CHAPTER II

CONSTRUCTION CONTRACTS AND CONSTRUCTION DISPUTE RESOLUTION

1. Definition and Scope of Construction Contracts

Thailand is a civil law country having the Civil and Commercial Code ("CCC") as one of its main codified legislation (Yut Sangoudhai, 1984 : 4). However, Chitti Tingsababh (1977 : 5) has an opinion that, in substance, Thailand follows the Common Law system rather than the Civil Law system. A construction contract falls within the category of "hire of work" contracts which is one of the 23 types of specific contracts under sections 587-607 of the CCC. The said provisions on "hire of work" deal with the rights and duties of the contractor and the owner, including liabilities for defective work and delays, limitation period, termination of contract and subcontracting. The provisions of the CCC apply where the contract is silent on these aspects.

The CCC does not require a construction contract to be in writing. Therefore, a verbal agreement between a contractor and an owner of a project is sufficient, and entitles one party to claim against the other rights and duties under the contract made between them.

In considering some foreign elements of the parties and the place concerned in construction works e.g. nationalities of the parties or the site of the construction

project, etc., a construction contract for example a FIDIC contract may generally be classified into two categories, i.e. domestic and international. This would affect the arbitral procedural law. For example, cases where a FIDIC contract is made between two Thai limited companies to construct a hotel in Bangkok ; it is clear that no foreign element exists in this situation. Cases where an American company agrees to construct a highway for the Thai Government, irrespective of whether or not Thai law is the governing law of the contract, a foreign element exists because one party is a foreign company. International construction contracts would result in international construction arbitrations which will be discussed later in 4.2 of this Chapter.

2. Persons Concerned in Construction Contracts

2.1 Employer vs. Contractor

An employer is a party to the construction work who requires the work to be done and who normally appoints an engineer under a contract separate from the FIDIC Conditions of Contract. The engineer is not a party to the construction contract made between the employer and the contractor.

Unless otherwise specified in construction contracts, the provisions in sections 587-607 in the CCC apply to employers and contractors in terms of the rights and duties between them.

Part I of the FIDIC Conditions of Contract defines the "Employer" and the "Contractor" as follows:

> "Employer" means the person named as such in Part II of the Conditions and the legal successors in title to such person, but not (except with the consent of the Contractor) any assignee of such person.
>
> "Contractor" means the person whose tender has been accepted by the Employer and the legal successors in title to such person, but not (except with the consent of the Employer) any assignee of such person."

According to Hawkins (1988 : 27), the contractor's basic undertaking is found in his tender:

> "...we the undersigned, offer to execute and complete such Works and remedy any defects therein in conformity with the Conditions of Contract, Specification, Drawings, Bills of Quantities and Addenda for the sum of..."

2.2 Contractor vs. Sub-Contractors

Sub-contractors are usually hired by the main contractor of a construction project. The sub-contractors have no contractual relationship with the project owner.

Usually, it is too burdensome for a project owner to hire all sub-contractors in addition to the main contractor. Wallace (1970 : 746-747) explained the reason why the project owner does not hire sub-contractors himself that he wants to have the whole construction work to be carried out by one contractor. As a result, the project owner obtains one price for the whole work, avoiding a multiplicity of contracts and liabilities, and the complicated problems of delay and interference which would certainly arise if the works were to be carried out by various contractors and their workmen, each separately employed by him to perform various parts of the work on the same site, though dependent on each other for speedy and economical progress.

The FIDIC Conditions of Contract defines the term "sub-contractors" as follows:

> "any persons named in the Contract as sub-contractors for a part of the Works or any persons to whom a part of the Works has been subcontracted with the consent of the Engineer and the legal successors in title to such persons, but not any assignees of any such persons."

The activities of the sub-contractors in construction works would involve multi-party disputes which will be discussed in more detail in Chapter IV.

2.3 Engineer vs. Contractor

The Engineer and the Contractor generally do not enter into any kind of contract between each other in the matters concerning construction work. As a result, there is no legal or contractual obligation between them. Further, Ludlow and Rees (1990 : 531) in "The Engineer's Role under FIDIC Standard Conditions of Contract" also cites the case of *Pacific Associates Inc. v. Baxter and Others,* in which the court held that the Engineer had no direct liability to the Contractor but that the Contractor could recover losses through the Employer if the Engineer's failure to act fairly was a direct cause of his loss. Ludlow and Rees also mentioned that this particular case is not an authority for a general principle of English law that in no circumstances will the Engineer, exercising a decision-making role under a FIDIC style contract, owe a duty of care to the Contractor.

2.4 Engineer vs. Employer

With respect to the duty of the Engineer owed to the Employer under an agreement entered into by them, there is a question whether the Employer is entitled to sue the Engineer by alleging that the Engineer has breached the contract made between him and the engineer where the Engineer gives a decision under FIDIC Clause 67 in favour of

the Contractor. The reason raised by the Employer is that the Engineer has a duty to safeguard the client's interests, and that the Engineer has violated this duty by accepting and supporting claims of the Contractor against the owner which are unacceptable to the owner. In the Employer's viewpoint, he is entitled to call *performance bond* issued by the Engineer in the form of a first demand bank guarantee. Unfortunately, the case did not go to arbitration but was settled by direct negotiation between the Employer and the Engineer (Hochuli, 1991 : 542).

3. Construction Disputes

Generally, the period of performance of construction work is long. So, those who are engaged in various activities, i.e. the employer, contractor, designer, sub-contractors, etc. who are dependent upon each other's performance for long periods of time and are expected to have good cooperation in completing the project. Construction contract is unlike many other types of contracts since each project is unique, situated on its own site, having its own combination of design details, environment, project management, contractor personnel and many other factors (Myers, 1991 : 313-314).

Seppala (1986 : 317-318) explained that disputes are usually made and claimed by the Contractor against the Employer because the Employer will have less need to claim against the Contractor. The reasons for this are that the Employer usually holds security for his claims in form of performance bonds or guarantees and also retention money of the Contractor. Under construction contracts, the Employer usually has a right to forfeit the retention money (which may be fixed at a certain percentage, e.g. 10% or 15% of the value of the work done) until the defective work has been made good (Wallace, 1970 : 623 and 703-704).

According to Hibberd (1986 : 9), the reasons for claims by Contractors are generally as follows:

1. Delay caused by design team
2. Variations of works
3. Errors in documentation
4. Unforeseen events
5. Commercial/tendering process

Hibberd also commented that "...the majority of claims and the greatest problem in contract management are both caused by variations". This would result in delay of the construction project and the Contractor may claim for both an extension of time and additional cost.

In order to have a valid arbitration, a "dispute" on any matter between the parties with respect to an agreement must be found. This is the first consideration for a party who wants to commence arbitration proceedings. Redfern and Hunter (1991 : 10) said that the word "dispute" has recently been described in the following terms:

> "Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them."

In many cases of construction work, no question of law is involved. The dispute may concern various matters, e.g. the meaning of a particular term in the contract, the existence of certain factual circumstances, whether the parties have adequately performed the contract, the effect of a failure to perform their obligations under the contract, the effect of a supervening occurrence or some extraneous but fundamental and relevant event. In resolving these questions, it is possibly unnecessary for arbitrators

to refer to any legal standard (Lew, 1978 : 493).

The ICC had two cases (unpublished) concerning the existence of a dispute between the parties as follows: (Jarvin, 1987 : 55)

ICC Case No.4265	An Egyptian commission agent claimed damages from its Dutch principal for two agreements concluded on its exclusive territory. The Dutch defendant alleged that *there was no dispute* as to the existence of the claim for commission, which it had admitted, at least partly, after the arbitration proceeding had started. Since the defendant had proposed to the claimant that a conciliation procedure be commenced, and since this proposal had been made before the claimant's request for arbitration, *the arbitrator held this fact was evidence (sic) enough of existence of a dispute*, and retained jurisdiction.
ICC Case No.4705	Where the respondent did not dispute the sum claimed or the liability to pay interest thereon (and where the only reason for not having paid was financial difficulties), the arbitrator defined the issue to be determined as "the manner in which the admitted debt and interest should be discharged".

FIDIC Clause 67 uses a phrase "...a dispute of any kind whatsoever...". It is interesting to consider how far this phrase can be constructed. Since under Thai legal systems and according to Thai court precedents, it is quite common and important to first examine the matter in dispute

and determine which issues are the questions of facts and which issues are the questions of law. The former normally require the hearing of witnesses while the latter do not require the same.

In general, construction disputes may be classified into legal and factual disputes. And it seems that FIDIC Clause 67 is intended to give a broad meaning of the term "dispute" which can cover both legal and factual disputes. Factual disputes in construction normally refer to "*technical*" problems which the Engineer has an expertise to resolve the disputes related to engineering or technical problems better than arbitrators or lawyers. Seppala (1986 : 317) explained that unforeseeable site conditions which involve variations in works, extension of time, specified political and economic risks, etc. are examples for technical disputes.

In connection with the arbitrators' jurisdiction when a dispute arises, it is important to also consider forms of words used in arbitration clauses in order to decide whether the dispute is arbitrable. This would involve the interpretation of arbitration clause. For example, where an arbitration clause provides that "all disputes *arising between the parties*", it would mean "the

disputes *arising under the agreement*" rather than "disputes *arising in relation to the subject-matter of the agreement*" (Walton, 1970 : 71). The writer understands that this interpretation is correct because the word "subject-matter" is too narrow. If we interpret that it concerns only the "subject-matter", there is a need to interpret again as to what the "subject-matter" is. These interpretations would without doubt help in deciding whether the disputes fall within the jurisdiction of the arbitration or that of the ordinary courts.

With regard to the term "dispute", section 5 of the Thai Arbitration Act 1987 provides that :

> "Arbitration agreement means an agreement or an arbitration clause in a contract whereby the parties agree to submit present or future *civil disputes* to arbitration, irrespective of whether there being the designation of an arbitrator."

The Act does not provide for the definition of the term "civil disputes" which may create a problem concerning an interpretation of what types of civil disputes fall within its definition. And there is no court case dealing with this point. However, according to Judge Jarun Pukditanakul's presentation at the seminar, titled "Alternative Dispute Resolution : US and Thai Experience"

(Arbitration Office, 1992 : 159-160) there is a possible trend that Thai Courts would refuse to consider any complaint where an arbitration agreement exists, unless the disputes have been referred to and decided by arbitrators, regardless of what types of disputes [it is possible that he also has the legal or factual disputes in his mind] are included in the arbitration agreement. Therefore, the term "dispute" or "civil dispute" as specified in the Act should be interpreted in a broad sense to cover both legal and factual disputes.

4. Construction Dispute Resolution

When a dispute arises in construction works, the parties need to adopt a dispute resolution method to settle the dispute. The parties have a free choice regarding an adoption of the dispute resolution method. In this respect, it must be remembered that the time and costs are involved and the nature of the problems may in turn require different expertise.

In general, those who are involved in construction disputes look for an effective and fair method which will not adversely effect the timely completion of the work or the ongoing business relationship between the parties.

Where the dispute is resolved by arbitration, an arbitral award would result in "thing decided" which is final and binding upon the parties according to section 22 of the Thai Arbitration Act 1987.

Dispute resolution methods are generally classified into the "non-judicial" process which is a non-binding proceeding as opposed to the "judicial" process. In this Chapter, the non-judicial process includes negotiation, conciliation and mediation. The judicial process includes arbitration.

4.1 Non-Judicial Process : Negotiation, Conciliation and Mediation

Negotiation

Negotiation is the most common and familiar form of dispute settlement. It is inexpensive and is less time consuming, compared to arbitration or litigation.

By the negotiation method, the parties can control the process and the solution by themselves which may be a great advantage. Otherwise, they have to bring in a third party to help resolve the problems (Goldberg, Green and Sander, 1985 : 7).

According to Fisher and Ury (see Goldberg, Green and Sander, 1985 : 19-20) the five basic points of this approach are as follows :

> "1. Separate the people from the problem. The negotiators should see themselves as attacking the problem posed by the negotiations, not each other.
>
> 2. Focus on interests not positions.
>
> Your positions are what you want. Your interests are why you want them. Focusing on interests may uncover the existence of mutual or complementary interests that will make agreement possible.
>
> 3. Invent options for mutual gain.
>
> Even if the parties' interests differ, there may be bargaining outcomes that will advance the interests of both. One well-known example involves the two sisters who are trying to decide which of them should get the only orange in the house. Once they realize that one sister wants to squeeze the orange for its juice, and the other wants to grate the rind to flavor a cake, an agreement that furthers the interests of each becomes apparent. (Bargaining in which such an outcome is possible is referred to as integrative or "win/win" bargaining.)
>
> 4. Insist on objective criteria.
>
> There are some negotiations, or at least some issues, that are not susceptible to a "win-win" outcome. The price of something can be such an issue, since each dollar I give you is one dollar less for me. (Bargaining about issues of this nature is generally referred to as "distributive" or "zero-sum" bargaining.) In order to minimize the risk of either inefficient haggling or a failure to reach on objective criteria to govern the outcome. Thus, instead of negotiating over the price of a used car, both parties might agree that the blue book price should govern.

5. Know your Best Alternative to a Negotiated Agreement (BATNA).

The reason you negotiate with someone is to produce better results than you could obtain without negotiating with that person. If you are unaware of what results you could obtain if the negotiations are unsuccessful, you run the risk of entering an agreement that you would be better off rejecting or rejecting an agreement that you would better off entering into. For example, it would be unwise to agree to buy a car from a friend for $6,000 without knowing how much a similar car would cost you elsewhere. The latter figure is your BATNA. It is important to note that your BATNA is not always constant but may change over time. Thus, in regard to the example, when the new model cars become available, the price of the current model is likely to go down, improving the buyer's BATNA."

According to Phijaisakdi Horayangkura (1992 : 66), the most important thing for retaining long-term relationship between the parties in negotiation is to be frank and straightforward to each other. The reputation and goodwill in commercial relationship is also important. By using any tricks, a party may take advantage only for a short period of time, and then lose his business.

Where there is a dispute in construction work, Cremades (1987 : 227) mentioned that most parties begin with negotiation as an approach to settle the dispute because the parties can continue their work on the contract while negotiation takes place. And if there is no agreement reached between the parties at negotiation stage, other

alternative dispute resolutions may be introduced, e.g. mediation, conciliation, arbitration, etc.

Where an agreement can be reached by the parties, a written agreement signed by both parties should be made in order to make the agreement enforceable. Such an agreement is called a "settlement agreement" according to section 850 of the CCC. The effect of such agreement is that the disputed rights and duties are superseded and modified as per the mutual concessions made in the settlement (section 852 of the CCC).

Conciliation and Mediation

The Black's Law Dictionary, Centennial Edition, (1891-1991 : 289 and 981) defines "conciliation" and "mediation" as follows:

> "Conciliation" is the adjustment and settlement of a dispute in a friendly, unantagonistic manner. *Used in courts* before trial with a view towards avoiding trial and in labor disputes before arbitration.
>
> "Mediation" is *private, informal dispute resolution process* in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties.

Conciliation and mediation are both the dispute resolution techniques whereby a neutral third party is used as conciliator or mediator in order to facilitate negotiations. Redfern and Hunter (1991 : 26) said that the terms "mediation" is sometimes used interchangeably with "conciliation". Tyrril (1992 : 371) said that in an international context, conciliation usually has a more formal structure than mediation". While Hollands (1989 : 38-39) said that in the conciliation process, the conciliator usually suggests terms of settlement or a decision by which the parties may choose to be bound. What a mediator does is only to help the parties to negotiate.

The aim of conciliation or mediation is to reach a settlement by devising terms which both parties are prepared to accept, which is quite different from that of arbitration. Arbitration is aimed to determine the dispute which has arisen in accordance with the rights and duties of the parties concerned (Rowland, 1988 : 1). Conciliation or mediation is more informal and unstructured than arbitration because the function of a conciliator or a mediator is to assist the parties to reach a mutually acceptable agreement, unlike that of an arbitrator which is to adjudicate the dispute.

According to Rosten (1992 : 129-131), the roles of mediators are as follows:

> "1. Assure that ground rules are set up (procedurals), e.g. that common rules of courtesy shall prevail. These help to promote trust among the adversaries and assist the smooth flow of the mediation.
>
> 2. Separate the subjective from the factual content of the arguments presented.
>
> 3. Assist participants in thinking creatively about the various factors of the dispute, thus generating alternative resolution options.
>
> 4. Assure that progress is made at an appropriate pace.
>
> 5. Make sure that issues and interests are not confused and that both are addressed in the final agreement (e.g., economic survival is an interest unfair dismissal is an issue, rooted in that interest.)
>
> 6. Preserve clarity of communications, especially in the formulation of the final agreement."

Generally, the role of a mediator is to help the parties to reach an agreed settlement by first listening to the parties' points of view and then assisting them to achieve a compromise solution (Redfern and Hunter, 1991 : 26). Mediators do not give advice nor render judgments or express opinions, so they need not to be experts in technical aspects nor substantive laws under dispute. They usually inject an element of creativity into the proceedings

through the skillful use of questioning (Warren and Rosten, 1992 : 3). Mediation is always recommended as the initial process in seeking a settlement. The goal of which is to reach a voluntary settlement, recognized as fair and just by all parties, notwithstanding that no party is likely to receive everything they originally asked for. One of the most important things in using mediation is good faith bargaining (Warren and Rosten ,1992 : 2-3). A mediator is unable to compel the parties to reach a settlement agreement. So, mediation as opposed to arbitration does not result in a binding or enforceable decision or award (Redfern and Hunter, 1991 : 27). Mediators may be lawyers or engineers or other professionals as appropriate (Anant Jantara-opakorn, 2533 : 95-96).

One commentator suggested that "...mediation can be an effective means to facilitate settlements of many disputes, particularly complex construction disputes." Not all construction disputes should be resolved by way of mediation. Gaede also mentioned that mediation is most likely to be successful if (Gaede, 1991 : 21):

> "(1) The dispute involves primarily factual disputes and economic matters.

> (2) The parties enter into the mediation process with an honest and open view toward settlement.
>
> (3) The party representatives appointed to the mediation process are not emotionally involved with the dispute.
>
> (4) The party representatives appointed to the mediation process are given adequate authority to reach or at least recommend a settlement.
>
> (5) The mediator is a person sufficiently skilled and trained to allow the benefits of mediation to be maximized.
>
> (6) Confidentiality of the mediation is maintained.
>
> (7) The mediation process does not slow down or otherwise inhibit the arbitration process."

The role of a conciliator is to, after having discussed with the parties concerned, draft and propose terms of an agreement to represent a fair compromise of the matter in dispute. A conciliator has no authority to render any award to bind the parties. Therefore, conciliation does not result in a binding or enforceable award as opposed to arbitration (Redfern and Hunter, 1991 : 26-27).

The formal structure of conciliation can be found in the ICC Rules of Conciliation which consists of 11 Articles in total (see **Appendix C**). For example, a request for conciliation must be submitted to the Secretariat of the Court of the International Chamber of Commerce (Article 2);

the other party who has been informed of such request for conciliation must give the answer to the Secretariat within 15 days whether he agrees or declines to participate in conciliation process (Article 3); unless otherwise agreed, the conciliator shall not act in any judicial or arbitration proceeding relating to the dispute which has been the subject of the conciliation process, whether as an arbitrator, representative or counsel of a party (Article 10), etc.

Normally, the conciliation process under the ICC Rules would be recorded as *minutes* which reflect the parties' agreement and are signed by the conciliator (Glossner, 1983 : 151).

It is interesting that a conciliator cannot act in any judicial or arbitration proceeding relating to the dispute which has been the subject of the conciliation process whether as an arbitrator, representative or counsel of a party, unless the parties agree otherwise according to Article 10 of the ICC Rules. Further, the parties may not call the conciliator as witness in any such proceedings, unless otherwise agreed. According to a discussion with Phijaisak Horayangkura, the reason for this Article 10 is that the parties in the conciliation process have to reveal

or even over reveal their business information to the conciliator more than what they do in the arbitration process or in litigation .

Even though conciliation or mediation is less expensive, less time-consuming, confidential and more speedy. However, these two methods may not be appropriate where a dispute involves the interpretation of a contract clause or where comprehension of the dispute may require a third party to have a high level of technical knowledge. This is because the focus or the emphasis of the conciliation or the mediation is the disputants' relationship, their attitudes toward each other, and gaining confidence in the conciliator or mediator. (Myers, 1991 : 317).

In practice, there is a problem of identifying "knowledgeable persons" who understand special technique concerned in the dispute (Glossner, 1983 : 151) and since the circle of trade in Thailand today is very small which makes it nearly impossible that the conciliator or mediator may not be a potential competitor of the parties. Then, there are not many persons available to become experts, counsels, conciliators (or even arbitrators).

4.2 Quasi-Judicial and Judicial Process : Arbitration and Litigation

According to the Black's Law Dictionary, Centennial Edition (1891-1991 : 105), the term "arbitration" is defined as a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.

David (1985 : 5) defines the arbitration as follows:

> "Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons the arbitrator or arbitrators - who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement"

Anant Jantara-opakorn (1990 : 83-85) explained about the key features of the arbitration as follows:

1. Arbitration is a method for settlement of disputes. But what kind of disputes which can be settled by arbitration depends on the domestic laws of each country.

2. Arbitrators must be independent outsiders, not belonging to either party, the number of whom may be one or more, selected by the parties or by the law.

3. The scope of the arbitrators' duty is to consider and decide the case according to agreements or contracts between the parties in dispute.

4. The arbitrators must consider and decide cases according to the rules of natural justice, for instance, all parties shall have equal opportunity in presenting cases, including to hear witnesses from all parties for the purpose of weighing testimonies. And they are not bound to strictly follow the procedural law in an arbitral proceeding, therefore it is unlike court proceedings.

5. Since the arbitration is a method run by private sector, the state should have a role only to help it to operate effectively, and there should be no unnecessary state intervention.

6. An arbitration award shall be final and binding upon the parties both in terms of facts and law. The parties can enforce such decisions through the court in case of non-compliance with the award.

7. The arbitration is not part of the use of sovereign power. In practice, it is easier for foreign courts to recognize or enforce arbitration awards than court decisions.

Arbitration is said to be "quasi-judicial process" or "private adjudication" conducted by arbitrators as opposed to "judicial process" or "public adjudication" conducted by courts or administrative agencies. English merchants in the 18th century used arbitration as an alternative to litigation since they preferred to have their disputes resolved according to their own customs rather than public law. Since the 19th and 20th centuries arbitration has been used in commercial and labor disputes (Goldberg, Green and Sander, 1985 : 189). It is believed that arbitration can be used in other kinds of disputes. Goldberg, Green and Sander (1985 : 189) explained that most private arbitration systems provide for the following:

"- joint selection and payment of the arbitrator;

- objective standards on which the arbitrator's decision is to be based (typically the terms of an agreement between the parties, the customs of the context in which they conduct business, the applicable law, or some combination of these);

- procedural rules to be applied by the arbitrator."

According to Myers (1986 : 222-223), arbitration, as compared to litigation gives parties the following advantages:

1. Parties in disputes have freedom of choice regarding the selection of arbitrators as decision-makers

who are expert in the subject matter of their disputes. There is no guarantee that judges in courts have any special expertise in the cases which they hear.

2. Parties in disputes may spend much less time and cost in arbitration proceedings since the parties can have their own control over the procedure and rules in reaching a resolution.

3. Parties in disputes can have better control over release of information about the proceedings and over the continuing commercial relationships among the parties.

4. Parties in disputes can maintain their commercial relationships beyond the resolution of the dispute.

5. Parties in disputes may facilitate presentations of complicated evidence and save time. [Presentation of evidence in arbitral proceedings is more flexible and less time consuming.]

Apart from the above, arbitration can also help reduce the burdens of the courts in deciding all disputes which could also be filed with the courts and require a third-party resolution. Arbitration becomes more sophisticated and gains wider acceptance in international construction projects since it is generally more expeditious, less expensive, more flexible and more useful.

However, there are indications that arbitration, in its conventional form, is probably not the best method for resolution of disputes occurring in complex long-term construction contracts (Myers, 1991 : 313). Where a dispute arises during the construction work is being processed, the resolution of dispute would normally be delayed until the work has been completed. So, there may not be any prompt resolution of disputes as they arise.

In order to expedite arbitration, Myers (1991 : 316) suggested that the parties should focus on or pay attention to the underlying disputes, not the conduct of the hearings.

It should be noted that both legal and factual disputes may be referred to the arbitrators (Walton, 1970 : 20). An arbitration award can normally be enforced by requesting a court order. Presently, there is one dispute resolution method that combines some features of both mediation and arbitration, called "Med-Arb". Most med-arb proceedings call for a third party neutral to first mediate or help the parties agree to as many issues as possible and then, by permission of the disputing parties, to arbitrate or make a decision on those that remain. The same neutral may perform both roles; or the role can be split between

several neutrals (Hickey, 1992 : 30).

Arbitration is generally used in the construction industry because the disputes are usually of a technical nature. The parties are happy to refer their disputes to a person who really understands technical problems and who can bring his experiences and practices gained in the construction industry to the formation of his judgement (Bernstein, 1987 : 237-238).

Since the FIDIC Conditions of Contract is basically a construction contract with an international character and the procedural rules of which are administered by the ICC which is an international arbitration institution, it is worth to also discuss briefly the domestic and international arbitrations, and the institutional and ad hoc arbitrations.

Domestic and International Arbitrations

It is important to confine the term "international" arbitrations which is nowhere defined either in a FIDIC contract or in the ICC Rules. This is because any disputes to be referred to the ICC Court of Arbitration must be "business disputes of an international character" as specified in Article 1.1 of the ICC Rules. An international

character of disputes would make the arbitration to be "international" as well.

The distinction between "domestic" and "international" arbitration is that "...more freedom may be allowed in an international arbitration than is commonly allowed in a domestic arbitration." (Redfern and Hunter, 1991, 14). The "more freedom" here should also include a free choice of the parties concerned to select the law governing arbitration in certain countries, namely Germany, France and Switzerland (see Mann, 1967 : 164-167). More importantly, there are at least three reasons why the nationality of arbitration has to be determined, i.e. (1) it identifies the *lex arbitri*, (2) it identifies the national court in which the arbitration is domestic, and (3) it identifies the procedure to be followed for the recognition and enforcement of the award (Lew, 1978 : 13).

In the context of an international arbitration, two factors are required in defining the term "international" , i.e. (1) analysis of the nature of disputes [international trade is involved] and (2) nationality or place of residence [or the headquarters under the "siege" theory] of the parties concerned. So, it is possible that an arbitration which is considered as

"international" in France due to international trade may be considered "domestic" in England due to same nationality of the parties (see Redfern and Hunter, 1991 : 15, 18 and 19).

Institutional and Ad Hoc Arbitrations

An ad hod arbitration is conducted according to rules of procedure adopted for a particular arbitration, normally before a dispute has already arisen. The rules may be drafted by the parties themselves, non-commercial international organizations (like UNCITRAL Arbitration Rules) or sometimes by the arbitral tribunal or by a combination of the two (Redfern and Hunter, 1991 : 13).

An institutional arbitration is administered by an institution which is specialized in arbitration under its own arbitration rules. The following arbitration institutions are well known in the world today (Redfern and Hunter, 1991 : 13-14) :

(1) American Arbitration Association (AAA)

(2) Inter-American Commercial Arbitration Commission (IACAC)

(3) International Centre for the Settlement of Investment Disputes (ICSID)

(4) International Chamber of Commerce (ICC)

(5) London Court of International Arbitration (LCIA), and

(6) Stockholm Chamber of Commerce (SCC)

Most of these institutions would recommend a sample clause of arbitration, for instance that of the ICC states:

> "All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by on or more arbitrators appointed in accordance with the said Rules."

The arbitration under the ICC Rules will be discussed in more details in Chapter III.

Litigation

Generally, litigation is quite time-consuming and is normally more expensive than alternative dispute resolution methods, e.g. negotiation, mediation or arbitration, etc. When a case has to be taken through all three instances of courts, the court proceedings could take five years or even more (Hutter,1992 : 2). An advantage in litigation is that the court found no difficulty in enforcing an agreement between the parties where the parties had given an authority to the arbitrators to settle the

disagreements over the term of any clauses (Montague, 1985 : 137).

According to Montague (1985 : 137), litigation as compared to arbitration can be summarized as follows:

> "(a) the courts have no power to make contracts for the parties, but arbitrators can be given power to do so;
>
> (b) although the courts have no power to make contracts, they may nonetheless enforce agreements to agree (i) if the circumstances allow the implication that, in default of agreement, reasonable solution was intended, (ii) if a formula is provided by reference to which any absence of agreement can be resolved, or (iii) if, even in the absence of such a formula, the parties have provided adequate machinery to resolve their disagreement;
>
> (c) arbitrators may be relieved of their general duty to decide according to the law if expressly so provided by the terms of the submission to arbitration;
>
> (d) arbitrators have no inherent power to make a fresh contract for the parties and, as the law stands, no implied power to do so; and
>
> (e) although the general law may save hardship clauses which have been inadequately drafted, hardship clauses drafted under English law should expressly empower an arbitrator to vary the parties' contract as required by the circumstances of hardship or provide for the appointment of a third party intervenor (the approach adopted,incidentally, in the British Gas case, where the points at issue were referred to a panel of experts.)"

5. Legal Analysis of the Engineer's Role under a FIDIC Contract

5.1 Concepts of the Engineer's Powers in Construction Work

In an article titled, "The Role of the Engineer as Contract Administrator and Quasi-Arbitrator in International construction and Civil Engineering Projects" written by Professor Dr. Fritz Nicklisch and published in the International Construction Law Review of July 1990, Dr. Nicklisch has clarified about the differences of the concept concerning the Engineer's powers existing in the Common Law countries and the Civil Law countries as follows (Nicklisch, 1990 : 322-326) :

Common Law Countries

The concept of the Engineer's powers in the Common Law countries is that the Engineer has very wide ranging powers in connection with the construction work. These powers mainly include certifying any payment to be made to the Contractor, ordering variations of work and especially settling or adjudicating disputes between the Employer and the Contract, etc. The FIDIC Conditions of Contract derive from the English ICE Conditions of Contract and as such

represent the main idea of the Engineer's role under the Common Law system.

Civil Law Countries

In Civil Law countries, the Engineer's powers are basically very limited. Namely, he normally acts as an "agent" of the Employer without any further function. What the Engineer does to represent the Employer during the performance of the construction project includes the making of planning decisions, change orders and supervising the execution of the construction. In some cases, the scope of the Engineer's may be wider than acting as an "agent" if the wording in the construction contract permits him to do so. There is so far not any set of international standard conditions of construction contract based on the concept of the Engineer's role under the Civil Law system.

5.2 Engineer's Powers under a FIDIC Contract

As aforementioned earlier that the FIDIC Conditions of Contract derive from the English ICE Conditions of Contract, the Engineer under a FIDIC contract, therefore, has a very wide ranging powers during the performance of the construction work. At the stage of designing the construction works and preparing tender

documents, the Engineer acts as an "*independent contractor*", whereby the Engineer is neither an agent nor employee of the Employer (Sawyer and Gillot, 1981 : 16). At this stage, he represents his own interests (Nicklisch, 1990 : 325). However, after the Engineer was approved to work for a project of the Employer, in the course of supervising the execution of the works by the Contractor in order to ensure that the Contractor performs his duty in conformity with the design, the Engineer acts as an "*agent*" of the Employer (Seppala, 1986 : 316). At this stage, he represents the interests of the Employer (Nicklisch, 1990 : 325). In addition, the Engineer may also become an "*administrator*" of the construction contract whereby he is given certain quasi-judicial powers and duties, including decision-making powers (Seppala, 1986 : 317). By acting as "administrator", the Engineer represent neither his own interests nor those of the Employer (Nicklisch, 1990 : 325).

The decision-making role of the Engineer under the FIDIC Conditions of Contract appears in Clause 67 - Settlement of Disputes (which will be discussed in more detail in Chapter III), and in the following clauses:

(1) Deciding whether the Contractor has executed the work in accordance with the Contract and to the satisfaction of the Engineer (Clause 13).

(2) Deciding whether, to what extent and at which price the Contractor has to make his own construction plant and facilities available to other contractors at the same construction site (Clause 31).

(3) Deciding whether the Contractor is entitled to extra time due to the bad weather or other special circumstances of any kind whatsoever (Clause 44).

(4) Deciding whether any variation of the scope of the work is necessary or desirable (Clause 51).

(5) Deciding whether new rates and prices should apply to varied work (Clause 52).

(6) Having access to the construction site, workshops and places where materials or plant are being manufactured (Clause 37).

(7) Approving drawings, specifications, calculations, etc. submitted by the Contractor (Clause 7).

(8) Objecting and requiring any person provided by the Contractor to be removed from the work (Clause 16).

(9) Delegating the Engineer's representative any of the duties and authorities vested in the Engineer (Clause 2).

(10) Determining extension of time or amount of costs to be added to the contract price where the materials,

plant or workmanship are not in accordance with the contract (Clause 36).

(11) Determining by measurement the value of the works in accordance with the contract (Clause 56).

(12) Instructing the Contractor to suspend the progress of the works and determining extension of time and amount to be added to the contract price by reason of such suspension (Clause 40).

(13) Determining an extension of time and the amount of any costs which may have been incurred by the Contractor by reason of such obstructions or conditions having been encountered which shall be added to the contract price (Clause 12).

As aforesaid that according to the Common Law system, the Engineer has three functions in total during the performance of a construction project. These functions include (1) independent contractor (2) agent of the Employer and (3) construction contract administrator [including decision-maker]. Generally speaking, there should be no question concerning the first two functions of the Engineer. For the third function, Nicklisch (1990 : 334) gave some reasons why the Engineer also has to act as the "administrator" of the construction contract, especially in settling construction disputes between the Employer and

the Contractor that the Engineer has first-hand knowledge of any problems which may arise since he was the one who made the planning work for the project, prepared the tender and drawings, supervised the execution of the works; and he is also familiar with the course of the project. The only thing which cannot be overlooked is that the Engineer must be neutral and independent when he acts as the dispute settler under a FIDIC contract. In this respect, Clause 2.6 of the FIDIC Conditions of Contract provides that the Engineer has to exercise his discretion by giving his decision "impartially". His decision under this Clause 2.6 is also subject to review by arbitrators under FIDIC Clause 67.

Some commentators said that the Engineer's role as an advisor of the Employer and at the same time as a mediator between the Employer and the Contractor is questionable because the independence and impartiality of the Engineer is not secured since the Engineer is employed and paid by the Employer (see Hochuli, 1991 : 542 and Goedel, 1988 : 54-55). Also in the course of giving decisions under FIDIC Clause 67, the Engineer was criticized that he cannot exercise his powers fairly and impartially in respect of the disputes between the Employer and the

Contractor because of the following reasons (Ludlow and Rees, 1992 : 530) :

> "(1) the fact that he is paid and employed by the employer to whom he therefore has contractual duties, and allegiance to a client on whom he may depend for future as well as past engagements;
>
> (2) the fact that, as designer of the works, he may where the contractor claims payment on the grounds, for example, of design changes, or delay in issuing drawings or instructions, sometimes appear to have a vested interest in making decisions which will not involve admitting his own default."

Moreover, what happens if the Engineer is a staff member of the Employer? In *European Construction Co. v. African State Corporation*, the Claimant argued that the Engineer under FIDIC Clause 67 means an "independent engineer" only. Unfortunately, the arbitrators in this case expressed no opinion on the legality of the Employer's choice to appoint one of its own employees as Engineer (see Jarvin, 1985 :67-71). But in ICC case No.3790 (1983) and ICC case No.4416 (1985), the arbitral tribunals have confirmed the principle of the "independence of the Engineer" by saying in the former case that the Engineer is not bound by the Employer's orders, and in the latter case that the unbiased valuation and technical independence of

the Engineer are some of the key features of a FIDIC contract (Dumont, 1986 : 413-416).

However, Ludlow and Rees (1992 : 529) further commented that:

> "...the decision-making role of the Engineer under Clause 67 has a valid and often effective purpose, both for the Contractor and the Employer, in enabling the Engineer to review and if necessary revise a determination made by him under his first decision-making role provided in Clause 12 (or other clauses) of the Contract".

To argue about the decision-making role of the Engineer, it should be noted that the thought underlying FIDIC Clause 67 is to avoid arbitration or even litigation during the performance of construction work (Hochuli, 1991 : 543). While many Engineer's decisions under FIDIC Clause 67 are confirmations of his instructions given at an earlier stage, therefore the Engineer's role may be conceptually "wrong" and there are no strong reasons to support this concept (Hochuli, 1991 : 542).

In considering the Engineer's characteristics in respect of decision-making role or function, it may be thought that the Engineer is deemed to be a "conciliator" between the Employer and the Contractor by acting like the one who proposes possible compromise solution for the Employer and the Contractor. Or sometimes, he also decides

how the solution should be without any binding effect under a FIDIC contract (except a compromise agreement is concluded) since the dissatisfied party may finally resort to arbitration under FIDIC Clause 67.

Ludlow (1992 : 532) argued that the Engineer is not a mediator or conciliator because the Engineer is not really an independent person. He actually belongs to the Employer who pays him. Coupled with the reason that the Engineer's function does not include that of the mediator or conciliator. While Hochuli (1991 : 542) takes the different view that the Engineer also acts as a mediator. More importantly, Nicklisch (1990 : 322) went further that the Engineer acts as a tribunal expert or even an arbitrator.

Although the Engineer has so many powers which may affect the Contractor's rights under the construction contract made with the Employer, the Engineer's dual role as both the Employer's agent and the decision-maker should be no problem. Because it is believed that the idea behind the FIDIC Conditions of Contract which imposes the Engineer's decision-making powers is to facilitate the construction work, most of which are full of technical problems. The most appropriate person who can decide these problems in the first place should be no one else but the Engineer who can

use his knowledge and expertise to deal with the technical problems in construction work. Further, it is true that the Engineer knows and keeps some confidential information in the construction work, he is then fit to be the preliminary decision maker for the Employer and the Contractor without having to hire a third person/party to help solve the problems.

Based on the writer's understanding that FIDIC Clause 67 is intended to minimize the number of construction disputes which may be referred to arbitration or to ordinary courts of justice as the case may be and because the function of the Engineer under a FIDIC contract is to find out what is true or what is not true for disputes arising in construction projects and then give solutions for those issues, the Engineer is therefore, in the writer's opinion, appointed to act as both a "fact finder" and an "evaluator" to help settle the disputes between the Employer and the Contractor. The reasons for this may be time and costs. Since the giving of decision-making power to the Engineer does not require the parties to spend longer time than usual and it does not cost more to the Employer. Coupled with the reason that the Engineer's decision is not final and binding if no settlement or compromise agreement has been concluded between the Employer and the Contractor. In such a case,

the Engineer's decision is deemed to be a preliminary and non-binding decision as opposed to the wording shown in FIDIC Clause which states that "..., the said decision shall become final and binding upon the Employer and Contractor".