Powers of the Engineer in Settlement of Disputes under the FIDIC-Conditions

And suggestions for simplifying the settlement of dispute in general—

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I. APPARENT POWER OF THE ENGINEER

(A) Standard Contract Provisions for Settlement of Disputes

Clause 67 of the FIDIC-Conditions (*Conditions of Contract (International) for Works of Civil Engineering Construction, 3rd edition March 1977, of the Fédération Internationale des Ingénieurs — Conseils*) contains the following provisions with regard to the subject of 'Settlement of Disputes — Arbitration':

'If any dispute or difference of any kind whatsoever shall arise between Employer and the Contractor in connection with, or arising out of the Contract, or the execution of the Works, whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of ninety days after being requested by either party to do so, give notice of his decision to the Employer and the Contractor. Subject to arbitration, as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor and shall forthwith be given effect to by the Employer and by the Contractor, who shall proceed with the execution of the Works with all due diligence whether he or the Employer requires arbitration, as hereinafter provided, or not. If the Engineer has given written notice of his decision to the Employer and the Contractor and no claim to arbitration has been communicated to him by either the Employer or the Contractor within a period of ninety days from receipt of such notice, the said decision shall remain final and binding upon the Employer and the Contractor. If the Engineer shall fail to give notice of his decision, as aforesaid, within a period of ninety days after being requested as aforesaid, or if either the Employer or the Contractor be dissatisfied with any such decision, then and in any such case either the Employer or the Contractor may within ninety days after receiving notice of such decision, or within ninety days after the expiration of the first-named period of ninety days, or as the case may be, require that the matters or matters in dispute be referred to arbitration as hereinafter provided. All disputes or differences in respect of which the decision, if any, of the Engineer has not become final and binding as aforesaid shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, revise and review any decision, opinion, direction, certificate or valuation of the Engineer. Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute or difference referred to the arbitrator/s as aforesaid. The reference to arbitration may proceed notwithstanding that the Works shall not then be or be alleged to be complete, provided always that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.'

(B) Prima Facie Meaning of Clause 67

1. The Engineer seems to have power to decide on any type of dispute. A dispute should not be interpreted to mean a mere difference of opinion but it may well include a legal dispute or a dispute on legal points.

   The Engineer seems to be able, at any stage of the contract, to decide over disputes between the Engineer himself and the Contractor. The Engineer being, in such cases, himself a party, no request from the Contractor (or, of course, the Employer) appears to be necessary.

   The clause provides that all these disputes shall have to be referred, by either party, in the first place to and settled by the Engineer. If the expression 'either party' refers to the party of this clause (and not, for instance, to the parties of the contract), then it is implied that the Engineer may, without consultation with the Employer, refer what the Engineer himself styles a dispute or difference of opinion between the Contractor and the Engineer to the Engineer himself.

   The Engineer's decision shall then be final and binding, however subject to arbitration or if no arbitration is opened by either of the parties to the contract within a period of 90 days.
2. The face of Clause 67 has lead several

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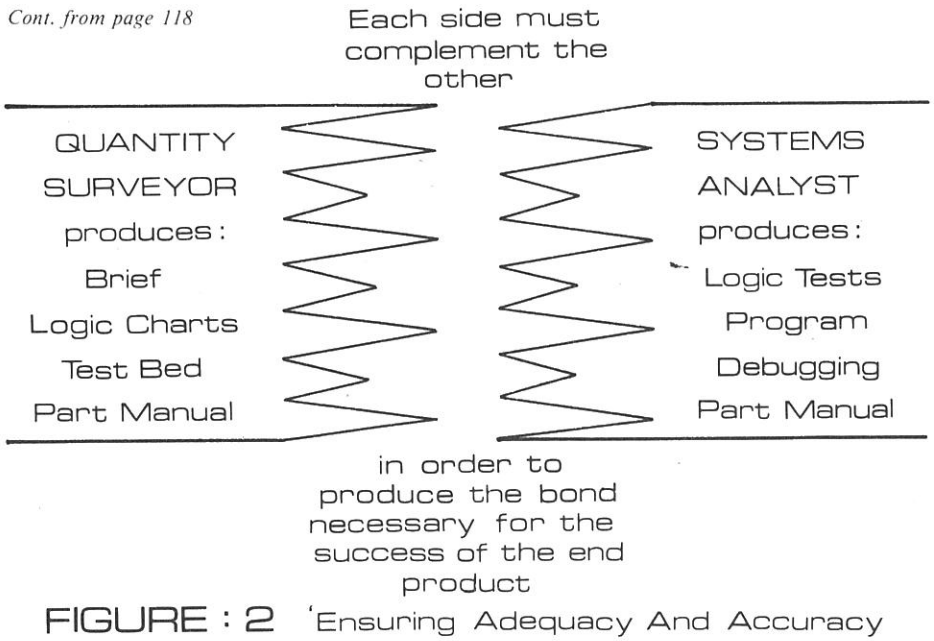

FIGURE : 2 'Ensuring Adequacy And Accuracy In The Production Of Software

program were to ensure a 99.9% elimination of bugs. Can you also imagine the problems that firming-up causes even when carried out manually, especially when the final account has to be passed to an auditor?

Producing programs for quantity surveying is not a licence to print money, it is a serious professional and demanding business.

Again, a final few words. There seems to be little advantage in rushing out to buy systems which at present have limited software coverage. After all the profession has coped without microcomputers until now. Micros are new, let's take them in our stride and remember the program applications are only as good as the person who produced them.

Footnote

Other articles in this series:

COMPUTER JARGON — A New Language — November 1980.

SYSTEMS ANALYSIS — Hardware and its Selection — March 1981.

QUANTITY SURVEYING APPLICATIONS — II — September 1981.

experts to believe that
— the Engineer acts as an arbitrator, or
— that the Engineer functions as a kind of 'pre-arbitrator' before the case comes to the 'real' arbitration (ICC Paris, as provided in the standard FIDIC form), or
— that the Engineer exercises a quasi-judicial authority, being 'more powerful than any judge' and
— that the Engineer is a judge in his own case.

II. REAL POWERS OF THE ENGINEER

(A) Legal Side

The proper and formal procedure (including a hearing) for settling any dispute or difference of opinion between the Employer and the Contractor is, according to the standard FIDIC text (cf. Clause 67), the ICC-Arbitration. The arbitrators appointed under this proviso are entitled to *inter alia* revise any decision of the Engineer, that is, including a 'decision' for the settlement of disputes or differences of opinion between the parties. The authority of the Engineer to intervene in a dispute or difference of opinion between the contract parties should be considered under the following factors:

1. The Engineer normally represents an Employer who does not want to get involved with any technicalities. If, therefore, a dispute or a difference of opinion arises, such will be less between the Employer and the Contractor and more between the Contractor and the Engineer, representing the Employer. If, consequently, an agreement is reached between the Engineer and the Contractor, such agreement is deemed to have been reached between the Employer and the Contractor and it will, if at all, only have to be formally sanctioned by the Employer.
2. Psychology is asked to play its role at the settlement of disputes in FIDIC-Contracts, which almost invariably involve great amounts of money. The parties are accordingly being given a time for consideration amounting to 90 days. The reason behind this is that emotions and personal feelings, which are normal to every construction project, either die out completely or at least are cut down to the minimum after the said period of three months.
3. The FIDIC-Procedure aims at clarifying and settling all types of claims, that is, whether such claims refer to quantity or quality. The result should be that only disputes and differences of opinion regarding principles (e.g. points of construction and interpretation) of the contract should possibly go to arbitration. The task of the Engineer under this provision (i.e. clause 67) is thus to filter out the various problems arising.

(B) Practical Side

1. The General Rule

The arbitrator/s have full power to open up, revise and review any decision, opinion, direction, certificate or valuation of the Engineer. This certainly includes a decision of the Engineer taken in case of dispute or difference of opinion between Employer and Contractor.

2. Exceptions to the General Rule

There are at least two cases in which the Engineer's decision does not seem to be able to be outweighed, which means that it has to be accepted as such by the arbitrator/s. The practical result is that the Engineer's 'decision' in these cases is final and binding on the parties (though not as a decision proper, but as an opinion), that is, the power of the arbitrator/s is thereby limited up to a certain extent.

These cases are the following:

A *Measurement of Works*

Clause 56 of FIDIC-Conditions provides that, should the Contractor not attend, or neglect or omit to send a qualified agent to assist the Engineer or the Engineer's Representative in making a measurement of work, then the measurement made by the Engineer or approved by him shall be taken to be the correct measurement of the work.

Even in case the Contractor could (under English law) successfully plead that such measurement of the work effected by the Engineer should not be considered to be final on the strength of equitable reasons, the Engineer's opinion is impossible to be overridden, because the Engineer will be giving evidence before the arbitrator/s as (expert) witness, and his opinion has to be taken into consideration. The practical effect is that the Engineer's opinion on the point of measurement is as weighty as an arbitrator's decision.

B *Effect of Maintenance Certificate*

Clause 62 of the FIDIC-Contract reads as follows:

> 'The Contract shall not be considered as completed until a Maintenance Certificate shall have been signed by the Engineer and delivered to the Employer stating that the Works have been completed and maintained to his satisfaction . . . Provided always that the issue of the Maintenance Certificate shall not be a condition precedent to payment of the Contractor of the second portion of the retention money . . .'

And Clause 61 provides:

> 'No certificate other than the Maintenance Certificate referred to in Clause 62 hereof shall be deemed to constitute approval of the Work.'
>
> These provisions do not allow the arbitrator/s to examine or go beyond the maintenance certificate. But whilst the maintenance certificate refers to the quantification of the Works, nothing is said with regard to the quality of the work performed, which remains to be finally decided upon by the arbitrator/s.

3. Result

The Engineer does not decide or function as an arbitrator. But the Engineer does play a decisive role as an Expert. The personal and professional qualifications of the Engineer cannot therefore be overemphasised: The FIDIC-Contract is founded absolutely on the integrity and the judgment of the Engineer. These were the qualities which characterised the English Consultants at the time of the drafting of the Contract.

It is still an appeasement to know that one will have to work with an English Engineer on an international construction project. Tradition survives. But care should be taken with Consultants coming from countries which do not enjoy such tradition, and efforts should be made, where possible, for nominating an internationally renowned Consultant as Engineer.

During the negotiations of a construction contract two further points are worth examining, namely:

Does the possibility exist of
— the Engineer being appointed by an agreement between the Employer and the Contractor?

It should be noted, however, that, if this is the case, no FIDIC-Contract proper is concluded.
— decreasing the period of 90 days?

III. SUGGESTIONS SIMPLIFYING THE SETTLEMENT OF DISPUTES

(A) Powers of the Engineer

The question of whether the Engineer exercises 'quasi-judicial' functions and any confusion resulting or which might possibly result from the drafting of Clause 67 can be eliminated by defining the position of the Engineer with regard to the subject of the settlement of disputes and the circumstances under which recourse may be had by him. It is suggested that the Engineer is styled 'technical expert'. This can be achieved either by supplementing Clause 67 accordingly or by adding a new clause to the FIDIC-Conditions.

A comparable procedure has been suggested by the ICC in a recommendation which reads as follows:

> 'The parties to this agreement agree to have recourse, if necessary, to the International Centre for Technical Expertise of the International Chamber of Commerce (ICC), in accordance with the ICC's Rules for Technical Expertise.'

There is, though, an immense difference between the ICC's and the writer's proposal regarding the person of the Expert: The FIDIC-Engineer is the person crucially and primarily involved in the implementation of the Contract and the proper execution of the works and is consequently the best qualified person to express an opinion regarding the works. Contrary to this, the ICC's Expert, whilst he might be qualified as well as the Engineer, has no immediate relation to the Works. Such theoretical Expert will therefore have to decide on the reports prepared and submitted to him by the practical Expert, who is, and can only be, the Engineer. This proves once again the importance of the Engineer. In effect, this means that such Expert's opinion should be given by the Engineer, with the exception of those cases where the Contractor does not feel happy as far as the Engineer's abilities are concerned, when reference to an external Expert can be made.

(B) Minimising Disputes

1. Ruling Language

Taking it that the person and qualifications of the Engineer are undisputed by the parties to the contract, and that, therefore, the Engineer acts as an expert mediator between the Employer and the Contractor for the settlement of disputes, the points which would lead to arbitration would in the first place result from the construction or interpretation of the contract.

Clause 6 of the FIDIC-Contract reads as follows:

> 'The language or languages in which the Con-

tract documents shall be drawn up shall be set out in Part II, and, if the said documents are written in more than one language, the language according to which the Contract is to be construed and interpreted shall be designated in Part II being therein designed the "Ruling Language".'

It is a fact that the greatest number of international contracts in general, but at least most of the international construction contracts, are drafted in the English language.

If the parties to the contract make an agreement on the law governing the contract, then there might exist several ways of constructing and interpreting the contract: A complication arises already if Ruling Language and Governing Law are not identical. An additional difficulty is caused when the contract documents, or any of them, are drafted in one language, but the parties decide on a different language being the Ruling Language. All contract documents must then be first translated into the Ruling Language in order that their legal construction may follow. It goes without saying that a number of expressions of the FIDIC-Contract do not exist in other (legal) languages, and their translation is therefore not possible; without being able to foresee genuine translator's errors.

Ruling Language and Proper Law must therefore be identical. When, therefore, negotiating a FIDIC-Contract which is not only an English drafted contract but a contract based on English Law, full of English legal expressions, one should examine and discuss the possibility of subjecting the contract to English Law.

2. Scope of Application of the Proper Law of the Contract

Normally the parties to the contract do not specify the scope of validity of the law which they themselves have chosen to govern their contract. In such cases party autonomy might be deemed to have been intended only with regard to that part of the Contract which touches issues of substantive law. The procedural questions arising from the contract will then have to be decided upon by the *lex fori*.

The definition of what is substantive and what is procedural law is not identical or even similar under various legal systems. It is consequently often of great importance whether a legal institution is classified under the one or the other category.

A few examples may illustrate this:

— The institution of Statutes of Limitation constitutes in German legal system substantive, in Anglo-American legal system procedural law.

— Under various legal systems the ordinary courts are entitled to exercise some type of control on the arbitration proceedings as well as on the arbitration award, and this happens even though the parties to the Contract have excluded such control by special stipulation.

— In other countries an appeal or a review of the arbitral award through the ordinary courts is possible, even against the will of the parties.

— The (usually unknown) law of the forum might contain terms regarding an unintended prolongation of the time limit resulting in a delay of the procedure.

— An award for payment of interest could be a procedural issue.

In conclusion, an agreement should be made with regard to the law governing the contract and it should be expressly stated that this single law shall decide on all issues of the Contract whether these be of substantive or of procedural nature.

3. Venue

The place where the arbitration proceedings should be instituted shall be chosen with care too, thus avoiding any conflict between the proper law of the contract and the law of the venue.

The *lex fori* will not respect the parties' choice of law if an issue contravenes the venue's *ordre public*.

Enough has been said about the various centres of international commercial arbitration. The real rivalry in Europe seems to lie between Paris and London, whereupon London arbitration enjoys at least two important advantages in comparison to Paris: London arbitration is less expensive and faster than the ICC-Arbitration.

CONCLUSION

There is no reason whatsoever why an international, English drafted (construction) contract, which is subjected to English Law should not provide for an English arbitration. It is therefore suggested that, for purposes of unification, all international contracts contain the following provision:

'The validity, construction and performance of this contract shall be governed by the law of England and any dispute that may arise out of or in connection with this contract, including its validity, construction and performance, shall be determined by arbitration under the Rules of the London Court of Arbitration at that date hereof, which Rules with respect to matters not regulated by them, incorporate the UNCITRAL Arbitration Rules.'

Form of Tender for Nominated Suppliers

The Joint Contracts Tribunal has published a Form of Tender for Nominated Suppliers for use with Suppliers nominated under the terms of clause 36 of the 1980 editions of the JCT Standard Form.

Use of the Tender is not obligatory under the terms of clause 36 but the Tribunal has nevertheless decided to publish it to enable users to comply with the provisions of this clause.

There are **two** Schedules attached to the Tender. The **first** Schedule sets out the various details of the Nominated Supplier's offer; the **second** Schedule sets out those provisions in clause 36 which are to be part of the contract of sale between a Contractor and a Nominated Supplier.

A **third** Schedule sets out a Warranty Agreement between an Employer and a Nominated Supplier. The Warranty Agreement is an optional addition.

The **Tender** and the **first two Schedules** are published under the reference TNS/1, in pads containing 100 4-page Forms, price £7.50 plus VAT.

The **third** Schedule (the Warranty Agreement between an Employer and a Nominated Supplier) is published, under the reference TNS/2, in pads containing 100 2-page Forms, price £4.50 plus VAT. These pads are available from the first week of May, 1981 from:

NFBTE Publications,
Federation House,
2309 Coventry Road,
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