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Arbitration in International Construction Projects and Participation of Civil Engineer as Arbitrator

Taisei Corp. Member ○ Seijiro Naito
Taisei Corp. Fellow Shunji Kusayanagi Ph.D.

1. Dispute Resolution in International Construction Projects

In international construction projects, the most widely used contract form is FIDIC 4th edition. In a FIDIC contract, if any claim arises between the Employer and the Contractor with regard to the Contractor's request for reimbursement of additional costs and/or granting extension of time, the Engineer is in the first instance responsible for evaluating such claim fairly and reasonably in accordance with the contract. If the Contractor is not satisfied with the Engineer's decision, the claim becomes a dispute. The resolution of such dispute is made in accordance with Clause 67 of FIDIC. The procedure specified in Clause 67 is shown in Fig.1. FIDIC Clause 67 specifies the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) for arbitration. Other widely used arbitration rules include UNCITRAL Rules and JCAA Rules.

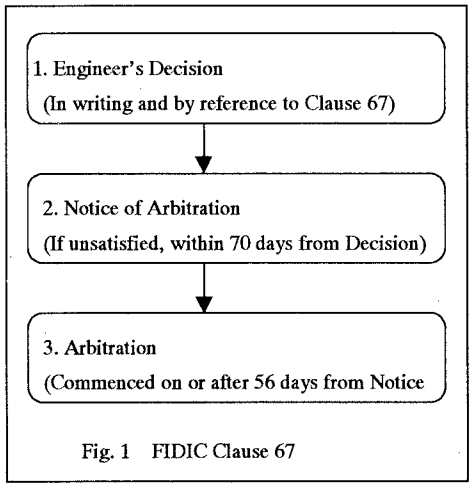

Fig. 1 FIDIC Clause 67

2. What is Arbitration

Arbitration is a private system to resolve dispute by judgement of the third party, who is called an arbitrator, as opposed to court which is the system of government. However, if an award of arbitration is made, such award is authorized by the international treaty which was reached in Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY 1958), provided that the relevant country ratified the treaty. In this sense the arbitration award is stronger than a court decision whose effect is confined within one country.

Arbitration is intended for a speedy resolution of dispute and conducted under the direction of one or three arbitrators at a place chosen by the relevant parties. Once an award is made, no appeal is allowed. It is possible to take a reasonable method of resolution flexibly case by case in accordance with the applicable Arbitration Rules. The cost of arbitration have to be borne by the claimant and the respondent, which includes administration expenses of the arbitration court, arbitrators' fee and expenses, cost of space for arbitration proceedings, attorneys' fee and expenses, etc. If the arbitration proceedings are prolonged, the costs of arbitration sore.

3. Arbitration in Japan for International Dispute

Japan is an economic giant in Asia. However, arbitrations of commercial disputes are not held frequently in Japan. According to the 1997 ICC arbitration report, 13 to 14 Japanese companies were involved in arbitrations of 452 cases, among which only 2 arbitrations were conducted in Japan. In the latest record advised orally in an arbitration seminar sponsored by ICC Japan, recently average 6

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Contact: Shinjuku Center Building, 1-25-1, Nishi-Shinjuku, Shinjuku-ku, Tokyo 163-0606 Tel: 03-5381-5336

arbitrations are conducted every year in Japan, and it takes average 25.2 months, approx. 2 years, ranging several months to 8 years to settle. This figure is still too small considering the magnitude of Japanese international trade. This situation is probably derived from Japanese companies' preference such as no use of arbitration as means of dispute resolution, no choice of Japan as the place of arbitration, Japan law not suitable for arbitration, insufficient numbers of Japanese arbitrators.

Japan law does not include contract law, nor arbitration law. The arbitration law, if legislated, is to handle matters such as arbitration agreement, composition and jurisdiction of arbitration tribunal, conduct of arbitral proceedings, making of award, etc. and provides the base of arbitration. Recently in Asian countries, the legislation of arbitration law has been rapidly implemented based on UNCITRAL model law. Japan seems to be falling behind the movement of other Asian countries. It may be noted that facilities good for use for international arbitrations are not sufficiently available except leading hotels and limited special facilities. Lack of Japanese arbitrators is also a problem; only 26 Japanese arbitrators (22 lawyers, 3 professors, 1 businessman) are registered in ICC Japan at present.

4. Civil Engineer's Participation as Arbitrator

As it can be seen from the number of arbitrators noted above, almost all arbitrators in Japan are lawyers and not engineers. This is contrary to the fact that not a few arbitrators of foreign nationality are engineers who have extensive experience in international construction works of civil engineering. The reason of engineer's participation in arbitration is that most of disputes come out of technical issues such as change in work, order of additional work, delay in issuance of construction drawings, unforeseen underground conditions, delay in site possession, problem in connection with specifications and measurements, which usually become claims for additional costs and extension of time or acceleration costs. It is of course necessary to have a good understanding of technical matters to resolve technical disputes. In this sense, the engineering knowledge is the core of dispute resolution and civil engineers most fit for arbitrators of construction disputes.

It is not intended to say that lawyers are not good arbitrators. Many lawyers do understand technical matters quite well. Foreign arbitrators sometimes have qualification of both lawyer and engineer. Lawyers are good at interpretation and application of contract and law, which is also indispensable capability for resolving disputes. However, lawyers have a tendency to be particular about procedural matters such as validity of arbitration clause, restriction due to contractual procedure, etc., which sometimes results in, or is intentionally used as tactics to cause, prolongation of arbitration proceedings, which is contrary to the spirit of arbitration.

It is suggested that an arbitrator with civil engineering background should judge the merit of construction claim with assistance of lawyer for conformity with the contract and law as necessary. In Japan, we have a good experience of solving problems without involvement of lawyers. Japanese civil engineers should not hesitate to participate in the dispute resolution process and take the leading role as arbitrator for the efficient resolution of disputes in international construction projects.

5. Future Prospects

As discussed before, Japan and Japanese law is not suitable for arbitration. There is a serious need for legislation and facilities. The recent trend of demanding an open market for construction projects in Japan by foreign powers may be helpful to improve the situation.

Education is also important as not many Japanese universities offer a course of international business practice, contract administration, negotiation, etc. for student civil engineers. It is hoped that universities shall provide up-to-date courses to help students be ready for participating in the actual world of international construction projects.