DISPUTE SETTLEMENT MECHANISM IN CONSTRUCTION CONTRACTS OF GOVERNMENT OF PAKISTAN

IMPLEMENTATION OF FIDIC DISPUTE SETTLEMENT CLAUSE IN CIVIL ENGINEERING WORKS

By

Bashir Ahmad
LL.M. (Corporate Law)
Reg.No.32-FSL/LLM-CL/F-04

Supervisor

Mr. Justice (Retd) Khalil-ur-Rehman Khan
Ex-Rector, IIU, Islamabad

2006

FACULTY OF SHARIAH & LAW
INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD

16/07.10

ENL

md Sir,

1. Mediation and conciliation.
2. Dispute resolution (Law) - Pakistan.

FACULTY OF SHARIAH & LAW

INTERNATIONAL ISLAMIC UNIVERSITY
ISLAMABAD

It is certified that we have read the thesis submitted by Mr Bashir Ahmad titled "*Dispute Settlement mechanism in construction contracts of Government of Pakistan*" as a partial fulfillment for the award of degree of LLM (Corporate Law). We have evaluated the thesis and found it up to the requirement in its scope and quality for the award of the degree.

Supervisor: _____

Justice (Retd) Khalil-ur-Rehman Khan,
Ex-Rector, International Islamic University, Islamabad

Internal Examiner: _____

(**Hafiz Aziz-ur-Rehman**)
Assistant Professor, Faculty of Shariah & Law, International Islamic University, Islamabad

External Examiner: _____

(**Mr. Nadir Altaf**)
External Examiner, International Islamic University, Islamabad

TABLE OF CONTENTS

CHAPTER – III

CHAPTER – IV

List of Abbreviation

1.	ADB	Asian Development Bank
2.	ADR	Alternate Dispute Resolution
3.	AIR	All India Reporter
4.	AAA	American Arbitration Association
5.	BIT	Bilateral Investment Treaty
6.	Bayindir	Bayindir Insaat Turizm Ticaret Ve Sanayi A.S
7.	BOT	Build Operate and Transfer
8.	COC	Conditions of Contract
9.	CPA	Conditions of Particular Applications
10.	DB	Dispute Board
11.	DAB	Dispute Adjudication Board
12.	DRB	Dispute Review Board
13.	DRE	Dispute Review Expert
14.	DRBF	Dispute Review Board Foundation
15.	DICON	Directory of Individual Consultants
16.	DAA	Dispute Adjudication Agreement
17.	EPCT	Engineering Procurement Construction Turnkey
18.	ECNEC	Executive Committee for National Economical Council
19.	FIDIC	Federation Internationale Des Ingineures- Conseils.
20.	FPIA	Foreign Private Investment Act
21	GM	General Manager
22.	GCC	General Conditions of Contract
23.	ICC	International Chamber of Commerce
24.	ICA	International Court of Arbitration
25.	ICSID	International Center for Settlement of Investment Dispute
26.	ICE	Institution of Civil Engineers
27.	M-1	Islamabad-Peshawar Motorway Project, Pak.
28.	MDB	Multilateral Development Bank
29.	NHA	National Highways Authority, Pakistan
30.	NESPAK	National Engineering Services of Pakistan
31.	PCJ	Permanent Court of Justice
32.	PEC	Pakistan Engineering Council
33.	PLD	Pakistan Legal Decisions
34.	P&DB	Plant and Design Build
35.	SBD	Standard Bidding Document
36.	SOP	Standard Operating Procedure
37.	TWB	The World Bank
38.	UNCITRAL	United Nation Commission for International Trade Law

Dedication

This research work is dedicated to my parents whose prayers have been with me throughout my life. May Allah bestow his blessings upon them. Ameen.

Acknowledgements

This research work has many debits. Most of all, I am deeply indebted to my Honourable Supervisor, Justice (Retd) Khalil-ur-Rehman Khan, and ex-Rector, International Islamic University, Islamabad, who very generously provided me all possible support, advice, guidance and material besides inspiring discussion on the topic, which influenced the shape and contents of this work.

I wish to express my thanks to Engr. Mazhar-ul-Islam, General Manager (NESPAK), Convener Pakistan Engineering Council, Engineer Muhammad Bashir, General Manager (Procurement & Contract Administration) NHA, HQ, Engr Pervaiz Akhtar, Director, NESPAK, Engr. Muhammad Saleem, Director (P&CA), NHA, HQ and Mr. Muhammad Younis Ch. Director (Legal), NHA, HQ for their support in providing information and material on the subject matter which has added to the usefulness and value of this thesis.

I also express my gratitude for Engineer Col (Rtd) Safiullah, Consultant (Contract Administration & Disputes Resolution) NHA, HQ, Islamabad for kindly reading, reviewing and editing the thesis.

I am also grateful to Mr Habib Ullah Malik, MD M/s AECO, Lahore, Mr. Inam-ur-Rab Minhas, CEO, Zeeruk International (Pvt) Ltd, Islamabad (Consultant), and Mr. Shamsher Alam, GM, M/s PIVATO, Rawalpindi (Contractor) for their fruitful discussion on the subject matter.

Also a big thank to my friends for an interesting discussion of some of the issues. I am also grateful to my room mate Mr. Muhammad Javaid Sawar Ch. LLB, for his moral support and motivation. I deem it my duty to acknowledge the role of NHA which inspired me for this work. Finally, words are inadequate to record my appreciation and gratitude for the sincere prays of my parents.

ABSTRACT

In any walk of life, disputes are inevitable. Therefore, we should not let the disputes to ruin our business, project, deal, relationship or even peace of mind rather should be resolved in befitting manners in the interest of local and foreign investment to promote construction industry of Pakistan. It is worth mentioning here that despite meticulous planning and flawless contract, ambiguity may arise at any time due to external factors.

FIDIC, a Federation of International Consulting Engineers, has provided Clause 67 in its General Conditions of Contract Part-I (4th edition), as a model clause for the settlement of disputes, which is being implemented in Pakistan in construction contracts of Government of Pakistan with certain modification. Although this clause has great significance yet it contains certain procedural flaws which are required to be redressed by the FIDIC.

The aim of this thesis is to explore mechanism of Clause 67, to highlight its merits and demerits and recommend viable methodology for the settlement of disputes.

This thesis has been divided into four chapters. Chapter-1 deals with general perspectives of dispute settlement, Chapter-II deals with FIDIC dispute settlement clause in global scenario, Chapter-III discusses on national legislation regarding dispute settlement whereas Chapter-IV provides findings and recommendations on the subject matter.

Developed nations, all over the world, are aware regarding frustration of litigation in courts. Therefore, an arbitration clause in a contract is provided as integral part of the conditions to settle the dispute through alternate dispute resolution system. Although, this clause is generally referred to as the arbitration clause yet it has a far wider impact. It provides mechanisms for resolving disputes between the parties without resorting to courts of law. An important factor to note is that by this Clause the parties waive their rights to submit their differences related to the contract to any other legal forums competent to resolve. Further, it

also contains an agreement between the parties to take two steps before entering into formal arbitration. The dispute is initially submitted to 'the Engineer, for his decision and if his decision is not agreed to, to attempt to settle the dispute amicably between them. However, arbitration may be commenced 56 days, or as agreed between the parties, after a notification to that effect, whether or not the second step has been taken. A second step was not included in previous editions and its insertion draws the attention of the parties to means of avoiding costly arbitration proceedings which consume both time and effort. Now FIDIC has prudently introduced another mechanism of DAB or DRB to avoid arbitration, which is appreciable and running successfully. Furthermore, if either party fails to comply with a final and binding decision of 'the Engineer', refer such failure to arbitration. The intention would be to have the decision made an arbitral award and enforceable under International Convention. The Engineer's decision is not binding upon the parties. It can be challenged by either party with in limitation.

Table of Cases

ICSID Cases

1. Occidental of Pakistan, Inc vs Islamic Republic of Pakistan, ICSID Case No.ARB/87/4 dated 7.11.1987, involved a Petroleum Concession.

2. SGS, SA vs Islamic Republic of Pakistan, ICSID Case No.ARB/01/13 dated 21.11.2001, involved a Service Agreement.

3. Impregilo S.p.A vs Islamic Republic of Pakistan, ICSID Case No.ARB/02/2 dated 12.2.2002, involved a Construction Agreement.

4. Bayindir vs Islamic Republic of Pakistan, ICSID Case No.ARB/03/29 dated 14.11.2005, involved a Construction Agreement of Islamabad-Peshawar Motorway, M-1.

   (http://www.worldbank.org/icsid/cases)

Pakistan Superior Court's Cases

5. Hitachi vs Rupali Polyester, 1998 SCMR 1668.

6. The HUB Power Co. vs WAPDA, 1999 CLC 1320

7. Suit No.1318/2004 of Sindh High Court- Justice Khilji Arif Hussain

Chapter 1

DISPUTE SETTLEMENT CLAUSE IN FIDIC BASED AGREEMENT (CIVIL WORKS) – GENERAL PERSPECTIVE

1.1. INTRODUCTION

In this era of globalization, only those countries will attract foreign investment, which provide congenial environment for the growth of economy and realization of economic benefits and security to investment and its income. The factors necessary for enhancing a country's competitiveness, as for the World Economic Forum are institutions, infrastructure, macro economy, health and primary education, higher education and training, market efficiency, technological readiness and business sophistication and innovation[1].

The economic development is obviously dependent on these nine factors which include development of basic infrastructure such as roads, bridges, tunnels, buildings, ports, dams essential for boosting the socio-economic sector of Society. The construction of major hydroelectric projects, being the cheapest source of electricity, is a top priority of the Government alongwith construction of gigantic projects like Lowari Tunnel and Gawadar port as with adequate availability of energy and boost on transport facilities the economic development of the entire region will be secured. The expansion of road network with foreign and local transport companies will be able to provide fast and safer transportation at less cost and on strategic basis[2].

Provision of this basic infrastructure is based partially on foreign investment through public and private sectors. This colossal achievement has successfully been attained by Pakistan through improvement in the socio economic policies. Significant foreign investment is being made in different segments by the foreign as well as local investors, giving a generous raise to the public life[3].

Western investors are concerned about judiciary and judicial system of Pakistan. In this regard a vibrant system is required to be framed and implemented for the

---

[1] Extract of discussion with Justice (Retd) Khalil-ur-Rehamn Khan, Ex-Rector, IIUI (Supervisor)
[2] As discussed with my Thesis Supervisor.
[3] Current media discussions.

attraction of foreign investors in the county to enhance foreign investment. Timely decision, transparent system and conducive atmosphere for the promotion of foreign investment in the country is essential feature. Lesson should be learnt from Hubco case to prevent malpractices[4].

Currently, two laws pertaining to arbitration and enforcement of arbitration agreement and foreign awards are in the filed namely the Arbitration Act, 1940[5] and recognition and enforcement of foreign arbitration agreement and foreign awards, Ordinance 2006 (amended)[6]. The former law pertaining to domestic arbitration has become outdated and requires to be redrafted and implemented following the international standard and norms.

All such investment is based on internal laws and policy guidelines however, no Standard Operating Procedures to regulate the contractual obligations are available in the existing legislation to help in resolving the disputes arising out of procedural flaws. Such disputes always result in delay in conclusion of the projects, and even at certain stages, the development work is stuck up due to unavailability of legal remedies resultantly foreign investment is at stake. In such a situation, a complete law on dispute resolution is badly felt so that construction industry may not suffer in the country. Introduction of such a law will not only provide a remedy for timely settling of the contractual disputes, but will also provide a mode for timely execution of projects and their consequent winding up within the targeted time span.

FIDIC is an abbreviation of French words, Federation Internationale Des Ingineures- Conseils. It is an international federation of national associations of independent consulting engineers, founded in 1913 by the national associations of three European countries, now with membership from over 60 countries[7], having its Secretariat in Geneva, Switzerland, for the promotion of common interest of consulting engineers with major activity to prepare standard forms of contract and other documents. Its traditional forms of contract are, inter alia, Conditions of Contract for works of Civil Engineering Construction (Red Book) fourth edition, 1987, reprinted in 1988 & 1992

[4] The Hub Power Co. vs WAPDA, 1999 CLC 1320
[5] The Arbitration Act (X of 1940)
[6] Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Award) Ordinance, 2006
[7] http/www.fidic.com

with editorial and further amendments which have been prepared & recommended in English Version with protection of copy rights for general use for the purpose of construction of such works where tenders are invited on international basis.

The above Conditions, subject to modifications, may also be suitable and applied for use on domestic contracts[8], as agreed between the parties. Its forms contain two parts: its general principles of part-I and particular conditions of part-II. General Conditions of Contract are standing conditions whereas Particular COC are variable according to the requirement of the parties and contract[9]. The above both Conditions of part-I and II provide a mechanism of dispute settlement, applicable law and venue of arbitration as agreed upon between the parties.

Clause 67 of FIDIC 4th edition 1987, (amended) deals with the subject matter and provides a modus operandi for settlement of disputes[10]. Although, FIDIC-1999 and Multilateral Development Banks (MDBs) Harmonized edition 2005, has introduced Dispute Settlement Clause 20 with new provisions of Dispute Adjudication Board (DAB) and Dispute Review Board (DRB), respectively yet the aforesaid Clause is still being implemented in Pakistan in construction contracts as a model clause.

FIDIC Conditions of Contract are being implemented in Pakistan on mega construction projects like Motorway M-1, Mangla Dam and Ghazi Barotha Hydel Project since its inception. However, the same have formally been implemented in Pakistan, mutatus mutands, in consistence with the law of the land after Ist August, 2002, under the provisions of Pakistan Engineering Council's "Standard form of Bidding documents (Civil Works), Ist Edition, duly approved by Executive Committee for National Economic Council (ECNEC) and notified by Planning and Development Division, Government of Pakistan[11]. Further, these conditions have also been adopted by the Pakistan Engineering Council, pursuant to ECNEC's decision taken in its meeting held on 28th February , 2002 and subsequently notified in the Official Gazette dated 4.9.2002 for implementation on Mega Projects having value over Rs.50 millions in the country[12].

---

[8] Foreword, FIDIC, 1987.
[9] FIDIC, 1987, Foreword.
[10] FIDIC, 1987, Clause-67
[11] Letter No.1(693)/PP&H/PD/2000 dated 12.4.2004
[12] file://C:Documents and Settings\Administrator\My Documents\IMPLEMENTATION... 4.9.06 – Implementation of PEC standard bidding

Although numerous legislative reforms have been made in the country for smooth execution of construction works and to promote foreign investment in the country, yet a specific law covering all aspects of the dispute resolution in line with International Laws and FIDIC to overcome the difficulties at any stage of the works is yet to be drafted and implemented.

Indeed, FIDIC dispute settlement procedure promotes international alternate dispute resolution (ADR) system instead of conventional litigation. Parties are left at their discretion to appoint arbitrators of their choice according to their laws and religious norms.

Mega construction projects of civil works involve hundred of agreements and contracts between government and respective companies or Consortiums and subsequent sub contracts executed by such companies. All these agreements and contracts contain dispute settlement clause as an important condition of the contract. This clause has great significance in the contracts from dispute settlement perspective.

1.2. DEFINITIONS

The term" Dispute", as mentioned in the said Clause, has not been defined explicitly anywhere in FIDIC's Legislation. However, Clause 67.1 of General Conditions of Contract itself gives sufficient detail of the matters which can be referred to for resolution and decision. Dispute ***includes any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer.***

Black's Law Dictionary[13] defines the said term as under:

> ***... A conflict or controversy, esp, one that has given rise to a particular lawsuit...***

According to a reported case[14], **a *dispute implies as assertion of a right by one party and repudiation thereof by another.***

AIR 1931 Bombay 164[15], sets forth that ***existence of difference or dispute is essential condition for arbitrator's jurisdiction- Mere non-payment by one partner does not amount to dispute.***

[13] Black's Law Dictionary (Seventh Edition)
[14] AIR 1921 Calcutta 342,
[15] AIR 1931 Bombay 164

PLD 1961 Kar 700, ***a dispute implies an assertion of a right by one party and a repudiation thereof by another. The repudiation by the other party may be either express or implied and may be by words or by conduct. Failure to perform a contract and to pay the amount claimed coupled with other circumstances may constitute a difference between the parties. Failure to pay under a claim of right is a dispute)***[16]. As defendant's rejection of the claim for the amount claimed by plaintiffs amounted to a dispute between the parties ar to be quantum of loss, arbitrators ought to have been called upon to determine the amount of loss **1992 MLD 215**.

If one party asserts a right and the other repudiates the same that is a dispute. Similarly any question on which parties join issue whether the court can legally enquire into it, is a dispute. It is analogous to a cause of action before a Civil Court. Where there is a difference between the parties about the liability of each other a dispute is clearly made out[17].

AIR 1970 AP 1", the term dispute has been explained as under:

It may be seen that there have been wrangling between the parties one party asserting and the other denying the liability and though in the wider sense of the term "dispute" such wrangling or quarries may be termed dispute, the Legislature was not in our view using the word in that sense but was using it as a noun in the sense that it arises in a contest. But where a dispute in fact so arises for adjudication before any of these authorities competent to determine it prior to an estate being notified it cannot be said that the dispute arises again subsequently at any other time. Where, however, a dispute arises and continues without any steps being taken for its adjudication, because all disputes must ultimately culminate in steps being taken for their adjudication, the dispute will be deemed to continue and arise only when such steps are taken[18].

Article 2 of Dispute Board Rules of the International Chamber of Commerce(ICC) in force as from 1 September 2004, defines the term" dispute as under:

'Dispute' means any disagreement arising out of or in connection with the Contract which is referred to a Dispute Board for a

[16] PLD 1961 Kar 700
[17] AIR 1968 Jammu and Kashmir 86 (V 55 C 23) (B)
[18] AIR 1970 AP 1.

Determination under the terms of the Contract and pursuant to the Rules[19].

Dispute means disagreement or bona fide contention, and if honest, affords basis of accord between parties, which law favors, and execution of which is satisfaction[20].

A dispute, as it is found in Wharton's definition of the word "lis", ***as meaning a suit, action, controversy, or dispute, means a conflict or contest.[21]***

In re Robinette, 300 N.W.798,799,211 Minn.223 (Words and Phrases, 1964, West publishing Co. USA, vol 12-A)

A" dispute" as basis for an action exists only where there is a matter of either law or fact asserted on one side and denied on the other.[22]

FIDIC Part I- General Conditions (4th Edition)[23] defines the following terms as under:

1.1 In the Contract (as hereinafter defined) the following words and expressions shall have the meanings hereby assigned to them except where the context otherwise requires:

(a) (i) **"Employer"** means the person named as such in part-II of these conditions and the legal successors in title to such person, but not (except with the consent of the Contractor) any assignee of such person.

(ii) **"Contractor"** means the person whose tender has been accepted by the Employer and the legal successor in title to such person, but not (except with the consent of the Employer) any assignee of such person.

(iii) **"Sub-Contractor"** means any person named in the contract as a subcontractor for a part of the works or any person to whom a part of the works has been sub-contracted with the consent of the Engineer and the

[19] Article 2 of Dispute Board Rules of the International Chamber of Commerce(ICC) in force as from 1 September 2004,

[20] Southern Cotton Oil Co. V Currle, 102 So. 149, 150,20 Ala.App.1 (Words and Phrases, 1964, West publishing Co. USA, vol 12-A

[21] State ex rel Hamilton v.Guinotte, 57 S.W. 281,283,156,Mo.513, 50 L.R.A 787, citing Stand. Dict. (Words and Phrases, 1964, West publishing Co. USA, vol 12-A)

[22] In re Robinette, 300 N.W.798,799,211 Minn.223 (Words and Phrases, 1964, West publishing Co. USA, vol 12-A)

[23] FIDIC Part I- General Conditions (4th Edition) "Definitions and Interpretation" .

legal successors in title to such person, but not any assignee of any such person.

(iv) **"Engineer"** means the person appointed by the Employer to act as engineer for the purpose of the Contract and named as such in part-II of these conditions.

(v) **"Engineer's Representative"** means a person appointed from time to time by engineer under Sub Clause 2.2.

(b) (i) **"Contract"** means these conditions (Part-I & II), the Specifications, the Drawings, the Bill of Quantities, the Tender, the Letter of Acceptance, the Contract Agreement (if completed) and such further documents as may be expressly incorporated in the Letter of acceptance or Contract Agreement (If completed).

(ii) **"Contract Agreement"** means the contract agreement (if any) referred to in Sub-Clause 9.1

(f) (i) "**Works**" means the permanent works and the temporary works or either of them as appropriate.

(ii) **"Permanent works"** means the permanent works to be executed (including Plant) in accordance with the Contract.

(iii) **"Temporary works"** means all temporary works of every kind (other than Contractor's Equipment) required in or about the execution and completion of the works and the remedying of any defects therein.

(iv) "**Day**" means calendar day.

FIDIC- 1999 AND 2005[24] defines the following terms as under:

In the Conditions of Contract ("these Conditions"), which include Particular Conditions, Parts A and B and these General Conditions, the following words and expressions shall have the meanings stated. Words indicating persons or parties include corporations and other legal entities, except where the context requires otherwise.

1.1.1.1(MDB)**" Contract"** means the Contract Agreement, the Letter of Acceptance, the Letter of Tender, these Conditions, the Specification, the Drawings, the Schedules, and the further documents(if any) which are listed in the Contract Agreement or in the Letter of Acceptance.

[24] FIDIC- General Conditions of Contract For Construction-1999 And MDBs Hamonised Edition, 2005

1.1.1.2 **"Contract Agreement"** means the contract agreement (if any) referred to in Sub-Clause 1.6 (Contract Agreement).

1.1.1.10 **"Contract Data"** means the pages completed by the Employer entitled contract data which constitute Part A of the Particular Conditions

1.1.2.2 **"Employer"** means the person named as employer in the Contract Data and the legal successors in title to this person

1.1.2.3 **"Contractor"** means the person(s) named as contractor in the Letter of Tender accepted by the Employer and the legal successors in title to this person(s).

1.1.2.4 **"Engineer"** means the person appointed by the Employer to act as the Engineer for the purposes of the contract and named in the Contract Data, or other person appointed from time to time by the Employer and notified to the Contractor under Sub-Clause 3.4 (Replacement of the Engineer).

1.1.2.10: **"FIDIC"** means the Federation Internationale des Ingenieurs-Conseils, the international federation of consulting engineers.

1.1.2.9 **"DB"** means the person or three persons appointed under Sub-Clause 20.2 (Appointment of the Dispute Board) or Sub-Clause 20.3 (Failure to Agree on the composition of the Dispute Board).

1.1.6.5 **"LAWS"** means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by laws of any legally constituted public authority.

(g) **"Investment"** Article 1(2) of the BIT[25] defines investment as follows:
The term "investment" in conformity with the hosting party's laws and regulations, shall include every kind of asset, in particular, but not exclusively:

(a) Shares, stocks or any other form of participation in companies

(b) returns reinvested, claims to money or any other right to legitimate performance having financial value related to an investment,

(c) moveable and immoveable property, as well as any other rights in rem such as mortgages, liens, pledges and any other similar rights,

(d) {...}

[25] Bilateral Investment Treaty (between Islamic Republic of Pakistan and the Republic of Turky-16 March 1995)

(e) business concessions conferred by law, or by contract, including concessions to search for, cultivate, extract or exploit natural resources on the territory of each party as defined hereinafter.

The latest agreement between the Government of Pakistan and the Government of Italy has been made on July 19, 1997 for the promotion and protection of Investment[26]. It defines the term "investment" to mean any kind of property invested after Sept, 1, 1954 by a natural or legal person being a national of one contracting party in the territory of the other in conformity with the laws and regulations of the latter.

> Trefry v. Putnam, 116 N.E, 904, 907,227 Mass. 522, L.R.A.1917 F, 255[27].
>
> ***"Capital" or "Investment" commonly means the amount of wealth which a person has on a fixed date.***
>
> In Tippett v. Tippett, 7 A.2d 612,617,24 Del.Ch.115[28]
>
> ***An "investment" usually means the sum invested or the property purchased by the laying out of money or capital in some species of property for income or profit. Money laid out by a testator in houses or lands and owned by him at the time of his death, are "investment", in absence of controlling provisions in will. The word "estate" is sometimes confined to land, or to some right or interest therein, but it is, also, frequently used in a broad and comprehensive sense, indicating an intent to include all classes of property belonging to a testator.***

An Ordinance of Pakistan Engineering Council,[29] defines the following terms:

(h) "**Engineering product**" means the products as a result of or the outcome of professional engineering works or engineering profession, or both[30];

---

[26] BIT, July 19, 1997

[27] Trefry v. Putnam, 116 N.E, 904, 907,227 Mass. 522, L.R.A.1917 F, 255. (Words and Phrases, 1964, West publishing Co. USA, vol 22-A).

[28] In Tippett v. Tippett, 7 A.2d 612,617,24 Del.Ch.115 (Words and Phrases, 1964, West publishing Co. USA, vol 22-A)

[29] Pakistan Engineering Council (amended) Ordinance, 2005

[30] Pakistan Engineering Council (amended) Ordinance, 2005

(i) **"Engineering profession"** means engineering education and practices of engineering and technology;

(j) **"Engineering Public Organization"** means a department of the Federal Government or a Provincial Government, a public Corporation, autonomous or semi autonomous body, cantonment board, municipality, improvement trust or other local authority;

(k) **"Engineering Services"** means services relating to study, preparation of reports, design, supervision, estimation, documentation, evaluation and advising in matters of engineering profession and engineering works;

(L) **" Professional Engineering Work"**[31] means the giving of professional advice and opinions, the making of measurements and layouts, the preparation of reports, computations, design, drawings, plans and specifications and the construction, inspection and supervision of engineering works, in respect of -

- railways, aerodromes, bridges, tunnels and metalled roads;
- dams, canals, harbours, light houses;
- works of an electrical, mechanical, hydraulic, communication, aeronautical power engineering, geological or mining character;
- waterworks, sewers, filtration, purification and incinerator works;
- residential and non-residential buildings, including foundations framework and electrical and mechanical systems thereof;
- structures accessory to engineering works and intended to house them;
- imparting or promotion of engineering education, training and planning, designing, development construction, commissioning, operation, maintenance and management of engineering works in respect of computer engineering, environmental engineering, chemical engineering, structural engineering, industrial engineering, production engineering, marine engineering and naval architecture, petroleum and gas engineering, metallurgical engineering, agricultural engineering, telecommunication engineering, avionics and space engineering, transportation engineering, air conditioning, ventilation, cold storage works, system engineering, electronics, radio and television engineering, civil engineering, electrical engineering, mechanical engineering, and biomedical engineering;
- organizing, managing and conducting the teaching and training in engineering universities, colleges, institutions, Government colleges of technology, polytechnic institutions and technical training institutions; and
- any other work which the Council may, be notification in the official Gazette, declare to be an engineering work for the purposes of this Act;

[31] PEC Ordinance, 2005 (amended)

The Contract Act, 1872[32] defines the term "Contract" as an agreement enforceable by law[33].

1.3 Necessity of Dispute Settlement

Disputes, in any transaction, are sometimes inevitable as numerous interests of the parties are involved. A dispute-free project is regarded as a model project in the construction industry. Settlement of dispute is unavoidable for the smooth progress of works to maintain cordial relations between the parties, to promote local & foreign investment, to bring prosperity & develop infrastructure in the countries. It also precludes the parties from conventional litigation and save their precious resources and time[34].

1.4 Background of FIDIC and its World Wide Recognition

FIDIC is an abbreviation of French words, Federation Internationale Des Ingineures-Conseils[35]. It is an international federation of national associations of independent consulting engineers, founded in 1913 by the national associations of three European countries, now with membership from over 60 countries from all parts of the globe and federation represents most of the private practice consulting engineers in the world[36]. It works to promote the common interest of consulting engineers with major activity to prepare standard forms of contract and other documents. Its Secretariat situates in Geneva, Switzerland. Its traditional forms of contract are Conditions of Contract for works of Civil Engineering Construction (Red Book) fourth edition, 1987, reprinted in 1988 & 1992 with editorial and further amendments which have been prepared & recommended in English Version for general use for the purpose of construction of such works where tenders are invited on an international basis[37].

In 1999, FIDIC published four forms of contract through its Update Task Group explicitly, CONS (Conditions of Contract for Constructions), P&DB (Conditions of Contract for Plant and Design-Build), EPCT (Conditions of Contract for EPC/Turnkey

[32] The Contract Act (IX of 1872) (25th April, 1872).
[33] Section 2(h) of the Contract Act, 1872.
[34] Extract of discussion with Justice Khalil ur Rehman Khan, (the Supervisor).
[35] Foreword FIDIC, Fourth Edition, 1987.
[36] http/www.fidic.com
[37] Foreword FIDIC, Fourth Edition, 1987.

projects and Short Form of Contract[38]. In 2005, FIDIC also published Multilateral Development Banks (MDBs) Harmonized edition, in consultation with Participating Banks, which can also be used by their borrowers and others involved in project procurement, such as consulting engineers, contractors and contract specialists working on MDB financed projects[39].

FIDIC arranges seminars, conferences and other events in the furtherance of its goals: maintenance of high ethical and professional standards; exchange of views and information; discussion of problems of mutual concern among member associations and representatives of the international financial institutions; and development of the consulting engineering industry in developing countries.

FIDIC publications include proceedings of various conferences and seminars, information for consulting engineers, project owners and international development agencies, standard pre-qualification forms, contract documents and client/consultant agreements, which are available in Secretariat Switzerland[40].

1.5 FIDIC General Conditions of Contract (Part-I)

FIDIC has formulated General Conditions of Contract (Part-I), with copyright ownership, after consultation with International Contractors, Consultants, Development Banks and executing agencies. Its contract documents contain two types of conditions i.e. General Conditions and Particular Conditions. General Conditions are permanent in nature which can be varied according to the specific requirement of the parties in the form of Particular Conditions. General Conditions may be termed as general principles equally applicable upon both the parties of FIDIC based agreement. However, if any modification therein is felt, the same may be made in Particular Conditions[41].

1.6 FIDIC Particular Conditions of Contract (Part-II)

These conditions are specific provisions formulated and subsequently agreed upon by the parties of the contract in pursuance of general conditions of contract, which contain detailed project data, like name of the employer, contractor and engineer, amount of the

[38] The FIDIC Contracts Guide, First Edition-2000, ISBN 2-88432-022-g, Foreword and Abbreviation
[39] MDB Harmonized Edition May, 2005 issued by FIDIC (ISBN 2-88432-044-x
[40] FIDIC 2000
[41] Extract of FIDIC documents

project, time for completion, rate of delay damages, Insurance, payments, governing law, ruling language and venue etc. These also take precedence over the General Conditions[42].

1.7.1 Clause 67- 4th Edition - FIDIC General Conditions of Contract (Part-I)

SETTLEMENT OF DISPUTES[43]

Clause 67 of FIDIC 1987 provides as under:

a. Engineer's Decision[44]

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place be referred in writing to the Engineer with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the such period of eighty-four days expired, as the case may be, give notice to the other party, with

[42] FIDIC Particular Conditions of Contract (Part-II)
[43] Clause 67 of FIDIC 1987 (4th Edition)
[44] FIDIC, 1987 Clause 67.1 (Engineer's Decision).

a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

b. Amicable Settlement [45]

Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made.

c. Arbitration[46]

Any dispute in respect of which:

(a) decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

(b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2,

shall be finally settled, unless otherwise specified in the Contract, 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, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

[45] FIDIC-1987, (amended, 1992), Clause 67.2
[46] Clause 67.2, GCC-Part-I, FIDIC, 1987.

Neither party shall be limited in the proceedings before such arbitrator/s to the evidence nor did arguments put before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute. Arbitration may be commenced prior to or after completion of the Works. Provided 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.

d. Failure to Comply with Engineer's Decision[47]

Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period Stated in Sub-Clause 67.1 and the related decision has become final and binding, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-Clauses 67.1 and 67.2 shall not apply to any such reference.

EXPLANATION

Clause 67 of FIDIC GCC, edition 1987 (amended) (Part-I), provides dispute settlement mechanism pertaining to three-stage process like the Engineer's decision, amicable settlement and arbitration. The Engineer is appointed and paid by the Employer for the purpose of the contract, named as such in Part-II of these conditions and notified to the Contractor for the execution of the works[48]. His duties and authority is defined in Conditions of Particular Application (Part-II)[49]. He has to obtain specific approval of the Employer in writing before taking any action specified in Part-I for approving subletting of any part of the works under clause 4; certifying additional cost under clause 6, 12 , 20,

[47] FIDIC, 1987, GCC, Part-I, Clause 67.4
[48] Clause 1.1(iv) (Definition) FIDIC, GCC-Part-I, 1987.
[49] Clause 2.1 of Conditions of Particular Application

27 , 40 , 42 determining an extension of time under clause 44, issuing a taking over certificate under clause 48, issuing a variation order(s) under clause 51 except in an emergency situation as reasonably determined by the Engineer provided such variation order (s) would increase the accepted contract amount by an amount not exceeding the limit given in appendix to the tender, certifying additional costs and /or fixing rates or prices under Clause 52; certifying additional payments under clause 53, issuing instructions under clause 58, issuing a defect liability certificate under clause 62, certifying additional payment under clause 65, certifying additional payment under clause 69, certifying additional payment under clause 70. His approval, reviews and inspection of any part of the works does not relieve the contractor from his sole responsibility and liability for the supply of material, plant and the equipment and their parts for the construction of works[50].

E.C. Corbett, writes[51] that at the outset, dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the contract, either during the execution of the works or after completion thereof and before or after termination of works, whether it relates to any opinion, instruction, determination, certificate or valuation of the Engineer, is to be referred in writing to the Engineer who is given 12 weeks (84-days) to give his decision. Unless the contract stands terminated, the contractor shall continue his works with due diligence[52]. The both parties are to give effect to the Engineer's decision. If either party is dissatisfied with the decision or the Engineer fails to make a decision, they have 10 weeks to give notice of their intention to commence arbitration[53]. If they fail to give such notice, the Engineer's decision will become final and binding upon the parties[54].

After the notice of arbitration is given, the parties try to settle their dispute amicably for 10 weeks[55]. If neither the Engineer's decision nor the attempts at amicable

[50] Clause 2.1 © of FIDIC, 1987

[51] FIDIC 4th- A Practical Legal Guide by E.C.Corbett.(The author is a specialist in International Construction Dispute Resolution and a qualified adjudicator. He is a Principal of Corbett & CO. based in London. He is author of FIDIC 4th- A practical Legal Guide. His practice also includes non-contentious work involving advising on procurement, drafting contracts, and advising during the currency of contracts and acting for employers, contractors and consultants.

[52] Clause 67.1 FIDIC, 1987.

[53] Clause 67.1, FIDIC 1987.

[54] FIDIC-1987, Clause, 67.1

[55] Clause-67.2 FIDIC-1987

settlement have succeeded in resolving the dispute, the matter is referred to arbitration[56] (*no specific time frame is given to refer the matter to the arbitrator*) under the rules of the ICC or of the country as agreed upon by the parties of the contract in Particular Conditions, part-II. The arbitrator(s) so appointed, will have power to look into any decision of the Engineer and replace any certificate, etc. that the Engineer has made[57]. The parties are at liberty to use fresh evidence and arguments during arbitration proceedings and may call the Engineer as a witness[58]. The arbitration may be commenced before or after the completion of the works[59] (*period not specified*). The conduct of any arbitration before completion will not change the obligations of the parties whatsoever[60]. Where an Engineer's decision has become final and binding, a party may refer any failure by the other party to comply with that decision directly to arbitration without the need for a further Engineer's decision or any attempt at amicable settlement[61] (*no time frame for filing reference before arbitrator, by the party seeking compliance of engineer's decision, notice 67.4*).

It may be seen that inappropriate procedure of the Engineer's decision has been given in sub-clause 67.1, where no detailed procedure of hearing, cross examination, producing evidence, witnesses, representation through counsel, appearance of co-contractors etc, has been laid down which requires to be reviewed. Sub-clause 67.2 also introduces unclear amicable settlement procedure. It provides that arbitration shall not be commenced unless an attempt to settle such disputes amicably is made first, but it is not clear from the contents of this clause as to what exact procedure would be adopted to settle the dispute amicably particularly when the other party is government agency and where chance of malpractice can not simply be overruled. Further, if after the Engineer's decision, the parties enter into compromise or negotiation, before entering into arbitration, without taking into account the Engineer's decision, whatsoever, then what will be the significance of the Engineer's decision as a professional expert and adjudicator. This process will result in wastage of time and may tend to evil practices,

[56] Clause 67.4, FIDIC 1987.
[57] Clause-67.3, FIDIC-1987.
[58] Clause 67.3, FIDIC 1987.
[59] FIDIC 1987, Clause-67.3
[60] Clause 67.3 FIDIC-1987
[61] Clause 67.4 FIDIC-1987

although the parties are competent to settle their disputes according to their wish. Further more, it is not clear whether the matter will be referred to mediator or conciliator appointed by the parties or as the case may be through an institution, as pre-arbitral process and in such case what would be the seat of mediation or conciliation or who will appoint the mediators or conciliator and paid accordingly. Clause 67.4 giving either party a right to go directly to arbitration in the event that an Engineer's decision has neither been challenged nor complied with[62]. It is not uncommon for one party to deny that a dispute exists and therefore to deny that an Engineer's decision or arbitration is appropriate or indeed permitted under the terms of the contract[63].

In England, a dispute has been held to require a claim by the contractor and its rejection[64]. This Court of Appeal decision on ICE 4th Edition centred on whether a dispute had been referred to the Engineer and illustrates the good sense of requiring the reference and the decision to say that they are made pursuant to this clause[65].

It is obvious from the said clause that the category of disputes to be referred to the Engineer includes breaches of contract[66]. Thus, the Engineer will be asked to give a decision on, for example, whether the Employer was in breach by failing to ensure that the Engineer certified properly in accordance with the contract. The Engineer is therefore, called upon to judge whether his own actions were correct or incorrect with possible implications under his contract with the Employer. It is perhaps asking too much of any Engineer to be independent and disinterested in relation to such a decision. This procedure is sometimes regarded as little more than a delay to the resolution of the dispute or as a cooling-off period[67]. In practice, a reference under clause 67.1 will often be preceded by correspondence between Contractor and Engineer in which the respective positions are set out. In these circumstances, the Contractor could justifiably consider a further 12 week delay, while the Engineer formalizes his position, to be time wasted[68].

---

[62] Clause 67.4 FIDIC-1987

[63] E.C.Corbett- A Practical Legal Guide on FIDIC 4th .

[64] See Monmouthshire Country Council V. Costelloe & Kemple (1965) 5 Build. L.R.83.

[65] E.C.Corbett- A Practical Legal Guide on FIDIC 4th .

[66] A Practical Legal Guide on FIDIC 4th by E.C.Corbett.

[67] E.C.Corbett- A practical legal guide, 4th.

[68] A practical legal guide, 4thby E.C.Corbett-

The above procedure seems to be very protracted with a period of up to 30 weeks from the reference to the Engineer until arbitration is commenced[69]. According to ICC Rules, an award less than a further six months is probably unlikely. This may encourage the parties to pursue only substantial complaints and to take the amicable settlement procedure seriously, a year is a very substantial period, particularly if the project will some how be affected by the award. For instance, a decision as to whether an Engineer is entitled to instruct a particular variation could be of great importance to the project.

Whether the opening phrases of clause 67.1[70] are sufficiently broad to require an Engineer's decision on a demand by either party for the rectification of the contract will depend on the applicable law. Under English law those words in an arbitration clause would almost certainly be held to give an arbitrator power to rectify the contract[71]. Accordingly, a party could apply for rectification in the first instance to the Engineer although, under clause 67.3[72], he would be free to put his argument in a different way and seek rectification from an arbitrator. It must be doubtful whether a decision by an engineer could have the effect of rectifying a contract as distinct from resolving the particular dispute referred to him for decision. If the Engineer's decision became final and binding for lack of challenge, an arbitrator looking at a separate dispute involving the "rectified" clause would, be at liberty to ignore or reconsider the Engineer's purported rectification[73].

There is no express time limit for a reference to the Engineer[74]. The clause envisages such references after the completion of the works. Limits on the ability of the Contractor to claim are contained in clause 53 (Procedure for claims), clause 60.7 (Discharge) and clause 60.9 (Cessation of Employer's liability)[75]. Nevertheless, clause 62.2 (Unfulfilled obligations) preserves obligations on both sides[76]. The most likely source of dispute long after the completion of the works would be the emergence of defects. Subject to the limitation period imposed by the law of the contract, such a

[69] Clause 67 FIDIC 1987.
[70] Clause 67.1 of FIDIC 1987.
[71] FIDIC 4th, A practical legal guide by E.C. Corbett.
[72] Clause 67.3 FIDIC 1987
[73] E.C.Corbett- A practical legal guide, 4th.
[74] Clause 67 FIDIC 1987
[75] Clause 60.9 FIDIC 1987.
[76] Clause 62.2 FIDIC 1987

dispute might arise many years after the project is complete[77]. For a discussion on when the Engineer's role comes to an end and he is functions officio, clause 2.1 (Engineer's duties and authority) of the contract sets out as under:

1.7.2 Engineer's Duties and Authority (Clause 2.1)[78]

(a) The Engineer shall carry out the duties specified in the Contract.

(b) The Engineer may exercise the authority specified in or necessarily to be implied from the Contract, provided, however, that if the Engineer is required, under the terms of his appointment by the Employer, to obtain the specific approval of the Employer before exercising any such authority, particulars of such requirements shall be set out in Part-II of these Conditions, Provided further that any requisite approval shall be deemed to have been given by the Employer for any such authority exercised by the Engineer.

(c) Except as expressly stated in the Contract, the Engineer shall have no authority to relieve the Contractor of any of his obligations under the Contract.

Since no arbitration, without an Engineer's decision, may start, other than one under clause 67.4, the question arises as to what happens if the Engineer is no longer available. The Engineer is defined as a person and Part 11 requires the insertion of a name. In either event, the individual could be dead, retired or in dispute with the Employer and the practice could be disbanded. The Engineer may simply refuse to consider any reference in case of any controversy with the employer. In these circumstances, the party must write the name set out in Part 11 and the address set out in Part 11 Pursuant to clause 68.2 (Notice to Employer and Engineer) and thereafter rely upon the ability 84 days later to give notice of intention to commence arbitration when the Engineer has failed to give notice of his decision.

Study of FIDIC C.O.C reveals that no express power has been given to the Employer to appoint a new Engineer if need arises. FIDIC wants the parties to agree on the identity of the new Engineer because the identity of the Engineer would have been

[77] E.C.Corbett – A practical legal guide 4th.
[78] Clause 2.1 FIDIC 1987

one of the factor which influenced the Contractor in the calculation of his tender. The effect on the current sub-clause is that the Employer is unable unilaterally to nominate a new Engineer and the Contractor will be entitled to serve notice of arbitration after 12 weeks[79].

It is made clear that the repudiation or other termination of the contract does not affect the disputes procedure. In many jurisdictions, the survival of the disputes procedure would not be beyond doubt. It could otherwise be arguable that the disputes procedure would perish along with the contract after repudiation. The issue of which parts of the contract remain alive and in what particular circumstances. Where, for certain purposes, "the contract shall be deemed to remain in force between the parties.

The above clause requires both the reference to the Engineer and Engineer's decision to state that they are made pursuant to clause 67. This removes considerable scope for argument as to whether any letter written to the Engineer claiming, for example, an extension of time amounted to a request for a decision and whether any response from the Engineer amounted to such a decision allowing the Contractor to move on towards arbitration. It is obviously right that the Contractor is obliged to proceed with the works whilst the disputes procedure is in operation[80]

If the Engineer certified that one of the grounds for termination under clause 63.1[81] (Default of Contractor) existed but, before the Employer gave notice of termination, the Contractor referred the dispute to the Engineer is entitled to terminate the contract. The current sub-clause[82] states that the Contractor should in every case continue to proceed with the works unless the contract has already been terminated. This situation has not been catered for in clause 63.1. It must be arguable by a Contractor and the employer that the right to terminate the contract is suspended until the Engineer has given his decision[83].

This clause makes it clear that the Contractor is obliged to proceed with the works pending the Engineer's decision, there is no corresponding obligation upon the Employer to continue to make payments. If followed strictly, this could lead to the Contractor being

[79] E.C. Corbett- A legal practical guide on FIDIC 4th.
[80] Clause 67 of FIDIC, 1987.
[81] Clause 63.1 FIDIC 1987
[82] Clause 67.1 FIDIC 87.
[83] E.C. Corbett – A practical legal guide- FIDIC-4th

obliged to continue working in circumstances where it was the Employer's failure to pay that give rise to the dispute in the first place. In reality, it must be unlikely that an unpaid Contractor would continue to work for an Employer who was not complying with his payment obligations[84].

As the statement of the dispute in the notice will establish the limits of the arbitrator's terms of reference in the absence of agreement to the contrary between the parties, it is important that the nature of the dispute is carefully deliberated. If too broad, the party giving the notice could be met with the argument that parts of the matters set out have not been referred to the Engineer for his decision. If too narrow, the arbitration may be too limited, despite the freedom to introduce new evidence and arguments as set in clause 67.3[85]. It is suggested that the parties would be well advised to err, when referring matters to the Engineer and when notifying intention to commence arbitration, on the side of broadly-worded statements of the dispute[86]. Two English cases on the point are Mid Glamorgan County Council. V. Land Authority for Wales (1990) 49 Build.L.R. 61 in which the courts stressed the need for clarity in defining the dispute as, if there had been no reference to the Engineer, the arbitrators would not have jurisdiction to deal with the dispute in absence of agreement between the parties; and Wigan Metropolitan Borough Council v. Sharkey Bros.(1987) 43 Build. L.R. 115 where it was held that the words "other matters" were an insufficient reference of disputes to arbitration; the court held that the respondent in the arbitration was not thereby given sufficient information as to the claim which he had to answer[87].

Another question arises whether a party is entitled to raise a new claim or counterclaim during the arbitration, if that claim has not been the subject of an Engineer's decision and attempts at amicable settlement. In practice, arbitration procedure is sufficiently expanded that a party would have a more than adequate time to refer the matter to the Engineer in order for it to be considered by the arbitrator. If an arbitrator was asked to consider a claim that had not been the subject of an Engineer's decision

[84] A practical legal guide- FIDIC-4th by E.C. Corbett
[85] Clause 67.3 FIDIC-1987
[86] E.C. Corbett – A practical legal guide- FIDIC-4th
[87] FIDIC 4th, E.C. Corbett – A practical legal guide

(other than one under sub-clause 67.4), a correct course would be for the arbitrator to disregard the claim[88]. In the case of the counterclaim, he could wait until after the award whereupon he could consider an application for any payment under the award to postpone until after the procedure was followed in respect of the counterclaim. If there was no doubt, about the creditworthiness of the beneficiary of the award and no particular difficulties about executing against the beneficiary in respect of any sums awards on the counterclaim, the arbitrator may well refuse any postponement of the payment[89]. The relevant arbitration rules would, however, have to be considered to see if any such power was given to the arbitrator. Such problems would be avoided by the terms of dispute such as "what sums are properly payable by a and b under or in connection with contract between a and b relation to the project."

The significance of the form of notice is obvious from the final paragraph of this sub-clause which affirms that in the absence of such notice, the Engineer's decision shall be final and binding. It is also crucial that the Engineer clearly defines the matter covered by his decision to minimize room despite over what dispute may no longer be the subject of arbitration. There can be no appeal from the decision becoming, final, only from arbitration. One exception to this could be statutory provisions such as Section 27 of the Arbitration Act 1950[90], which permits an application in certain circumstances. Note that if in the absence of a decision by the Engineer and a notification of arbitration the status quo ante is not then fixed but the parties could refer the matter to the Engineer afresh.

A possible exception to the "final and binding" effect is found in sub-clause 67.4[91] whereby arbitration may be commenced in relation to a failure to comply with the Engineer's decision. If the failure was referred to arbitration under the clause, a party could argue that the arbitrator should consider the decision as well as the failure to comply. The other party would undoubtedly argue that, as the decisions has become "final and binding" the arbitrator's terms of reference would not extend beyond a consideration of the con-sequences of the failure to comply. This argument seems correct on the interpretation of the two sub-clauses, which could put an arbitrator in the difficult

[88] A practical legal guide by E.C.Corbett.
[89] E.C.Corbett-A practical Legal Guide.
[90] Section 27 of the United Kingdom's Arbitration Act 1950
[91] Clause 67.4 FIDIC 1987.

position of assessing the consequences of a failure to comply, must ensure that he observes the time limit strictly.

A failure to comply with the dispute procedure laid down in Clause 67.1[92], results that no arbitration may be commenced. This gives rise to the question whether court proceedings would be open to the parties as an alternative. An English court may well decide that the wording of the clause should not prevent it attempting to do justice between the parties on the grounds only of a failure to comply with a particular time limit. However, a court would decline to review or revise any certificate or other decision of the Engineer. This is because of the Court of Appeal's decision[93] where it was held that, in a contract where an independent person was empowered to make decisions binding on the parties, a court does not have power to substitute its own views for that of parties' chosen decision maker. The courts are reinforced in this view where there is an arbitration clause whereby the parties agreed upon a procedure for the review of the decision-maker's rulings. Thus, the courts should, be prepared to consider a defects claims, a claim for breach of contract or other claim which did not depend for its success upon the revision of the Engineer's decisions[94].

An Engineer is apparently entitled to review and revise his own certificates so that, whereas under clause 60.4 (Correction of certificates)[95] a specific power is given to correct interim certificates in subsequent interim certificates, under the current sub-clause, an Engineer may correct any certificate. Both the Contractor and the employer must give effect to the revised certificate. Such notice shall establish the entitlement of the party to commence arbitration. This must be subject to clause 67.2 and the 56-days amicable settlement period provided for there[96]. These words may have been included to make it clear that no further notice is required could arise whether the running of a limitation period is halted by the notice of intention to commence arbitration or the commencement of the arbitration which may only take place (other than under sub-clause 67.4)[97] eight weeks later., In England, the Limitation Act[98] defines the commencement of

[92] Clause 67.1 FIDIC 1987.
[93] N.W.R.A. Derek Crouch [1984] Q.B.644; 26 Build.L.R. 104
[94] E.C.Corbett- A Practical Legal Guide.
[95] Clause 60.4 FIDIC 1987
[96] Clause 67.2, FIDIC 1987
[97] Clause 67.4 1987, FIDIC

the arbitration for limitation purposes as when one party serves a notice requiring the other party to agree an arbitrator or to submit the dispute to the designated person. The reference to the ICC under sub-clause 67.3 is a request for the nomination of arbitrators and so would normally be the effective date but this will depend on the relevant law and the terms of the notice given under this sub-clause.

It is obviously desirable for the parties to resolve disputes without arbitration if possible but this provision will often merely represent a eight-week delay to the resolution of the dispute. Opponents of this clause would say that no responsible, commercial men would allow a dispute to descend into the mire of arbitration without first having attempted to negotiate a settlement. This may often be true but it also happens that the parties become entrenched and relations between the parties are such that any suggestion of discussion leading towards amicable settlement could be interpreted as a sign of weakness. The advantage of a clause such as this is that it may allow the parties to meet or to engage the services of a third party such as a mediator without loss of face. By the same criterion, this clause could be criticized for failing to provide any guidance as to how the 56 days should be spent. Parties entering into these conditions may decide that they would be best served either by adopting some conciliation rules such as those of the ICC or by writing their own into the contract[99].

The automatic limit of 56-days is necessary as problems frequently arise where arbitration clauses state that arbitration may only commenced "in the event that amicable settlement is not possible." Parties determined to delay the commencement of arbitration may argue that all avenues for amicable settlement of arbitration have not been exhausted and therefore that arbitration should not commence.

A failure by a party to attempt to settle the dispute amicably would not appear to be a breach of contract. Where the position is hopeless the parties are at liberty to agree a shorter period than the eight weeks for the commencement of the arbitration. Equally, if settlement discussions are making progress, the parties may agree to a longer period.

[98] England Limitation Act 1980
[99] E.C.Corbet- Practical Legal Guide.

The arbitrator has very wide power to resolve disputes and is not limited to opening up, reviewing and revising the Engineer's decision[100]. The difficulties of defining the limits of the arbitrator's power are illustrated by the following problem. If the contract calls for an on demand bond to be provided by the Contractor, as is often the case in international contracts, and Employer calls the bond, does the arbitrator have power to deal with the resulting dispute when the Contractor contends that the Employer's loss represented but a small fraction of the amount paid out under the bond? Whilst it is reasonably clear that the dispute "arises between the Employer and Contractor in connection with or arising out of the Contract" and thus falls within clause 67, there appears to be no express mechanism for brining the money paid to the Employer under the bond into account. Unless it is possible to find some implied term of the contract, there appears to be no contractual right for the Contractor to reclaim the excess payment. The question therefore arises whether the arbitrator has power to make awards to do justice between the parties or whether he is confined to considering only claims with a clear basis in law or upon the terms of the contact. In reality, the answer is that the arbitrator will be limited by the rules of arbitration and the applicable law only insofar as his awards are open to the Court's supervision.

It may be kept in mind that an arbitrator is only obliged to conduct the arbitration and decide the award in accordance with any relevant law to the extent that any court has power to supervise his action either by means of a power to remove the arbitrator for misconduct or to overturn or remit his award on appeal. In many countries, the courts will intervene in exceptional cases only and many arbitration rules make the arbitrator's award final excluding any appeal. Perhaps as a refection those reality there is an increasing use of so-called "equality clauses" which expressly empower the arbitrator to decide the dispute between the parties in accordance with the principle of common-sense and commercial fair play rather than by the application of any particular law. On the other hand, arbitration clauses are also frequently deleted in favour of resolution by the local court. The list of the Engineer's functions which may be reviewed and revised omits consents, satisfactions, approvals and notice but seems to be intended to be comprehensive.

[100] E.C.Corbet, Practical Legal Guide, FIDIC 4th.

Clause 2.6 (Engineers to act impartially) states that "any such decision, opinion, consent, expression of satisfaction, or approval, determination of value or action may be opened up, reviewed or revised as provided in Clause 67." Whilst the parties may unrestricted in the evidence or arguments that may use before the arbitrator, they would be limit as to the disputes which they may raise. Any dispute which has not been the subject of an Engineer's decision and an attempted amicable settlement could and probably should be rejected by the arbitrator[101].

The Engineer being a witness may be called before arbitrator. But a judge at first instance may not be called as a witness on an appeal; it is certainly possible to envisage an argument seeking to prevent an Engineer being on his decisions. Thus it is sensible for the contract to provide expressly for the Engineer to be called.

The contract makes express what should be clearly implicit that the obligations of the parties are unchanged by the conduct of arbitration during the progress of the works. Difficulty arises when it is the nature and extent of those obligations that is being resolved at the arbitration.

The parties may well decide to amend the contract to ensure that arbitration does not take place prior to substantial completion. The dispute could involve the Engineer and other key figure being absent at arbitration in a different country and preoccupied with its preparation when their time and energies are needed by the project. The lengthy disputes procedure and inevitable delay is involved in ICC arbitration should usually ensures that the arbitration will take place after the works are complete, however, if the award is published during the currency of the works, that award will affect the obligations of the parties. Thus, if an extension of time has been granted by the arbitrator, the Contractor must be entitled to work to that time regardless of any notice under clause 46.1, Rate of progress[102]. If the arbitrator makes a money award, that award should be included in the following interim certificate under clause 60.2 (Monthly payments)[103], in the absence of a more specific direction by the arbitrator.

With regard to the Engineer's power to rectify the contract and ability of the arbitrator to make such an award will depend on the law of the contract and the rules and

[101] A Practical Legal Guide by E.C.Corbett.
[102] Clause 46.1 FIDI C 1987
[103] Clause 60.2 FIDIC, 1987.

procedural law applicable to the arbitration. In English law, the opening words of clause 67.1 would be sufficiently wide to allow and arbitrator to rectify[104].

It is therefore, advisable to stipulate in the contract, the place of arbitration, which will determine the nature of any interference or supervision by the courts. The procedural law and the language in which such proceedings are to be conducted should also be put beyond arguments.

A failure to comply with the Engineer's decision may be arbitrated whereupon the arbitrator may be invited to review the Engineer's decision as well as the consequences of the failure. The arbitrator may decline to extend the scope of the arbitration beyond the failure to comply and its consequences even if the arbitrator disagrees with the Engineer's decision[105].

1.7.3 **Dispute Settlement Clause – 67 of CPA-Part-II**

In CPA part-II, name, authority and duties of the Engineer is specified by the employer. The Engineer gives his decision under Clause 67.1 GCC, Part-I. Moreover, Law, language and place of Arbitration is also specified in this portion as agreed upon between the parties. These covenants, under all circumstances, should be duly honored by the parties irrespective the provision of an agreement of general nature debars. These conditions are particulars in nature and should prevail.

1.7.4 **FIDIC -1999, General Conditions of Contract, Clause 20**[106]

Dispute Resolution Mechanism has made this Clause relevant to be discussed in the paper under review as a parallel to Clause 67 of FIDIC-4^{th,} (Red Book). The said Clause provides Contractor's claim Dispute and Arbitration and has further been classified as under:

20.1 Contractor's Claims

20.2 Appointment of the Dispute Adjudication Board

20.3 Failure to agree Dispute Adjudication Board

---

[104] se Ashville Investments Ltd. V. Elmer Contractors [1988] 3 W.L.R. 867 where the Court of Appeal held the words "arising in connection with" the contract to be broad enough to cover rectification.

[105] A practical legal guide by E.C.Corbett.

[106] Clause 20 FIDIC 1999.

20.4 Obtaining Dispute Adjudication Board's Decision

20.5 Amicable settlement

20.6 Arbitration

20.7 Failure to comply with Dispute Adjudication Board's Decision

20.8 Expiry of Dispute Adjudication Board's Appointment

Contractor's Claims[107]

If the Contractor considers himself to be entitled to any extension of the time for completion and / or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstances giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28-days after the Contractor became aware, or should have become aware, of the event or circumstances.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this sub-clause shall apply.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record keeping and / or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these record, and shall (if instructed) submit copies to the Engineer[108].

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstances giving rise to the claim, or within such other period as may be proposed by the Contactor and approved by the Engineer, the Contractor shall

[107] Clause- 20.1, FIDIC Conditions of Construction Contract,1999.
[108] Clause 20.1, FIDIC 1999.

send to the Engineer a fully detailed claim which includes full supporting particular of the basis of the claim and of the extension of time and / or additional payment claimed. If the event or circumstances giving rise to the claim has a continuing effect:

(a) this fully detailed claim shall be considered as interim;

(b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and / or amount claimed, and such further particulars as the Engineer may reasonably require; and

(c) the Contractor shall send a final claim within 28-days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate[109].

The Engineer shall proceed in accordance with Sub-clause 3.5 (Determinations) to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 (Extension of Time for Completion), and / or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the event(if any) to which the failure has prevented or prejudiced

[109] FIDIC 1999, Clause 20.1

proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

APPOINTMENT OF THE DISPUTE ADJUDICATION BOARD[110]

Dispute shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 (Obtaining Dispute Adjudication Boards Decision). The Parties shall jointly appoint a DAB by the date stated in the appendix to Tender.

The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons ("the members"). If the member is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member or the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.
However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than any one who is unable or unwilling to accept appointment to the DAB.

The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAB consults, shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying One-half of this remuneration.

If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any one or more members of the DAB.

[110] Clause-20.2, FIDIC General Conditions of Constructions Contract-1999

Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment.

If any of these circumstances occur and no such replacement is available, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of DAB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12(Discharge) shall have become effective[111].

FAILURE TO AGREE DISPUTE ADJUDICATON BOARD[112]

If any of the following conditions apply, namely:

(a) The Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2,

(b) Either Party fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date,

(c) The Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or

(d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the Appendix to Tender shall, upon the request of either or both of Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party

[111] Clause 20.2, FIDIC- 1999.
[112] FIDIC,1999, Clause-20.3

shall be responsible for paying one-half of the remuneration of the appointing entity or official[113].

OBTAINING DISPUTE ADJUDICATION BOARD'S DECISION[114]

If a dispute (of any kind whatsoever) arises between the Parties in connection with or arising out of, the Contract or the execution of the works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the Chairman of the DAB.

Both Parties shall promptly make available to the DAB all such additional information, further access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s).

Within 48 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, **within 28 days after receiving the decision**, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 48 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

[113] Clause 20.3, FIDIC, 1999.
[114] (FIDIC CLAUSE-20.4)

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 (Failure to Comply with Dispute Adjudication Board's Decision) and Sub-Clause 20.8 (Expiry of Dispute Adjudication Board's Appointment), neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both parties[115].

AMICABLE SETTLEMENT[116]

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, **both Parties shall attempt to settle the dispute amicably before the commencement of arbitration**. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-six day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

ARBITRATION[117]

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by International arbitration. Unless otherwise agreed by both parties:

(a) The dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,

(b) The dispute shall be settled by three arbitrators appointed in accordance with these Rules, and

(c) The arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 (Law and Language)

[115] Clause 20.4, FIDIC, 1999.
[116] FIDIC Clause 20.5,1999.
[117] FIDIC Clause 20.6

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence nor did arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works[118].

FAILURE TO COMPLY WITH DISPUTE ADJUDICATION BOARD'S DECISION[119]

In the event that:

(a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 (Obtaining Dispute Adjudication Board's Decision),

(b) the DAB's related decision (if any) has become final and binding, and

(c) a Party fails to comply with this decision,

.then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 (Arbitration). Sub-Clause 20.4 (Obtaining Dispute Adjudication Board's Decision) and Sub-Clause 20.5 (Amicable Settlement) shall not apply to this reference.

EXPIRY OF DISPUTE ADJUDICATION BOARD'S APPOINTMENT[120]

[118] Clause 20.6 FIDIC 1999
[119] CLAUSE 20.7

[120] CLAUSE - 20.8, FIDIC 1999.

If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

(a) Sub-Clause 20.4 (Obtaining Dispute Adjudication Board's Decision) and Sub-Clause 20.5 (Amicable Settlement) shall not apply, and

(b) the dispute may be referred directly to arbitration under Sub-Clause-20.6 (Arbitration)

1.7.5 FIDIC MDB HORMONIZED EDITION-2005 [121]

The Multilateral Development Banks (MDBs) harmonized Master Procurement Document for Procurement of Works and User's Guide incorporates General Conditions of a MDB Harmonized Edition of the FIDIC Conditions of Contract for Construction, which text has been agreed by FIDIC and various MDBs for inclusion in the Master Procurement Document for Procurement of Works and User's Guide. FIDIC and the MDBs, collectively known as Participating Banks, have separately executed a licence agreement in several counterparts, each of which is deemed an original, but all of which together constitute one and the same agreement. This agreement regulates the terms and conditions of use of the MDB Harmonized General Conditions. The SBDs of the MDBs may include Particular Conditions for use in conjunction with the MDB Harmonized General Conditions to supplement or otherwise amend the MDB Harmonized General Conditions of Contract, and that these Particular Conditions may be developed and issued without the need to obtain the agreement of FIDIC.

FIDIC reviews periodically the contents of its Conditions of Contract for Construction. During the period of licence agreement with a Participating Bank, the MDB Harmonized General Conditions (a) can only be modified and updated through prior agreement by the parties; b) FIDIC shall maintain communication with the Banks to assess the need for modification; c) FIDIC shall promptly incorporate all agreed

[121] Conditions of Contract for Construction MDB (Multilateral Development Banks) Harmonized Edition May, 2005.

modifications in new editions of the MDB Harmonized General Conditions that shall be provided by FIDIC to the Participating Banks:

Following are the Participating Banks, which will adopt this edition of the FIDIC document in their Standard Bidding Documents and will use on projects financed in whole or in part by them:

- African Development Bank
- Asian Development Bank
- Black Sea Trade and Development Bank
- Caribbean Development Bank
- European Bank for Reconstruction and Development
- Inter-American Development Bank
- International Bank for Reconstruction and Development (the World Bank)
- Islamic Bank for Development Bank
- Nordic Development Fund

Clause 20 of the said Edition[122] also deals with Dispute Settlement Mechanism, therefore, is being reproduced here under for appraisal:

Contractor's Claims[123]

If the Contractor considers himself to be entitled to any extension of the time for completion and / or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstances giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28-days after the Contractor became aware, or should have become aware, of the event or circumstances.

If the Contractor fails to give notice of a claim within such period or 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this sub-clause shall apply.

[122] Clause-20, FIDIC, MDB Harmonized Edition-2005
[123] Clause- 20.1, FIDIC Conditions of Construction Contract

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

The Contract shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record keeping and / or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these record, and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contactor and approved by the Engineer, the Contactor shall send to the Engineer a fully detailed claim which includes full supporting particular of the basis of the claim and of the extension of time and / or additional payment claimed. If the event or circumstances giving rise to the claim has a continuing effect[124]:

(a) this fully detailed claim shall be considered as interim;

(b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and / or amount claimed, and such further particulars as the Engineer may reasonably require; and

(c) the Contractor shall send a final claim within 28-days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

[124] Clause-20.1, FIDIC MDB Harmonized Edition-2005

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Engineer shall proceed in accordance with Sub-clause 3.5 (Determinations) to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 (Extension of Time for Completion), and / or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the event(if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

APPOINTMENT OF THE DISPUTE BOARD[125]

Disputes shall be referred to DB for decision in accordance with Sub-Clause 20.4 (Obtaining Dispute Board's Decision). The Parties shall appoint a DB by the date stated in the Contract Data.

The DB shall comprise, as stated in the Contract Data, either one or three suitably qualified persons ("the members"), each of whom shall be fluent in the language for communication defined in contract and shall be a professional experienced in the type of construction involved in the Works and with the interpretation of contractual documents. If the number is not so stated and the parties do not agree otherwise, the DB shall comprise three persons, one of whom shall serve as chairman.

[125] Clause-20.2, FIDIC,2005

If the Parties have not jointly appointed the DB 21 days before the date stated in the contract data and the DB is to comprise three persons, each party shall nominate one member for the approval of the other party. The first two members shall recommend and the parties shall agree upon the third member, who shall act as chairman.

The agreement between the Parties and either the sole member or each of the three members shall incorporate by reference the General Conditions of Dispute Board Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DB consults, shall be mutually agreed upon by the Parties when agreeing the terms of appointment of the member or such expert (as the case may be). Each Party shall be responsible for paying One-half of this remuneration.

If a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as describe in this sub-clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of DB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12(Discharge) shall have become effective.

FAILURE TO AGREE ON THE COMPOSITION OF THE DISPUTE BOARD[126]

If any of the following conditions apply, namely:

(a) the Parties fail to agree upon the appointment of the sole member of the DB by the date stated in the first paragraph of Sub-Clause 20.2 (Appointment of the Dispute Board).

[126] FIDIC 2005, Clause-20.3,

(b) either Party fails to nominate a member (for approval by the other Party) or fails to approve a member nominated by the other party, of a DB of three persons by such date,

(c) The Parties fail to agree upon the appointment of the third member (to act as chairman) of the DB by such date, or

(d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the Contract Data shall, upon the request of either or both of Parties and after due consultation with both Parties, appoint this member of the DB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

OBTAINING DISPUTE BOARD'S DECISION[127]

If a dispute (of any kind whatsoever) arises between the Parties in connection with or arising out of, the Contract or the execution of the works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

For a DB of three persons, the DB shall be deemed to have received such reference one the date when it is received by the chairman of the DB.

Both Parties shall promptly make available to the DB all such additional information, further access to the Site, and appropriate facilities, as the DB may require for the purposes of making a decision on such dispute. The DB shall be deemed to be not acting as arbitrator(s).

Within 48 days after receiving such reference, or within such other period as may be proposed by the DB and approved by both Parties, the DB shall give its decision which shall be reasoned and shall state that it is given under this Sub-Clause. The

[127] FIDIC 2005, CLAUSE-20.4

decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration. If the DB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction and intention to commence arbitration.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 (Failure to Comply with Dispute Board's Decision) and Sub-Clause 20.8 (Expiry of Dispute Board's Appointment), neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DB's decision, then the decision shall become final and binding upon both parties.

a. Amicable Settlement[128]

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-six day after the day on which notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement has been made.

b. Arbitration[129]

[128] FIDIC, 2005, Clause 20.5

Unless settled amicably, any dispute in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by International arbitration. Unless otherwise agreed by both parties:

(a) Arbitration proceedings shall be conducted as stated in the Particular Conditions,

(b) if no arbitration proceedings are so stated, the dispute shall be finally settled by institutional arbitration under the Rules of Arbitration of the International Chamber of Commerce,

(c) the dispute shall be settled by three arbitrators, and

(d) the arbitrators shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language].

The arbitrators shall have full power to open up, review ad revise any certificate, determination, instruction, opinion or valuation of the Engineer, from being called as a witness and giving evidence before the arbitrators on any mater whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence nor arguments previously put before the DB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

FAILURE TO COMPLY WITH DISPUTE BOARD'S DECISION[130]

In the event that a party fails to comply with a DB decision which has become final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-clause 20.6 [Arbitration]. Sub-Clause 20.4

[129] FIDIC, 2005, Clause 20.6

[130] Clause 20.7, FIDIC, 2005

[Obtaining Dispute Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

EXPIRY OF DISPUTE BOARD'S APPOINTMENT[131]

If a dispute arises between the parties in connection with, or arising out of, the Contracts or the execution of the Works and there is no DB in place, whether by reason of the expiry of the DB's appointment or otherwise.

(a) Sub-Clause 20.4 [Obtaining Dispute Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and

(b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].:

ANALYSIS

Mr.Gordon L.Jaynes[132] writes that much is happening in the international engineering and construction industry with respect to dispute boards. He further writes that FIDIC's publication of the 1999 First Editions of its three major sets of Conditions of Contract has been followed in 2001 by the publication in hard copy of its Guide to the use of those Conditions, which includes detailed insight into the use of FIDIC's Dispute Adjudication Board system. In May 2000, the World Bank published a new addition of its Standard Bidding Document, "Procurement of Works" which includes the latest version of the Bank's Dispute Review Board system, significantly changed from its previous version. Starting in 2000, and continuing into 2001, FIDIC has conducted Training and Assessment Workshops for persons seeking admission to its President's List of Dispute Adjudicators. In June of 2001, the American Arbitration Association opened its first office outside the United States, increasing its international activities with respect to Dispute Boards. Also in June 2001, the Dispute Review Board Foundation held its first

[131] Clause 20.8, FIDIC, 2005.

[132] Mr.Gordon L.Jaynes in his article "A Dispatch from the front" Dispute Boards at 2002 (The International Construction Law Review, 2002). The author's law practice is based in England, and is devoted to international engineering and construction projects ranging from large civil works projects to major industrial plants. He has extensive experience in dispute resolution, acting as counsel and arbitrator. He also serves as a Consultant to The World Bank for the preparation of the dispute review board (DRB). He currently chairs two international projects in China (Xiaolangdi dam project) and Pakistan (Ghazi-Barotha Hydropower project). He is also member of DRBF and associate member of FIDIC.

International Conference with attendees from 13 countries. In September 2001, the UK's Institution of Civil Engineers (ICE) presented a seminar on Dispute Boards at the World Bank headquarters in Washington, DC. The International Chamber of Commerce, acting through the Commission of its Court of International Arbitration and through its Centre for Expertise, is increasing its activities with respect to Dispute Boards[133].

Meanwhile, practitioners are encountering Dispute Board arrangements which differ significantly from past practice; also, the use of the Dispute Board technique has begun to be applied in aspects of large projects other than just engineering and construction, such as in the resolution of disputes arising in the operation of project financing arrangements for both projects undertaken as privately financed and those undertaken as "public-private partnership".

1.8 The World Institutions and Dispute Boards

1.8.1 The World Bank and Dispute Board

In January 1995, the Bank revised its Standard Bidding Document entitled *Procurement of Works*, it began its requirement that borrowers resolve disputes by use of a three-person Dispute Board if the financed contract was estimated to cost US$50 million or more (including contingency allowances), and gave its borrowers three options for financed contracts estimated to cost less than that US$50 million benchmark: a three person Dispute Board, a single Dispute Expert, or if the Engineer was "independent from the employer" the Engineer[134].

The current edition of "Procurement of Works" (May 2000) retains the US$50 million benchmark, but deletes the option to use the Engineer on contracts below that benchmark, and instead refers only to contracts "smaller than US$10 million", and indicates that they "should generally follow the Standard Bidding Documents, Procurement of Works, Smaller Contracts, which provide for a similar disputes review method". The similarity is that an outside party is used for dispute resolution. However, in the Smaller Contracts document, the "Adjudicator" becomes involved with the project

[133] Gordon L. Jaynes- FIDIC Conditions of Contract & The Dispute Adjudication procedure establishing the Dispute adjudication board.

[134] Conditions of Contract & The Dispute Adjudication procedure establishing the Dispute adjudication board by Gordon L. Jaynes.

only if, and after, a dispute arises, whereas in a traditional Dispute Board, the Board is in place and active from the outset of the contract, and before any disputes arise.

The 2000 edition also changes the effect of the Dispute Board's "Recommendation". In the 1995 edition, a Recommendation was not binding if, within 14 days of receipt of a Recommendation, either party gave written notice to the other of intention to commence arbitration of the dispute. (If no such notice was timely given, the Recommendation became final and binding and was "to be implemented by the parties forthwith, such implementation to include any relevant action of the Engineer."). The 2000 edition provides, " The Recommendation of the Board shall be binding on both parties, who shall promptly give effect to it unless and until the same shall be revised, as hereinafter provided, in an arbitral award". It retains the 14-day deadline for notice of intention to commence arbitration, failing which the Recommendation becomes final and binding. **In both editions, there is no time limit for the actual commencement of arbitration,** provided notice of intention to do so have been given timely.

Although the 2000 edition was published after the publication of FIDIC's 1999 First Edition of its Conditions of Contract for Construction, the Document continues the use of Part-I, General Conditions, of FIDIC's 1987 Conditions of Contract for Works of Civil Engineering Construction (as amended in 1988 and 1992), but the Bank 's Part-II, Conditions of Particular Application, amends Clause 67 of those General Conditions to substitute the Dispute Board for the Engineer in the resolution of disputes[135].

1.8.2 **FIDIC AND DISPUTE BOARD**

The use of Dispute Boards in the FIDIC forms first appeared in 1995, in Clause 20 of the Conditions of Contract for Design-Build and Turnkey (the "Orange Book"), and next appeared in the 1996 Supplement to the Fourth Edition of the Conditions of Contract for Works of Civil Engineering Construction"[136]. The three major forms published as 1999 First Editions all contain Dispute Board provisions, although in two versions- "full term"

[135] Conditions of Contract & The Dispute Adjudication procedure establishing the Dispute adjudication board by Gordon L. Jaynes.

[136] Conditions of Contract & The Dispute Adjudication procedure establishing the Dispute adjudication board by Gordon L. Jaynes.

and "ad hoc". The Conditions of Contract for Construction use a **"full term" Board** (i.e. established before the Contractor commences work), **whereas the forms Conditions of Contract for Plant and Design-Build and Conditions of Contract for EPC/Turnkey Projects recommend "ad hoc" Boards** (i.e established only if , and after, a particular dispute arises).

The Dispute Board provisions of the 1999 Conditions of Contract for Construction differ significantly from those of the 1996 Supplement to the Fourth edition of the Conditions of Contract for Works of Civil Engineering Construction. Also, the Dispute Board provisions of both the 1999 Conditions of Contract for Plant and Design-Build and those for EPC/Turnkey Projects differ from the provisions of the 1995 Conditions of Contract for Design-Build and Turnkey. The differences are more in detail than in fundamental structure. However, FIDIC's Dispute Board provisions from their first arrival, have had significant differences from those of the World Bank, principally:

- FIDIC's provisions have been a substitution for a **written decision of the Engineer, intended to take effect immediately, even if notice is given of intention to refer the dispute to arbitration**. The Bank's provisions stemmed from the USA origins of the Dispute Board, in which the Board's Recommendations were intended to be persuasive rather than obligatory, and could be averted by timely notification of dissatisfaction. This difference is reflected in the terminology of the two organizations: FIDIC used the name "Dispute Adjudication Board" (DAB); the World Bank used "Dispute Review Board" (DRB), the name in general use in the USA[137].

- FIDIC's provisions include a requirement for "amicable settlement" efforts following a notice of dissatisfaction. Resort to arbitration cannot occur before a minimum of 56 days of such efforts. The World Bank provisions permit immediate initiation of arbitration. Neither set of provisions set any time limit by which arbitration must be commenced.

[137] Gordon L. Jaynes- Conditions of Contract & The Dispute Adjudication procedure establishing the Dispute adjudication board by

Both the Bank's Dispute Board provisions and those of FIDIC include "default" appointment systems, akin to those found in typical arbitration Rules. FIDIC foresees the possibility of it serving as the appointing entity selected by the parties, and the new Guide includes detailed instructions to users on how to obtain that service from FIDIC." The appointment is made by "the President of FIDIC or a person appointed by the President" and in connection with such appointing activity FIDIC has established the "FIDIC President's List of Approved Arbitrators", the introductory note to which states: "FIDIC has established a high standard for {the List}. Successful attendees at an Adjudication Assessment Workshop will need to be fluent in English and familiar with FIDIC's 1999 Conditions of Contract. Attendees will be subject to rigorous testing, and will be expected to demonstrate compliance with the specified criteria for inclusion on the List.

Although the clauses of the FIDIC Conditions do not include any requirements for use of FIDIC as a "default" appointing entity, the new Guide sets out a detailed procedure which must be followed if such use is made.

The World Bank "default" appointment provision does not include comparable appointment services from any part of the Bank, although it suggested " appropriate international appointing authorities" include the Secretary-General of the Bank's "sister" organization, the International Center for Settlement of Investment Disputes, in Washington, DC.

Other than a few footnotes, the World Bank provisions offer no guidance to users, whereas FIDIC's new Guide includes some six A4-size pages of detailed commentary[138].

1.8.3 **The American Arbitration Association ("AAA") and Dispute Board**

The study of International Construction Law Review, 2002 reveals that on 20 June 2001 "AAA"s International Center for Dispute Resolution was opened in Europe, which reflects the emerging activities of the AAA in international dispute resolution since the establishment of its international division in 1996. It further reveals that the said division administered disputes in 70 different countries and **during the year 2000, the division**

[138] Gordon L. Jaynes. Conditions of Contract & The Dispute Adjudication procedure establishing the Dispute adjudication board by

received 511 cases. Only the European office of the said Center was involved in service to Dispute Boards including the expansion of the International division's roster of dispute review board members from various countries including more than 60 persons (web site: www.adr.org.)[139].

1.8.4 The Dispute Review Board Foundation ("DRBF") and Dispute Board

"DRBF" is not-for-profit Corporation. Its core purpose is to promote successful use of Dispute Boards. It conducts annual conferences and publishes a small journal, Foundation Forum. It also operates training programs on the use and chairing of Dispute Review Boards. The Foundation members have also published a book namely "Construction Dispute Review Board Manual[140]. Its first International Conference was held at London in June, 2000 where over 40 attendees from all over the world appeared (web site: www.drb.org/home/.)

1.8.5 The Institute of Civil Engineers (ICE-UK) and Dispute Board

This Institution is based in London, England, however, it has also local associations in various countries like Mid-Atlantic States Local Association ("ICE MASLA"). It co-sponsored with the World Bank a seminar in 2001 at the venue of World Bank on the topic "**Ten Years of DRB Success at China's Ertan Dam**". In this difficult and complex project, the Ertan Dispute Board members got the works executed ahead of schedule and all disputes amicably settled by the end of the construction[141].

1.8.6 International Chamber of Commerce (ICC) and Dispute Board

The ICC activities relating to Dispute Boards is at increase. In April 2001, the ICC Commission on International Arbitration received a report on Arbitration, which

[139] Conditions of Contract & The Dispute Adjudication procedure establishing the Dispute adjudication board by Gordon L. Jaynes.

[140] Published by McGraw Hill, 11 W,19th , St (4th Flr), New York. Also see {2001} ICLR 275.

[141] ICLR- 2002.

highlighted the growing use of Dispute Boards and their impact on construction arbitrations (and arbitrators)[142].

ICC Forum on ADR, is working in parallel with the Commission's Working Group on ADR. It is preparing a "White Book" survey of ADR techniques in use throughout the world and is considering the most recent developments with respect to Dispute Boards, as well as possible future activities of the Commission in respect of the promotion of successful use of Dispute Boards. It may be noted that the Commission established a July 2001 publication date for its new Rules and Guide for ADR [143].

Furthermore, the ICC's International Centre for Expertise is revising the Rules of the Centre, to include, inter alia, provisions highlighting and improving its service as a source for suitable experts available to serve as Members of Dispute Boards[144]. It has recently **introduced video conferencing system to settle the dispute**, which will be very useful for the parties to save their time and resources.

1.9 Comparison between the World Bank DRB System and FIDIC DAB System

This comparison uses only the World Bank's May 2000 Standard Bidding Document "Procurement of Works (TWB) and the FIDIC 1999 First Edition "Conditions of Contract for Construction "(FIDIC"). It does not address the FIDIC provisions regarding what it terms "adhoc" DABs for the 1999 First Edition Conditions of Contract for Plant and Design-Build("P&DB") nor the Conditions of Contract for EPC Turnkey Project ("EPCT").

It may be noted that there are earlier versions extant (and in use of both TWB and FIDIC Dispute Board provisions which differ from the versions compared here[145].

1. FIDIC Guide gives more detailed suggestions and guidance to the user than TWB. FIDIC publishes list of vetted adjudicators; TWB maintains

[142] 2001,ICLR 644, paras, 12 et seq.

[143] Commission Doc, 420/19-014).

[144] (ICLR-644, 2001) (web site:iccarbitration.org.).

[145] FIDIC Conditions of Contract and the Dispute Adjudication Procedure establishing DAB by Gordon L.Jaynes.

DICON (Directory of Individual Consultants) but does not have a formal system of vetting people entered on DICON.

2. TWB requires three-persons Board if contract estimated to cost US$10m, can use Adjudicator. FIDIC considers three-Member Board appropriate if average monthly Payment Certificate is expected to exceed US$2m (at year 2000 prices).

3. TWB established a Board not later than 28 days after date of Employer's Letter of Acceptance of Contractor's Tender; FIDIC uses Appendix to Tender to set number of Board members and dated of establishment of the Board. Also, FIDIC foresees possible selection from list contained in contract.

4. Under both, all members to be agreed by both parties. TWB criteria; experienced with the type of construction involved in the Works and with the interpretation of contractual documents" and " fluent in the language of the Contract" FIDIC: "suitably qualified". (But see paragraph 3, " Warranties", of FIDIC Appendix, which is to be agreed with members and has same three requirements as TWB.)

5. TWB, selected by two agreed party-appointed members and approved by parties: FIDIC, parties appoint after "consulting" the two agreed party-appointed members.

6. Under FIDIC, member replaceable by agreement of parties after 70 days notice (unless for default); no such TWB provision. Both forms foresee replacement for death, disability or resignation. Resignation requires 70 days notice under FIDIC; no prior notice required under TWB. FIDIC: expires at "Discharge" under sub-clause 14.12("Discharge") unless otherwise agreed. TWB: ends, "regular activities" at end of DLP or Contractor's expulsion from site under sub-clause 63.1("Default of Contractor") and recommendations made on all disputes previously received; remains available to process any dispute referred to it (presumably for dealing with disputes referred to it during DLP) but no fees unless dispute referred.

7. TWB: If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after the repudiation or other termination of the Contract".

   FIDIC: "Disputes shall be adjudicated by a DAB in accordance with sub-clause 20.4" which refers to "... a dispute (of any kind whatsoever

between the Parties in connection with or arising out of, the Contract or the execution of the works..."

Apart from formal disputes, FIDIC foresees parties agreeing to obtain Board "opinions" on matters" whereas paragraph 2 of the World Bank Rules and Procedures restricts " advice or consultation from the Board".

8. TWB's is shorter than FIDIC's: members available for site visits in 7 vs 28 days; Board's written decision in 56 vs. 84 days; party dissatisfaction notification 14 vs. 28 days; FIDIC has minimum 56-days amicable settlement period after notice of dissatisfaction before resort to arbitration and TWB has no similar provision.
9. Board compensation: FIDIC leaves to parties and individual member, thus member compensation can differ among members; also, compensation reviewed every 24 months; retainer dropped to 50 per cent at TOC. Both foresee a monthly retainer plus a daily fee, plus expenses. TWB gears both monthly retainer and daily fee to ICSID Arbitrators' Daily Fee, and fixes both for duration of service, with retainer fee reduced by two-thirds during DLP (or if Contractor expelled). FIDIC foresees "suitable security" to member for costs before attending site visit or Board meeting; no comparable TWB provision.

10. Site visits: TWB, not less than thrice in 12 months; FIDIC refers to three criteria, no less than 140 days, no sooner than 70 days (Procedural Rule 1); "Typically every three or four months".

11. FIDIC has "Appendix" to General Conditions of Dispute Adjudication Agreement" (approximately five pages); also has "Annex" entitled "Procedural Rules" (approximately 1.5 pages). TWB has "Rules and Procedures" (six pages) and Board member's "Declaration of Acceptance" (one page). Key points[146]:

    i. TWB foresees possibility (with prior consent of other party) of employment of a Board member by a party during service on Board (paragraph 1 © of Rules and Procedures); e.g. party appointment to a Board on a different project. FIDIC also foresees same possibility but requires consent of parties, the Engineer, and the other Board members.

    ii. FIDIC discusses member default, and includes liability, inter alia, to reimburse all fees and expenses paid to all members reproceedings or decisions rendered void or ineffective. (But see paragraph 5© of Appendix.) No such provision in TWB.

[146] FIDIC Conditions of Contract and the Dispute Adjudication Procedure establishing DAB by Gordon L.Jaynes.

iii. FIDIC contains express confidentiality provision; TWB does not.

iii. Generally, FIDIC Appendix and Annex are broader; more detailed, and provide much more guidance to users than TWB.

12. Arbitration: TWB sets different procedural approach for foreign Contractor than domestic Contractor; FIDIC requires three arbitrators unless otherwise agreed. FIDIC expressly provides direct recourse to arbitration if a party fails to comply with a Board decision which has become binding, thus avoiding "recycling" through the Board a dispute over such failure; TWB has no such provision. FIDIC also provides for such direct resort if no Board is "in place"; TWB does not[147].

Notwithstanding the detailed formats of the dispute Board provisions of the World Bank and FIDIC, individual contract provisions must be studied with some care because despite overall appearance of conformity with the formats of the Bank or FIDIC, it not unusual for individual contract provisions to contain significant alterations to those formats. Also, all of the formats suggested by The Bank and FIDIC are extent and in use in all of their various past and present additions, so practioners must be alert to the differing procedures apt to be encountered. Also as with other standards documents, Employer often "edit" the dispute provisions in ways which may not be noticed from the general appearance of the clauses, and which require careful study of the particular wording.

1. Some dispute resolutions procedure have wording which suggests that Dispute Boards are being established but in fact they do not conform to all of the traditional feature of Dispute Boards. Interesting variants have been developed on the Channel Tunnel, the new Hong Kong International Airport, and the continuing use by the Hong Kong Architectural Services Department of Dispute Resolution Advisors.

2. For whatever reasons, Dispute Boards continued to be established late. The parties to contract used for several major projects financed by the World Bank have failed to establish the required Dispute Boards until years after commencement of construction. This deprives the Boards of their essential characteristics of being conversant with construction as it progresses and being in place to assist in resolution of disputes as soon as they arise. It also

[147] FIDIC Conditions of Contract and the Dispute Adjudication Procedure establishing DAB by Gordon L.Jaynes.

leads to a "backlog" of disputes awaiting the Dispute Boards when established – disputes on which the parties have developed entrenched positions.

3. Whether from lack of understanding or from determination to involve the Engineer in dispute resolutions, many contracts on several projects financed by the World Bank have had "double decker" dispute resolution vehicles, involving a traditional written decision of the Engineer followed by Dispute Board consideration of the dispute if either party is dissatisfied with the Engineers' decision. (There also have been instances of the reverse –a Dispute Board consideration followed by an Engineer's decision if either of the parties is dissatisfied with Dispute Board's determination.) Apart from creating great potential for delay in resolution of disputes, such "hybrids" lack the essential characteristic of traditional Dispute Boards, and almost invite friction between the Engineer and the Dispute Board.

4. The current FIDIC "ad hoc" Dispute Board provisions for the plant and Design-Build Conditions and the EPC/ Turnkey Projects Conditions also deprive the Board of its traditional advantages of being in place from the outset of the contract and, as with Boards established late, convert the Board into an ADR device akin to a "pre-arbitration quasi-arbitration"

5. Users should note the seeming contradiction in the present version of FIDIC Appendix to the General Conditions entitled "General Conditions of Dispute Adjudication Agreement": Unless otherwise agreed in writing, clause 5© excludes Dispute Board Member liability for "anything done or omitted in the discharge or purported discharge of the Member's functions, unless the act or omission is shown to have been in bad faith. However, clause 8, a broad and Draconian provision, states: "if the Member fails to comply with any obligation under clause 4, he or she shall not be entitled to any fees or expenses hereunder and shall, without prejudiced to their other rights, reimburse the Employer and the Contractor for any fee and expenses received by the Member and the other members (if any), for the proceedings or decisions (if any) of the DAB which are rendered void or ineffective. Clause 4 lists 11 obligations of Members and clearly a Member could fail to comply with some of them without having any bad faith.

6. Although FIDIC's Guide comments that Dispute Boards Members are entitled to finance charges in respect of delay in payment of their invoices, the text of the relevant clause does not so state.

7. There are obvious advantages to restricting nationalities of Dispute Boards Members to other than those of the Employer, the Contractor (Including those of constituent members of a multinational Contractor), and the Engineer especially if either or both the Employer and the Engineer are state organizations. Some Employers insists on freedom to use persons of the Employers own nationality. Indeed, some Employers restrict all Board

> Membership to persons of the same nationality as the Employer. Such arrangements create the risk of at least the appearance of probable bias within the Board, which undermines confidence in (and ultimate acceptability of) the Boards determinations. However, there is an inherent dilemma for Employers, especially those of developing countries; if they do not inject Boards Members from their own countries, how can those countries develop a suitable number of experts experienced in service on Dispute Boards.

There are so many organizations which are active in the establishment and operation of Dispute Boards process. It is obvious that further developments in the methodology will emerge in due course. Dispute Boards are already playing on projects not only directly related to engineering and construction matters, including disputes arising from project financing arrangements, especially on private finance infrastructure projects.

1.10 **Short-comings (Clause-67):**

Certain terms used in the COC have not been defined properly for the removal of doubts. For example the term "dispute" has not been defined in COC part-I and II. The impartiality of an "Engineer" being Employer's appointee/payee, some times becomes cloudy, as he has also to safeguard the interest of the Employer being his agent in some cases, however, he is duty bound to be impartial in case a dispute is referred to him under the agreement. The Engineer seems to be a judge in his own cause while making Engineer's decision against his own valuation and certification, which is against the principle of natural justice. His impartiality, however, should be without any doubt and decision binding upon the parties except misconduct for which, he may be removed from the site besides disciplinary action under the relevant law. The term "misconduct" for the Engineer should be drafted and incorporated in the General Conditions. Further, no professional qualification or experience in the relevant field, for the appointment of the Engineer has been prescribed by the FIDIC. There is no express time frame for the submission of reference to the Engineer by the parties. Arbitration may be commenced prior to or after completion of the Works, but no time frame is given for the commencement of arbitration after completion of works. Further, exact procedure for amicable settlement has also not been provided in the FIDIC. Time limitation for filing reference against any failure by the other party to comply with that decision directly to arbitration has not been specified in the Clause. Procedure given in Clause-67 seems to

be very protracted with a period of upto 30 weeks from the reference to the Engineer until an arbitration is commenced. The proceedings before the Engineer can be reopened before the Arbitrator by changing grounds and arguments of the case already made before the Engineer. And Engineer can be called as a witness, which is uncalled for. The Engineer acts as a judge of 1st instance, who should not be compelled to be cross examined by the Arbitrators. If the Engineer refuses to perform his duty or fails to give his decision within stipulated period, no suitable action against him has been recommended by the FIDIC. There is no express power given to the Employer to appoint a new Engineer, if need arises in Clause 67. However, this paucity has been provided now in FIDIC Clause 20 (1999). According to Clause 2.6 (FIDIC-1987), the Engineer is to act impartially, but this provision does not appear in Clause 67 (FIDIC-1987 and 20 (FIDIC-1999). The form of the notice of intention to commence arbitration is not specified.

1.11 **Conclusion**

Dispute settlement mechanism as laid down in Clause-67 (FIDIC Edition 1987, as amended, Red Book) seems to be very sophisticated and needs to be re-evaluated by the FIDIC. The Red Book discusses about the design by or for employer, features of 'the Engineer' and uses of Bill of Quantities. FIDIC's Conditions of Contract are used by development banks, foreign construction companies in Pakistan and are subject matter of many books and articles in the world. These are duly copyrighted by the FIDIC and are used as models by some government agencies in Pakistan like WAPDA and NHA on mega projects having value over Rs.50 millions.

The Engineer, being appointee and agent of the Employer cannot be fully impartial, as he is to protect the interest of the employer, therefore, cannot perform his obligations of contract independently. Furthermore, local Arbitration Laws should be in line with FIDIC containing the provisions of Engineer's Decision, amicable settlement etc to make binding force thereof.

Clause 20 of FIDIC GCC (1999) contains claims, disputes and arbitration as Clause 67 (FIDIC-1987 (amended) contains the disputes, Engineers decision, amicable settlement and arbitration. According to FIDIC, 1999 and 2005, the powers of the

Engineer as an adjudicator have been extinguished. Now DB, DAB, DRB or DRE, as the case may be, acts as an adjudicator in place of the Engineer and its/his recommendations are followed by the parties.

Chapter 2

FIDIC DISPUTE SETTLEMENT CLAUSE IN GLOBAL SCENARIO

2.1 FIDIC Dispute Settlement Clause in International Agreements.

FIDIC's dispute settlement clause plays significant role in international agreements in resolving contractual disputes between the parties outside the court to avoid legal technicalities. The appointment of 'the Engineer' as adjudicator and amicable settlement before entering into formal arbitration is added attribute attached to this clause. Thus the parties are provided two forums to settle their differences before entering into arbitration and subsequently in litigation. It provides a viable mechanism to settle the disputes arised during the course of construction or after completion of the works. However, the parties are at liberty to appoint the Engineer and arbitrators of their own choice and to decide the venue of arbitration and applicable law thereof according to their requirement by necessary modification in part-II of Particular Conditions of Contract.

Following International Construction Agreements of Government of Pakistan contain the subject dispute Clause:

1. Construction of Lahore-Islamabad Motorway M-2 by M/s Daewoo Corporation[1].
2. Construction of Islamabad – Peshawar Motorway M-1 by M/s Bayinder Construction Company of Turkey[2].
3. Construction of NHA mega projects like Lahore Bypass Project, Kohat Tunn Project.
4. M-2 service areas by M/s DPMSL.
5. Construction of Ghazi Barotha Dam Project by M/s Imperiglo

2.2 International Legislation on Dispute Settlement through ADR:

---

1 Lahore-Islamabad Motorway M-2 by M/s Daewoo Corporation, 1992 (NHA vs Daewoo)

2 Pakistan Motorway, Islamabad-Peshawar Section, M-1, March 18, 1993. (NHA vs Bayinder)

The International Community formulated the followings Protocol and Convention to settle their disputes through alternate dispute resolution mechanism.

2.2.1 Geneva Protocol on Arbitration Clauses, 1923 [3]

The Protocol on Arbitration Clauses was signed at Geneva on 24th Sept, 1923 and implemented in India through the Arbitration (Protocol and Convention) Act, 1937 (the First Schedule), before partition, which was subsequently adopted by the government of Pakistan, after partition. It may be noted that after the independence of Pakistan, the Geneva Treaties continued to be in force by the virtue of Pakistan (Adaption of Existing Laws) Order. The applicability of the Geneva Treaties has been expressly confirmed by the Supreme Court of Pakistan[4].

The salient features of the above Protocol were that the Contracting States had to recognize the validity of an agreement whether relating to existing or future differences between the parties to the jurisdiction of different Contracting States. By which the parties to a contract were agreed to submit to arbitration all or any in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction non of the parties is subject. According to the said Protocol, each Contracting State reserved the right to limit the obligations to the extent of commercial contracts under its national law. It further dictated that the arbitral procedure and constitution of tribunal shall be governed by the will of the parties and by the law of the country in whose territory the arbitration took place. It further elaborated that each Contracting State was to ensure the execution of award in accordance with their national laws (Art-1-3).

The above Protocol stands ceased to have effect between Contracting States on their becoming bound and to the extent that they become bound after promulgation of New York Convention[5].

---

[3] Protocol on Arbitration Clauses signed on 24th Sept, 1923 at Geneva and implemented in India through the Arbitration (Protocol and Convention) Act, 1937 (the First Schedule), before partition, which was subsequently adopted by the government of Pakistan, after partition.

[4] PLD 1961 SC 373.

[5] New York Convention, 1958 (Art-VII (2)).

2.2.2 Geneva Convention on the Execution of Foreign Arbitral Award, 1927 [6]

The Convention was signed at Geneva on 26.9.1927 and implemented in India through the Arbitration (Protocol and Convention) Act, 1937 (The Second Schedule), before partition, which was subsequently adopted by the government of Pakistan after partition. According to the above Convention, it was mandatory for the member States to execute the foreign arbitral awards in their countries in accordance with the laws subject to certain impediments as explained therein. Since the Convention, alongwith Protocol of 1923, stands ceased[7], therefore, discussion on its salient features need not to be dilated upon.

2.2.3 New York Convention -1958 - Convention on the recognition and enforcement of foreign Arbitral Awards.

This Convention was done at New York[8] and entered into force on 7th June, 1959. The focal rationale behind the drafting of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements and awards arising out of the international contracts and to unify the standards. Its role is reflected in some proactive provisions which compel to the parties of the arbitration as well as enforce arbitral awards in an organized and effective manner.

The Government of Pakistan has ratified the said Convention on 14 July,2005 and has given effect on the same day by promulgating the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2006. It is evident from the dissemination of the above law that Pakistan is investor-friendly country and wants to promote and protect foreign investment.

The New York Convention is successor to the Geneva Convention and deals with arbitration matters more effectively. The New York Convention relatively has more parties, as compare to Geneva Convention. All of the Geneva Convention States have ratified the New York Convention. It has wider scope of application in international arbitral awards as compare to Geneva Convention. NYC (New York Convention) will

[6] The Convention for the Execution of Foreign Arbitral Award, signed on 26.9.1927 at Geneva and implemented in India through the Arbitration (Protocol and Convention) Act, 1937 (The Second Schedule)

[7] Article VII (2) of New York Convention, 1958.

[8] On 10th June 1958.

apply to all awards that are rendered in NYC state. The provisions of the NYC are clearly meant to apply to awards that are not only "foreign" in the sense that they have been made in a state other than the enforcing state, but also to awards that have an international element. The N.Y. Convention, economically is more beneficial and capable to enhance the efficiency of the arbitral process.

2.2.4 UNCITRAL (United Nations Commission on International Trade Law) ARBITRATION RULES, 1976 and 2000

(UNCITRAL Arbitration Rules 1976, adopted by the General Assembly on December 15, 1976 (General Assembly Resolution 31/98).

The General Assembly, recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations recommended the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes and promulgated the same in 1976. The ICC and ICSID follow the UNCITRAL Rules of Arbitration for the settlement of disputes.

2.2.5 UNCITRAL INTERNATIONAL COMMERCIAL ARBITRATION (UNCITRAL MODEL LAW, 1985)

UNCITRAL Model Law on International Commercial Arbitration (1985)

UNCITRAL Model Law on International Commercial Arbitration (1985) (as adopted by the United Nations Commission on International Trade Law on 21 June 1985)

The major salient features of the above law are as under:

1. This Law applies to international commercial arbitration, subject to any agreement in force between the States. According to the said law, arbitration is international, if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States or one of the following places is situated outside the State in which the parties have their places of business:

(i) The place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

Moreover, the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. The matters so governed by the above Law, no court shall intervene except where so provided in this Law. According to the above law, a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is real and void, inoperative or incapable of being performed. It further sets out that where an action has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

It states that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

According to Article 10, the parties are free to determine the number of arbitrators, failing which the number of arbitrators shall be three. The appointment of arbitrator will generally be made by the parties by mutual agreement; however, no person shall be precluded by reason of his nationality from acting as an arbitrator or as the parties may agree. The parties are free to agree on a procedure of appointing the arbitrator or arbitrators. Failing such agreement, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in the above law (Article- 6)

Where, under an appointment procedure agreed upon by the parties, a party fails to act as required under such procedure, or the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party

may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

It is the duty of every arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence to the parties unless they have already been informed of them by him. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If a challenge under any procedure agreed upon by the parties is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award. If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates, if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal. A substitute arbitrator will be appointed as a result of revocation of authority of the previous arbitrator.

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an

arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified. The arbitral tribunal may rule on a plea either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

The arbitral tribunal has a power to take interim measures, as deemed appropriate. The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation

of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitrator proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30. The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place. After the award is made, a copy signed by the arbitrators shall be delivered to each party. The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal. Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days. Recourse to a

court against an arbitral award may be made only by an application for setting aside. An arbitral award may be set aside by the court specified in article 6 only if the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitrator proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

If an application for setting aside or suspension of an award has been made to a court, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

2.3 ROLE OF INTERNATIONAL INSTITUTIONS IN DISPUTE SETTLEMENT

2.3.1 International Chamber of Commerce (ICC)

The International Chamber of Commerce was founded in 1919 with an overriding aim that remains unchanged: to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital.

Much of ICC's initial impetus came from its first president, Etienne Clémentel, a former French Minister of Commerce. Under his influence, the organization's international secretariat was established in Paris and he was instrumental in creating the ICC International Court of Arbitration in 1923.

ICC has evolved beyond recognition since those early post-war days when business leaders from the allied nations met for the first time in Atlantic City. The original nucleus, representing the private sectors of Belgium, Britain, France, Italy and the United States, has expanded to become a world business organization with thousands of member companies and associations in around 130 countries. Members include many of the world's most influential companies and represent every major industrial and service sector.

ICC is the voice of world business championing the global economy as a force for economic growth, job creation and prosperity. Because national economies are now so closely interwoven, government decisions have far stronger international repercussions than in the past. ICC, the world's only global business organization responds by being more assertive in expressing business views. Its activities cover a broad spectrum, from arbitration and dispute resolution to make the case for open trade and the market economy system, business self-regulation, fighting corruption or combating commercial crime.

ICC has direct access to national governments all over the world through its national committees. The organization's Paris-based international secretariat feeds business views into intergovernmental organizations on issues that directly affect business operations.

Arbitration under the rules of the ICC International Court of Arbitration is on the increase. Since 1999, the Court has received new cases at a rate of more than 500 a year. ICC's Uniform Customs and Practice for Documentary Credits (UCP 500) are the rules that banks apply to finance billions of dollars worth of world trade every year. Its Incoterms are standard international trade definitions used every day in countless thousands of contracts. Its model contracts make life easier for small companies that cannot afford big legal departments. It is a pioneer in business self-regulation of E-commerce. Its codes on advertising and marketing are frequently reflected in national legislation and the codes of professional associations. It supports government efforts to make a success of the Doha trade round. It provides world business.

After the disintegration of communism in eastern Europe and the former Soviet Union, ICC faced fresh challenges as the free market system won wider acceptance than ever before, and countries that had hitherto relied on state intervention switched to privatization and economic liberalization. As the world enters the 21st century, ICC is building a stronger presence in Asia, Africa, Latin America, the Middle East, and the emerging economies of eastern and central Europe.

Today, 16 ICC commissions of experts from the private sector cover every specialized field of concern to international business. Subjects range from banking techniques to financial services and taxation, from competition law to intellectual

property rights, telecommunications and information technology, from air and maritime transport to international investment regimes and trade policy.

ICC keeps in touch with members all over the world through its conferences and biennial congresses - in 2004 the world congress was held in Marrakesh. As a member-driven organization, with national committees in 84 countries, it has adapted its structures to meet the changing needs of business. Many of them are practical services, like the ICC International Court of Arbitration, which is the longest established ICC institution. The Court is the world's leading body for resolving international commercial disputes by arbitration. In 2004 561 Requests for Arbitration were filed with the ICC Court, concerning 1682 parties from 116 different countries and independent territories.

The first Uniform Customs and Practice for Documentary Credits came out in 1933 and the latest version, UCP 500, came into effect in January 1994. These rules are used by banks throughout the world. A supplement to UCP 500, called the eUCP, was added in 2002 to deal with the presentation of all electronic or part electronic documents. In 1936, the first nine Incoterms were published, providing standard definitions of universally employed terms like Ex quay, CIF and FOB, and whenever necessary they are revised. Incoterms 2000 came into force on 1 January 2000.

Another ICC service, the Institute for World Business Law was created in 1979 to study legal issues relating to international business. At the Cannes film festival every year, the Institute holds a conference on audiovisual law.

In the early 1980s, ICC set up three London-based services to combat commercial crime: the International Maritime Bureau, dealing with all types of maritime crime; the Counterfeiting Intelligence Bureau; and the Financial Investigation Bureau. A cyber crime unit was added in 1998. An umbrella organization, ICC Commercial Crime Services, coordinates the activities of the specialized anti-crime services.

International Chamber of Commerce has always intended to provide the international business community with effective dispute resolution services tailored to its various needs. These services include arbitration, ADR, expertise and a service for establishing and using Dispute Boards. Each of these services has its own characteristics, rules and utility. It is up to the parties to determine which of them or which combination of them is suitable for their particular needs.

Arbitration is the only one mode which ultimately results in an award by a tribunal that is enforceable at law. Whereas determinations made by Dispute Boards (DB) are not enforceable at law as such, although they may become contractually binding on the parties as described in the DBs rules. Hence, Dispute Board members do not act as arbitrators.

ADR (alternate dispute resolution) is primarily intended to help the parties to the contract to arrive at a settlement agreement in relation to a particular dispute. In contrast, Dispute Boards (DBs), are standing bodies set up to deal with disputes as they arise, ADR is designed to deal with disputes on a one-off basis. ADR proceedings are administered by ICC under its ADR Rules.

The purpose of expertise proceedings which are administered by ICC under Rules of Experties is to provide the parties with an expert's report or opinion on a particular issue. ICC has also recently started arbitration proceedings through video conferencing to save the precious time and resources of the parties.

The contribution of the International Chamber in resolving the disputes of the business community and capacity building measures by conducting seminars, workshops and training programs is indeed promising and commendable at international level.

2.3.2 International Center for Settlement of Investment Dispute (ICSID), 1966

The World Bank as an institution, and the President of the Bank in his personal capacity, have assisted in mediation or conciliation of investment disputes between governments and private foreign investors on a number of occasions in the past. The establishment of the ICSID in 1966 was also intended to relieve the President and the staff of the burden of becoming involved in such disputes. But the Bank's consideration in creating ICSID was the belief that an institution specially designed to facilitate the settlement of investment disputes between governments and foreign investors could help to promote increased flows of international investment.

ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention) which came into force on October 14, 1966. ICSID has an Administrative Council and a Secretariat. The

Council is chaired by the WB President and consists of one representative of each State which has ratified the Convention. Annual meetings of the Council are held in conjunction with the joint Bank/Fund annual meetings.

ICSID is an international autonomous organization and has close links with the World Bank. All ICSID's members are also members of the Bank. Unless a government makes a contrary designation, its Governor for the Bank sits ex officio on ICSID's Council. The expenses of the Secretariat are financed out of the Bank's budget, although the costs of individual proceedings are borne by the parties involved. In pursuance of the Convention, ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is entirely voluntary. However, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent. Moreover, all ICSID States, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards.

In addition to the above, providing facilities for conciliation and arbitration under the ICSID Convention, the Centre has since 1978 had a set of Additional Facility Rules authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention. These include conciliation and arbitration proceedings where either the State party or the home State of the foreign national is not a member of ICSID.

Additional Facility conciliation and arbitration are also available for cases where the dispute is not an investment dispute provided it relates to a transaction which has "features that distinguishes it from an ordinary commercial transaction." The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry "to examine and report on facts."

The third ICSID's activity in the field of the settlement of disputes has consisted in the Secretary-General of ICSID accepting to act as the appointing authority of arbitrators for ad hoc (i.e., non-institutional) arbitration proceedings. This is most commonly done in the context of arrangements for arbitration under the Arbitration Rules

of the United Nations Commission on International Trade Law (UNCITRAL), which are specially designed for ad hoc proceedings. Provisions on ICSID arbitration are commonly found in investment contracts between governments of member countries and investors from other member countries. Advance consents by governments to submit investment disputes to ICSID arbitration can also be found in about twenty investment laws and in over 900 bilateral investment treaties. Arbitration under the auspices of ICSID is similarly one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties[9].

As per ICSID Convention, ICSID proceedings need not be held at the Centre's headquarters in Washington, D.C. The parties to an ICSID proceeding are free to agree to conduct their proceeding at any other place. The ICSID Convention contains provisions that facilitate advance stipulations for such other venues when the place chosen is the seat of an institution with which the Centre has an arrangement for this purpose. ICSID has to date entered in such arrangements with the Permanent Court of Arbitration at The Hague, the Regional Arbitration Centers of the Asian-African Legal Consultative Committee at Cairo and Kuala Lumpur, the Australian Centre for International Commercial Arbitration at Melbourne, the Australian Commercial Disputes Centre at Sydney, the Singapore International Arbitration Centre, the GCC Commercial Arbitration Centre at Bahrain and the German Institution of Arbitration (DIS). These arrangements have proved their usefulness in many ICSID cases and have helped to promote cooperation between ICSID and these institutions in several other respects. The number of cases submitted to the Centre has increased significantly in recent years. These include cases brought under the ICSID Convention and cases brought under the ICSID Additional Facility Rules. In addition to its dispute settlement activities, ICSID carries out advisory and research activities relevant to its objectives and has a number of publications. The Centre collaborates with other World Bank Group units in meeting requests by governments for advice on investment and arbitration law. The publications of the Centre include multi-volume collections of Investment Laws of the World and of Investment Treaties, which are periodically updated by ICSID staff. Since April 1986, the Centre has published a

[9] the North American Free Trade Agreement, the Energy Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur.

semi-annual law journal[10]. The journal was recently rated as one of the top 20 international and comparative law journals in the United States. Since 1983, the Centre has also co-sponsored, with the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) International Court of Arbitration, colloquia on topics of current interest in the area of international arbitration. Other conference activities involving the Centre are described in the ICSID Annual Report.

2.4 Bilateral Investment Treaty (BITs):

Pakistan has so far entered into **fifteen BITs** with China (1989), France (1983), Germany (1959), Italy (1997), Republic of Korea (1988), Kuwait (1983), Kyrgyz Republic (1995) , Malaysia (1995), Netherlands (1988), Romania (1978), Spain (1994), Sweden (1981), Switzerland (1995), Turkey (1995), and United Kingdom (1994). These, inter alia, provide for settlement of disputes between investors and the contracting parties.

The latest agreement between the Government of Pakistan and the Government of Italy has been made on July 19, 1997 for the promotion and protection of Investment. It defines the term **"investment"** to mean **any kind of property invested after Sept, 1, 1954 by a natural or legal person being a national of one contracting party in the territory of the other in conformity with the laws and regulations of the latter.** This definition is much wider than the definition of **"foreign private investment"** provided in the Foreign Private Investment (Promotion and Protection) Act 1976.

FPIA defines the term "foreign private investment" in a more restrictive sense to mean **"investment in foreign capital by a person who is not a citizen of Pakistan or who, being a citizen of Pakistan, is also the citizen of any other country or by a company incorporated outside Pakistan, but does not include investment by a foreign Government or agency of foreign Government.**

The broader definition of investment allows for a wider array of investment disputes to be settled through the settlement procedures provided in BITs. The broad and relatively vague definition of the term " investment " in BITs is likely to give rise to an unnecessary prolongation of the preliminary issue of jurisdiction in arbitration proceedings because of an inherent conflict between national law (FPIA) and an

[10] ICSID Review-Foreign Investment Law Journal, April, 1986.

international obligation (BIT), particularly where Pakistani law is the applicable law of the contract.

The contracting parties to BITs are required to settle their disputes amicably through diplomatic channels, failing which they may resort to arbitration before an ad hoc arbitral tribunal. Disputes between investors and the contracting party are also required to be settled as amicably as possible. For example under the Italian Agreement, if a dispute cannot be settled amicably within six months of the date of a written application, the concerned investor may submit the dispute, at his discretion Modern BITs have retained broad uniformity in their provisions. In addition to deter-mining the scope of application of the treaty, that is, the investments and investors covered by it, virtually all bilateral investment treaties cover four substantive areas: admission, treatment, expropriation and the settlement of disputes. Almost all modern BITs include provisions dealing with disputes between one of the parties and investors having the nationality of the other party. In this respect most provide for arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) which entered into force in 1966. ICSID has since the early 1970s collected the texts of bilateral investment treaties. Most of these have been included in a multivolume collection of Investment Treaties published by the Centre. Lists of bilateral investment treaties were published in 1989 and 1992[11]. The Centre also published in 1995 a book on Bilateral Investment Treaties.

The present publication was compiled to provide an up to date inventory of a particular area of foreign investment law which has expanded tremendously over a very short period of time. While the treaties listed in this publication only include those that have been entered into bilaterally, it may be recalled that over the last ten years several multilateral agreements with provisions on investment have also been concluded.

2.5 Jurisdiction of the Courts

It is evident from the above discussion, that the courts of the country where arbitration takes place have full supervisory jurisdiction in the arbitration proceedings. They can appoint the arbitrators/umpire, set aside the award, amend the award, make the award rule

[11] The ICSID Review-Foreign Investment Law Journal, 1989 & 1992.

of the court and enforce the award under the law of that country. Foreign arbitral awards are also recognized and enforced by the courts according to the law of the land and public policy. The courts have also power to refuse recognition of the award in accordance with law. According to UNCITRAL rules of arbitration, the States shall implement the foreign awards subject to law and public policy[12].

The courts generally do not interfere in the presence of arbitration agreement and direct the parties for the enforcement of arbitration clause as agreed upon by the parties but in some cases the courts prevent the parties for entering into arbitration as the subject matter of dispute did not relate to terms and conditions of the contract.

In administrative contracts in civil law jurisdictions, there may be conflict or overlap between the role of the administrative court and arbitration. **An English court may well decide that the wording of any clause should not prevent it attempting to do justice between the parties on the grounds only of a failure to comply with a particular time limit**. However, a court would decline to review or revise any document[13].

The arbitrator is limited by the rules of arbitration and the applicable law only insofar as his awards are open to the Court's supervision. In many countries, the courts will intervene in exceptional cases only and many arbitration rules make the arbitrator's award final excluding any appeal.

The applicability of the Geneva Treaties has been expressly confirmed by the Supreme Court of Pakistan[14]. According to the law, a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is real and void, The court may also grant interim protection to the parties during the proceedings.

2.6 Shortcomings

12 UNCITRAL rules of arbitration

13 This is because of the Court of Appeal's decision in N.W.R.A. Derek Crouch [1984] Q.B.644; 26 Build.L.R. 104 where it was held that, in a contract where an independent person was empowered to make decisions binding on the parties a court does not have power to substitute its own views for that of parties' chosen decision maker.

14 PLD 1961 SC 373

International Arbitration is protracted and expensive method for the settlement of dispute. Arbitration should be conducted in the country where subject matter of the dispute exists so that all evidences, record and witnesses may be produced before the arbitrators by the parties. Preference should be given to appoint international arbitrators from neighboring states of the country where contract has been executed or being executed to avoid allied expenditures and time. Arbitration through Video Conferencing should also be conducted to save precious time and resources of the parties. A list of Arbitrators should be named at the time of entering into the contract, equally acceptable to both the parties, to avoid delay in appointing process of arbitrators. All International and national laws and rules on arbitration and conciliation are required to be reviewed to meet the present requirements. Developing countries, like Pakistan, India, Sri Lanka etc should establish regional arbitral institutions rather depending upon global institutions to save their time and foreign reserves.

The term "investment" has not been defined in the ICSID Convention, which should be drafted and implemented now so that the correct scenario could be brought by the parties before international arbitration.

The concept of Dispute Review Board (DRB) has been introduced by the FIDIC but no time frame has been given for DRB to finalize the matter, which frustrates the very purpose of the Board to settle the dispute in time. Moreover, no time limit to file reference to DRB has been given which will also frustrate the purpose of timely completion of project. In Pakistan, Ghazi Bharotha dam has been completed and notice has been served but no start of DRB. Further more late constitution of DRB members also frustrates the purpose of timely completion of the project.

The approach of the parties towards the role of DRB members does not seem positive. They treat them as arbitrators or judges rather friends and facilitators. DRB members are helping guys rather judges. They are not aloof rather they bring the parties together to resolve the disputes. This is much purpose of DRB constitution. Further capacity building measures are required to be taken to coach our local lawyers, arbitrators, judges and government dealing officers to deal with such cases as is being done in foreign countries to enhance their exposure. Foreign lawyers, arbitrators and judges are well trained in their capacity building and exposure. In this regard seminars,

workshops and short term courses are carried out by the foreign institutes for the building of capabilities of lawyers and judges etc. We are also required to take capacity building measures to train our lawyers, arbitrators, judges and government dealing officials besides their exposure. The developing countries while taking loan from foreign financial institutions accept all their terms and conditions including foreign arbitration with ICC or ICSID etc, which is very expensive for developing countries perspective. The said institutions compel the borrowers states to conduct arbitration at ICSID center and to engage foreign arbitrators. They do not believe on our judiciary, judges, arbitrators and judicial system. Moreover, seat of arbitration at international level and engaging of foreign lawyers and experts to defend the case may drain out foreign reserves of the parties.

2.7 **Conclusion**

In the end, it is concluded that FIDIC dispute settlement Clause has world wide recognition. All International construction contracts based on FIDIC contain this Clause which provide dispute settlement mechanism. The said Clause develops the concept of ADR to avoid conventional litigation in the courts of law and to settle the disputes amicably. The Arbitration is one mode of ADR, which is globally recognized. All States have their own Arbitration laws. United Nations Commission on International Trade Law has its own arbitration rules 1976, which are also adopted by ICC and ICSID in arbitral proceedings.

Chapter 3

DISPUTE RESOLUTIONS AND NATIONAL LEGISLATION (CIVIL WORKS)

3.1 Constitution of Islamic Republic of Pakistan, 1973 (Relevant provisions of Arbitration to resolve the dispute).

The Constitution of Pakistan 1973 recognizes arbitration as a legal means for the settling of disputes. In fact, the Constitution itself relies on this method to regulate certain administrative relations between Federation and Provinces of Pakistan[1].

Pakistan has promulgated and adopted arbitration laws and international treaties to recognize and give effect to both domestic and international agreements and awards[2]. The Arbitration Act, 1940[3] only deals with arbitration on commercial matters in Pakistan at national level and has become outdated, therefore, is required to be reviewed. Although there is no direct legislation in the Constitution of the Islamic Republic of Pakistan regarding dispute settlement in construction contracts of Government of Pakistan of civil works, however, some provisions relevant to arbitration are available in the Constitution which are reproduced here under for reference:

Power of Federation to confer powers etc on Provinces in certain cases[4]:

Notwithstanding anything contained in the Constitution, the Federal Government may, with the consent of the Government of a Province, entrust either conditionally or unconditionally to that Government, or to its officers, functions in relation to any matter to which the executive authority of the Federation extends.

(2) An Act of Parliament may, notwithstanding that it relates to a matter with respect to which a Provincial Assembly has no power to make laws, confer powers and impose duties upon a Province or officers and authorities thereof.

---

[1] Art 146, 152, 159, 4th Schedule (concurrent legislative list) of the Constitution of Islamic Republic of Pakistan

[2] Recognition and enforcement (Arbitration agreements and foreign arbitral awards, Ordinance, 2006

[3] The Arbitration Act (X of 1940), 11th March, 1940.

[4] Art 146 of the Constitution of Islamic Republic of Pakistan, 1973.

(3) Where by virtue of this Article powers and duties have been conferred or imposed upon a Province or officers or authorities thereof, there shall be paid by the Federation to the Province such sum as may be agreed or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of Pakistan in respect of any extra costs of administration incurred by the Province in connection with the exercise of those powers or the discharge of those duties.

Acquisition of land for Federal Purposes[5]:

The Federation may, if it deems necessary to acquire any land situate in a Province for any purpose connected with a matter with respect to which Parliament has power to make laws, require the Province to acquire the land on behalf, and at the expense, of the Federation or, if the land belongs to the Province, to transfer it to the Federation on such terms as may be agreed or in default of agreement, as may be determined by an **arbitrator** appointed by the Chief Justice of Pakistan.

Broadcasting and telecasting[6]:

The Federal Government shall not unreasonably refuse to entrust to a Provincial Government such functions with respect to broadcasting and telecasting as may be necessary to enable that Government:-

a) to construct and use transmitters in the Province; and

b) to regulate, and impose fees in respect of, the construction and use of transmitters and the use of receiving apparatus in the Province:

Provided that nothing in this clause shall be construed as requiring the Federal Government to entrust to any Provincial Government any control over the use of transmitters constructed or maintained by the Federal Government or by persons authorized by the Federal Government, or over the use of receiving apparatus by persons so authorized.

[5] Art 152 of the Constitution of Islamic Republic of Pakistan, 1973.
[6] Art 159 of the Constitution of Islamic Republic of Pakistan, 1973.

Any functions so entrusted to a Provincial Government shall be exercised subject to such conditions as may be imposed by the Federal Government, including, notwithstanding anything contained in the Constitution, any conditions with respect to finance, but it shall not be lawful for the Federal Government so to impose any conditions regulating the matter broadcast or telecast by, or by authority of, the Provincial Government.

Any Federal law with respect to broadcasting and telecasting shall be such as to secure that effect can be given to foregoing provisions of this Article.

If any question arises whether any conditions imposed on any Provincial Government are lawfully imposed, or whether any refusal by the Federal Government to entrust functions is unreasonable, the question shall be determined by an arbitrator appointed by the Chief Justice of Pakistan.

Nothing in this Article shall be construed as restricting the power of the Federal Government under the Constitution for the prevention of any grave menace to the peace or tranquility of Pakistan or any part thereof.

Concurrent Legislative List (4th Schedule)[7]

Para-8 of concurrent legislative list deals with the subject matter of arbitration.

3.2 Arbitration (Protocol and Convention) Act, 1937

The Arbitration (Protocol and Convention) Act, 1937 was promulgated in India on 4th March, 1937 to make certain further provisions respecting the law of arbitration in Pakistan in order to give effect to Protocol on Arbitration Clauses, 1923 and Convention on the execution of foreign arbitral awards, 1927 as India was signatory of the said Protocol and Convention. Since the said Act has already been repealed by Section 10 of an Ordinance No.XIV of 2006, an Ordinance to provide for the recognition and enforcement of arbitration agreements and foreign arbitral awards, therefore, further discussion on its provisions are considered unwarranted.

[7] Para-8 of concurrent legislative list (4th Schedule), the Constitution of Islamic Republic of Pakistan, 1973.

3.3 Arbitration Act, 1940

This Act was promulgated on 11th March, 1940 and came into force on Ist July, 1940 to consolidate and amend the law relating to arbitration in Pakistan. This law is a complete Code relating to arbitration saves as mentioned in Section 47[8].

The provisions of the Act relating to arbitration without the intervention of a Court follow the English Acts in important particulars. The remaining provisions of the Act follow those in the Second Schedule to the Code of Civil Procedure, 1908 though with some changes. By this Act, all other laws relating to arbitration have been repealed and uniformity in the application of the law over the whole of this sub-continent has been secured.

The underlying object of the said law is to enforce the arbitration agreement whereby the parties have bound themselves down to have their disputes arising out of transaction to which such an agreement is applicable, adjudicated upon and decided by the domestic tribunal. Further to give expeditious relief to parties unhampered by rules of procedure laid down in the Civil Procedure Code and the Qanun-e-Shahdat, 1984 and consequently is not to be so interpreted as to prolong proceedings before arbitrators[9]. The Act lays down the rules to be followed by the parties, arbitrators and Courts, but many of its provisions may be excluded by express agreement between the parties.

Arbitration is settlement of a dispute by the decision not of a regular and ordinary court of law but of one or more persons who are called arbitrators, whose decision the parties agree to accept as binding whether they agree to the decision or not[10].

The Act provides three classes of arbitration:–

(a) Arbitration without court intervention[11]

(b) Arbitration where no suit is pending, (but through court)[12]

(c) Arbitration in suits (through court)[13]

8 PLD 1970 SC 43.

9 PLD 1958 Kar 158

10 PLD 1964 Lah, 490(FB).

11 Chapter II, sections 3-19, Arbitration Act, 194 0

12 Chapter III, section 20 , Arbitration Act, 194 0

The Act also contains further provisions, common to all the three types of arbitration[14]. It provides that whatever be the class of arbitrations, it is mandatory that there must be written arbitration agreement between the parties to submit present or future differences to arbitration, whether an arbitrator is named therein or not[15].

The number of arbitrators can be one or more. In the case of an even number of arbitrators, an umpire is to be appointed according to the procedure given in the Act [First Schedule. Where the arbitration agreement does not specify the number, the arbitration shall be by a sole arbitrator.[16] An arbitrator may be named in the agreement or may be left to be appointed by a designated authority. Where the arbitration agreement is silent about the mode of appointment of arbitrators and the parties cannot agree about the choice of the arbitrator, the Act gives power to the court to make the appointment, after following the prescribed procedure.[17] An arbitrator, guilty of misconduct can be removed by the court after due inquiry. Death of a party does not terminate the arbitration proceedings, if the cause of action survives. The arbitrator has certain statutory powers, including the power to administer oaths to witnesses, and power to "state a case" for the opinion of the court etc. If a party to an arbitration agreement refuses to go to arbitration, the other party can seek intervention of the court to compel a reference to arbitration. The Act is totally inadequate with regard to matters of procedure. The arbitrator is to observe the essentials of natural justice, failing which his award can be set aside on the ground of misconduct.[18] Various stages of the process are not dealt with in the Act.

The award is to be pronounced by the arbitrator(s) within the time limits laid down in the arbitration agreement or failing such agreement, within 4 months of the commencement of hearing. However, the time limit can be extended by the court in certain circumstances. It has to be in writing and signed by the arbitrator (s). If there are more than one arbitrator, the majority view prevails. The Act itself does not provide that

[13] Chapter IV, sections 21-25., Arbitration Act, 1940
[14] Chapter V, sections 26-38, Arbitration Act, 1940
[15] Section 2 (2).
[16] First Schedule Arbitration Act, 1940.
[17] Sections 8-10, Arbitration Act, 1940
[18] Section 30, Arbitration Act, 1940

the arbitrator shall give reasons for the award. When the award is a non-speaking award, the scope for interference by the court with the award becomes somewhat limited. An award cannot be enforced, by itself until judgment of the court is obtained. The award is followed by the judgment and subsequently by the decree. The court may pass judgment in terms of the award or modify or correct the award or remit the award for re-consideration by the arbitrator or umpire or set aside the award. In short, the court may totally accept the award, or totally reject it, or adopt the intermediate course of modifying it or remitting it, as the case may be.

The court can set aside the award, only on one or more grounds, namely that the arbitrator or umpire has misconducted himself or the proceedings or that the award has been made after issue, by the court, of an order superseding the arbitration; or that an award has been improperly procured or is otherwise invalid[19].

The civil court is competent to exercise various powers under the Act, if a suit is filed on the cause of action which forms the basis of the arbitration.

Arbitration is an integral part of the national and religious norms of Pakistan. It is an effective tool for the resolution of commercial and other disputes both within and outside the country[20]

3.4. Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2006

This Ordinance was promulgated in Pakistan in 2006 pursuant to United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 as Pakistan was signatory of the said Convention[21].

This law shall apply to arbitration agreements made before, on or after the date of coming into force of this Ordinance, however, it shall not apply to foreign arbitral awards made before the 14th day of July, 2005 on which the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2006 came into force.

[19] Section 3, Arbitration Act, 1 940.

[20] See generally, Hassan, International Commercial Arbitration in Pakistan, 33 The Arbitration Journal (No.3) 41(1978) see also Jaffer & Shah, Arbitration in Pakistan: A Millennium insight (unpublished paper).

[21] Website:www.jamilandjamil.com

The above law is based on the said Convention[22]. It has 10 sections and one Schedule. It defines the term "contracting state "as a State which is a party to the Convention. Only the High Court or such other superior court in Pakistan as may be notified by the Federal Government have exclusive jurisdiction to adjudicate the matters related to or arising from this Ordinance.

Foreign arbitral award means an arbitral award made in a Contracting State and such other State as may be notified by the Federal Government, in the official gazette. According to the said Ordinance, each Contracting State shall recognize an agreement in writing and the court, at the request of the one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The Court has full power under the law to accept or reject the award. If it is accepted, the same will be enforced as judgment or order of a court in Pakistan. However, the award can be refused by the court, on the grounds given in Article-V of the Schedule. The Convention has prevailing status in case of any inconsistency between the laws or judgment of any court. This Ordinance has repealed the previous law the Arbitration (Protocol and Convention) Act, 1937.

It may be seen that the main purpose behind the drafting of the New York Convention on Arbitral Awards has been to encourage the recognition and enforcement of commercial arbitration agreements and awards arising out of international contracts and to substantially unify the standards. The Convention's facilitative role is reflected in proactive provisions which compel parties to arbitration as well enforce arbitral award in an orderly and effective manner. The Government of Pakistan has ratified the NY Convention and promulgated the said Ordinance. The underlying policy considerations of the NY Convention will have a major impact on the law relating to International commercial arbitration and arbitral laws relating to the enforcement of foreign awards in Pakistan which had become outdated and in need of reform[23].

The enforcement and recognition of arbitral awards currently being applied in Pakistan is embodied in the Arbitration (Protocol and Convention) Act of 1937 which

[22] New York Convention, 1958
[23] www.jamilandjamil.com.

was implemented pursuant to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. The parties to the said Convention are few and not as economically viable as compared to the parties of the NY Convention. Further, the concept embodies in the Geneva Convention are not as facilitative of the recognition and enforcement of arbitral awards as would be ideal.

The first issue concerning the 1937 Act concerns its scope in enforcing arbitral awards rendered in countries not party to the Geneva Convention. The jurisdiction of the 1937 Act according to S2 (b) and (c), only extends to awards made:

> ".....between such persons of whom one of the subject to the jurisdiction of some one of such powers as the Central Government being satisfied that reciprocal provisions have been made. May be notification in the official Gazette declare to be parties to the convention... and of who, the other is subject to the jurisdiction some other of the Power aforesaid; and....
>
> .... In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may by like notification, declare to be territories to which the said Convention applies"

The problem with this provision rests on two factors. Firstly interpreting the phrase 'subject to the jurisdiction of has been found in various jurisdictions to cause many difficulties in being far too restrictive and territorial in its application Secondly, a practical problem occurs where a sizeable number of nations cannot enforce awards within Pakistan either because they have not become parties to the Geneva Convention or they have not been declared by the Central Government to be parties to which the 1937 Act would apply. Numerous awards rendered in the major trading nations of the world, including the US, have not been enforced within Pakistan due to this jurisdictional problem[24]. A related issue is that the 1937 Act applies only to 'foreign awards'. This is a definitional problem concerning the scope of the Act that is restrictive of the types of awards the Geneva Convention is applied to within Pakistan. This point will be further discussed when dealing with the impact of the Ordinance and the NY Convention.

Another issue in relation to the 1937 Act is that there is no specific provision that deals with the enforcement of arbitral agreements. Although the Geneva Protocol did

[24] Yangtze (London) Ltd. V. Barlas Bros (Karachi) (PLD 1961 SC 573) and Continental Grains Co. V. Naz Bros (1982 CLC 2301) where the courts refused to enforce arbitral awards rendered in courts that had not been expressly declared by the Central Government to be parties falling under the 1937 Act).

make provisions for the enforcement of arbitration agreements, this provision was merely left in the First Schedule of the Act rather than being made a substantive provision in the main Act. In addition Article 3 of the Protocol which provides for compelling parties to arbitration does not precisely enunciate the circumstances under which the courts could refuse to compel the parties to arbitration. This has led to problems of interpretation in the Pakistani courts in a leading case[25].

The grounds for enforcement of the award in the Geneva Convention have not proved to be very efficient in encouraging the enforcement of arbitral awards. An illustration of this is that the burden of proof in the Geneva convention on the issue of the validity of an award. This results in the creation of procedural and substantive burdens on the winning party to arbitration and thus hinders the efficiency of the arbitral process. In addition, the inefficiency is by the fact that the grounds on which a party can seek to resist the enforcement of an award under the Geneva Convention are also exceedingly cumbersome and not clearly defined,. For example, the requirement in Article 1 (d) of the Geneva Convention that an award become final in the country is with it has been made' has proven to be conceptually problematic in other jurisdictions (bringing an issue of whether or not double exequatur would be required) and results in delays or obstructions to the award merely on the grounds that the losing party to the arbitration can simply institute proceedings against the award in another state. Such a state of affairs is unsatisfactory in light of current international and domestic policies geared towards facilitating arbitration and increasing the efficiency of the arbitral process.

The powers of the courts in relation to enforcing arbitration agreements and awards are not adequately distributed under the Geneva Convention. The first example of this is seen in the mandatory provisions of Article 2 of the Geneva Convention which lays down grounds for the refusal of enforcement by the courts and then says that if those grounds are satisfied " recognition and enforcement of the award shall be refused. This leaves very little scope for courts to exercise their own discretion in allowing the enforcement of an award under the 1937 Act, even if only one of the grounds for resisting recognition is proved, the courts will be bound to refuse enforcement of the award. In

[25] HUBCO v WAPDA (PLD 2000 SC 841).

addition, on the issue of enforcing agreements to arbitrate the courts are required by Article 4 of the Protocol on Arbitration clauses to refer the parties to arbitration without any clear criteria as to when this should be denied thus forcing the Pakistani courts to develop their own criteria which may or may not be conducive to an arbitration friendly policy. Such mandatory provisions bind the courts far too restrictively and resultantly cause the enforceability of the arbitral process to be less effective.

The New York Convention

As explained earlier, Pakistan has recently ratified the NY Convention on 14.07.2005 and promulgated the aforementioned Ordinance to give effect to the NY Convention. This marks the end of a period of 47 years where Pakistan was the only country in the world that had been an original signatory to the NY Convention but had not rectified it. However, with the ratification of the NY Convention, Pakistan has sent out a clear signal to the international community that it is an investor friendly country that facilitates and protects foreign investment. This will go a long way in stimulating growth within the economy that will benefit the country as a whole. The ratification of the NY Convention[26] would mark the end of an era of isolationism and parochialism and allow Pakistan to increase its commercial intercourse with international community.

There are more nations that are parties to the NY Convention than the Geneva Convention. In fact nearly all of the Geneva Convention states have also rectified the NY Convention. Therefore the potential scope of application of the NY Convention to international arbitral awards is much wider than that which exists under the Geneva Convention. Furthermore, the NY Convention shall apply to all arbitral awards that are rendered in a NY convention state even if that state is party to the Geneva Convention. This is clearly highlighted in Article VII (2) of the NY Convention and also given force through S 10 of the Ordinance. Thus, an arbitration award rendered in the UK (which is both a Geneva and NY Convention country) would be governed by the NY Convention.

Countries which are purely Geneva Convention countries and not New York Convention countries as of the writing of this memorandum to which the Act would

[26] July 14, 2005.

continue to apply include the Bahamas, Gambia, Gibraltar, Guyana, Iraq some of the Leeward and Windward Islands, Liechtenstein, Mayamar, and St. Helena

The second sentence of Article I(1) states that "[the Convention] shall also apply to arbitral awards not considered as domestic awards" in the enforcing State. This is an issue that goes right to the heart of a problem faced by certain jurisdictions in trying to define difference between foreign awards and domestic awards. The 1937 Act poses just such a problem in that it applies the Geneva Convention only to "foreign awards." Section 2 Arbitration (Protocol and convention) Act of 1937. The provisions of the NY Convention are clearly made to apply to awards that are not only 'foreign' in the sense that they have been made in a state other than the enforcing state, but also to awards that have an international element.

The Ordinance, in S- 2(d) does not clearly describe this distinction. It merely applies the application of the NY Convention to foreign arbitral award made in a Contracting State and such other State as may be notified by the Federal Government, in the Official gazette." As such, it will be the duty of the Pakistani courts to interpret, establish and give meaning to the term 'not considered as domestic' in trying to determine whether an award is truly foreign or not. A variety of factors influence whether or not an award is determined to be 'International' in character *inter alia* the nationalities of the parties; the subject matter of the arbitration; etc. The UNCITRAL Model Law on International Commercial Arbitration can be used as a standard of International best practice in determining the nature of an award importantly, Article 1(3) & (4) states:

An Arbitration is international if:

a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States **or**

b) one of the following places is situated outside the State in which the parties have their places of business:

   i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

   ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place

with which the subject matter of the dispute is most closely connected; or

c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one county:

For the purpose of paragraph 3) of this article:

a) If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

b) if a party does not have a place of business, reference is to be made to his habitual residence.

Further more, the US legislation is even more expansive where 9 U.S.C.S 202 states:

"[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."

Such an interpretation of a non-domestic award expands the scope of the NY Convention to a large number of awards that are sought to be enforced in the US. Conversely, the definition of a foreign award under the 1937 Act and case law prior to the coming into force of the Ordinance is restrictive and ought to be adapted and interpreted to meet the international best practice definitions expounded above. SS 9 of the Act of 1937 states that:

"Nothing in this Act shall....

(b) apply to any award made on an arbitration agreement governed by the law of Pakistan.

The supreme Court of Pakistan in Hitachi Ltd. V. Rupali Polyester[27] had applied SS 9 to arbitration awards rendered in a foreign country but governed by Pakistani substantive law . This had the effect of raising a barrier of high risk for both domestic and foreign investment, and harmed Pakistan's commercial and trade opportunities. The

[27] 1998 SCMR 1618

problems with this legal interpretation was also found in India where an identical provision existed in SS 9 of the Indian Foreign Awards Act 1961 ('Savings Clause') which stated that:

> "Nothing in this Act Shall.....
>
> b) apply to any award made on an arbitration agreement governed by the law of India."

The problems in this clause were recognized by the Indian legislature which repeated the SS9 Savings Clause through a new arbitration act in 1996.

The faults of the Savings Clause were seen in the interpretation of the term 'foreign award' in India. Through the Savings Clause, and converse to the American interpretation, the types of awards to which the NY Convention applied in India had been very narrowly construed. In National Thermal Power Corporation v. The Singer Company 80,[28] the Supreme Court of India held, in paragraph 26, the under an arbitration agreement governed by Indian substantive law,

> "The courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement."

The decision of the Indian Supreme Court in the Singer case had been severely criticized as being contrary to the spirit of the NY Convention. The provisions of the NY Convention especially Article I (1) applies to arbitrations conducted in one country but applying the substantive laws of another country. The courts of the Country, whose substantive laws apply to the arbitration agreement, are not meant to have an appellate/ supervisory status in these matters. The only supervisory jurisdiction is usually reserved to the courts of the seat of the arbitration[29]. However this is precisely the effect that the Singer decision along with the Indian Savings Clause had on any arbitration award

[28] AIR SC 998 (1993)

[29] As seen in Union of India v McDonnell Douglas corporation 1993-2 Lloyds Rep 48

rendered under Indian substantive law. A consequence of this decision was that foreign investors in India would always try to avoid Indian law from applying to the substance of their agreement.

Fortunately, the Pakistani Supreme Court in Hitachi suggested that this theory of concurrent jurisdiction', as developed by the Indian Supreme Court, was unworkable and impartial. However, the Hitachi Court still gave credence to the theory. If this interpretation is brought into Pakistan, once the NY Convention is in place, the same result as the Signer decision could follow.

This has been seen in India through the two decisions of Bhatia international v bulk Trading[30] and ONGC v Saw Pipes 2003SOL Case no. 175 which have practically restored the workings of the Savings Clause through interpretive techniques based on constructions of the several Parts of the Indian Arbitration Act 1996.

If the same judicial precedents and interpretations are followed in Pakistan businessmen will always find foreign investors trying to choose their own laws to govern their agreements; since they do not wish the arbitral awards to be subject to the supervisory jurisdiction of Pakistani courts. Furthermore, by interpreting such awards as being domestic awards, these awards shall be subject to the Arbitration Act 1940 and thus subject to problems of Limitation and procedure under that Act. For example SS 14 of the Arbitration Act 1940 requires the arbitrators themselves to file the award into court' such a procedural requirement is unheard in the international commercial arbitration community and creates procedural problems for investors that seriously prejudice their substantive rights.

This will result in Pakistani parties to arbitration not only having to go to the expense of having to conduct arbitrations in other countries, but also having to engage specialist lawyers in other legal systems to represent them. They will be faced with having to deal with legal systems that are highly unfamiliar to them and may not be as favorable. The *Hitachi* judgment used the legal analysis propounded in Singer as well as some English cases that had either been decided before England ratified the NY Convention, or did not specifically deal with the NY Convention's applicability. The faults in this analysis of concurrent jurisdiction were recognized by other nations. This

[30] S.A (2003)5 SCC (Jour) 22

can be seen from the fact that both India and England promulgated new arbitration acts in 1996 and the Indian legislature, although not expressly repealing Singer, has nonetheless repealed the SS 9 Savings Clause, thus removing the basis of the Singer decision.

Furthermore, in Pakistan, the Ordinance has been drafted without the inclusion the 9(b) Savings clause. As such, a strong argument exists that the intention of the legislature was such as to repeal the Savings Clause as well as the reasoning behind it. Pakistani arbitral jurisdiction thus has the opportunity to benefit from India's misadventures with the NY Convention and allow it to be implemented in its spirit as well as form by interpreting the works 'not considered as domestic; expansively and in line with international best practices. This will benefit both foreign and domestic investors as it will provide a degree of certainty within the law that is conducive to commerce within Pakistan.

The NY Convention enunciates the criteria under which a valid arbitration agreement ought to be enforced and the parties be compelled to arbitration. Article ii (3) states:

> The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

This is repeated and reiterated in SS 4 of the Ordinance and is a lot clearer than the Geneva Convention which merely compelled the courts to refer parties to arbitration whenever an agreement was held to be "valid in virtue of [Article I] and capable of being carried into effect". Article 4 Protocol on Arbitral Clauses. In this sense, the NY Convention realises the need for an enunciation of the restrictions on the type of agreements that the courts are bound to enforce.

The efficacy of the arbitration process in addition is still dependant on the attitude of the courts of the parties involved. The enforcement of arbitration agreements is a point that is still under the power of the enforcing court that employs the concepts of separability and the arbitrability of disputes to determine the validity of an arbitration agreement. An illustration of this point exists in the Pakistani case law in the

HUBCO v. WAPDA[31] case mentioned above. In that case, the Supreme Court of Pakistan held an arbitration agreement to be invalid due to the **commission of corrupt practices by the parties in procuring amendments to their contract**. As such, the validity of the arbitration agreement was nullified when the court stated,

> *"This dispute between the parties are not commercial disputes arising from an undisputed legally valid contract... for ... account of these criminal acts, disputed documents did not bring into existence any legally binding contract between the parties, therefore, the dispute primarily relates to very existence of a valid contract and not a dispute under such a contract.;*

According to the above analysis, the court felt that the contract under Section 23 of the Contract Act "was void and not void able simpliciter: and thus held the arbitration agreement to be void as well. This is an important aspect of the case that has wide reaching implications for arbitration laws in Pakistan since it goes to the heart of the doctrine of separability. Although the court felt that recognizing issues of fraud and criminality as being arbitrable would be contrary to public policy, the validity of the arbitration agreement is a concept that would be logically prior to considerations of arbitrability. Thus, since the validity of the arbitration agreement was not recognized, the clause was unenforceable even before such issues could be deemed non arbitrable.

The grounds for refusing enforcement of award are clearer and more precise in the NY Convention. For example, unlike the Geneva Convention, which required that an award be final before it could be enforced, the NY convention, in Article V(1), allows the refusal of an award where it "has not yet become binding on the parties." This provision is an example of the reversal of the burden of proof enunciated earlier, and it also lays out a more precise ground for refusal of an award.

In addition, the NY Convention also strikes a more balanced difference between the grounds of enforcement available to the party against whom the award is being invoked, and the grounds of enforcement which the courts are supposed to consider on their own cognizance. Under Article V (2) (a) and (b), the courts are meant to consider the issues of arbitrability and whether "recognition of the award would be contrary to

[31] PLD 2000 SC 841

public policy". The other grounds for refusal have to be raised by the parties themselves. This makes the picture a lot clearer for the courts.

The powers of the courts to facilitate arbitration have been expanded greatly by the NY Convention. In Article V of the Convention the word 'may' is used in relation to whether courts should refuse to enforce an award. This gives the courts discretion to recognize and enforce an award even if the grounds for refusal have been proven. This is given further impetus by S.6,7,8 of the Ordinance which place the NY Convention as being hierarchically superior over the implementing legislation and also mandate that recognition and enforcement of awards are only to be done in accordance with Article V of the NY Convention.

In addition, as mentioned earlier, the grounds for enforcing an arbitration agreement are more precisely laid out in the NY Convention and give the courts more well-defined situations in which to recognize an agreement to arbitrate.

On 14.02.2006, Justice Khilji Arif Hussain of the High Court of Sindh at Karachi issued an anti-injunction and compelled parties to proceed to arbitration at the Singapore International Arbitration under the New York Convention 1958. As such, from the said judgment, it seems that arbitration agreements will be enforced with the provisions of the New York Convention. This judgment will improve Pakistan's image in the international business community and attract greater investment into the country.

Recognition and enforcement of arbitration agreement and foreign arbitral awards in Pakistan

UNCITRAL prepared the convention on the recognition and enforcement of foreign arbitral awards[32], which provides for the recognition and enforcement of arbitral awards rendered in foreign countries. About a hundred States are party to the New York Convention at present. **Pakistan signed this Convention on 30 Dec, 1958 and has ratified the same by promulgating recognition and enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2006.** The New York

[32] New York 10 June, 1958 (New York Convention)

Convention is a more recent multilateral agreement on international arbitration and in a sense a successor to the Geneva Protocol and Convention.

Section 4 of the Ordinance puts forth that where there is an arbitration agreement between the parties and one party brings legal proceedings in the court of law against the other, the later may apply to that court for stay of the proceedings in respect of matter which falls under the purview of arbitration agreement, under notice to that party, and the court shall refer the parties to arbitration. But if it is established that the arbitration agreement is null and void or inoperative or incapable of being performed, the same would be refused. The party applying for enforcement of arbitral award shall furnish at the time of application to the court duly authenticated original award or certified copy thereof, original agreement or certified copy thereof and translated copies of agreement and award if not made in the official language of the country in which the award is relied upon.

Section 6 of the said Ordinance sets out that the court **shall recognize and enforce the award** in the same manner as a judgment or order of a court in Pakistan unless the court pursuant to Section -7 ibid refuses the application seeking recognition and enforcement of a foreign arbitral award.

The term " foreign arbitral award" means an arbitral award made in a Contracting State and such other State as may be notified by the Federal Government , in the official Gazette (S-2(d) ibid).

Section-7 ibid provides that the recognition and enforcement of a foreign arbitral awards shall not be refused except in accordance with Article V of the Convention.

Article V of the Convention provides that the recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the **competent authority** where the recognition and enforcement is sought, **proof that** the parties to the agreement referred to in article II were under some incapacity, under the law applicable to them, , or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made or that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case or the award deals

with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration, can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced or the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or , failing such agreement, was not in accordance with the law of the country where the arbitration took place or the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority if the country in which, or under the law of which that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country or the recognition or enforcement of the award would be contrary to the public policy of that country.

Judgment dated 14.2.2006 of Justice Khilji Arif Hussain of the High Court of Sindh at Karachi and Hubco case vs WAPDA are leading cases. In former case, the court recognized the arbitration agreement as valid and directed the parties for arbitration at Singapore. Whereas, in latter judgment, the court did not recognize the arbitration agreement being void and against the public policy.

It may be seen that it is mandatory for the Pakistani courts to recognize and enforce foreign award in Pakistan, if it fulfills the requirement of Article V of the Convention. Article V provides discretion to the Pakistani courts to refuse the recognition and enforcement of foreign awards, if it is made against the public policy, or where parties to the agreement were incompetent or agreement was void or where the award was issued without notice of arbitration or it contains decisions on matters beyond the scope of arbitration or composition of arbitral authorities was not made as per agreement or the award has not yet become binding upon the parties.

3.5 Pakistan Engineering Council (amendment) Ordinance, 2006

According to this law[33], the PEC shall regulate the engineering profession with the vision that the engineering profession shall function as a key driving force for achieving rapid and sustainable growth in all national, economic and social fields. The Council shall as its mission set and maintain realistic and internationally relevant standards of professional competence and ethics for engineers, technologist and technicians and licence engineers, technologists, technicians and engineering institutions to competently and professionally promote and uphold the standard. The Council managed by the distinguished engineers covering the entire spectrum of engineering disciplines, shall function as an apex body to encourage and promote the pursuit of excellence in engineering profession and to regulate the quality of engineering education and the practice of engineering and technology and thereby promote rapid growth in economic and social fields in Pakistan..

As is indicative from the above preamble, the PEC is a regulatory body which regulates engineering related matters in the country. It has prepared, inter alia, following documents for civil works as under[34]:

Standard Form of Bidding Documents (Civil Works) (to be used for construction contract over Rs.50 millions)

- Instructions to users of the documents guide step by step to fill in the gaps and make the document project specific.
- Invitation to Tenderers
- Instructions to Tenderers
- Used FIDIC Conditions of Contract (Part-I)
- PEC varied some FIDIC provisions mandatory for users (Part-IIA).
- Provisions kept for further changes by the user in Part-IIB.
- Escalation formula as approved by the GOP.
- Arbitration provisions under the Arbitration Act, 1940.
- Tendering Data to provide specific information. This will facilitate not making any changes in Instructions to Tenderers.

[33] Pakistan Engineering Council (amendment) Ordinance, 2006

[34] file://C:Documents and Settings\Administrator\My Documents\IMPLEMENTATION... 4.9.06 – Implementation of PEC standard bidding

- Tender and Appendices provide formats and instructions to fill data such as Bill of Quantities, proposed construction Schedule etc.
- Various forms such as Tender Security, Performance Guarantee etc.
- Formats for complete bidding documents with the index for Specifications, Technical provisions and drawings to remind the user need of components to complete the documents.

The above documents are based on FIDIC and World Bank formats tailored to make them country specific in line with relevant PEC construction and consultancy Bye-laws and instructions given by Government of Pakistan (GoP). These documents are applicable to all projects to be executed in Pakistan[35]. The implementation of the above documents in private and public sector organizations will ensure quality construction, transparent award and execution of contracts between the parties. This will provide major break through for our construction industry and consultancy services to grow and develop its capability to effectively undertake all types of development projects of the country in due course of time.

3.6 Code of Civil Procedure (amended) 1908

The Government of Pakistan introduced new amendment in the year 2002 by inserting Section-89-A and Order 10 rule 1-A in CPC to promote ADRs in the country before entering into formal litigation to avoid extra burden on the courts and to save the resources and time of the countrymen on litigation. The provisions of the said amendment are reproduced hereunder for perusal:

Section 89-A: Alternate Dispute resolution:

It sets out that the court may, where it considers necessary having regard to the facts and circumstances of the case, with the object of securing expeditious disposal of a case, in or in relation to a suit, adopt with the consent of the parties alternate dispute resolution method, including mediation and conciliation.

[35] file://C:Documents and Settings\Administrator\My Documents\IMPLEMENTATION... 4.9.06 – Implementation of PEC standard bidding

This provision of law empowers the court to adopt alternate dispute resolution method including mediation and conciliation for the quick disposal of the cases with the consent of the parties. However, no detailed method of mediation and conciliation or appointment of mediator or conciliator has been elaborated in the Code. The Government of India and Bangladash have also amended the above Code to promote ADRs in true sense.

Order X rule I-A, CPC dictates that the court may adopt any lawful procedure not inconsistent with the provisions of this Code to conduct preliminary proceedings and issue orders for expediting processing of the case, to issue, with the consent of the parties, commission to examine witness admit documents and take other steps for the purpose of trial and to adopt with the consent of the parties, any alternative method of dispute resolution including mediation, conciliation or any such other means.

In the above provision of the law, the court has been given more power to get the issue resolved through any alternative method like medication, conciliation and such other means. These means have not been defined adequately trough which the disputes could be resolved. Again, no detailed standing operating procedure has been provided to conduct mediation or conciliation. Further, no mediation or conciliation centers, as has been done by the ICC, have been established in the country so far to refer the matter to them by the courts. This requires due consideration by the high ups.

3.7 Other related laws of Pakistan

Section 195-C, Customs Act, Section-47-A, Sales Tax Act, Section 134-A, Income Tax Ord, 2001, Section-38 Federal excise Act, Cooperative Societies Act, 1925, Electricity Act, 1910, The Companies Act, 1913 , contain the provisions to settle the dispute through arbitration/ADRs.

Rule 48 of Public Procurement Rules, 2004 also provides dispute settlement mechanism in case of any controversies between the parties of the contract.

3.8 Standing Operating Procedure (SOP) of Corporate Sector for settlement.

Although there is no specific method given in Clause 67 of FIDIC GCC for amicable settlement of disputes yet the National Highway Authority (Pakistan), an Authority enacted under the Act of Parliament, 1991 (amended) has devised its own SOP[36] for settlement, which is given as under:

General:

The construction contracts of National Highway Authority are based on FIDIC-IV construction contract form in line with the Standard Form of Bidding Documents prepared by Pakistan Engineering Council. This is in accordance with Article-26 Chapter-III of NHA Code. NHA launched a massive construction program in the early years of its inception (1991 to 1993). Indus Highway Project, Lahore Islamabad Motorway project, Islamabad – Peshawar Motorway project and rehabilitation/dualization of N-5 were all commenced in that period. During the execution of these contracts, many factors lead to raising of large claims by the contractors. The fact that FIDIC forms of contract recognize and set down procedures for pursuing claims is a testament to the property of the concept and practice of paying additional costs via claims. However, most of the claims raised in NHA contracts turned into disputes on account of primarily the absence of any standard procedures in NHA to deal with such cases.

NHA as a matter of policy has undertaken to settle long outstanding claims of the contractors in the mode of amicable, post arbitration award, and out of court settlements. Two stages committees have been approved by the Chairman, NHA for the purpose. It is now intended to formulate appropriate SOP to ensure transparency in the procedure with the objective to achieve best possible results for NHA.

Settlement of the claims of services, suppliers and contractors can vary in nature depending upon various stages reached such as amicable settlement (settlement prior to arbitration as per notice served on the parties with regard to issues indicated) or (if the parties agree can be transformed into final settlement of disputes with respect to entire project), post arbitration settlement to similar effect as for amicable settlement except that the settlement agreement shall be submitted to the arbitrator and followed up until the rule of court is made. Out of court settlement which will also have a similar arrangement except that the settlement agreement shall be submitted to the court. All the forms of settlement agreements shall be "Settlement Agreements" with a variation only. "Final Settlement Agreement" which shall require discharge from the contractor. Following steps shall be taken as standard operating procedure (SOP) for reaching settlements:

Step-I

[36] SOP issued by National Highway Authority, Pakistan on Dec 23, 2002 for settlement of construction disputes, with the approval of NHA Executive Board.

Claims shall be received in the operation wing of NHA along with the Engineer's decision/point of view and with the review of supervisory consultant and project director or concerned official NHA from the office of the concerned General Manager. The concerned GM must endorse his recommendations on the principle and quantification of the claim as submitted by concerned project director. The claim and its allied correspondence shall be reviewed by the operation wing and if all essentials are required in order, the case may be referred to contract section.

Step-II

The contract section shall review the claims in the light of contract administration reports, which contains details of claims being submitted and action in hand. The contract section will review in depth the principles and the quantification of the claims and prepare working paper for the review of fist stage committee.

Step-III

The first stage committee (General Manager (Contract &Specification), General Manager (Ops), General Manager(Fin/Audit), regional General Manager or his representative, Director (Legal), Director (C&S), Dy. Director /Assistant Director (C&S) shall meet and deliberate on the claim/claims and submit its recommendations to the second stage committee.

Step-IV

The second stage committee comprising Member (Finance), Member (Planning), Member (Ops) and GM(C&S) shall review the whole case and submit its recommendations to the Chairman, NHA. The Chairman, NHA may like to approve the recommendations or may desire to get the whole case reviewed by any forum of his choice.

Step-V

Once approved by the Chairman, the payment shall be made as per prevailing procedure as amended from time to time. As for the claims in backlog, where the projects have been completed claims are in various stages such as pre or post arbitration, courts etc, the working paper shall be prepared by contract section through a sub-committee of the first stage committee comprising of the following:

1. Representative of contract section to be nominated by GM(C&S)

2. Representative of accounts wing to be nominated by GM(Fin)

3. Representative of operation wing to be nominated by GM(Ops)

The sub-committee nominations shall be on case to case basis. The sub-committee shall do re-appraisal of the claims including that of the principle of the claim as well as

the quantification and after obtaining approval of the Chairman of first stage committee may enter into **preliminary negotiation** with the party as well. No single person shall conduct any negotiation with any party unless authorized by Member Operations or the Chairman, NHA, in writing.

3.9 Award and Decree

An award is a decision or a judgment on a cause or matter in difference referred to an arbitrator who is, no doubt, the final judge of all questions both of law and of facts. It is distinguishable from the judgment in the sense that it is not necessary for the Arbitrator to discuss the facts or to give reasons. A judgment on other hand must give facts in order to bring to the surface the dispute between the parties, the points of issue between them and all the decisions on those points[37].

An award rendered by an arbitrator is lifeless and is not capable of being executed still such time the life is infused, into it by the court by passing a decree in accordance with the same[38] and a decree in terms of award could be passed only when court finds no cause to remit the award. Before making award rule of the court, it would be obligatory to examine basic and inherent infirmities of award apparent on record and after satisfying itself about its legality and propriety to pass final order[39].

3.10. **A study of Pakistani case law** - Bayindir vs Islamic Republic of Pakistan (Construction of Islamabad-Peshawar Motorway Project M-1, ICSID Case[40].

In 1993, National Highway Authority, hereinafter referred to as NHA, a public Corporation of Pakistan established under the Act of Parliament, 1991) and Bayindir (Construction Co. of the Republic of Turkey, incorporated under the laws of the Republic of Turkey , having principal office at Turkey (the claimant) entered into FIDIC (1987 edition) based agreement for the construction of Motorway M-1 project[41]. **Dispute arose in connection with the said contract which NHA and Bayindir resolved in 1997.** As part of their settlement, on 29.3.1997, the parties executed a Memorandum of Agreement

[37] PLD 1980 Lah 422.
[38] PLD 1994 Lah 525; PLJ 1994 Lah, 446
[39] PLD 1989 Quetta 1; PLJ 1989 Quetta 8 ; NLR 1990 CLJ 70.
[40] ICSID Case No.ARB/03/29, Bayindir vs Islamic Republic of Pakistan (Decision on jurisdiction).
[41] The 1993 Contract.

with the objective of reviving the Contract Agreement dated 18.3.1993 (the 1993 contract). Under Clause 8 of this Memorandum of Agreement, the parties agreed to apply to the arbitration tribunal in appropriate manner to seek the decision of the tribunal on only the issue of the quantum of expenses incurred by Bayindir as specified in Bayindir's claim for expenses only.

On 3.7.1997, the parties entered into a new contract, the Agreement for the Revival of Contract Agreement for the construction of Motorway M-1(the 1997 contract). The 1997 contract incorporated the 1993 contract in its entirety with some overriding conditions agreed by the parties in the memorandum of agreement signed on 29.3.1997. The contract was to be governed by the laws of Pakistan. It was a term of the contract that NHA would pay to Bayindir 30% of the contract price as an advance payment (the Mobilization Advance). Thereafter, NHA paid to Bayindir an amount of USD 159,080,845 as Mobilization Advance (namely two separate amounts of USD 96,645,563.50 and PKR 2,523,009,751.70). It was a further term of the contract that Bayindir would provide a bank guarantee equivalent to the amount of the Mobilization Advance. On 9.1.1998, a consortium of Turkish banks issued two guarantees on behalf of Bayindir to secure the Mobilization Advance in accordance with the contract. The guarantees were payable to NHA on his first demand without any right of objection whatsoever on the part of banks and without his first claiming to the contractor. The amounts of the Mobilization Advance Guarantees were to decrease, as interim payments were made for work in progress. The performance of the contract was to be supervised by an Engineer. The contracts provided multi-tier mechanism for the settlement of disputes under Clause 67 of the contract, which may be sketched as under:

- Any matter in dispute shall, in the first place, be referred in writing to the Engineer (Clause 67.1(1))

- Either of the parties dissatisfied with any decision of the Engineer or engineer fails to give notice of his decision on or before eighty fourth day after the day on which he received the reference, may give notice to the other party of his intention to commence arbitration(clause 67.1(3).

- The parties shall attempt to settle such dispute amicably and unless the parties otherwise agree, arbitration cannot be commenced on or after the

fifty sixth day after the day on which notice of intention to commence arbitration was given.

- The dispute shall then be finally settled under the rules and provisions of the Arbitration Act, 1940 as amended or any statutory modification or reenactment thereof for the time being in force.

On 3.6.1998, the Engineer issued the order to proceed to the construction with original completion dates foreseen on 31.7.2000. Between Sept, 1999 and 20 April, 2001, Bayindir submitted several claims regarding payment and four claims for extension of time invoking different omissions on the part of Pakistan (late handing over of the land by NHA). The fist two extension of time claims were settled by agreement among the parties during a meeting on 18.2.2000. This agreement led to the execution of Addendum No.9 of 17.4.2000 to the contract, which set out among other things, that the revised contract completion date shall be 31.12.2002 and that NHA will hand over the remaining land as expeditiously as possible, but not later than 4 months from the signing of Addendum No.9. The detailed schedule attached to Addendum No.9 provided that two priority sections had to be completed before 23 March, 2003.

Bayindir, asserting that NHA failed to give possession of site as per said addendum, submitted its third extension of time claim on 15.1.2001 for completion of the two priority sections by October 2001. On 3.4.2001, the Engineer's representative granted the contractor a limited extension of time of twenty seven and ten days respectively. On 6.4.2001, Bayindir disputed this extension of time and referred the matter to the Engineer for his decision under Clause 67.1 of the contract reiterating its entitlement to an extension under its 3rd claim of time extension. On 19.4.2001, NHA informed the contractor that liquidated damages would be imposed for late completion of the above two priority sections w.e.f 20.4.2001 that is the end of the limited extension granted on 3.4.2001. Bayindir on the same day wrote to NHA to refer the decision to impose liquidated damages to the Engineer pursuant to Clause 67.1, in particular on the ground that EOT-03 was still pending with the Engineer for decision. On 20.4.2001, the contractor wrote to the NHA to inform that it had been unable to complete the priority sections due to reasons beyond its control and requested that procedure of clause 67.1 be allowed to follow to determine its entitlement for time extension. On 23.4.2001, before

the engineer issued its determination, NHA served a Notice of Termination of Contract upon the contractor requiring the latter to hand over possession of the site within 14-days. Thereafter the site was taken over and the contractor's personnel evacuated. On 23.12.2002, NHA concluded a contract for the completion of balance works of M-1 project with local joint venture of Pakistani contractors.

From January to July 2001, the contractor served several notices of intention to commence arbitration pursuant to clause 67.1 of the contract. The matters were not settled but the arbitration was not pursued. (with specific regard to a claim introduced on 7.9.01 concerning escalation payment, the contractor filed an application under section 20 of the Arbitration Act, 1940 for the appointment of an arbitrator on 19.4.01. the application was dismissed as premature (failing notice under clause 67.4 of the contract) on 24.3.2003. An appeal against this decision was dismissed as withdrawn. On 30.4.2001, the contractor filed a constitutional challenge against the notice of termination by the NHA before the Lahore High Court, which was dismissed on 7.5.2001, on the ground that the contract contained an arbitration clause. Between 2001 and 2003, NHA raised a series of claims against the Bayindir and served a notice of arbitration. NHA sought concurrence of Bayindir on 31.3.03 in the appointment of a sole arbitrator. ON 10.4.03, Bayindir informed NHA that it had already submitted the matter to ICSID jurisdiction for arbitration (pursuant to ICSID Convention & Bilateral Investment Treatry, 1997 between Pakistan and Turkey) and requested to await the decision thereof.

NHA applied for the appointment of an arbitrator in Pakistan on 5.1.2004 under Section 20 of the Arbitration Act, 1940 and the court of civil judge, Islamabad appointed Mr. Justice (Retd) Afzal Lone as an arbitrator, who was subsequently replaced with Mr. Justice (Retd) Zahid.

In the meantime, on 24.4.2001, NHA called for payment under the Mobilization Advance Guarnatees of approximately USD 100,000,000. Bayindir then obtained an order from the Turkish courts enjoining the banks from paying. This injunction was lifted on 12.9.2003. Execution proceedings against the Banks, to which Bayindir is not a party, are currently stayed following ICSID Procedural Order No.1.

NHA challenged the arbitration jurisdiction of the ICSID on the grounds that Bayindir did not make an investment within Article 1(2) of the BIT, 1997 or Article 25 of

the ICSID Convention. The basis of the contractor's claim is alleged breach of contract. The contract is governed by the law of Pakistan and pursuant to that, NHA is a separate legal person, distinct from Pakistan. The tribunal has no jurisdiction in respect of alleged breaches of the contract as such breaches are not attributable to Pakistan. Further, the contract claims are inadmissible in the light of the agreement of the employer and the contractor to refer their disputes to arbitration, and the proceedings should be stayed pending resolution of the contractual dispute by arbitration. Furthermore, to the extent that Bayindir's claim are based on an alleged breach of the BIT, i.e to the extent that they are Treaty Claims. They are entirely artificial and advanced solely for purposes of expediency. Since Bayindir's Treaty Claims are dependent upon the claims for breach of the contract that have to be settled in another forum, the tribunal can not exercise jurisdiction over the treaty claims, at least until that other forum has reached a conclusion with regard to the alleged breach of the contract. Insofar as Bayindir's Treaty Claims are distinct from the alleged breach of the contract, these allegations have no colourable basis and are insufficient for this Tribunal to assert jurisdiction. Besides, to exercise jurisdiction, would raise a potential conflict between two very important treaties, the New York Convention, 1958 and Washington Convention, 1965. Insofar as there are alleged breaches of the Treaty distinct from the alleged breaches of the contract. Bayindir is barred from raising them as it has previously characterized these breaches as contractual. The ICSID proceedings should be stayed pending the resolution of the contractual dispute by arbitration. Bayinder had failed to comply with the formal requirements of Article VII of the above BIT[42].

The ICSID tribunal, in Bayindir case[43], after hearing the parties to the contract in detail and after full deliberation took the jurisdiction of arbitration and decided in the following terms:

a. The Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration.

b. The Tribunal denies respondent's application to suspend these proceedings.

[42] Article VII of the BIT between Pakistan and Turkey- 1995

[43] ICSID Case No.ARB/03/29 (Bayindir vs Islamic Republic of Pakistan, in Motorway M-1 construction contract)

c. The Tribunal will, accordingly, make the necessary order for the continuation of the proceedings on the merits.

d. The decision on costs is deferred to the second phase of the arbitration on the merit.

3.11 Shortcoming

There is no direct legislation in the Constitution or any other laws for the time being enforce pertaining to the settlement of dispute of civil works. However, certain provisions for general arbitration exist in the Constitution of Pakistan, 1973. Arbitration Act, 1940 deals with arbitration matters, however has become outdated and requires to be redrafted in the light of UNCITRAL arbitration rules, ICC arbitration rules, and ICSID arbitration rules and implemented to meet the challenges of the time. It is appreciable that necessary legislation for the promotion of alternate dispute resolution (ADRs) mechanism has recently been introduced in the country in several law statutes, but still detailed method of mediation and conciliation is yet to be drafted and implemented.

In New York Convention, the burden of proof lies to the party against whom the recognition and enforcement of award has been sought that award had not become final in the country where it was made, which is against the norms of justice as it is the duty of the plaintiff to establish his case before the court of law. In both construction projects i.e Motorway M-1 and Ghazi Barotha dam, the covenants of Clause 67 were not due honored as committed. In both cases, International arbitration has been sought from ICSID instead of domestic arbitration under Arbitration Act, 1940 as agreed upon by the parties at the time of contract.

3.12 Conclusion:

In the end it is concluded that there is no specific dispute resolution provision available in the national legislation particularly pertaining to civil works. Arbitration Act, 1940 deals with general domestic arbitration only whereas Ordinance 2005 deals for the recognition and enforcement of foreign arbitral agreement and awards in Pakistan. Ministry of Law discourages arbitration with local contractors but allows the same with foreign contractors.

Chapter 4

FINDINGS & RECOMMENDATIONS

4.1 Findings

After detailed study and thorough discussion, I have following findings:

1. DAB or DRB is provided as a mode of amicable settlement. The formation of the DRB is to guide the parties to a course of action which is in the best interest of the project as well as parties and to save them from taking the matter to arbitration. Though after recommendations of DRB parties are free to resort to Arbitration but mostly they do not proceed to arbitration because of costs.

2. According to Clause 2.6 (FIDIC-1987), the Engineer is to act impartially while acting under the contract, but this provision does not appear in Clause 67 (FIDIC-1987. Moreover, the form of the notice of intention to commence arbitration is also not specified.

3. An extensive dispute procedure and inevitable delay is involved in ICC and ICSID arbitration. It should usually ensure that the arbitration will take place after the works are completed; however, if the award is published during the currency of the works, that award will affect the obligations of the parties. Thus, if an extension of time has been granted by the arbitrator, the Contractor must be entitled to work to that time regardless of any notice under clause 46.1 (Rate of progress). If the arbitrator makes a money award, that award should be included in the following interim certificate under clause 60.2 (Monthly payments), in the absence of a more specific direction by the arbitrator.

4. There is no such practice of mediation or conciliation in Pakistan as is being done in foreign countries. In many developed countries mediation and conciliation centers are functioning effectively and efficiently under certain mediation or conciliation rules.

5. Generally, it is upto the parties of the contract to agree upon the law and place of arbitration while entering into contract. However, according to the Government of Pakistan's policy, circulated vide Ministry of Law and Parliamentary affairs OM dated 29.3.1975, the government departments were directed that provision for resolution of disputes through arbitration should not be reintroduced in agreements with domestic contractors, however, the government feels that while entering into agreements with foreign contractors a flexible approach should be adopted and each case considered on its merit. Where arbitration agreement becomes unavoidable all out effort should be ensured to secure that it provides that the dispute referred for adjudication to two arbitrators, one to be nominated by each part, who before entering upon the reference, appoint an umpire by mutual agreement and if they do not agree, the Chief Justice of Pakistan should appoint the umpire and that the arbitration proceedings are held in Pakistan and conducted under Pakistani law while entering into agreements with foreign as a policy matter.

6. The Scheme of the First Schedule of the Arbitration Act, 1940, (Implied Conditions of Arbitration Agreements) is that the reference shall be to a sole arbitrator unless otherwise expressly provided. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire with in one month. The above Government policy as stated in para supra is not coinciding with the provisions of the Act, as the same also provides the concept of sole arbitrator, if not agreed upon otherwise.

7. FIDIC has also introduced new concept of DAB (edition 1999) DB, DRB (2005) and DRE to prevent the parties from emerging disputes by evading the active role of the Engineer as an adjudicator. This process undertakes to resolve rising disputes at site and is functioning successfully. Mr.C.F.(Frank) Gee, P.E, retired Chief Engineer of operations of the Virginia Department of Transportation (VDOT) felt the strongest asset of a DRB is that with its presence the parties settle their issues and an unbiased Board is available as a resource to assist. He concluded that it should be used on all projects (DRBF-Forum, Volum-7 issue-4,

Nov, 2003). He further states that they utilized DRB on Phase 2 and 3 of Springfield Interchange project and $ 100 million phase was completed early enough for the contractor to earn a $ 10 million bonus and the contractor finished without any claims. The positive aspects of DRBs are that they resulted in the settlement of disputes between the parties within the contract time and there was excellent dialog in the quarterly business meetings. Mr. Allen Sylvester, senior vice president for the Clark Construction Group, Inc, observed that the mere presence of a DRB results in the resolution of disputes. It also eliminates posturing. No body wants to bring an issue to a Board of reputable people and look foolish. ICE (Institution of Civil Engineers, UK) has been a firm supporter of the DRBF and has promoted DRBs in the UK. Majority is of the view that formation of DRBs at prime contracts should be formed at the beginning whereas some are of the opinion that when a dispute arises. However, the process of DAB, DB or DRB also contains certain procedural flaws. For example, again no time frame for referring the matter to Boards for decision has been laid down. Likewise, no time frame has been given for DRB to finalize the matter, which frustrates the very purpose of the Board to settle the dispute in time. In Pakistan, Ghazi Bharotha dam has been completed and notice has been served but DRB's proceedings have not taken place as yet, which also frustrates the purpose of DRB's appointment. Further late constitution of DRB members also frustrates the purpose of timely completion of the project.

8. Study reveals that Western investors do not have trust in legal and judicial system of Pakistan. They in the contract provide for International Arbitration through foreign institutions like ICC or ICSID etc. International Arbitration is very expensive from the developing countries perspective.

9. International Arbitration is very protracted and costly method of ADRs to resolve the disputes. Huge amount of foreign reserves drains out on heavy charges of foreign arbitrators, lawyers, experts and institutions with other allied expenditures like cost of arbitration, as decided by the tribunal, which is not affordable for the developing countries. Study reveals that during ICSID hearing on jurisdiction in

Bayindir case from 25.7.2005 to 26.7.05, 19 persons (6 x from Bayindir, Turkey and 13 x from NHA Pakistan, including lawyers, consultants and government officials) from both sides appeared to present and defend the case at Paris, hence expenditure on their remunerations, boarding and lodging etc comes to a formidable.

10. According to Article 62 and 63 of ICSID Convention, arbitration proceedings are required to be held at the ICSID head office except in certain circumstances. Even under those circumstances, arbitration proceedings are most likely to be conducted in some other western capital. This clearly results in a location disadvantage for developing countries which generally fell pressured to hire expensive western lawyers. According to an Article by Dr. Tariq Hassan, ex-Advisor to Finance Minister, Pakistan titled International Arbitration, a developing country perspective presented at the ICC Regional Foreign Direct Investment Conference, held in Karachi on 17-18 Feb, 2002, International experience with the ICSID dispute settlement mechanisms is rather limited. So far following four cases have been filed against Pakistan in ICSID:

(i) Occidental of Pakistan, Inc v Islamic Republic of Pakistan (Case No.ARB/87/4), which involved a Petroleum Concession. The case was registered with ICSID on 7.11.1987. The Arbitration Tribunal, constituted on 6 May, 1988. The proceeding was discontinued at the request of the Claimant pursuant to a settlement agreed by the parties.

(ii) SGS, SA vs Islamic Republic of Pakistan (Case No.ARB/01/13) which involved a Service agreement. The case, which was registered with ICSID on 21.11.2001, was still pending in 2002. The Arbitration tribunal had not yet been constituted.

(iii) Impregilo S.p.A vs Islamic Republic of Pakistan (Case No.ARB/02/2) which involved a construction agreement. The case was registered with ICSID on 12.2.02.

(iv) Bayinder vs Islamic Republic of Pakistan (Case No.ARB/03/29), which involved construction agreement of Motorway M-1. The tribunal has decided the question of jurisdiction vide decision dated 14.11.2005. Further proceedings are in progress.

11. Further, the quantum of work with ICSID has increased manifold. Several cases which were registered with the ICSID are still pending since long. The registration of an arbitration request, activates the establishment of the arbitration tribunal, the initiation of arbitral proceedings, and of course the payment of costs of the proceedings (Art:59-61 ICSID Convention). Resultantly, the usually cash-strapped developing countries and nationals thereof are at a disadvantage from the outset. According to Dr. Tariq Hassan, it is a fundamental deficiency which encourages unnecessary proceedings, which can be, and are probably, used as a pressure tactic by rich investors against poor developing countries. Furthermore, because of the affinity of ICSID to the World Bank, the ICSID arbitration process also gives the investors an unfair political advantage of peddling influence through World Bank management.

12. Likewise, ICC (Paris) administers the vast majority of international commercial arbitrations, not only in Paris but in other countries like London, UK, and Geneva, Switzerland. These are very popular seats for ICC arbitration. Its arbitrations also involve complex cases and can be as lengthy and expensive as conventional court proceedings. In practice, a small group of professional arbitrators tends to handle the bulk of cases. Despite foreign businessmen and investors usually prefer arbitration as an alternate method of settlement instead of formal litigation and technicalities thereof.

13. The term' investment' has not clearly been defined in ICSID Convention to take jurisdiction by the Center. Reliance is generally made on the definitions provided in BITs between the parties. In Bayinder Case, definition of the term "investment" was taken by the ICSID from BIT between Pakistan and Turkey.

14. Arbitration is a fundamental part of national norms as well religious norms of Pakistan and is an effective tool for disputes resolution. It is an ad hoc procedure which is recognized and enforced in Pakistan. There is no any national arbitral institution in Pakistan like some other countries. However, the trade and industry sectors of Pakistan have established arbitral mechanism for a limited purposes.

For instance, The Federation of Pakistani Chamber of Commerce and Industry (FPCCI) has set up arbitration machinery under section 12 of Trade Organization Ordinance, 1961 to arbitrate in matter of disputes arising between FPCCI and its members. The Government of Pakistan, as stated earlier, has directed to its departments that as arbitration proceedings normally result in heavy losses to the Government, therefore, government departments shall not go in for arbitration in future. It is clear from the above, that a developing country like Pakistan can not even afford domestic arbitration in small contracts.

15. Arbitration Act, 1940 deals with domestic arbitration where as recognition and enforcement of foreign arbitration agreement and arbitral award Ordinance, 2005 deals with foreign arbitration. The said Ordinance has been promulgated pursuant to New York Convention, 1958 which repeals the previous Act of Arbitration (Protocol and Convention), 1937. The said Convention also repeals Geneva Protocol on Arbitration Clauses, 1923 and Convention of 1927.

16. International Chamber of Commerce (ICC), has started Arbitration through Video Conferencing, which shall save precious time and resources of the parties. At ICSID, the arbitration proceedings are generally tap-recorded or recorded through camera.

17. According to time lines of FIDIC, 1999, Clause 20, any party to the dispute may refer the dispute to DAB, comprising one or three qualified member(s), jointly appointed and equally paid by the parties for adjudication, which will give its reasoned decision, within 48 days or on such date as agreed upon by the parties, which shall be binding upon the parties unless revised in settlement or award. If any party is dissatisfied with the decision of DAB, he may serve notice of dissatisfaction to other party within 28-days. Thereafter upto 56-days, process of amicable settlement may continue to reach proper negotiation. Failing, the matter is referred to arbitration. In these lines, it is again silence as to when the dispute will be referred to DAB and as to when the matter is to be referred to arbitration.

This vagueness of the limitation may be misused by the parties in their own favour.

18. World Bank's procedure of dispute settlement also carries the same ambiguity. It does not indicate as to when the dispute is to be referred to the DB or DRB by the party and when the matter is to be referred to arbitration in case of failure to comply with DB decision. According to Edition 2000, recommendations of board are binding, if within 14 days after recommendation, no notice to commence arbitration is served. There is no time limit for actual commencement of arbitration. In major projects, where estimated cost of project becomes US$ 50 million or more, three board members are appointed as adjudicators. And for small contract less than US$ 50 millions, a single dispute expert. For smaller US$ 10 millions, and contains similar dispute review method.

19. The approach of the parties towards the role of DRB members does not seem encouraging. They treat them as arbitrators or judges rather friends and facilitators. DRB members are helping guys rather judges. They are not aloof rather they bring the parties together to resolve the disputes. This is very purpose of DRB constitution.

20. Least interest is taken to adopt capacity building measures to coach our local lawyers, arbitrators, judges and government dealing officers to deal with high profile cases, as is being done in foreign countries to enhance their exposure. Foreign lawyers, arbitrators and judges are well trained with significant exposure. In this regard seminars, workshops and short term courses are carried out by the foreign institutes for the building of capabilities of lawyers and judges etc.

21. The developing countries while taking loan from foreign financial institutions accept all their terms and conditions including foreign arbitration with ICC or ICSID etc, which is quite expensive for developing countries perspective. The said institutions compel the borrower States to conduct arbitration at ICSID or ICC and to engage foreign arbitrators. They do not have faith in our judiciary,

arbitrators and judicial system. Moreover, seat of arbitration at international level and engaging foreign lawyers and experts to defend the case may drain out foreign reserves of the parties.

22. Arbitration Act, 1940 has become outdated and requires to be redrafted in the light of UNCITRAL, ICC and ICSID arbitration rules and implemented to meet the present emerging challenges in the construction sector of Pakistan. The Government of India has revised its Arbitration Act, 1940 and has promulgated Arbitration and Conciliation Act, 1996 in the country. It is however, appreciable that necessary legislation for the promotion of alternate dispute resolution (ADRs) mechanism has recently been introduced in the country in several legal statutes, but still detailed method of mediation and conciliation is yet to be provided through appropriate legislation and implemented in the country.

23. It has been observed that in both mega construction projects i.e Motorway M-1 and Ghazi Barotha dam, the covenants of dispute clause were not duly followed and complied with. Resultantly in motorway case International arbitration has been sought from ICSID instead of domestic arbitration under Arbitration Act, 1940 as initially agreed upon by the parties at the time of contract.

24. The Government generally enters into Bilateral Investment Treaties with foreign countries for reciprocal promotion and protection of investment and national treatment to their investors, but this aspect is ignored while drafting agreements. BIT claims of the States should not prevail over the contractual claims.

25. As per National Highway Authority's progress report for the year 2003-05, issued by Director (Legal), 12 x cases of arbitration including 8 cases of foreign companies working on NHA projects and 4 national companies having total financial implication of Rs.35,552/- millions, were registered but only 5 x cases have been decided so far, which indicates performance of local arbitration.

26. As pointed out supra, according to Government decision, arbitration with local contractors should be avoided to prevent government from heavy losses.

However, arbitration with foreign contractors is allowed under Pakistani law in the country. Pakistan Engineering Council has formulated a policy, as stated in preceding para, that project having cost of Rs.50 millions and above, will be FIDIC based agreement. FIDIC has provided an arbitration clause. Hence, local contractor having project cost more than 50 millions will be entitled for arbitration, disregard to above government policy. This will also result in discrimination with local contractors against foreign contractors and violation of fundamental right to be treated equal. CPC also contains provisions of ADRs (Section 89, Order 10 rule-1A), which also includes arbitration, hence courts may allow arbitration to the local contractors.

27. Perusal of study reveals that amicable settlement's technique between the parties to settle their disputes is more inspiring, inexpensive, swift and involves less procedural and legal technicalities as is done in arbitration. In NHA, during 2000 to 2006, 6 x cases costing to Rs 52 billions were settled amicably whereas 2 x cases were settled at 30% of the claimed cost as informed by Consultant Disputes, NHA during my interview with him in December, 2006. General study reveals that the parties to the dispute prefer to settle their disputes amicably without entering into the complexity of arbitration and subsequently before the court. Moreover, arbitration involves heavy costs for the engagement of arbitrators and lawyers from both parties perspective and therefore, is time taking technique. It may expand upto several years to finalize the award due to procedural requirements. Further, awards of the arbitrators are to be filed in the court of law to make it rule of the court. This process again requires further time for the review of the court. The court again calls objections from both parties where lawyers are again to be engaged by both parties. After hearing objections from both parties, if any, the court may either issue its judgment on the basis of award which will be followed by the decree or remit the award to arbitrators for review or set aside the award on grounds of technicalities. All in all, this time consuming method frustrates the very purpose of the arbitration to settle the dispute by the parties through ADRs without involving conventional litigation.

28. According to NHA Progress Report 2003-2005, out of total amount of Rs.9,419,342/- an amount of Rs.6,848,000/- has been spent on arbitration matters on account of fee of arbitrators and counsels, which is evident that arbitration has become costly method of ADR. However, according to said report, 26 cases were referred to arbitration out of which 18 were decided and 8 were still pending. Out of said 18 cases, 12 were decided in NHA's favor whereas 6 were decided against NHA.

29. DRB system is more efficient and impartial as compare to the mechanism given in clause 67.

4.2 Recommendations

Having gone through the findings, following recommendations are made:-

1. FIDIC, Clause 67 (4th edition) needs to be re-evaluated and reconciled in line with FIDIC Editions 1999, 2000 and 2005 to enhance the role of Engineer as 'more impartial' to avoid formal costly arbitrations. The term 'dispute' as given in the clause should be defined clearly and incorporated in GCC Part-I. The role of the Engineer as an adjudicator has been debarred in FIDIC 1999, 2000 and 2005 and replaced with DB, DAB and DRB which is more impartial system and should be implemented accordingly.

2. FIDIC has also introduced new concept of impartial DAB (edition 1999) DB, DRB (2005) and DRE to prevent the emerging disputes and protracted arbitration. This process undertakes to resolve rising disputes at site and functioning successfully. In the presence of FIDIC edition 1999 and 2000, implementation of FIDIC 1987 is not tenable, which should be reviewed. Although DAB or DRB system seems to be expensive, being additional forum in the dispute mechanism clause however, is close to the spirit of natural justice, being impartial. It may be

noted that DAB or DRB is appointed and paid equally by both the parties; therefore, its role seems impartial.

3. The scheme of clause 67 seems to be very protracted with a period up to 30 weeks from the date of filing reference before the Engineer until arbitration is commenced. However, FIDIC has reduced the above period in its aforementioned new editions, which appears reasonable for both parties and should be implemented accordingly. The FIDIC, being engineering based Council, may establish its own Arbitration Center in line with ICC and ICSID, having its own rules exclusively for engineering disputes.

4. Time schedule for filling references before dispute resolution boards and commencement of arbitration, in case of dispute, should clearly be specified in the clause to avoid unnecessary delay.

5. As per policy of Government of Pakistan, Arbitration with foreign companies must be conducted in Pakistan under Pakistani law. This provision should be made integral part of the contract part-II while floating international tenders.

6. Arbitration Act, 1940 has become outdated and requires to be redrafted in the light of UNCITRAL ICC and ICSID arbitration rules to meet the emerging challenges in the construction sector of Pakistan.

7. The Government of Pakistan should draft a viable Standing Operating Procedure (SOP) in line with NHA SOP or make rules for conducting amicable settlement, particularly in construction sector where huge amount is involved, to avoid malpractices and illegalities by government officials. Moreover, since the Government has already introduced ADRs culture through several legal statutes as mentioned in Chapter-3, therefore, it should explore and introduce possible ADR techniques in the country besides establishing mediation or conciliation center in Pakistan in line with ICC and ICSID.

8. The image of Pakistani judiciary and judicial system should be promoted in the eyes of international community so that foreign investors may come in the country for investment having full faith on judicial system. In this connection, the judiciary should be made independent as fourth vibrant organ of the state as dictated by the supreme law of the land. Hence the state law givers should realize their constitutional obligation and make the judiciary independent so as to enhance its image before other nations.

9. Capacity building measures are very important to be taken at government level to enhance the abilities and exposure of judges, arbitrators, lawyers and government officials involved in high profile assignments of national interest. In this regard, the culture of seminars, workshops and training at national and international level should be promoted in the country as well as abroad to prevent them to wholly depend on foreign judges, arbitrators and lawyers.

10. The term "Investment" has not been defined by ICSID Convention for exercising jurisdiction by the Center, due to which extra burden of irrelevant cases is at increase at ICSID. The Center should define the said term and incorporate in the Convention for enforcement.

11. International Arbitration is very protracted and costly method of ADRs to resolve the disputes with developing countries perspective. Huge amount of foreign reserves drains out on heavy charges of foreign arbitrators, lawyers, experts and institutions with other allied expenditure like cost of arbitration, as decided by the tribunal, which is not affordable for the developing countries. Such arbitration should be conducted by the institutions at their regional level for their ease.

13. It has been observed that in both mega construction projects i.e Motorway M-1 and Ghazi Barotha Dam, the covenants of Clause 67 were not duly honored by the parties as committed. In Motorway case, International arbitration has been sought from ICSID instead of domestic arbitration under Arbitration Act, 1940 as initially agreed upon by the parties at the time of contract. Legally and ethically

Bibliography

1. Articles by Dr. Tariq Hassan- International Arbitration in Pakistan- A developing country perspective- Journal of International Arbitration, 2002.
2. "A DISPATCH FROM THE FRONT" Dispute Boards at 2002- Gordon L Jaynes
3. Arbitration (Protocol and Convention) Act, 1937
4. Arbitration Act, 1940.
5. Bayindir vs NHA (Construction of Motorway M-1) ICSID Case No.ARB/03/29
6. Constitution of Islamic Republic of Pakistan, 1973
7. Code of Civil Procedure, 1908 (amended)
8. Contract Act, 1876.
9. Compendium on Arbitration (cases and material) prepared by Hafiz Aziz ur Rehman, Assistant Professor (Law), Faculty of Sharia & Law, IIU, Islamabad
10. FIDIC 4th – A Practical Legal Guide by E.C.Corbett
11. FIDIC- Guide to the use of FIDIC Conditions of Contract for works of civil engineering construction- fourth edition
12. FIDIC-1999 Conditions of Contract for Construction of building and engineering works designed by the employer
13. FIDIC Contracts Guide, issued by FIDIC, First Edition 2000, ISBN 2-88432-022-9
14. FIDIC's 1999 Editions of Conditions of Contract for "Plant and Design-Build" and "EPC Turnkey Contract" – Is the DAB still a star? - Gordon L Jaynes.
15. file:///D/Articles/IIUI/Arbitration/arbitration_law_in_pakistan.ht- Arbitration Law in Pakistan, 25.3.03
16. http://www.kluwerarbitration.com/arbitration/arb/home/ipn/print....dated 3.4.04
17. International Construction Law Review, 2002.
18. International Arbitration in Pakistan- A Janusian perspective- by Gordon Jaynes (Journal of International Arbitration- Vol 21.
19. ICSID Review- Foreign Investment Law Journal.
20. Multilateral Development Bank Harmonized Edition, May 2005 issued by FIDIC (ISBN 2-88432-044-x).
21. Pakistan Recognition and enforcement (Arbitration agreements and Foreign Arbitral Award) Ordinance, 2006 – Commentary by Jamil & Jamil (website: www.jamilandjamil.com).
22. Pakistan Engineering Council Act, 1975.
23. Progress report of Legal Bureau NHA, for the year 2003-2005 issued by Director (Legal), NHA.
24. Standing Operating Procedure (SOP) issued by NHA for settlement of dispute.

the parties should perform their contractual commitments and obligations. This aspect should be kept in mind while drafting BITs or Contracts by the government

14. International arbitration institutions and courts should adopt modern techniques and start video conferencing in line with ICC so that parties may be saved from extra expenses.

15. Arbitration at regional level should be promoted by the developing countries so that their judges, arbitrators and lawyers may be groomed.

16. Approach of the parties towards the role of DRB, DAB or DRE members does not seem encouraging. They treat them as arbitrators or judges rather friends and facilitators. They are not aloof rather they bring the parties together to resolve the dispute which is much purpose of DRB constitution. The parties should change their approach positively and treat them as facilitators.

17. The foreign contractors coming into Pakistan should be asked to open "letter of credit" in banks functioning in Pakistan. The government should not accept bank guarantees of foreign banks without having counter guarantee of bank(s) working in Pakistan to avoid legal implications and court's jurisdiction at any stage. Lesson should be learnt from Bayinder case.

18. Making rule of the court to consenting award should be avoided to save time and resources of the parties.

19. The government agencies as employers should develop viable system of documentations and secrecy thereof to defend their cases properly.