediation or conciliation, expert appraisal, mini-trial, etc. (Burke and Chinkin, 1990 : 446). When the amicable settlement of disputes fails, arbitration may take place in order to avoid litigation. Arbitration is now widely accepted in most countries since it has been proved as a method that can save time and costs compared to litigation in the courts. It helps reduce the number of cases going to the court. (Remarks attached to the 1987 Arbitration Act, published in the Government Gazette, Special Issue, Part 4, Volume 156, dated 12 August 1987, p.17). In Thailand, arbitration may be conducted in the English language and under a shorter period of time than is possible in Thai Courts, resulting in faster decisions and lower costs. Arbitration being a less time consuming process also helps the parties to retain good relationship which is congenial to their smooth construction work, as opposed to litigation which sometimes brings them into a prolonged confrontational situation which may bring them into a non-friendly position. Arbitration, therefore, is well-known as a method of dispute settlement.

In the construction industry, arbitration is very well recognized and major construction projects normally

include an arbitration clause in construction contracts, for instance, The Hopewell or Second Stage Express Way Projects, etc. (Arbitration Office, 1992 : 142).

The "Federationale Internationale des Ingenieurs-Conseils" (FIDIC) or International Federation of Consulting Engineer, which was formed in 1913 by five national associations of independent consulting engineers within Europe published a standard construction contract, called the "FIDIC Conditions of Contract" to be used in engineering industry. The original copy of which was based on the English ICE Conditions for Civil Engineering Works (ICE means the Institute of Civil Engineers). The First Edition of the FIDIC Conditions of Contract was introduced in 1957, the Second Edition in 1969, the Third Edition in 1977 and the Fourth Edition which is the current version was published in 1987, known as the "Red Book" (Ludlow and Rees, 1992 : 525 and 531). Clause 67 of the Red Book (the "FIDIC Clause 67") deals with a settlement of dispute between an employer and a contractor (see **Appendix A**). Compared to Clause 67 of the Third Edition 1977 of the FIDIC Conditions of Contract (see **Appendix B**), significant changes brought in by the Fourth Edition are as follows:

The Term "Dispute"

In the Third Edition 1977, it states that "...any dispute or difference of any kind whatsoever...". In the Fourth Edition 1987, it states that "...a dispute of any kind whatsoever..., including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer,..."

It is important to note that the term "dispute" in the Fourth Edition 1987 has been expanded to include "any dispute" in connection with any opinion, instruction, determination, certificate or valuation of the Engineer. It is clear from this expansion of the term "dispute" that the Fourth Edition expressly allows the Engineer to consider and decide any dispute as to his opinion, instruction, determination, etc.

Reference to Clause 67

Clause 67 of the Fourth Edition requires the parties to state that a reference of dispute or the Engineer's decision is made pursuant to Clause 67, while the Third Edition does not. Clause 67 of the Fourth Edition uses the phrase "...Such reference shall state that it is made pursuant to this Clause.", and "...Such decision shall state that



it is made pursuant to this Clause". It is understood that this change would make it clearer to the effect that a party intends to proceed according Clause 67.

Time limits

Formerly, Clause 67 of the Third Edition provides the same time limit of 90 days for both pre-arbitral proceedings and arbitral proceedings. But in the Fourth Edition, there are three different time limits as follows:

- 1) 84 days : The Engineer has to give his decision within 84 days from the day on which he receives a reference of dispute.
- 2) 70 days : A party who is not satisfied with the Engineer's decision may commence arbitration within 70 days from the date on which he receives the decision.
- 3) 56 days : Arbitration may be commenced on or after 56th day after the day on which notice of intention to commence arbitration of such dispute was given unless agreed otherwise.

Amicable settlement of dispute

Sub-Clause 67.2 of the Fourth Edition provides that "...arbitration of such dispute shall not be commenced unless an attempt has first been made by the parties to *settle such dispute amicably.*", while Clause 67 of the Third Edition does not provide so.

Conditions to commence arbitration

Under Sub-Clause 67.2 of the Fourth Edition, there are two conditions for the commencement of arbitration, namely:

- a) The Engineer's decision has not become final and binding pursuant to Sub-Clause 67.1, and
- b) The amicable settlement has not been reached within the period stated in Sub-Clause 67.2

In addition, a notice to commence arbitration must be given.

While Clause 67 of the Third Edition does not provide so.

Under FIDIC Clause 67 of the Red Book, where there is a dispute between them, the dispute must be first referred in writing to and decided by The Engineer. The Engineer must

give his decision to the Employer and the Contractor within 84 days after the day on which he receives such reference. Such reference shall state that his decision is made pursuant to Clause 67. Such decision shall be final and binding. Nevertheless, where either party is dissatisfied with any decision of the Engineer or the Engineer fails to give his decision before the said 84 day-period expires, either party may give notice to the other party, with a copy to the Engineer expressing his intention to commence arbitration. The notice of intention to commence arbitration must be made within 70 days upon receiving the Engineer's decision or within 70 days after the day on which the 84-day period expires. Where there is the Engineer's decision and neither the Employer nor the Contractor gives notice to commence arbitration as to such dispute within the said 70-day period, the Engineer's decision shall be final and binding upon both parties. Where the Engineer's decision has not become final and binding pursuant to Sub-Clause 67.1 and amicable settlement has not been reached within the period stated in Sub-Clause 67.2, it shall be finally settled, unless otherwise specified in the contract, under the ICC Rules of Conciliation and Arbitration. More explanation on the procedure of the settlement of dispute under FIDIC Clause 67 can be found in Chapter III of this Thesis.

The problems which will be addressed in this Thesis are as follows:

1. What happens when a FIDIC contract is void for whatever reasons? Is FIDIC Clause 67 still valid in such a case?

2. Supposing the Employer and the Contractor under a FIDIC contract changed their mind regarding FIDIC Clause 67 - Settlement of Disputes. For example, where the Engineer's decision has already been given, can the parties terminate FIDIC Clause 67, ignore the Engineer's decision? Or in a situation where the parties would like to use an ad hoc arbitration, instead of institutional arbitration like ICC, can the parties do that?

3. What happens if a party fails to appoint arbitrators? How does the "ICC Rules" deal with this problem?

4. Where the Engineer's decisions have been given, how can the arbitrators make use of the Engineer's decisions?

5. Where a request to arbitrate has been made to the ICC Court of Arbitration which already declared that the dispute is in its jurisdiction, there is a question whether the claimant party has a right to withdraw his request from the ICC Court.

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

7. There is a question as to how a multi-party arbitration can take place.

8. There is a question to what extent the ICC Rules conform to the Thai Arbitration Act 1987.

2. Objectives of the Research

This Thesis is aimed to study the nature of issues which may arise under Thai laws when the settlement of dispute clause under the FIDIC Conditions of Contract is invoked. In addition, it will explore the possible solution to the said problems.

3. Hypotheses

1. Procedures for settlement of disputes under a FIDIC Clause 67 are, subject to minor amendments, appropriate for inclusion in construction contracts for major projects in Thailand which are governed by Thai laws.

2. International arbitrations have to conform to the Thai Arbitration Act 1987.

4. Scope of the Thesis

This Thesis will address issues concerning the settlement of dispute clause under the FIDIC Conditions of Contract and alternative solutions.

5. Benefits Expected from the Thesis

1. It will yield better understanding of the nature of the issues which may arise when the settlement of disputes clause under the FIDIC Conditions of Contract is employed.

2. It will explore and expose solutions to the said issues according to Thai law and principles of foreign laws.

3. It will enlighten what extent to which the Thai Arbitration Act 1987 may apply to the issues.