

CHAPTER V
CONCLUSION AND SUGGESTIONS



The purpose of this Thesis is to survey the problems which may arise when parties to a major construction project use a FIDIC form of agreement including the standard FIDIC Clause 67 - Settlement of Dispute.

FIDIC Clause 67 establishes a number of procedures with which the contractual parties have to comply if one party would like to assert claims against the other party in connection with construction work.

The procedures under FIDIC Clause 67 can be summarized as follows:

(1) A dispute must be referred in writing to the Engineer for his decision in the first place. No later than 84 days after the day on which the Engineer receives such reference, he must give notice of his decision to the Employer and the Contractor. Such decision must state that it is made pursuant to Clause 67. Subject to (2) below, such decision is final and binding on both parties.

(2) However, if either party is dissatisfied with any decision of the Engineer or if the Engineer fails to give notice of his decision on or before the 84th day after the day on which he received the reference, then either party may, on

or before the 70th day after the day on which he received notice of such decision or on or before the 70th day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy to the Engineer, of his intention to commence arbitration. Such notice is a condition to the commencement of an arbitration subject to Sub-Clause 67.4.

(3) Where the Engineer gives his decision and neither the Employer nor the Contractor gives notification of intention to commence arbitration as to such dispute on or before the 70th day after the day on which the parties receive notice as to such decision from the Engineer, the Engineer's decision shall become final and binding upon both parties.

(4) Finally, Sub-Clause 67.3 provides that any dispute in respect of which the decision of the Engineer 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 by one or more arbitrators appointed thereunder.

In order to obtain an enforceable decision, all steps specified in FIDIC Clause 67 should be strictly observed. An arbitral award rendered in connection with a

particular claim of the parties would probably be considered invalid if the dispute has not first been referred to the Engineer as a condition precedent. Where a dispute is directly referred to arbitrators, the arbitrators should declare themselves incompetent to act until the matter has been submitted to the Engineer according to the procedure under FIDIC Clause 67.

Many construction disputes do not involve questions of law or necessitate reference to any legal provision. Arbitrators thus need consider the intention of the parties concerned and see whether they have been achieved. To most questions, the arbitrators will look at the surrounding relevant facts and probably the Engineer's decision. Frequently, they are not required to refer to any system of law. Construction disputes usually involve technical disputes, e.g. unforeseeable site conditions which involve variations in works and extensions of time, etc. FIDIC Clause 67 states that "...a dispute of any kind whatsoever" but there is nowhere defined the term "dispute" either in the FIDIC Conditions of Contract or in the Thai Arbitration Act 1987. However, the term "dispute" under FIDIC Clause 67 covers both legal and factual (technical) issues.

The Engineer's decisions are not final and binding upon the parties unless a compromise agreement has been reached and evidenced in writing according to section 850 of the CCC. In the absence of such an agreement, it is believed that Thai courts would consider the Engineer's decisions as an expert's opinion.

It is clear from FIDIC Clause 67 that the Engineer does not play the role as an arbitral tribunal since the arbitral process shall be conducted separately after the Engineer's decision-making process, upon a request of either party to commence arbitration. In the course of giving decisions for the disputes between the Employer and the Contractor, the Engineer acts as a fact finder.

In case a FIDIC contract is void for whatever reasons, FIDIC Clause 67 - Settlement of Dispute which is so called, the "arbitration clause" is still valid due to the principle of the autonomy of the arbitration clause.

The parties have freedom at any time to cancel FIDIC Clause 67 and have a new agreement concerning settlement of disputes. But if a request for an arbitration has been made to the arbitrators, a consent from the other party to withdraw the request is required or the dispute may be settled by way of compromise.

Where a party fails to appoint an arbitrator, the ICC Rules provides that the ICC Court of Arbitration may appoint him on behalf of such party.

In principle, the rules governing arbitral proceedings adopted by the parties apply only to the extent to which it is not in conflict with the law governing the arbitral proceedings. Otherwise, the said law would prevail.

In large construction projects in Thailand, there is more likelihood the disputes may involve more than two parties under one contract, due to the widespread practice of splitting construction contracts to achieve tax savings. The FIDIC Clause 67 does not expressly contemplate multiparty arbitration.

Multi-party arbitration has both advantages and disadvantages to the parties concerned. Advantages include the time and cost saving. Disadvantages include lack of control on confidential information. Some of the parties concerned may not want to disclose the trade information or construction formulae to each other since they are worried about the potential competition after disclosing the same to other parties who may not be involved directly in their disputes. This is an area in which the Thai court may or may not intervene to force consolidation. However, according to section 8 of the Thai Civil Procedural Code, the Court may,

upon a request by either party, consolidate two cases or more into one on the grounds that the issues are the same or very closely connected. While the Thai Arbitration Act 1987 is silent on this matter, there is no reason to invalidate a multi-party arbitration clause. The arbitrators should have the power to consolidate two disputes or more into one if they found that the issues are the same or very closely connected. In other words, section 8 of the Civil Procedural Code should apply *mutatis mutandis* as an analogy according to section 4 of the Civil and Commercial Code.

The ICC Rules have to conform to the Thai Arbitration Act 1987 in all cases.

It is worth to note that in complex projects the Engineer's role assists the project owner in minimizing its costs, in contract administration, in monitoring progress, and in settling minor disputes quickly without significant expense or delay to the project. As Thai project owners become more sophisticated, they will move towards unit pricing, quantity surveying and more complicating pricing provisions, to achieve speed and economics and avoid payment of contingency sums, otherwise incurred under lump-sum turn-key projects. This will necessarily involve a third party such as the Engineer whose decisions can help reduce the burden of arbitrators or

even of ordinary courts. The FIDIC Conditions of Contract, Fourth Edition 1987 serves as a valuable model form of agreement to achieve these goals, and is likely to be used more in practice in the future in Thailand.

It is therefore suggested that a FIDIC contract be introduced and used more in Thai construction projects. However, the following subjects under the FIDIC contract should be adapted:

(1) Time limits or time periods under FIDIC Clause 67 should be reduced to have a faster time table, for example the Engineer's decision should be given no later than one month instead of 84 days as specified in FIDIC Clause 67.

(2) In order to allow a more flexible period of time for the parties to settle their disputes by arbitration than 70 days as specified in FIDIC Clause 67, the said 70-day period should be amended to read, for example, "...the reference of disputes to arbitrators should be made within the same period of time as that of the prescription period specified by law".

(3) Since the arbitration is to be governed by *lex arbitri* which cannot be chosen directly by the parties, but indirectly through the choice of arbitral seat. It is suggested that the place of arbitration should be determined by the parties in the FIDIC contract.

(4) For Thai construction projects, ICC Rules as specified in FIDIC Clause 67 should be replaced by the Arbitration Rules proposed by the Ministry of Justice.

(5) The language of arbitral proceedings should be clearly stated in FIDIC Clause 67.

(6) In order to have a final and binding Engineer's decision under Thai law, the relevant part of FIDIC Clause 67 should read, "...The Engineer's decision shall be final and binding on the parties when both parties agree in writing with the said decision."