DOCUMENT

EURO-ARAB DIALOGUE

Commentaries and guidelines for contracting in industrial projects

October 1984

COMMISSION
OF THE EUROPEAN COMMUNITIES

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EURO / ARAB DIALOGUE

Commentaries and guidelines for contracting in industrial projects

October 1984

Document

This document has been prepared for use within the Commission. It does not necessarily represent the Commission's official position.

"Remark : The authors of this document would have preferred to publish both the commentaries and the texts which are commented, for obvious reasons. Some practical difficulties prevented them from doing so.

The commented texts are widely available. In case of difficulty, information could be requested from the Commission of the European Communities (att. Mr. Struxiano) 200 rue de la Loi - B - 1049 Brussels"

FOREWORD

THE SPECIALIZED GROUP ON GENERAL CONTRACT CONDITIONS WITHIN THE EURO-ARAB DIALOGUE

The practical work of the Euro-Arab Dialogue is conducted in seven Committees covering the following topics: Industrialization, Infrastructure, Agriculture, Financial Cooperation, Trade, Science and Technology, and Cultural and Social Affairs. In November 1975 the Industrial Committee decided to examine the possibility of introducing general contract conditions in Arab-European economic relations and to make appropriate proposals. The Arab and European members felt that practical steps in this field could serve to itensify and facilitate economic cooperation between the Member States of the European Communities and of the Arab League.

To this end the Committee established the Specialized Group on General Contract Conditions of Arab and European representatives including not only civil servants from individual Member States of both the Arab League and the European Economic Community but also from the League Secretariat, Arab economic organizations and the Commission of the European Communities. Experts requested by interested parties and distinguished Arab and European Lawyers in private practice and from the Universities were invited to all meetings which concerned their particular disciplines.

At its first meeting in July 1976 the Group agreed on the following terms of reference:

> "To establish general principles and guidelines for contracts, to cover all phases of contracting with a view to the creation of optional rules for contracting for industrial projects."

It was agreed that it was too early for the Group to attempt to draw up model contract conditions of its own; rather it should restrict itself to commenting on certain model contract conditions commonly used in international business.

It therefore adopted a programme of work based on the idea that major industrial programmes normally start with a project phase in which the client defines the concept of a project in conjunction with the construction phase and by the stage of contractual relations when machinery or plant is supplied and installed. In view of their importance the Group addressed itself to the problems raised by contract guarantees, applicable law and the settlement of disputes, in particular by conciliation and arbitration. The deliberations of the Group were recorded in the English language.

The programme of work was completed at the eighteenth meeting of the Group in March 1983 and consists of three volumes of texts, notes and commentaries.

The deliberations of the Group were mainly of a practical nature, this overcoming difficulties arising from the different legal concepts not only in the Arab and European legal systems but also within each of those systems.

The aim of the Group is to highlight for contracting parties in Arab and European countries the special features arising from the legal situation in the Member States of the European Communities and of the Arab League. The comments and recommendations can in no way be considered as official statements of the Arab League and its Mamber States or of the European Community and its Member States. The group believes however that the work contained in these volumes may prove of value to prospective Contracting Parties.

The Industrialization Committee urges contracting parties give serious consideration to these comments and recommandations when negociating contracts when negociating contracts in these fields.

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1. IGRA 1976 D.&S. and P.I.
2. IGRA 1979 D.&S. and P.I.
3. IGRA 1980 P.M.
4. Technical Services Contracts
5. Contract Guarantees
6. Applicable Law
7. Conciliation and Arbitration

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(1) IGRA 1976 D & S and P.I.
(2) IGRA 1979 D & S and P.I.
(3) IGRA 1980 P.M.
(4) Technical Services Contracts
(5) Contract Guarantees
(6) Applicable Law
(7) Conciliation and Arbitration

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VOLUME I

Chapter 1

INTERNATIONAL MODEL FORM OF AGREEMENT BETWEEN CLIENT AND CONSULTING ENGINEER AND INTERNATIONAL GENERAL RULES OF AGREEMENT BETWEEN CLIENT AND CONSULTING ENGINEER FOR PRE-INVESTMENT STUDIES

IGRA 1979 P.I.

INTRODUCTION

At four meetings in 1976 and 1977 the Group prepared its commentary on the 1976 edition (IGRA 1976 P.I.) of the model form and international general rules of agreement. Subsequently FIDIC revised the international rules and the new model was published in 1979 (IGRA 1979 P.I.).

In May 1982 the Group examined the new edition and revised its earlier commentary accordingly.

GENERAL

The International Model Form of Agreement and International General Rules form the basis for a suitable agreement between client and consulting engineer.

Though the Rules are in two parts, Part I containing clauses of universal application known as Standard Conditions and Part II containing clauses to suit the individual requirements of the client and the consulting engineer, both parts should be examined carefully, for what may appear to Europeans as standard or universal may not be so in Arab experience.

The Group cannot stress too highly the importance to both parties of the completion of the various appendices, "Scope of Services", "Consulting Engineer's Personnel", "Counterpart Personnel, Assigned Specialists, Equipment and Facilities to be provided by the Client", "Remuneration and Payment". Unless careful thought is given to the completion of the Appendices disputes are likely to result, a matter which will give rise to the possible breakdown of confidence between the client and consulting engineer.

Whilst it is entirely for the client and consulting engineer to agree the terms of their contract the Group recommends that in considering IGRA 1979 D and S as the basis for contracts for design and supervision of construction of works

Arab clients and European consulting engineers should have regard to the FIDIC "Guide to the Use of Independent Consultants for Engineering Services", 3rd Edition 1980, and to the observations and comments set out below.

FORWARD

This establishes that, for the purpose of translation into other languages, the English language version of IGRA 1979 P.I. is the authentic text. The choice of language to be used for any particular agreement is governed by Clause 2.1.3.

Clause 2.1.2

It is assumed that the position of the consulting engineer and of anyone else performing the services under the agreement is that of an independent contractor.

Clause 2.1.3

It is recognised that the agreement should be drawn up in both Arabic and the appropriate language of the European Communities. Though the "Ruling Language" will normally be

Arabic, it will generally be necessary for practical reasons to accept that the other text is also authentic in law.

The question of applicable law is considered in Chapter 6.

Clause 2.1.4

It is recognised that changes in customs duties, taxes and other legislation, in the country for which the study is being carried out, while the contract is being performed, can result in adverse financial consequences to either party. Accordingly the parties should ensure that the contract deals with the responsibilities and obligations of the client and consulting engineer in such circumstances.

Clause 2.1.7

It is intended that any notice should be given in the two languages chosen, unless it is legally required that such notice is given in Arabic.

Clause 2.2.1

It may be advisable to recognise that in some Arab countries the signature of the client will need to be ratified or otherwise authorised before the client is bound by the Agreement. If this is so provision should be made for notification of the ratification or authorisation to the consulting engineer, within a reasonable time limit.

Clause 2.2.7

In consultancy contracts the personal element is often very important. Consequently, where the consulting engineer is a partnership, the client should be given prior notice of any change in partnership not caused by death. Where the consulting engineer is a legal person the client should similarly be given prior notice of any change in a Board of Directors. Substantial changes may affect the relationship of the parties.

Clause 2.2.8

Notwithstanding the advance written agreement of the client to any subcontract by the consulting engineer and modifications and termination thereof, the consulting engineer's responsibility to the client for the performance of his services under the agreement is unaffected by any such subcontract (See also clause 2.3.4 last paragraph). Before giving written agreement the client should examine the terms and conditions of the subcontract and modifications thereof.

Clause 2.2.9

This clause lacks balance as between the client and the consulting engineer. The Group therefore recommends that the client should have the same rights as the consulting engineer in respect of Force Majeure in sub clause 2.2.9.2 and should be able to give immediate written notice, as can the consulting engineer in sub clause 2.2.9.3 (ii). Furthermore the Group considers the title of sub clause 2.2.9.3 "Default by the client" to be misleading particularly with regard to sub clause 2.2.9.3 (ii). It is suggested that these sub clauses be amended to take account of the Group's recommendations.

Clause 2.2.9.1

This clause should be modified to ensure that the client also has the same rights as the consulting engineer in clause 2.2.9.3 (ii).

Clause 2.2.9.2

The Criterion here is impossibility of performance. The parties may wish to provide also for the case where there is a fundamental change in the basic circumstances, prevailing at the time the agreement was entered into, which adversely affects the consulting engineer's rights or the performance, in whole or in part, of his obligations under the agreement. If such circumstances arise and result in a postponement of the service, the parties should always try to negotiate an acceptable solution so that work may be resumed as soon as possible. The client should have the same rights as the consulting engineer and the clause be modified accordingly.

Clause 2.2.9.3 (i)

In certain Arab countries the consulting engineer may not be entitled to terminate the agreement if the client is a government authority but may only request termination on agreed terms which shall obviate any financial loss to the consulting engineer.

Further the parties may wish to agree that termination under the provisions should arise only after the consulting engineer had served prior written notice on the client, and the client had failed to make the payment in question within a time limit laid down in the agreement.

Clause 2.2.9.4

"All costs incidental to the orderly termination of the Services" means costs not already covered by the contract which properly and reasonably are incurred in closing down the contract. They may include any reimbursable costs and those termination costs (if any) ensuing for the consulting engineer or his successor and assigns from contracts already entered into in respect of the agreement.

Clause 2.2.9.6

The consulting engineer is only entitled to receive the remuneration due for services properly rendered.

Clause 2.3

It should be noted that in some Arab countries publication of descriptive articles is strictly controlled and it is therefore prudent to obtain prior written consent of the client before publication.

Clause 2.3.1

Despite the use of the word "his" it is clear that all the staff employees and attached specialists must carry out all their responsibilities in accordance with the professional standards of their professions. The clause implies that the highest technical and ethical standards will be observed and that strict impartiality should be shown with regard to specification and design to ensure that the client has the widest possible choice of manufacturers and contractors.

Clause 2.3.4

The Group considers that the Scope of Services listed in appendix A should include setting up a regular reporting procedure and a detailed co-ordination procedure. In preparing appendix A the consulting engineer must exercise the maximum foresight to avoid the necessity of supplementary services.

Clause 2.4

The question of liability must be decided in accordance with the law applicable to the contract and exemptions from liability may be of limited effect. In this connection:

i. The consulting engineer is liable for his negligent or criminal acts and omissions and for those of his employees.

ii. The consulting engineer is not liable for any violation of the rights of third parties in the country where the contract is performed unless these rights have been brought to the attention of the consulting engineer by prior written notice or unless the consulting engineer could reasonably have been expected to know of their existence.

Whether the damages to be taken into account are direct damages excluding indirect or consequential damages will depend on the law applicable to the contract and, when appropriate, on the agreement of the parties to the contract.

Clause 2.4.1

The liability of the consulting engineer is not limited in cases of his gross negligence or criminal action. The introductory phrase of the first sentence being of an extremely restrictive nature the parties should carefully reflect on the consequences of excluding "anything herein contained to the contrary".

Clause 2.4.3

Clause 2.3.5 vests the copyright of all documents prepared by the consulting engineer in the client. This clause makes the consulting engineer liable for any violation of legal provisions or rights of third parties in respect of patents and/or copyrights introduced into documents prepared by him. The parties should reach agreement as to whether the consulting engineer, over and above his maximum liability laid down in clause 2.4.1, shall indemnify and hold harmless the client against any infringement of the industrial property rights of third parties for which the consulting engineer is responsible.

Clause 2.4.4

This clause requires redrafting because the linking of different types of insurance could result in there being no cover. The consulting engineer's professional liability cover should not be linked to third party cover and insurance of the client's equipment. The parties therefore should decide, prior to the signing of the contract, on the nature and extent of the insurance coverage needed, bearing in mind that excessive insurance is an unnecessary project cost and that the insurance market is unwilling or unable to issue policies covering unlimited liability for consulting engineers.

Clause 2.4.5

The phrase "which is not covered by the Scope of Services" may be amended to read "which is not covered by, or reasonably inferred from, the Scope of Services ".

Clause 2.5.1

This clause is intended to ensure that the necessary information is available in good time.

It is advisable in appendix A to set a time limit within the overall time schedule for the clients decision and for approval of major activities to be given to avoid undue delay to the work and to alert the client to assemble the task force required to give such decisions and/or approval on time.

Clause 2.5.2 (iii)

It is recommended that any specific foreign currency or other requirements should be specified in an Appendix to facilitate the grant of any necessary permits, where this is required and possible.

Clause 2.5.2 (v)

It is only an emergency that materially affects the site or the work or the security of personnel which should necessitate repatriation. The parties should consider defining "emergency" appropriately.

The obligation of the client only extends to facilitating repatriation of the consulting engineer's personnel.

Clause 2.5.4

It should be noted that in some countries it is not possible to shift the incidence of tax or to obtain tax exemptions.

Attention is drawn to the desirability of a reasonable definition of property for the personal use or consumption of the consulting engineer and his personnel in (iii).

Clause 2.5.5

Both parties should ensure that they understand exactly what equipment and facilities are to be provided by the client. Appendix C should be completed very carefully.

Clause 2.5.6

It is advisable to add that the time extension will commence to run after due notice has been given and a time set for such notice to take effect.

The question of remuneration should be settled on a case by case basis.

Clause 2.5.7

The question of remuneration should be settled on a case by case basis.

Clause 2.5.8

The expression "Counterpart personnel" is capable of different interpretations. It is therefore suggested that the parties should consider the following sentence to replace the first sentence of the first paragraph of this clause:

> "The client will, in conjunction with the consulting engineer, arrange for the selection and provision of the personnel required by the consulting engineer for the performance of his services, as indicated in Appendix C hereto. Such personnel will work under the exclusive direction of the consulting engineer".

Any further references to "Counterpart personnel" in this clause and in Appendix C should merely refer to "personnel".

If personnel provided by the client is to be trained by the consulting engineer this should be covered in a separate clause.

The consulting engineer and the client should consult fully on the matter of replacement of counterpart personnel and should agree on suitable measures taking into account the client's interest in the speedy completion of the project and the consulting engineer's overall project responsibility.

Clause 2.5.9

To avoid ambiguity over the expression "others" it is suggested that the first paragraph should read:

> "The client will arrange the provision of services from the firms/and/or individuals listed in and in accordance with Appendix C. The consulting engineer will co-operate with such firms and/or individuals".

In the last paragraph of this clause it would be clearer if the expression "others" were replaced by a reference to the firms and/or individuals listed in Appendix C.

Clause 2.6

The question of settlement of disputes is considered in Chapter 7 of this Volume under the heading of "Conciliation and Arbitration".

Clause 2.7.3

The Group understands that the term "financial consequences" means the cost of replacement. Such request for replacement should be the subject of full consultation between the client and consulting engineer.

Clause 2.7.4

It is suggested that the expert should be assigned to participate with the consulting engineer in the services.

It is recommended that the last sentence of the first paragraph should be deleted since the expert must remain under the control of the client.

Clause 2.8

Remuneration is always for agreement between client and consulting engineer. This clause sets out the basic principles that should be observed when considering how the consulting engineer should be remunerated.

Both the client and consulting engineer should be careful to ensure that the method of remuneration is appropriate for the services in question and that it is fair to both parties.

The text of this clause is accepted, however, it is felt that the lump sum method of remuneration is particularly appropriate for these agreements.

For the purpose of applying an escalation clause (2.8.4), if agreed upon, the components of the lump sum should be detailed (as in the Guide to the Use of Independent Consultants for Engineering Services, 3rd Edition 1980 published by FIDIC).

Clause 2.8.2

The Group considers that reference to termination should probably de deleted as this is dealt with in clause 2.2.9.4.

Clause 2.9.2

This clause gives the client forty five days to verify any account and to make payment before interest becomes payable and the interest should run only from the end of that period.

Clause 2.9.3

If an item is in dispute and this leads to non-payment or partial payment it is only equitable that the consulting engineer should be entitled to interest on the sum agreed or determined to be due from the time when, but for the dispute, the sum should have been paid.

Clause 2.9.5

Allowance should be made for the fact that not all countries have an official Foreign Exchange Market. In this case reference should be made to the official rate determined by the Central Bank of the country concerned.

Supplementary Observations

Parties should give consideration to providing, in the contract, for the following points:

1. Where the consulting engineer requires an advance payment this should be covered by a bank guarantee.

2. Some Arab Countries, depending on the particular project, require a performance bond from the consulting engineer.

3. It is advisable, prior to the presentation of the first invoice, for the parties to agree on the form of invoice to be used.

4. In view of the importance of effective communication, the parties are advised to agree the co-ordination procedure between the two leading responsible persons on both sides.

5. Because of the importance of training, specific provision should be made, when appropriate, to ensure that the consulting engineer briefs the client's personnel as fully as possible on the operations undertaken in the performance of the contract.

Chapter 2

INTERNATIONAL MODEL FORM OF AGREEMENT BETWEEN CLIENT AND CONSULTING ENGINEER AND INTERNATIONAL GENERAL RULES OF AGREEMENT BETWEEN CLIENT AND CONSULTING ENGINEER FOR DESIGN AND SUPERVISION OF CONSTRUCTION OF WORKS

IGRA 1979 D. & S.

INTRODUCTION

At four meetings in 1976 and 1977 the Group prepared its commentary on the 1976 edition (IGRA 1976 D & S) of the model form and international rules of agreement. Subsequently FIDIC revised the international rules and the new model was published in 1979 (IGRA 1979 D & S).

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Whilst it is entirely for the client and consulting engineer to agree the terms of their contract the Group recommends that in considering IGRA 1979 D & S as the basis for contracts for design and supervision, of construction of works Arab clients and European consulting engineers should have regard to the FIDIC "Guide to the Use of Independent Consultants for Engineering Services", 3rd Edition 1980, and to the observations and comments set out below.

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It is recognised that the agreement should be drawn up in both Arabic and the appropriate language of the European Communities. Though the "Ruling Language" will normally be Arabic, it will generally be necessary for practical reasons to accept that the other text is also authentic in law.

The question of applicable law is considered in Chapter 6.

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It is recognised that changes in customs duties, taxes and other legislation, in the country for which the study is being carried out, while the contract is being performed, can result in adverse financial consequences to either party. The contract should deal with the responsibilities and obligations of the parties in such circumstances.

Clause 2.1.7

It is intended that any notice should be given in the two languages chosen, unless it is legally required that such notice is given in Arabic.

Clause 2.2.1

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In consultancy contracts the personal element is often very important. Consequently, where the consulting engineer is a partnership, the client should be given prior notice of any change in partnership not caused by death. Where the consulting engineer is a legal person the client should similarly be given prior notice of any change in a Board of Directors. Substantial changes may affect the relationship of the parties.

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This clause lacks balance as between the client and the consulting engineer. The Group therefore recommends that the client should have the same rights as the consulting engineer in respect of Force Majeure in sub clause 2.2.9.2 and should be able to give immediate written notice, as can the consulting engineer in sub clause 2.2.9.3 (ii). Furthermore the Group considers the title of sub clause 2.2.9.3 "Default by the client" to be misleading particularly with regard to sub clause 2.2.9.3 (ii). It is suggested that these sub clauses be amended to take account of the Group's recommendations.

Clause 2.2.9.1

This clause should be modified to ensure that the client also has the same rights as the consulting engineer in clause 2.2.9.3 (ii).

Clause 2.2.9.2

The criterion here is impossibility of performance. The parties may wish to provide also for the case where there is a fundamental change in the basic circumstances, prevailing at the time the agreement was entered into, which adversely affects the consulting engineer's

rights or the performance, in whole or in part, of his obligations under the agreement. If such circumstances arise and result in a postponement of the service, the parties should always try to negotiate an acceptable solution so that work may be resumed as soon as possible. The client should have the same rights as the consulting engineer and the clause be modified accordingly.

Clause 2.2.9.3 (i)

In certain Arab Countries the consulting engineer may not be entitled to terminate the agreement if the client is a government authority but may only request termination on agreed terms which shall obviate any financial loss to the consulting engineer.

Further, the parties may wish to agree that termination under the provisions should arise only after the consulting engineer had served prior written notice on the client, and the client had failed to make the payment in question within a time limit laid down in the agreement.

Clause 2.2.9.4

"All costs incidental to the orderly termination of the Services" means costs not already covered by the contract which properly and reasonably are incurred in closing down the contract. They may include any reimbursable costs and those termination costs (if any) ensuing for the consulting engineer or his successor and assigns from contracts already entered into in respect of the agreement.

Clause 2.2.9.6

The consulting engineer is only entitled to receive the remuneration due for services properly rendered.

Clause 2.3.1

Despite the use of the word "his" it is clear that all the staff employees and attached specialists must carry out all their responsibilities in accordance with the professional standards of their professions. The clause implies that the highest technical and ethical standards will be observed and that strict impartiality should be shown with regard to specification and design to ensure that the client has the widest possible choice of manufacturers and contractors.

Clause 2.3.4

The Group considers that the Scope of Services listed in appendix A should include the setting up a regular reporting procedure and a detailed co-ordination procedure. In preparing appendix A the consulting engineer must exercise the maximum foresight to avoid the necessity of supplementary services.

Clause 2.3.5

The Group understands that the intent of this provision is that:

1. the consulting engineer when in charge of the supervision of works under construction shall have authority to make such minor alterations to design as may be considered necessary or expedient for the efficient execution of the works provided that they do not alter the nature of the project, that the cost is kept to a reasonable minimum not exceeding .... (sum or percentage) and that the consulting engineer notifies the client of the alterations and the cost thereof;

2. the consulting engineer shall obtain the prior approval of the client to any substantial modification of the design and cost of the works and to any instruction to a contractor which constitutes a major variation omission or addition to the contract;

3. notwithstanding the foregoing, in the event of an emergency, which in the opinion of the consulting engineer requires immediate action in the client's interests, the consulting engineer shall have authority to issue such orders as required on behalf of and at the expense of the client. The consulting engineer must inform the client immediately of any orders issued without prior consent which will result in an additional cost to the client and follow up such advice as soon as possible with an estimate of the probable cost.

4. where during the course of the performance of the contract a contractor or manufacturer proposes a substantial modification of the design, the consulting engineer must apply his technical skills in making a fair and accurate assessment of the proposal subject to clause 2.8.2. Provided that the consulting engineer has or can obtain the skills required to supervise construction or manufacture based on the modified design, he should continue his task of supervision.

   The Group agreed that when possible such modification should be put forward at the tender stage and not after the award of the contract.

Clause 2.3.6

Application of this provision must be phased in with the contract between the client and the contractor. In this context, questions such as the definition of the term "integral part", the length of the notice and the testing required and minor deficiencies should be given special consideration by the parties when drawing up the contract.

Clause 2.3.8

Having examined the clause, the Group considers that:

1. copyright, as defined in international conventions, in documents prepared by the consulting engineer rests with him.

2. the property in these documents passes to the client who is entitled to use them for the project concerned. He may also use them for any essentially identical repetitions, additions and/or extensions to the works, and the consulting engineer is entitled in such cases, unless otherwise agreed, to additional remuneration being a reasonable proportion, to be mutually agreed, of the original fee paid to the consulting engineer.

   The client will advise the consulting engineer of his decision to use the documents for such purposes and the consulting engineer will thereupon advise the client of any improvements deemed feasible.

3. If the client requires the assistance of, or supervision by, the consulting engineer for such repetitions, additions and/or extensions the consulting engineer shall be entitled to additional remuneration to be mutually agreed.

4. It is to be noted that in some Arab Countries it is mandatory that all design documents, drawings and specifications, prepared by the consulting engineer, become the property of the client upon submission to the client who may use them in any way he sees fit for the carrying out of the project, subject however to any conditions regarding patents and registered designs pertinent to these documents.

Clause 2.3.10

It should be noted that in some Arab Countries publication of descriptive articles is strictly controlled and it is therefore prudent to obtain prior written consent of the client before publication.

Clause 2.4

The question of liability must be decided in accordance with the law applicable to the contract and exemptions from liability may be of limited effect. In this connection:

i. the consulting engineer is liable for his negligent or criminal acts and omissions and for those of his employees.

ii. the consulting engineer is not liable for any violation of the rights of third parties in the country where the contract is performed unless these rights have been brought to the attention of the consulting engineer by prior written notice or unless the consulting engineer could reasonably have been expected to know of their existence.

Whether the damages to be taken into account are direct damages excluding indirect or consequential damages will depend on the law applicable to the contract and, when appropriate, on the agreement of the parties to the contract.

Clause 2.4.1

The liability of the consulting engineer is not limited in cases of his gross negligence or criminal action. The introductory phrase of the first sentence being of an extremely restrictive nature the parties should carefully reflect on the consequences of excluding "anything herein contained to the contrary".

Clause 2.4.3

The parties should reach agreement as to whether the consulting engineer, over and above his maximum liability laid down in clause 2.4.1, shall indemnify and hold harmless the client against any infringement of the industrial property rights of third parties for which the consulting engineer is responsible.

Clause 2.4.4

This clause requires redrafting because the linking of different types of insurance could result in there being no cover. The consulting engineer's professional liability cover should not be linked to third party cover and insurance of the client's equipment. The parties therefore should decide, prior to the signing of the contract, on the nature and extent of the insurance coverage needed, bearing in mind that excessive insurance is an unnecessary project cost and that the insurance market is unwilling or unable to issue policies covering unlimited liability for consulting engineers.

Clause 2.4.5

This provision implies that the consulting engineer is liable for the consequences of any of his decisions or directives affecting any part of the works not designed by him or under his responsibility.

Clause 2.4.6

The phrase "which is not covered by the Scope of Services" may be amended to read "which is not covered by, or reasonably inferred from, the Scope of Services".

Clause 2.5.1

This clause is intended to ensure that the necessary information is available in good time.

It is advisable in appendix A to set a time limit within the overall time schedule for the client's decision and for approval of major activities to be given to avoid undue delay to the work and to alert the client to assemble the task force required to give such decisions and/or approval on time.

Clause 2.5.2 (iii)

It is recommended that any specific foreign currency or other requirements should be specified in an Appendix to facilitate the grant of any necessary permits, where this is required and possible.

Clause 2.5.2 (v)

It is only an emergency that materially affects the site or the work or the security of personnel which should necessitate repatriation. The parties should consider defining "emergency" appropriately.

The obligation of the client only extends to facilitating repatriation of the consulting engineer's personnel.

Clause 2.5.4

It should be noted that in some countries it is not possible to shift the incidence of tax or to obtain tax exemptions.

Attention is drawn to the desirability of a reasonable definition of property for the personal use or consumption of the consulting engineer and his personnel in (iii).

Clause 2.5.5

Both parties should ensure that they understand exactly what equipment and facilities are to be provided by the client. Appendix B should be completed very carefully.

Clause 2.5.6

It is advisable to add that the time extension will commence to run after due notice has been given and a time set for such notice to take effect.

The question of remuneration should be settled on a case by case basis.

Clause 2.5.7

The question of remuneration should be settled on a case by case basis.

Clause 2.5.8

The expression "Counterpart personnel" is capable of different interpretations. It is therefore suggested that the parties should consider the following sentence to replace the first sentence of the first paragraph of this clause:

> "The client will, in conjunction with the consulting engineer, arrange for the selection and provision of the personnel required by the consulting engineer for the performance of his services, as indicated in Appendix B hereto. Such personnel will work under the exclusive direction of the consulting engineer".

Any further references to "Counterpart personnel" in this clause and in Appendix B should merely refer to "personnel".

If personnel provided by the client is to be trained by the consulting engineer this should be covered in a separate clause.

The consulting engineer and the client should consult fully on the matter of replacement of counterpart personnel and should agree on suitable measures taking into account the client's interest in the speedy completion of the project and the consulting engineer's overall project responsibility.

Clause 2.5.9

To avoid ambiguity over the expression "others" it is suggested that the first paragraph should read:

> "The client will arrange the provision of services from the firms/and/or individuals listed in and in accordance with Appendix B. The consulting engineer will co-operate with such firms and/or individuals".

In the last paragraph of this clause it would be clearer if the expression "others" were replaced by a reference to the firms and/or individuals listed in Appendix B.

Clause 2.6

The question of settlement of disputes is considered in Chapter 7 of this Volume under the heading of "Conciliation and Arbitration".

Clause 2.7.3

The Group understands that the term "financial consequences" means the cost of replacement. Such request for replacement should be the subject of full consultation between the client and consulting engineer.

Clause 2.7.4

It is suggested that the expert should be assigned to participate with the consulting engineer in the services.

It is recommended that the last sentence of the first paragraph should be deleted since the expert must remain under the control of the client.

Clause 2.8

Remuneration is always for agreement between client and consulting engineer. This clause sets out the basic principles that should be observed when considering how the consulting engineer should be remunerated.

Both the client and consulting engineer should be careful to ensure that the method of remuneration is appropriate for the services in question and that it is fair to both parties.

The points mentioned in paragraphs 2.8.2 to 2.8.4 must be provided for in settling the details of remuneration, but it is recommended that in paragraph 2.8.4 the words "and a compensation for the damage resulting from such operations or cause" should be deleted.

For the purpose of applying an escalation clause (2.8.5), if agreed upon, the components of the lump sum should be detailed.

Clause 2.8.2

The Group considers that reference to termination should probably be deleted as this is dealt with in clause 2.2.9.4.

The term "supplementary services" includes the making of a fair and accurate assessment by the consulting engineer of a proposal by a contractor or manufacturer for a substantial modification of the project. Where possible such proposal should be made at the tender stage and not after the award of the contract.

Clause 2.8.4

The Group was unable to see the reason for the exclusion of the consulting engineer's equipment.

Clause 2.9.2

This clause gives the client forty five days to verify any account and to make payment before interest becomes payable and the interest should run only from the end of that period.

Clause 2.9.3

If any item is in dispute and this leads to non-payment or partial payment it is only equitable that the consulting engineer should be entitled to interest on the sum agreed or determined to be due from the time when, but for the dispute, the sum should have been paid.

Clause 2.9.5

Allowance should be made for the fact that not all countries have an official Foreign Exchange Market. In this case reference should be made to the official rate determined by the Central Bank of the country concerned.

Supplementary Observations

Parties should give consideration to providing, in the contract, for the following points:

1. Where the consulting engineer requires an advance payment this should be covered by a bank guarantee.

2. Some Arab Countries, depending on the particular project, require a performance bond from the consulting engineer.

3. It is advisable, prior to the presentation of the first invoice, for the parties to agree on the form of invoice to be used.

4. In view of the importance of effective communication, the parties are advised to agree the co-ordination procedure between the two leading responsible persons on both sides.

5. Because of the importance of training, specific provision should be made, when appropriate, to ensure that the consulting engineer fully briefs the client's personnel on the operations undertaken in the performance of the contract, and permits them as much access as possible to the consulting engineer's offices and the site with a view to their participation in the project.

6. It is normally preferable to appoint a recognised Inspection Authority which, in place of but in co-ordination with the consulting engineers, will inspect plant and equipment.

Chapter 3

INTERNATIONAL MODEL FORM OF AGREEMENT BETWEEN CLIENT AND CONSULTING ENGINEER AND INTERNATIONAL GENERAL RULES OF AGREEMENT BETWEEN CLIENT AND CONSULTING ENGINEER FOR PROJECT MANAGEMENT

IGRA 1980 PM

GENERAL

The International Model Form of Agreement and International General Rules form the basis for a suitable agreement between client and Project Manager.

Though the Rules are in two parts, Part I containing clauses of universal application known as Standard Conditions and Part II containing clauses to suit the individual requirements of the client and the Project Manager, both parts should be examined carefully, for what may appear to Europeans as standard or universal may not be so in Arab experience.

The Group cannot stress too highly the importance to both parties of the completion of the various appendices, "Scope of Services", "Assigned Specialists/Personnal Equipment and Facilities to be provided by the Client", "Remuneration and Payment". Unless careful thought is given to the completion of the Appendices disputes are likely to result, a matter which will give rise to the possible breakdown of condifence between the client and Project Manager.

The parties must ensure that there is no conflict between the list of services agreed in Appendix A (Scope of Services) and the services excluded, if they use the optional paragraph proposed in the "Important Notice - Professional Liability" on page 35 of the Model Form.

Whilst it is entirely for the client and Project Manager to agree the terms of their contract the Group recommends that in considering IGRA 1980 PM as the basis for contracts, Arab clients and European Project Managers should have regard to the observations and comments set out below.

FORWARD

This establishes that, for the purpose of translation into other languages, the English language version of IGRA 1980 PM is the authentic text. The choice of languages to be used for any particular agreement is governed by Clause 2.1.3.

INTRODUCTION

This defines Project Management.

Clause 2.1.2

It is assumed that the position of the Project Manager and of anyone else performing the services under the agreement is an independent contractor. The Project Manager acts as agent for the Client, as principal, where the agreement specifically so provides. This should be covered in appendix A.

Clause 2.1.3

It is recognised that the agreement should be drawn up in both Arabic and the appropriate language of the European Communities. Though the "Ruling Language" will normally be Arabic, it will generally be necessary for practical reasons to accept that the other text is also authentic in law.

The question of applicable law is considered elsewhere in the context of agreements in general.

Clause 2.1.4

It is recognised that changes in customs duties, taxes and other legislation, in the country for which the study is being carried out, while the contract is being performed, can result in adverse financial consequences to either party. The contract should deal with the responsibilities and obligations of the parties in such circumstances.

Clause 2.1.7

It is intended that any notice should be given in the two languages chosen, unless it is legally required that such notice is given in Arabic.

Clause 2.2.1

It may be advisable to recognise that in some Arab countries the signature of the client will need to be ratified or otherwise authorised before the client is bound by the Agreement. If this is so provision should be made for notification of the ratification or authorisation to the Project Manager, within a reasonable time limit.

Clause 2.2.7

In project management contracts the personal element is often very important. Consequently, where the Project Manager is a partnership, the client should be given prior notice of any change in partnership not caused by death. Where the Project Manager is a legal person the client should similarly be given prior notice of any change in ownership, control or in the Board of Directors. Substantial changes may affect the relationship of the parties.

Clause 2.2.8

Notwithstanding the advance written agreement of the client to any subcontract by the Project Manager and modifications and termination thereof, the Project Manager's responsibility to the client for the performance of his services under the agreement is unaffected by any such subcontract (See also clause 2.3.4 last paragraph). Before giving written agreement the client should examine the terms and conditions of the subcontract and modifications thereof.

Clause 2.2.9

It should be noted that the Project Manager is not normally a single individual. This clause lacks balance as between the client and the Project Manager. The Group therefore recommends that the client should have the same rights as the Project Manager in respect of Force Majeure in sub clause 2.2.9.2 and should be able to give immediate written notice, as can the Project Manager in sub clause 2.2.9.3 (ii). Furthermore the Group considers the title of sub clause 2.2.9.3 "Default by the client" to be misleading particularly with regard to sub clause 2.2.9.3 (ii). It is suggested that these sub clauses be amended to take account of the Group's recommendations.

Clause 2.2.9.1

This clause should be modified to ensure that the client also has the same rights as the Project Manager in clause 2.2.9.3 (ii).

Clause 2.2.9.2

The criterion here is impossibility of performance. The parties may wish to provide also for the case where there is a fundamental change in the basic circumstances, prevailing at the time the agreement was entered into, which adversely affects the Project Manager's rights or the performance, in whole or in part, of his obligations under the agreement. If such circumstances arise and result in a postponement of the service, the parties should always try to negotiate an acceptable solution so that work may be resumed as soon as possible.

The client should have the same rights as the Project Manager and the clause be modified accordingly.

Clause 2.2.9.3 (i)

In certain Arab Countries the Project Manager may not be entitled to terminate the agreement if the client is a government authority but may only request termination on agreed terms which shall obviate any financial loss to the Project Manager.

Further, the parties may wish to agree that termination under the provisions should arise only after the Project Manager had served prior written notice on the client, and the client had failed to make the payment in question within a time limit laid down in the agreement.

Clause 2.2.9.4

"All costs incidental to the orderly termination of the Services" means costs not already covered by the contract which properly and reasonably are incurred in closing down the contract. They may include any reimbursable costs and those termination costs (if any) ensuing for the Project Manager or his successor and assigns from contracts already entered into in respect of the agreement. The Group was unable to interpret the term "compensation" in the last sentence and draws the attention of the parties to the legal uncertainty of the last sentence.

Clause 2.2.9.5

The Project Manager is only entitled to receive the remuneration due for services properly rendered.

Clause 2.3.1

Despite the use of the word "his" it is clear that all the staff employees and attached specialists must carry out all their responsibilities in accordance with the professional standards of their professions. The clause implies that the highest technical and ethical standards will be observed and that strict impartiality should be shown with regard to specification and design to ensure that the client has the widest possible choice of manufacturers and contractors.

Clause 2.3.4

The Group considers that the Scope of Services listed in appendix A should include the setting up a regular reporting procedure and a detailed co-ordination procedure. In preparing appendix A the Project Manager must exercise the maximum foresight to avoid the necessity of supplementary services.

Clause 2.3.5

The Project Manager, as agent, requires the prior written approval of the Client, as principal, for authority to execute these procurement contracts.

Clause 2.3.6

The contracts, referred to in this clause, mean those contracts between the Client and contractors which are being managed by the Project Manager. The Group understands that the intent of this provision is that:

1. The Project Manager shall have authority to make such minor alterations to contracts as may be considered necessary or expedient for the efficient execution of the project provided that they do not alter its nature, that the cost is kept to a reasonable minimum not exceeding .... (sum or percentage) and that the Project Manager notifies the client of the alterations and the cost thereof;

2. The Project Manager shall obtain the prior approval of the client to any substantial modification of the project and to any instruction to a contractor which constitutes a major variation, omission or addition to the project;

3. Notwithstanding the foregoing, in the event of an emergency, which in the opinion of the Project Manager requires immediate action in the client's interests, the Project Manager shall have authority to issue such orders as required on behalf of and at the expense of the client. The Project Manager must inform the client immediately of any orders issued without prior consent which will result in an additional cost to the client and follow up such advice as soon as possible with an estimate of the probable cost.

Clause 2.3.8

Having examined the clause, the Group considers that:

1. Copyright, as defined in international conventions, in documents prepared by the Project Manager rests with him.

2. The property in these documents passes to the client who is entitled to use them for the project concerned. He may also use them for any essentially identical repetitions, additions and/or extensions to the works, and the Project Manager is entitled in such cases, unless otherwise agreed, to additional remuneration being a reasonable proportion, to be mutually agreed, of the original fee paid to the Project Manager. The client will advise the Project Manager of his decision to use the documents for such purposes and the Project Manager will thereupon advise the client of any improvements deemed feasible.

3. If the client requires the assistance of, or supervision by, the Project Manager for such repetitions, additions and/or extensions, the Project Manager shall be entitled to additional remuneration to be mutually agreed.

4. It is to be noted that in some Arab Countries it is mandatory that all design documents, drawings and specifications, prepared by the Project Manager, become the property of the client upon submission to the client who may use them in any way he sees fit for the carrying out of the project, subject however to any conditions regarding patents and registered designs pertinent to these documents.

Clause 2.3.10

It should be noted that in some Arab Countries publication of descriptive articles is strictly controlled and it is therefore prudent to obtain prior written consent of the client before publication.

Clause 2.4

The question of liability must be decided in accordance with the law applicable to the contract and exemptions from liability may be of limited effect. In this connection:

i. The Project Manager is liable for his negligent or criminal acts and omissions and for those of his employees.

ii. The Project Manager is not liable for any violation of the rights of third parties in in the country where the contract is performed unless these rights have been brought to the attention of the Project Manager by prior written notice or unless the Project Manager could reasonably have been expected to know of their existence.

Whether the damages to be taken into account are direct damages excluding indirect or consequential damages will depend on the law applicable to the contract and, when appropriate, on the agreement of the parties to the contract.

Clause 2.4.1

The liability of the Project Manager is not limited in cases of his gross negligence or criminal action. The introductory phrase of the first sentence being of an extremely Restrictive nature the parties should carefully reflect on the consequences of excluding "anything herein contained to the contrary".

Clause 2.4.3

The parties should reach agreement as to whether the Project Manager, over and above his maximum liability laid down in clause 2.4.1, shall indemnify and hold harmless the client against any infringement of the industrial property rights of third parties for which the Project Manager is responsible.

Clause 2.4.4

This clause requires redrafting because the linking of different types of insurance could result in there being no cover. The Project Manager's professional liability cover should not be linked to third party cover and insurance of the client's equipment. The parties therefore should decide, prior to the signing of the contract, on the nature and extent of the insurance coverage needed, bearing in mind that excessive insurance is an unnecessary project cost and that the insurance market is unwilling or unable to issue policies covering unlimited liability for Project Managers.

Clause 2.4.5

This provision implies that the Project Manager is liable for the consequences of any of his decisions or directives affecting any part of the works not designed by him or under his responsibility.

Clause 2.4.6

The phrase "which is not covered by the Scope of Services" may be amended to read "which is not covered by, or reasonably inferred from, the Scope of Services".

Clause 2.5.1

As the commencement date and the completion date are established in the contract this clause is intended to ensure that the necessary information is made available to the Project Manager in good time.

It is advisable in appendix A to set a time limit within the overall time schedule for the client's decision and for approval of major activities to be given to avoid undue delay to the work and to alert the client to assemble the task force required to give such decisions and/or approval on time.

Clause 2.5.2 (iii)

It is recommended that any specific foreign currency or other requirements should be specified in an Appendix to facilitate the grant of any necessary permits, where this is required and possible.

Clause 2.5.2 (v)

It is only an emergency that materially affects the site or the work or the security of personnel which should necessitate repatriation. The parties should consider defining "emergency" appropriately.

The obligation of the client only extends to facilitating repatriation of the Project Manager's personnel.

Clause 2.5.4

It should be noted that in some countries it is not possible to shift the incidence of tax or to obtain tax exemptions.

Attention is drawn to the desirability of a reasonable definition of property for the personal use or consumption of the Project Manager and his personnel in (iii).

Clause 2.5.5

Both parties should ensure that they understand exactly what equipment and facilities are to be provided by the client. Appendix B should be completed very carefully.

Clause 2.5.6

It is advisable to add that the time extension will commence to run after due notice has been given and a time set for such notice to take effect.

The question of remuneration should be settled on a case by case basis.

Clause 2.5.7

The question of remuneration should be settled on a case by case basis.

Clause 2.5.8

The expression "Counterpart personnel" is capable of different interpretations. It is therefore suggested that the parties should consider the following sentence to replace the first sentence of the first paragraph of this clause:

> "The client will, in conjunction with the Project Manager, arrange for the selection and provision of the personnel required by the Project Manager for the performance of his services, as indicated in Appendix B hereto. Such personnel will work under the exclusive direction of the Project Manager".

Any further references to "Counterpart personnel" in this clause and in Appendix B should merely refer to "personnel".

If personnel provided by the client is to be trained by the Project Manager this should be covered in a separate clause.

The Project Manager and the client should consult fully on the matter of replacement of counterpart personnel and should agree on suitable measures taking into account the client's interest in the speedy completion of the project and the Project Manager overall project responsibility.

Clause 2.5.9

To avoid ambiguity over the expression "others" it is suggested that the first paragraph should read:

> "The client will arrange the provision of services from the firms/and/or individuals listed in and in accordance with Appendix B. The Project Manager will co-operate with such firms and/or individuals".

In the last paragraph of this clause it would be clearer if the expression "others" were replaced by a reference to the firms and/or individuals listed in Appendix B.

Clause 2.5.10

This sub clause is so widely drafted as to create legal uncertainty. The Group therefore advises the parties to define clearly the services and contracts to which it applies.

Clause 2.6

The question of settlement of disputes is considered in Chapter 7 of this Volume under the heading of "Conciliation and Arbitration".

Clause 2.7.3

The Group understands that the term "financial consequences" means the cost of replacement. Such request for replacement should be the subject of full consultation between the client and Project Manager.

Clause 2.7.4

It is suggested that the expert should be assigned to participate with the Project Manager in the services.

It is recommended that the last sentence of the first paragraph should be deleted since the expert must remain under the control of the client.

Clause 2.8

Remuneration is always for agreement between client and Project Manager. This clause sets out the basic principles that should be observed when considering how the Project Manager should be remunerated.

Both the client and Project Manager should be careful to ensure that the method of remuneration is appropriate for the services in question and that it is fair to both parties.

The points mentioned in paragraphs 2.8.2 to 2.8.4 must be provided for in settling the details of remuneration, but it is recommended that in paragraph 2.8.4 the words "and a compensation for the damage resulting from such operations or cause" should be deleted.

For the purpose of applying an escalation clause (2.8.5), if agreed upon, the components of the lump sum should be detailed.

Clause 2.8.2

The Group considers that reference to termination should probably be deleted as this is dealt with in clause 2.2.9.4.

The term "supplementary services" includes the making of a fair and accurate assessment by the Project Manager of a proposal by a contractor or manufacturer for a substantial modification of the project.

The Group agreed that when possible such modification should be put forward at the tender stage and not after the award of the contract.

Clause 2.9.2

This clause gives the client forty five days to verify any account and to make payment before interest becomes payable. The Group recommends that the interest should run only from the end of that period.

Clause 2.9.3

If any item is in dispute and this leads to non-payment or partial payment it is only equitable that the Project Manager should be entitled to interest on the sum agreed or determined to be due from the time when, but for the dispute, the sum should have been paid.

Clause 2.9.5

Allowance should be made for the fact that not all countries have an official Foreign Exchange Market. In this case reference should be made to the official rate determined by the Central Bank of the country concerned.

Supplementary Observations

Parties should give consideration to providing, in the contract, for the following points:

1. Where the Project Manager requires an advance payment this should be covered by a bank guarantee.

2. Some Arab Countries, depending on the particular project, require a performance bond from the Project Manager.

3. It is advisable, prior to the presentation of the first invoice, for the parties to agree on the form of invoice to be used.

4. In view of the importance of effective communication, the parties are advised to agree the co-ordination procedure between the two leading responsible persons on both sides.

5. Because of the importance of training, specific provision should be made, when appropriate, to ensure that the Project Manager fully briefs the client's personnel on the operations undertaken in the performance of the contract, and permits them as much access as possible to the Project Manager's offices and the site with a view to their participation in the project.

6. It is normally preferable to appoint a recognised Inspection Authority which, in place of but in co-ordination with the Project Manager, will inspect plant and equipment.

Chapter 4

TECHNICAL SERVICES CONTRACTS

The term "Technical Services Contracts" is sufficiently wide to apply to a variety of individual and combined contracts negotiated together with, parallel to or after the contracts dealing with Pre-investment Studies, Design and/or Supervision, Project Management, Civil Engineering Construction or Delivery, Erection and Commissioning of Plants, on which the Group has already made its comments in this and its accompanying volumes. This report in no way invalidates the above-mentioned comments, which, where appropriate, may apply mutatis mutandis, to clauses in Technical Services Contracts.

The Group based its discussions on the "check-list" set out in Annex I which envisages five types of contract and lists sixteen points which are generally common to all five types.

A. The specific points of particular relevance to each of the five types be considered by the parties to such contracts were agreed to be as follows:

1.0 Operation includes the technical running of the installation on behalf of the client. The specific points to be considered are:

1.1 Definition of scope of Responsibility

- Exclusive - the operator undertakes entire responsibility
- Supervisory - responsibilities carefully defined and specifically divided between the operator and client

1.2 The materials to be supplied

- by the client
- by the operator

1.3 Production targets to be met within a specific period

1.4 Duties of the Operator and client in respect of safety of personnel and plant

1.5 Preparation or updating of manuals of operating procedures and other relevant documents

1.6 Allocation of costs and charges.

2.0 Management includes the supervision of purchasing, production, marketing, financing and personnel. The specific points to be considered are:

2.1 Definition of scope of responsibility

- Exclusive - the Managing Contractor undertakes entire responsibility
- Supervisory - responsibilities carefully defined and specifically divided between the Managing Contractor and the client

2.2 Techno-Economic Evaluation of the Project or Review of existing studies

2.3 Marketing

2.4 Evaluation and selection of processes and patents

2.5 Cost control within the allocated budget.

2.6 Control of Time-schedule to ensure achieving the targets of the contract

2.7 Co-ordination of all the specified duties

3.0 Maintenance includes keeping the installation in good working condition and replacing (automatically in cases of emergency) all worn or broken parts essential to the efficient working of the installation. The specific points to be considered are:

3.1 Definition of the scope of maintenance

- Routine
- Emergency
- Overall

3.2 Allocation of Responsibility (including financial responsibility) for:

3.2.1 Maintenance contractor's and client's maintenance personnel

3.2.2 Procurement of materials

3.2.3 Safety and inspection

3.2.4 Repetition of Performance Tests in the event of major changes as a result of defects

3.2.5 Procurement of Spare Parts

3.2.5.1 Obtaining quotations

3.2.5.2 Arranging for the possibility of the client purchasing direct from the manufacturer

3.2.5.3 Availability of spares for a reasonable period

- from stock
- making provisions for obsolescence.

4.0 Administration includes undertaking on behalf of the client such matters as in-plant accounting, purchasing, personnel recruitment and relations, internal transport, insurance and statistics. The specific points to be considered are:

4.1 Organisation of advanced training courses for personnel

4.2 Stock and Inventory Control of raw and auxiliary materials and finished products

4.3 Safety precautions, regulations and inspections to meet the requirements of the Insurance Company

4.4 Health and Safety at work

4.5 Environment Protection and Pollution Control.

5.0 Training of Personnel includes training in management, administration and/or in the process of manufacture used in the installation.

The interest of the Arab client, in any contract with a European firm, is to gain technology and improve the technical capabilities of his personnel. Therefore training may take several forms depending on the scope of work of the Technical Service Contracts.

The specific forms of training to be considered:

5.1 Cover provision of practical 'on the job' experience for qualified staff in

5.1.1 Techno-Economic Evaluation of Projects

5.1.2 Basic and detailed design

5.1.3 Modernisation of plant and production techniques.

5.2 Cover (for the specific plant)

5.2.1 Operation and subsequent improvement in production techniques

5.2.2 Maintenance

5.2.3 Management, accounting, stores and inventories

5.2.4 Marketing and sales

The contractor should be ready to put at the disposal of the client's trainees all Data relevant to their training and should ensure that the training is of such a standard as to give the client's personnel an active role in the running of the plant. There should be provision in appropriate cases for the training to be of sufficient breadth to enable senior personnel to work in similar plants. The contractor is responsible for calculating the manpower requirement for the particular plant on the basis of the quality of staff and labour available in the country concerned rather than on the basis of norms appropriate for similar plants in other countries. He has therefore the duty to assess carefully the quality of the client's personnel available for training and to make regular progress reports on their aptitudes and diligence in following the training programme.

Where a new plant is under construction it is essential that training should commence as early as possible in order to ensure the availability of qualified manpower by the time the plant is complete.

In view of the language difficulties it is emphasised that on site training in the country where the plant is situated is very valuable.

B. With regard to the sixteen points in Annex I, twelve were considered of general application but four points were further elaborated as follows

Point 5. Secrecy and Confidentiality

Contracts should stipulate:-

1. that neither party will disclose to third parties the contents of the contract or information, relevant to the contract, given by the other party without the consent of that party.

2. conditions with respect to authorisation by the client of publications about the projects.

3. if and under what conditions the contractor may permit any visit to the plant by persons not connected with it.

Point 6. Copyright and Ownership of Documents

Specific points to be considered are:-

1. Copyright in, ownership and use of drawings and technical documents supplied to the contractor by the client.

2. Copyright in, ownership and use of drawings and technical documents prepared by the contractor.

3. Use of drawings and technical documents by the client for other projects.

4. Release of the contractor from liability in the event of use envisaged in the preceding paragraph.

Point 7. 'Industrial Property and Copyright (Intellectual Property)

Industrial property means patents, know-how, registered designs and trade marks. Intellectual property means industrial property and copyright.

Specific points to be considered are:-

1. The parties should state in the contract which intellectual property is to be used.

2. Non-liability of the client for any infringement of intellectual property introduced by the contractor.

3. Non-liability of the contractor for any infringement of intellectual property made available to him by the client.

4. Provision for secrecy agreements to prevent the disclosure of the know-how and other confidential information supplied by a third party.

5. Procedures in cases of infringement.

6. Use by the client for other projects.

Point 8. Allocation of Insurance Responsibilities

The Technical Service Contract should incorporate clauses to ensure that a protective insurance cover is available to cover the Contractors activities and protects client's and Contractor's interests. Insurance cover should be provided for those of the risks set out below which are appropriate to the particular contract.

1. Plant under manufacture for the client.

2. Transport and marine risks.

3. Erection/construction all risks.

4. Maintenance period risks.

5. Fire and other risks during normal operation.

6. Third party risks.

7. Consequential loss.

8. Personnel.

9. Products liability.

Annex I to Chapter 4

TECHNICAL SERVICES CONTRACTS

CHECK-LIST

These are of various kinds and are entered into in respect of existing installations which have been newly completed or which have been in existence for some time.

They cover all or any of the following:

- operation
- management
- maintenance
- administration
- training of personnel

Operation means the technical running of the installation on behalf of the client.

Management means the supervision of purchasing, production, marketing, financing and personnel.

Maintenance means keeping the installation in good working condition and replacing (automatically in cases of urgency) all worn or broken parts essential to the efficient working of the installation.

Administration means undertaking on behalf of the client such matters as in-plant accounting, purchasing, personnel recruitment and relations, internal transport, insurance and statistics.

Training of personnel means training in management, administration and/or in the processes of manufacture used in the installation.

Such contracts should

1. clearly define the scope (operation or management etc)

2. give definitions of expressions used

3. set out the contractor's duties

4. set out the client's obligations

5. deal with secrecy and confidentiality

6. deal with copyright and ownership of documents

7. provide, if necessary, for separate agreements on industrial property

8. allocate insurance responsibilities

9. allocate responsibility for taxes, duties and social security payments

10. cover price and payments

11. cover commencement, duration and termination

12. outline the effects of force majeur

13. govern the use of subsidiaries and deal with non-assignment

14. take into consideration the effect of religious and local customs

15. settle law and language

16. deal with arbitration.

CHAPTER 5

CONTRACT GUARANTEES

With the growth of international trade, the practice of requiring contract guarantees has increased. The European Experts consider that the financial risk and burden of providing such guarantees is such that small an medium size enterprises in particular, whether European or Arab, may no longer be able to compete in the international market. The group therefore stresses the need to ensure that such guarantees give fair and adequate protection to the interests of the beneficiary, while safeguarding the interests of the principal to the extent commensurate with that aim.

To that end, the Group has considered the International Chamber of Commerce Uniform Rules for Contract Guarantees (Publication NO. 325) and has formulated certain recommendations and comments in respect thereof.

The Uniform Rules

Article I

It is emphasized that the conditions in the guarantee prevail over the conditions in the contract relating to guarantees.

Article 2

The default of the principal to repay follows an earlier breach of contract by the principal giving rise to the requirement to repay. The parties could therefore provide that the repayment guarantee may be exercised "in the event of default by the principal to fulfill his obligations and to repay... (lines 7 and IO)

Article 3

If the contract provides for a progressive reduction in liability under the guarantee as a result of partial performance, the relevant provisions in the contract should be repeated in the guarantee.

Article 4 (a)

The Tender guarantee, though valid from the date of submission of the tender, shall remain valid for six months from the closing date for submission of tenders as specified by the beneficiary in his call for tenders.

Article 4 (b)

It is recommended that, where appropriate, this paragraph be amended to read "... expiry of any maintenance period or any extension thereof or the date of the certificate of final acceptance..." Whole the Arab Experts consider that the maintenance period should automatically be covered by the performance guarantee, unless the guarantee expressly excludes such maintenance period, the European Experts consider that such matters should be covered expressly in the guarantee itself, rather than in the Uniform Rules.

Article 4, final sub-paragraph

The expiry date may fall on a non-business day in either the guarantor's country, or in that of the beneficiary. The parties should decide whether the extension should operate if the non-business day falls in either country or both countries.

Article 5 (1)

It is to be understood that provided a claim has been made pursuant to Art.8.1 of the rules, the guarantee remains in force, so far as that claim is concerned, until

agreement is reached or the arbitration award or judgment of the court is handed down. If no such claim has been received, the guarantee ceases to be in force.

Article 5 (2) (a)

Signature by the principal of the contract should be understood to mean conclusion and coming into force of the contract.

Article 5 (2) (b)

The Arab Experts consider that the tender guarantee should cease to be in force under this provision only when a binding contract has been concluded with another tenderer. The Group agreed that in view of the expense of maintaining such guarantees, they should be returned to unsuccessful tenderers at the earliest practicable opportunity, once the beneficiary's interests have been secured by a binding contract.

Article 5 (2) (c)

It is recommended that the guarantee should provide that it ceases to be in force in the event of the beneficiary declaring in writing either to the principal or the guarantor that he does not intend to place a contract.

Article 7

It was agreed that uncertainty might arise if the tender guarantee was valid only in respect of the original tender but not in respect of an amended tender, unless the guarantee otherwise provides. A solution would be for the parties to agree, where appropriate, that Article 7 (2) shall apply to tender guarantees as well as to performance and repayment guarantees. Article 7 (1) would then be deleted in its entirety.

Article 8

The Arab Experts consider that payment must be effected to the beneficiary upon his demand and submission of the documents specified in the guarantee, notwithstanding any contestation by the principal that the conditions in the contract giving rise to enforcement of the guarantee have not been fulfilled.

Article 8 (3) (b)

The European Experts consider that in every case where the beneficiary requires payment under a performance or repayment guarantee, the documentation referred to in Article 8 (3) (b) should include a copy of the prior notice by which the beneficiary notifies the principal of his intention to claim under the guarantee.

Article 8 (3) (c)

For the sake of clarity, the guarantee could provide that this documentation should be presented after receipt of a claim within the period of time specified in the guarantee or, failing such a specification, without undue delay instead of "as soon as practicable or in the case of documentation of the beneficiary at the latest within 6 months from receipt of the claim".

Article 8, final sub-paragraph

This paragraph should be read to mean that a claim shall not be honoured if the guarantee has ceased to be in force prior to receipt of the claim.

It is agreed that the payment of sums under the guarantee in no way prejudices the rights of either party under the contract.

Article 9

The Arab Experts indicated that where the beneficiary is a Government agency or organization, the practice in certain Arab States has been to require guarantees exercisable on demand. Where local law so provides, Article 9 would require suitable amendment by the parties.

The European Experts expressed the hope that there would be increasing recourse, even by Government agencies and organisations, to rules such as these Uniform Rules.

It may be advisable for the parties to agree, where appropriate, that the guarantee shall be enforced on presentation of an expert report or certificate of the Engineer.

Article 9 (a)

The parties may agree that the declaration relates to the principals acceptance of either the original or the amended tender (see note on Article 7 (1)).

The Arab Experts observed that, where there is recourse to judicial proceedings, whether by agreement or otherwise, the failure of the beneficiary to state in his claim that he is ready to submit to the jurisdiction of the court should not be a bar to his claim being honoured.

Article 10

It is recommended that the parties agree on the law applicable to the guarantee. Furthermore, the Arab Experts considered that it would be preferable to have the same law applicable to both the guarantee ant the contract.

CHAPTER 6

APPLICABLE LAW

Recognizing the legal uncertainty arising for the parties in the absence of a valid choice of law clause in the contract, the Group considered that the contracting parties should negotiate and agree on the applicable law for their contract.

This law may be that of one of the parties or of a third country. However, this choice cannot limit or exclude rules with regard to "ordre public" or other mandatory rules of the countries of the parties to the contract.

If the parties do not choose the applicable law the judicial or arbitral tribunal settling a dispute between the parties will determine the applicable law taking into account all relevant factors.

CHAPTER 7

CONCILIATION AND ARBITRATION

CONCILIATION

a. Preliminary remarks

The Group was convinced that recourse to conciliation is in itself a solution deserving of interest, in view of its non-contentious character. In this respect the conciliation procedure must be rapid and must not be marked by a belligerent approach. The procedure must be optional.

It is not fitting that a conciliation procedure should be similar to the setting up of an arbitral tribunal (contentious phase).

Further, to set up a conciliation committee consisting of three conciliators considerably complicates the procedure above all where one of the parties fails to appoint his conciliator on the one hand, or where the two conciliators fail to agree on the appointment of a chairman, on the other hand.

It may be considered that the refusal of one of the parties to appoint his conciliator is tantamount to a refusal of the attempted conciliation and that there are grounds, in order to gain time and protect the interests of the parties, to accept the failure and to commence the arbitration procedure.

b. General proposals

The Group therefore recommands that in view of the foregoing, the procedure should be as follows :

1. An attempt at amiable settlement between the parties themselves. This will allow them better to identify the subject of the dispute and to clarify the extent of the dispute.

This procedure should be limited in time.

2. In the event of failure to reach an amiable settlement, provision could be made for an attempt at conciliation by a third party chosen by common agreement by the parties from a list of persons to be drawn up by the parties on the basis of their competence and the subject of the contract. The conciliation procedure must also be limited in time.

3. In general parties should use the Conciliation Rules of the United Nations Commission on International Trade Law ("UNCITRAL Conciliation Rules") adopted in Resolution 35/52 by the General Assembly on 4 December 1980.

Comments on the UNCITRAL Conciliation Rules

Article 2

The contracting parties should give careful consideration to the time-limits to be applied in this article and other articles in the Rules. The Group agreed that a time-limit of 15 days might be sufficient to allow the defendant to indicate, by telephone or telex confirmed in writing, his acceptance of the procedure.

Article 3

The contracting parties should decide whether one, two or three conciliators should be appointed. They should give careful consideration to the appropriate institution or person to be invited to nominate conciliators and when possible should name the institution or person in the contract. The Group considers that the two conciliators appointed by the contracting parties should attempt to choose by common agreement the third conciliator within a fixed time-limit which might be 15 days from receipt of nomination of the second conciliator.

Article 5

The defendant should be allowed a fixed time-limit, such as 30 days, within which to reply to the written statement of the party initiating the conciliation.

Article 13

The Group agreed that the contracting parties should consider setting a time-limit such as three months as from the date of nomination of the conciliator, within which he must put forward the terms of a settlement.

Article 15

The Group considered that this article might be amended to make it clear that the conciliation proceedings were deemed to have failed

- if the defendant does not reply to the request that he appoint a conciliator, or replies in the negative within the stipulated time-limit ;

- if the parties or their conciliators cannot agree on a third conciliator ;

- if after three months and in the absence of an express extension of time agreed by the parties no terms of a settlement have been put forward.

- if the terms of a settlement are not accepted by one of the parties ;

- if one of the parties fails to appear or be represented in the conciliation proceedings.

The contracting parties should also agree that if the attempted conciliation procedure fails, the parties may have recourse to arbitration, recourse to the courts being excluded save in respect of interim measures.

4. Where the Arab and European contracting parties consider that because of their nationality or technical speciality another conciliation procedure is more suited to their needs, that conciliation procedure should be named in the contract. For example, Arab and French contracting parties might prefer to follow the conciliation procedure of the Euro-Arab Chambers of Commerce. It should be noted that the International Chamber of Commerce has also established Conciliation Rules.

ARBITRATION

Preliminary remaks

The contracting parties are advised to provide for an arbitration clause in their contract provided this does not conflict with the law governing the contract.

The Group considered the possibilities of both institutional and ad hoc arbitration as a means of avoiding rupture between the parties.

Institutional Arbitration

Attention is drawn to, inter-alia, the Court of Arbitration of the International Chamber of Commerce which provides for the settlement of business disputes of an International character in accordance with the Rules of Arbitration of the International Chamber of Commerce and also to the Higher Arbitration Council and National Arbitration Boards implementing the Rules of the Euro-Arab Chambers of Commerce governing conciliation, arbitration and the appointment of experts.

Ad hoc Arbitration

When the parties agree to ad hoc arbitration their attention is drawn to the problems which arise when one of the parties fails to nominate his arbitrator, when one (or more) of the arbitrators resigns or dies or when two arbitrators fail to agree on the appointment of the chairman of the arbitral tribunal.

a. Where there is such failure, it is preferable, where the national legal system so permits, to have recourse to the President of the Court of Appeal in the capital of the country of the party who has so failed.

b. Where the two arbitrators disagree on the appointement of a chairman a very delicate situation arises. The Group therefore recommends the drawing up of a very precise clause by mutual agreement fixing the appointing authority for the third arbitrator. This could be one of several existing bodies including the Euro-Arab Chambers of Commerce which provide, in Article 26 of the Arbitration Rules, for parties using an ad hoc arbitration to apply for the appointment of a single or a third arbitrator. In addition the Group also suggested that the Industrialization Commitee should consider the problems -administrative and political - of the creation of a Committee, within the Euro-Arab Dialogue consisting of an equal number of Europeans and Arabs with a rotating Chairmanship, the Chairman having a casting vote. Its terms of reference would be to nominate a third arbitrator possessing the expertise in law and technology for each particular arbitration concerned. Nationality should normally be irrelevant to the appointment of the third arbitrator. It is essential in the Group's opinion that such Committee, if created, should be supported by an effective and speedy machinery.

c. It should be stressed that an arbitration clause in itself does not cover all the problems posed by arbitration proceedings. Thus for all other aspects of procedure reference should be made to arbitration rules such as those established by the United Nations Commission on International Trade Law ("UNICITRAL") and adopted in Resolution 31/98 by the General Assembly on 15 December 1976. If the parties have not fixed the place of arbitration it should be left to the arbitration tribunal to fix it. If the parties fix the place they should bear in mind that the Location may have legal consequences.

UNCITRAL Rules

The Group draws the attention of the parties to the following articles.

Article 1 (2)

It is essential to ascertain if there is any provision of Law which conflicts with the use of arbitration to settle the dispute.

Article 6 and 7

The contracting parties should decide whether one or three arbitrators should be appointed. They should give careful consideration to the appropriate institution or person to be

invited to nominate arbitrators and when possible should name the institution or person in the contract.

Where one of the parties fails to nominate his arbitrator it is preferable, where the national legal system so permits, to have recourse of the President of the Court of Appeal in the capital of the country of the party who has so failed.

Where the two arbitrators fail to agree on the third arbitrator the Group considered that suitable authorities might be :

- the Secretary General or President of professional organization or arbitral institutions

- the President of the High Court of a third country.

Enforcement

It is of course understood that the arbitration awards may be enforced only if they are not contrary to the "ordre public" and sovereign legislation in force in the State of the place of enforcement. It is prudent for the parties to verify if the Convention on the Recognition and Enforcement of Foreing Arbitral Awards (Convention of New-York 1958) or other relevant bilateral conventions apply to their contract.

VOLUME II

CHAPTER 1

Condition of Contract (International) for Works of Civil Engineering Construction, with forms of tender and agreement, 3rd Edition March 1977 approved by FIDIC and FIEC.

Introduction

These "Conditions", sometimes known as "the Red Book" should be used in conjunction with "Notes on Documents for Civil Engineering Contracts" ("Notes").

Performance Bonds and Guarantees are considered in Chapter 2, Applicable Law in Chapter 3 and Conciliation and Arbitration in Chapter 4.

Civil Engineering Contracts play and will continue to play an important part in the development of Arab States. It is essential that such contracts should be undertaken on conditions which hold a fair balance between the interests of the Employer and Contractor, and upon conditions which respect the role to be played by Engineering whether they be employees of the Employer or independent Consulting Engineers.

The Arab Experts, who submitted working papers totalling some ninety pages, questioned the adequacy of the powers of the Engineer throughout the Contract and were of the opinion that certain legal principles on which the conditions are based needed examination, to ascertain that they were consistent with the established legal principles and practices prevailing in the Arab countries.

General Comments

Part I of the Conditions is intended to provide a framework for civil engineering contracts on the basis of which the parties can conclude contracts which suit the particular civilengineering project that the Employer requires. Thus, the parties should prepare Part II to suit the particular requirements of the Works. The notes on Part II and the items listed on pages 22 and 23 of the Conditions (in the English language edition) are by no means exhaustive. Part II should also contain the specific details of any modifications required by the parties to the general provisions of part I. The contract must provide (see infra comments under clause 5/2) that in case of any conflict between the provisions of Parts I and II, Part II is to prevail.

The Group agrees that the Red Book is intended to provide guidelines for the benefit of the parties concerned, whereby amendments, additions, deletions etc... could be made to any of the clauses of the Conditions of Contract. The Arab Experts proposed recommandations for amendments, deletions and/or additions to part I wich in its opinion suit best the requirements of the Arab countries. In the opinion of the European Experts any such amendments, deletions and/or additions should be made in Part II.

The following comments are to be understood on the above basis.

Clauses, on which the Expert felt no need to comment, have been omitted from the commentary.

It was noted that the following clauses contained various manifestations of the expression "execute and maintain" or "execute or maintain" :

Clauses 1 (1) (j), 1 (1) (h), 1(1)(i), 7, 8 (1), 12, 13, 16(19) and 22(1).

In order to make the intention clear, it was agreeed to insert "complete" between "execute" and "maintain" in Clause 8 (1) and possibly in other clauses in which the expression occurs.

- Attention was drawn to the use of the word "completion", in a number of Clauses, for both sustantial and final completion.

Clause 1 - Definitions and interpretation

(1) (a) In relation to assignment by the Employer see the comments on clauses 3 & 4. The present wording should be changed accordingly to read "and his permitted assigns" instead of "except etc" which should be deleted.
(e) Works (i) "Temporary works" and (j) "Permanent works"
It will be essential to define these terms in particular detail.

(f) The "Contract" definition should be changed to take into account the cases where the documents comprising the contract are either more or less than those stated in the present definition. Further the Arabs Experts suggested that a definition of "contract documents" be added.

(K) The "Specification" contained in the Contract will normally be that issued with the tender together with agreed amendments made during the negotiation leading to the signature of the contract or where there is no tender, the Specification issued to the contractor.

(i) For "Drawings" the observations in (k) above as relevant.

(m) In the definition of "Site", the word "documents" should be added after "Contract" (see comment on (f) above). It is vital that as precise a description as possible of the site be given in Part II or the preamble to the specification with sketch maps where appropriate.

(4) Where "Extra" cost is payable to the Contractor under any provisions of the contract, he is not entitled to any allewance for profit.

Clause 2 - Engineer's Representative

2 (1) It is in the common interest of the parties to refer in Part II to the laws, regulations or decrees entailing any limitation of the Engineer's powers, notwithstanding that it is the contractor's duty to familiarize himself with the relevant legal consequences. The Group agreed that this clause required no amendement.

Clauses3 and 4 - Assignment and Subletting

Assignment The Group notes that under 1 (a) of Clause I, the Contractor's consent is required to any assignment by the Employer. It was thus agreed to amend the rule for assignment as follows under clause 3.

(i) Where the Employer is in the private sector and proposes to assign, the consent for the Contractor is not to be unreasonably witheld.

(ii) The Contractor's consent would not be required if during the negotiations leading to the contract, it was made clear that the Ministry or state agency in charge of the negotiations would assign performance of the contract to a public body or corporation under the control of the State. Nevertheless the Contractor must be notified in advance of the date of the assignment.

(iii) If during the execution of the contract, the Employer, being a ministry or state agency, wishes to assign the contract to a body or corporation within the public sector, the Contractor will be entitled to receive a notification from the Employer assuring the Contractor that the assignes is in a position to honour the original Employer's obligations under the contract. This is especially so where credit terms have been made available to the Employer or where the Contractor has taken out credit insurance in respect of the original Employer (the assignor). The earliest possible advance notice of any such assignment should be given to the contractor.

Subletting

The Contractor is responsible for all his subcontractors whether they are these of his own choice or nominated subcontractors chosen by the Employer and appointed in accordance with clause 59.
The Group recommends deleting the reference to "piecework".

Clause 5 - Contract Documents

5 (1) (a) It is recongnized that for some individual contrats, the Arabic version of the Contract agreement (on the form set out on page 28 of the Conditions) will be the original version. If it is agreed that the ruling language for other documents forming part of the contract e.g. the specification, is different from that agreed for the contract agreement or any other document, this should be made clear in part II.

5 (1) (b) However, it will generally be necessary for practical reasons, to have another authentic text in one of the Community languages. The questions of applicable law is considered in Chapter 3.

5 (2) As noted in the general comments, it is agreed that the provisions approved by the parties in part II shall prevail over the general conditions contained in part I. The documents which form the contract are intended to be mutually explanatory of one another and clause 5 (2) is to amended accordingly. The Group recommends that the Contract agreement on page 28 of the conditions clearly shows the order of procedence to these documents to assist in the interpretation of the contract, otherwise this can be conveniently set out in part II.

If the parties wish to limit the Engineer's power to adjust discrepancies or ambiguities without reference to the Employer, to technical matters only, then specific reference to this limitation should be made in part II envisaged by clause 2 (1) of part I.

The Arab Experts consider that in determining whether the contractor is entitled to extra cost, by reason of compliance with an Engineer's instruction explaining or adjusting an ambiguity or discrepancy, an objective as opposed to the subjective test provided in part I should be satisfied, i.e. "an experienced Contractor" and not the "Contractor".

If compliance with the instruction decreases the Contract's costs, an adjustment in faveur of the Employer should be made.

Clause 6

6 (1) The Contractor should not use the drawings for any other projects nor divulge them to third parties except for the purposes of the contract, without the Employer's prior written approval.

6(3) The Contractor should give adequate advance notice of the requirement of drawing or orders if work is not to be delayed. It is agreed that the directions, instructions or approvals must be specifically required under the contract if the Contractor is to have the benefit of the provisions of clause 6 (4), which should be amended accordingly.

6 (4) The Contractor would be entitled to an extension of time or to payment of extra costs only if the necessity for the drawings, orders, directions, instructions or approvals is

recognized by the Engineer and/or the Employer. Clause 6 (4) should be amended accordingly.

As to the verification of extra costs, see the comment on Clause 52 (4).

Clause 8 - Contractor's General Responsibilities

(1) It is agreed that a specific reference to "completion" be included in clause 8 (1).

The Employer will help the Contractor to identify any established customs in the Employer's country which the Employer would expect the Contractor to observe in carrying out the contract, the Contractor being responsible for their evaluation in so far as they affect his contractual obligations, nothwithstanding the Contractor's duty to familiarize himself withe the said customs.

(2) If the Contractor accepts design responsibilites in relation to any part of the permanent works or the temporary works, it is recommended that the Contractor be required to take out insurance for the benefit of the Employer, against failure to meet such responsibilities, and that such insurance, if possible be integrated with the Engineer's insurance policy.

Contractors should note that, despite any express provision in the contract to the contrary, in many Arab states the Contractor will be jointly responsible with the Engineerforensuring the safety of the works whether he has designed them or not, for a certain period, e.g. 10 years after completion, on grounds of public policy, both as regards the Employer and third parties. In such cases, it would not be possible for the parties to the contract to reduce the period of responsibility as between themselves (see for example article 651 of the Egyptian Civil Code). The Employer should, during the contract negotiations,draw the attention of the Contractor to such provisions.

Clause 10 - Performance Bond

In some Arab states, the bond or guarantee must be provided by or through a national bank of the state concerned. Any such requirement should be stated in the Instructions to Tenderers or in Part II. Performance Bonds and Guarantees are the subject of Chapter 2.

Clause II - Inspection of Site

The provision of data by the Employer upon which the contractor's tender is based, is intended to facilitate the evaluation of tenders by ensuring that all tenders have been prepared on the same basis as the Engineer's drawings and design.

Where the particular requirements of the contract require that design and construction should proceed together, e.g. particularly in construction management contracts, or where the Contractor is selected otherwise, article 11 will have to be amended.

It was agreed that generally this clause represented a reasonable division of responsibilities without modification.

The parties may find it necessary in certain circumstances, to elaborate on the extent to which the contractor is expected to make investigations and satisfy himself as to the form and nature of the Site.

Clause 12 - Sufficiency of Tender and Adverse Physical Conditions

The phrase "except in so far as it is otherwise provided in the Contract" -refers to such items as provisional sums.

The Arab Experts consider that physical conditions and artificial obstructions should be defined and do not accept that any physical conditions or artificial obstructions outside the site should entitle the contractor to any extra costs. The Contractor in their view is only entitled to extra costs if the physical conditions or artificial obstructions are encountered on the site.

The European Experts maintain that the Contractor is entitled to extra cost if the physical condition or artificial obstruction affects the performance of the contract it being the Contractor's responsibility to take the risks of any matters which could reasonably have been forseen by an experienced contractor.

The Arab Expert also take the view that it should be made clear that if the contractor does not give notice of his intention to claim extra costs, he loses the right to payment for any such extra costs.

Generally, the Arab Experts prefer the wording of article 12 of 5th edition of"Conditions of Contract for Works of Civil Engineering Construction" published by the Institution of Civil Engineers, 8 Great George St., London (known as the ICE conditions) as far as the practicable measures indicated. The European Experts consider that the ICE contract is not an appropriate precedent (See comment on Clause 65)

Clause 13 - Work to the Satisfaction of the Engineer

It was agreed that the phrase "physically impossible" could apply to conditions not covered elsewhere in the Conditions and should therefore remain.

Clause 14 - Programme to be furnished

Further consideration should be given to the introduction of sanctions designed to ensure that the Contractor complies with requests from the Engineer, particularly in those cases where delay would affect critical completion dates within the Contract programme. The Withholding of payments for preliminary works was a possibility in connection with the submission of a detailed programme under Clause 14.

In case the contractor fails to provide the programme within the time stated in Part II of this Clause, it may be appropriate in some cases to provide in article 47 that the date for provision of the programme should be a "key date" involving a specific daily penalty or liquidated damages until the programme is furnished.

The Engineer's approval of the programme should not, unless expressly agreed by the parties, bind the Employer as regards any of the dates stated therein except the commencement and completion dates in the contract.

Clauses 15 and 16 - Contractor's Superintendence and Contractor's Employees

It is noted that there is no remedy, other than the ultimate remedy of termination, if the Contractor fails to comply with the Engineer's instructions concerning the Contractor's superintendence or labour. The parties may consider it desirable to agree on an appropriate remedy in Part II, e.g. daily penalty or liquidated damages.

Clause 15

As in the case of the Engineer's representative, the Contractor should be required to notify the Employer and the Engineer of the extent of devolution of duties to his Site Representative.

Clause 16 A reference to sub-contractor's employees could be added.

Clause 17 - Setting out

"Progress" to be replaced by "execution".

Clauses 20 - 23 Insurance Provisions

The clauses make provision for three types of insurance which, taken together, provide sufficient cover to protect the Contractor's areas of responsibility for loss, damage or injury under the terms of the contract and give the indemnities that he is required to provide to the Employer. The insurance market, particulary in London, has developed separate policies of insurance which cover the three sets of obligations and the Contractor can accordingly select the insurer giving the cover required at the most economic rates. Both sides noted that an efficient contractor with a good insurance record will enjoy lower premiums and better cover, which will improve his competitive position against other contractors, the cost benefit being passed on to the Employer.

Consideration should be given to creatury a combined and comprehensive policy for appropriate projects in the names of the Employer, all contractors and all sub-contractors, to eliminate gaps in cover and disputes between insurers regarding the liabilities of their respective policy holders.

Consideration must be given to the role of national insurance compagnies in accordance with the law of the country of performance of the contract.

Clause 20

20 (1) The Arab Experts considered that the Employer should be given a certain period (14 days in the ICE Conditions) after the Engineer has issued the certificate of substantial completion, to make his own insurance arrangement before the risk passes to the Employer. The European Experts hold the view that risk should pass with the certificate and that sufficient flexibility had already been introduced by stipulating that the risk passes on the date stated in the certificate. As the date on the certificate is that chosen by the Engineer, it is his duty to ensure that he selects a date which gives the Employer adequate time to make insurance arrangements in place of the Contractor's Policy under Clause 20 (1). This implies that the Engineer is free to choose a date for inclusion in the certificate irrespective of the factual date.

The Groupe examined various words and phrases and concluded that they were normally interpreted as follows :

"Any part of the Permanent Works (line 4) includes "sections of work" as referred to in Article 48.

"Outstanding work" (line 7). Experience shows that insurers generally consider that such work remains the responsibility of the Contractor until it is completed and that the insurance cover operates until the maintenance certificate is issued (Clause 61). When damage occurs which is the joint responsibility of the Employer and the Contractor there is no apportionment of liability under Clause 21 and the insurance cover should meet the cost of repairs in full.

"So that at completion" (line 12). "completion" here means "substantial completion".

"In the event of any such damage, loss or injury happening from..." (line 14). "Happening from" means "arising out of or in consequence of".

"And subject always to the provisions of Clause 65 hereof" (line 15) means that Clause 65 excludes the operation of Clause 20.

20 (2) "A cause solely due to the Engineer's design" (line 4). It was pointed out that the wording of policies issued on the London market was not identical. There is need for both parties to review the policies to ensure that they provide the cover required by the contract (Clause 21).

"Use or occupation by the Employer of any part of the Permanent Works" (line 4). If use or occupation is required prior to substantial completion, this should be agreed between the Contractor and the Employer at the time the contract is drawn up.

"Forces of nature as an experienced Contractor could not foresee..." (line 9) means "forces of nature which an experienced Contractor could not reasonably foresee".

When part of the Permanent Works are used or occupied by another of the Employer's Contractors, that Contractor is responsible for the work he is undertaking and will be covered by his insurance. Any consequential damage he causes to the remaining parts of the Permanent Works will be covered by his liability policy. Use or occupation, by the Employer or by another of his Contractors, does not relieve the Contractor of his obligation in respect of the remainder of the Permanent Works.

Clause 21

The Arab Experts thought that there should be an obligation to insure against the need to repair or reconstruct any work constructed with materials or workmanship not in accordance with the requirements of the Contract. The European Experts stated that such a provision had not been included because of the prohibitive expense of arranging such insurance.

It was noted that though the policy was in the joint names of the Employer and Contractor, and subject to the Employer's approval, the Contractor was the policy holder and thus only he could instruct the Insurer to make changes in the policy. However, the practice is increasing whereby the Employer Obtains a statement from the insurer at the commencement of construction, which gives details of the cover provided for the project and includes an undertaking that the insurer will report to the Employer any changes of a significant nature in the cover for which the Contractor as policy holder gives instructions. This practice is advantageous to the Employer and should be provided for in the Instructions to Tenderer.

Clause 22

22 (1)(c) Insurers interpret "unavoidable result of the execution or maintenance of the Works in accordance with the Contract" as meaning that if the Contractor carried out the Work in strict accordance, both explicitly and implicitly, with the instructions given by the Engineer, he would not be liable for injuries or damage which may occur as a result.

22 (1)(d) The contributory negligence of the Contractor will reduce the amount of the indemnity payable by the Employer under sub-clause 2.

Clause 23

The law applicable in the state where the Works are situated may provide that the Contractor remains liable for the safety of the structure for a fixed period of time after completion, (See comment on Clause 8) and should be brought to the Contractor's notice before the contract is signed.

The Arab Experts feel that a sub-clause should be added to the effect that the Contractor is responsible for notifying the insurance companies of any matter or event which by the terms of such insurances are required to be notified and in the manner and time specified in the insurance policies. The Arab Experts thought that another clause should be added, to the effect that any monies received under the policies should be paid to the Employer and then paid by the Employer to the Contractor in such amounts and at such times as shall be certified by the Engineer as being fair and reasonable in view of the progress made by the Contractor in making good the damage or loss aforesaid. If and in so far as such monies shall be insufficient for the purposes aforesaid, the deficiency shall be borne by the Contractor. The European side presented to the Arab Side "Construction and Erection Insurance" Advanced Study 208, published by the Insurance Institute, London, and pointed out that there was non Lloyds Standard Wording for these policies. The Claimant under the policy has to prove his financial loss to the insurer. As the Contractor has to reinstate at his own expense the insurer will pay him on proof of expenditure and satisfactory reinstatement. In unusual circumstances where the Employer can prove financial loss, for example where the Contractor fails to reinstate and the Employer has to use another Contractor then the insurer will pay the Employer direct. In cases where the insurer advanced significant sums aimed at covering both interests he would require a joint-discharge from the Contractor and the Employer.

Clause 26 - Compliance with Statutes, etc..

Details of the fees payable, clearly defining the respective responsibilities for payment should be included either in the specifications (see Notes p. 26) or in Part II.

Il was noted that fees include stamp duties.

Clause 27 - Fossils, etc..

Il was noted that the Contractor is not the owner of the Site ; accordingly, there is non question of his obtaining mineral rights in respect of the site.

The interpretation of the word "reasonable" depends upon the nature of the Site.

Clause 28 - Patent Rights and Royalties

See comment on clause 63.

Clause 29 - Interference with Traffic

This clause relates to the overall responsibility of the Contractor to avoid, so far as is possible, causing inconvenience to the public within the requirements of the Contract. It does not relate to claims arising out of the Contractor's occupancy of the Site, which is covered in clause 22 (1)(a).

Clause 30 - Extraordinary Traffic, Special Loads, etc.

where construction plant and machinery are chosen by the Contractor, he shall pay the costs under this clause.

Clause 33 - Clearance of Site on Completion

No maintenance certificate would be issued until the Site has been properly cleared.

Clause 34 - Labour

In order to ensure truly comparable tenders, the documents accompanying the invitations to tender should state clearly the Employer's requirements in respect of housing, welfare, etc.. The Employer can in this way ensure that adequate standards are provided whichever tenderer is awarded the Contract without running the risk of disturbing work relations. (See also page 27 of the Notes).

Clause 35 - Returns of Labour, etc..

The words "if required by the Engineer" can be deleted in Part II if the proper law so requires.

Statistical data, if required by law, will be mentioned in Part II.

It was observed that a reference to returns of sub-contractor's Labour should be included where appropriate.

Clause 36 - Quantity of Materials, Samples and Tests, etc..

Clauses 36 to 39 are not intented to qualify or detract from the general responsabilities of the Contractor as described in Article 8.

The words "clearly intended" cover the case where the nature of the Contract so demands.

Clause 37 - Access to Site

When appropriate, an additional subclause in Part II should provide that the Engineer should have access to any place other than the Site, where a test is to be carried out on materials etc. which are the subject of a subcontract.

Clause 38 - Examination of Work

The Arab Experts suggest that it should be provided in Part II that the Employer or Contractor should pay the costs or expenses as the case may be. This would replace subclause (2) by which the Employer generally pays the expenses, but the Contractor pays his own costs when subparagraph 1 has not been complied with.

The Arab Experts suggest that provision for set-off as provided in clause 39 (2) should also be applied to sub-clause 2 of this clause.

Clause 39 - Removal of Improper Work and Materials

Where there is a design obligation on the Contractor, Part II should cover the power of the Engineer to order removal or re-execution etc. of improper work.

The Arab Experts questioned the adequacy of the powers of the Engineer. In particular they considered that the Engineer should be able to order removal, re-execution etc. during the maintenance period. The European Experts considered that this solution was not practicable, since the Contractor would have left the Site - and possibly the country- by this time.

Whereever possible, orders under this clause shall specify the time within which removal, execution etc. is to be carried out.

Clause 40 - Suspension of Work

In many Arab states where a national Civil Code applies, the risks resulting from forcemajeure are divided between the contracting parties, each bearing its own costs and losses without recourse to the other. This is not a matter of public policy and thus parties can make valid agreements otherwise apportioning the risks. The Arab Experts recommend this division of risks while recognizing that this may lead to Contractors increasing prices to cover contingencies.

Where the suspension is within sub-clause (1)a), c) or d) the traditional practice would be to set a time limit beyond which both parties have a right to terminate.

In sub-clause (1) d) the words "proper execution of the Works" must be interpreted as including compliance with safety regulations and measures for the safety of persons, either workmen or third parties.

Clause 41 - Commencement of Works

The words "wholly beyond the Contractor's control" mean that commencement is impossible.

For greater certainty Part II should indicate a period within which the Engineer is to give the Contractor a written commencement order.

Clause 42 - Possession of Site

It may be useful to indicate under Part II that the Contractor suffering delay under this clause will request an extension of time under clause 44, will make a claim in accordance with clause 52 (4) or (5) as the case may be, and will be paid in accordance with clause 60.

It is for consideration whether or not an Employer can delay giving possession to the Contractor until the programme is submitted. The Arab Experts suggest that the submission of the programme could be a condition precedent to possession of the site, or some other remedy be found to ensure the timely submission of the programme. (See comment on Clause 14).

Clause 44 - Extension of Time for Completion

This clause is concerned only with extension of time and not necessarily with claims involving extra cost, if any, which are dealt with in clause 52 (5).

It should be indicated in Part II that the words "special circumstances" mean "exceptional circumstances".

The "default of the Contractor" includes his failure to maintain a proper rate of progress envisaged under clause 46.

The procedure in the second sentence is limited to "additional work or other special circumstances" which appears to exclude "any cause of delay referred to in the conditions on exceptional adverse climatic conditions" (see first sentence). This requires clarification by a suitable amendment in Part II.

There needs to be explicit mention of the Engineer's power to grant extension of time for parts or sections of the Works in view of the Common Law rules on liquidated damages.

There needs also to be a time limit within which the Engineer shall determine the amount of the extension and notify the parties.

Clause 46 - Rate of Progress

The Arab Experts consider that there needs to be provision for the Engineer, irrespective of granting an extension to which the Contractor would be entitled, to order the speeding up of the work (subject to additional payment) so far as this is practicable and is in the interest of the Works.

It is suggested that, for greater clarity with regard to night or weekend working, the following sentence be added to the end of the clause : "The Contractor shall not be entitled to any additional payment for taking such steps".

Nuisance claims as a result of night and weekend working are the subject of Clause 22 and are insurable risks under Clause 23.

Clause 47 - Liquidated Damages

It must be noted that the national Civil Codes, unlike Common Law, make no distinction between liquidated damages and penalties. Both are subject to the same legal provisions and each can be used in the Contract in different contexts.

Clause 48 - Certification of Completion

Action under this clause may be initiated either by the Contractor under sub-clauses (1) and (2) or by the Engineer under sub-clause (3). If the Contractor makes the request in the proper form the Engineer has the option either to issue a certificate of completion if the Works have, in his opinion, been satisfactorily completed according to the Contract or, if the request is premature, he can tell the Contractor what further work to complete before the certificate can be issued.

The basic rights of the parties to the Contract are not altered by the modified wording which has been introduced into the Third Edition to allow the Contractor to make the request if he feels that the issue of the certificate is overdue.

Clause 49 - Definition of Period of Maintenance, etc.

The need is rare for an extension of the period of maintenance on completion of work made good under this clause in civil engineering contracts, whereas there is more frequent need for an extension of the defects liability period in mechanical and electrical engineering contracts.

The implementation of sub-clause (4) is not subject to any formalities in the conditions of contract. However, in countries where a civil code exists, formalities would be required; if the applicable law is based on a civil code system, there must therefore be an explicit waiver of formalities.

Clause 50 - Contractor to Search

This clause is not concerned with the allocation of the burden of proof in the event of the Contractor contesting liability. The Arab Experts again questioned the adequacy of the powers of the Engineer in this context (See comments in Introduction and on Clause 39).

Clause 51 - Variations, etc.

It is useful to empower the Engineer by suitable provision in Part II to order practicable changes in the specified sequence or timing of the Works, in addition to the powers granted hereunder.

In sub-clause (1) e) the Contractor may be ordered to execute additional work of any kind necessary (but not arising from any default on the part of the Contractor) for the completion of the Works.

In sub-clause (2) the provise referring to Bills of Quantities is superfluous as the matter is dealt with in Clause 55.

Clause 52 - Valuation of Variations, etc.

Though the wording of this clause in the Third Edition differs from that in the Second Edition, this in no way affects the substance of the Engineer's rights and duties.

Sub-clause (1) concerns the valuation of all the extra or additional work done or work omitted by order of the Engineer under Clause 51 (1) but is not intended to deal with work done or omitted as a result of a breach of the Contractor's obligations. A provision to this effect is necessary in Part II.

The Arab side considers that the word "applicable" may need some guidelines for its implementation, it is useful to request the Contractor to specify, in the tender, rates or prices for possible variations.

In sub-clause (2) the omission or addition must arise out of a variation and it is recommended that Part II should provide for the claim to be accompanied by as many particulars as practicable in the circumstances.

Sub-clause (3) is concerned with the adjustment of the final contract price, after exclusions, at the end of the contract, when the estimated comparable price at the time of award differs by more than 10 %. This percentage may be varied if the parties to the Contract so wish. In the opinion of the Arab Experts, this sub-clause is fair to both parties, is a useful addition but would be more appropriately located in the context of Clause 60, thus clearly distinguishing between the final adjustment in Clause 60 and the itemised variations in Clause 52.

Sub-clause (4). To aviod subsequent controversies the parties should set out the specific procedures for the reconding and verification of the time spent and materials used in cases where the Contractor is entitled to recover extra costs under the contract.

Sub-clause (5) second paragraph should be qualified to the effect that the Engineer shall be entitled to authorise payment if the Contractor has at the earliest opportunity notified the Engineer in writing that he intends to make a claim for such work and has at the earliest practicable opportunity notified the Engineer of the particulars of his claim.

Clause 53 - Plant , etc..

In sub-clause (2) "upon completion of the works" should be interpreted as meaning "at the end of the Maintenance Period".

In sub-clause (3) : Clauses 20 and 65 relate to "materials" but not to "Constructional plant" nor "Temporary Works". This provision should therefore be interpreted as meanind "Constructional plant, Temporary Works or, except as mentioned in Clauses 29 and 65, materials".

With regard to sub-clause (5) it was agreed that the Employer should use his best endeavours to assist the Contractor.

Clause 56 - Works to be measured

The words "the measurement made by the Engineer shall be taken to be the correct measurement" should be interpreted as raising a legal presumption as to the accuracy of the measurement.

Clause 57 - Method of Measurement

See Notes page 39 - general directions on Bills of Quantities.

Clause 58 - Provisional Sums

Procedure has been simplified by the deletion of "Prime Costs" which are now included under the general definition of "Provisional Sums".

In sub-clause (2) it is emphasized that the Engineer has power to order any or all of the actions required by paragraph a), b) and c); the contracting parties may, if they think fit, amend the introductory sentence accordingly.

Clause 59 - Nominated Sub-Contractors

If there is need, due to the nature of the subject matter, for detailed provisions to cover the possible rejection of the sub-contractor these should be set out in Part II as should the detailed procedure in case of forfeiture of the subcontract.

In sub-clause (1) persons to whom the Contractor is required to sublet any work are referred to as "nominated sub-contractors". Such a person approximates more to a normal sub-contractor as the main difference between a "nominated sub-contractor" and a normal sub-contractor is that the Contractor has a right to object to a "nominated sub-contractor". There is no privity of contract between the Employer and a "nominated sub-contractor". The definition in this sub-clause could be simplified.

Sub-clause (2) does not prevent the Employer reserving sub-contracts to local sub-contractors against whom the Contractor raises non reasonable objections. The arbitration clause in the sub-contract should be identical with that in the main contract and also provide for the nominated sub-contractor to be joined in arbitration proceedings under the main contract.

In sub-clause (5) a problem arises under the Common Law systems, as opposed to the Civil Codes, in that the Employer is not, as the sub-clause is now written, entitled to pay the "nominated sub-contractor" directly :

a) If the Contractor is not yet in default but has become insolvent or bankrupt, or

b) If the Contractor has no more monies due to him and is in default as regards payments to the sub-contractor.

Provisions regarding such direct payments should be included in Part II. See also comment on Clause 63.

In paragraph a) of sub-clause (5) the word "inform" should be replaced by the word "satisfy" to ensure that the Contractor in fact has reasonable cause for withholding payment.

Under sub-clause (6) where the Contractor makes an assignment of the benefit of a nominated sub-contract, he remains fully liable to the Employer for any default of the nominated sub-contractor. He will only be relieved of such liability by the termination of the sub-contract and its novation between the Employer and the nominated sub-contractor.

Clause 60 - Certificates and Payments

This clause provides an outline which is supplemented by the check list in Part II, but this is insufficient to guide the parties through the practical and legal questions raised. Part II should contain full provisions.

Clause 61 - Approval only by Maintenance Certificate

It is suggested that the intention behind this provision is to establish that only a single maintenance certificate can be acceptable evidence that the Works have been completed and maintained to the satisfaction of the Employer.

Clause 62 - Maintenance Certificate

- Sub-clause (1) describes

the effect of the issuing of a maintenance certificate (namely that the Contract is complete), and

the mechanics of issuing it.

- Sub-clause (2) terminates the Employer's liability to the Contractor unless the Contractor has made a claim in writing before the issue of the Maintenance Certificate. It is submitted that the Employer should also remain liable in circumstances where the Contractor was not in a position to make such a claim before the issue of the maintenance certificate.

- Sub-clause (3) defines certain derogations with regard to unfulfilled obligations.

Clause 63 - Default of Contractor

The death of a physical person, who is a "Contractor" as defined in clause 1 (1)(b) does not put an end to the Contract which is carried on by the Contractor's personal representatives, etc. If the Contractor is a partnership any change in the partnership may be notified to the Employer, but does not entitle tle Employer to take action under Clause 63 nor to terminate the Contract unless so provided in Part II under clause 1 (1)(b).

Clause 63 (1) is intented to apply to bankruptcy and legal situations equivalent to bankruptcy, e.g. "réglement judiciaire" and proven insolvency. It is possible that in some countries the Employer's rights against the Contractor may not prevail against a trustee in bankruptcy or a liquidator on ground of public policy. Thus it would be prudent when invoking Clause 63 not to rely on bankruptcy and equivalent legal situations alone but also to cite other breaches.

The total subletting of the Works by the Contractor is prohibited under Article 4. If it were to be considered the equivalent of an assignment of the contract it would require the prior written consent of the Employer under Clause 3, otherwise the Contractor would be in default and Clause 63 (1) could be invoked. The Arab Experts suggest that the clause should be extended to cover subletting the whole of the Works.

Abandoning the contract in Clause 63 (1) (a) includes abandoning the works.

Clause 63 (1) is intented to cover failure to make reasonable and satisfactory progress in the execution of the work in accordance with the contract time (see Clause 8) and failure to supply sufficient or suitable constructional plant, temporary works, labour, materials, or things (Clause 8). In Clause 63 (1) (d) "warnings in writing by the Engineer" is clearly intended to mean notification by the Engineer himself in writing warning the Contractor that he is not executing the contract with due care and diligence, or is persistently neglecting to carry out his fundamental contractual obligations and that he must take such steps as are necessary and as the Engineer may approve. Such notification must lay down a reasonable period within which the breach should be remedied. Two such warning notifications, if disregarded, would entitle the Employer to issue the fourteen day in writing prior to entry on site.

The Employer's right under Clause 63 to expel the defaulting Contractor and have the Works completed is without prejudice to his right under the proper law of the Contract to rescind the Contract for fundamental breach. Such rescission entitles him to claim the appropriate damages.

Where Clause 63 is invoked the contract is not voided nor is the Contractor released from any of his obligations or liabilities under the Contract. The Employer revokes a contractual licence and recovers the Site or that part of it which was delivered to the Contractor under Clause 42 temporarily to enable him to execute the Works. Expulsion is not subject to nay judicial formalities. The Contractor's remedy lies in a claim for damages for wrongful expulsion but he has no right to remain on the site after the notice has expired.

As the Contractor is not released from any of his obligations or liabilities under the Contract. Clause 47 on liquidated damages ceases to operate at the date of completion by the Employer or by the new Contractor. The Arab Experts consider that liquidated damages should, in the event of forfeiture, cease to operate on the expiry of the notice, so that thereafter ordinary damages would apply, it being for the Employer to prove the quantum. The European Experts observed that the undermining of the principle of liquidated and ascertained damages would introduce considerable uncertainty for both parties to the Contract. However, as pointed out above, the Clause is without prejudice to the Employer's right of rescision with appropriate damages. As the Contractor is still bound by his liabilities and obligations under the Contract and the sub-contractors are bound to him, the Contractor must ensure that the sub-contracts are carried out. The Employer's right to pay sub-contractors after forfeiture should be included in this clause.(See also comment on Clause 59). The Arab Experts consider that each sub-contract should contain a clause which requires it to be assigned to the Employer or any Contractor nominated by him in the event of Clause 63 being invoked. Without the right of assignment of the sub-contracts, forfeiture is not an effective remedy. Furthermore under the Civil Codes of some Arab countries the Employer will be bound to pay the sub-contractor and therefore it is equitable that he should be able to have privity of contract with him. The European Experts observed that many sub-contractors would not be willing to accept such a clause because it might cause them to work either for the Employer himself (to all intents and purposes as a main contractor) or another contractor of a different nationality or of indifferent reputation.

Where there is bankruptcy or an equivalent legal situation, Clause 63 specifically requires the Plant Materials etc. listed in Clause 53 to be put in the possession of the Employer for use to complete the Works or for sale to satisfy debts due from the Contractor. Note 63 (5) Part III. Under Common Law the Employer is a bailee in possession, having the right to sell by virtue of Clause 63. Under other systems, for example Belgian, French and German Law, the Employer has possession with a contractual right to sell. Both parties should make the necessary provision, under the proper law of the contract in Part II to ensure that the Employer's right of sale is effective against third parties. The proper law of the contract may necessitate a specific provision that the Employer shall not pay rent for the plant etc to the Contractor. This Clause does not affect the Employer's right to indemnity in respect of patent rights and royalties under Clause 28. Sale under Civil Code systems requires specific provisions under Clause 53 (Part II).

The Arab Experts suggest that whenever damages to the Employer or sums due to the Contractor are ascertainable either party should be able to claim payment at once without waiting for the completion of the Works. However, sums paid prior to completion of the Works take no account of the continuing liabilities and obligations of the Contractor and may require adjustment on completion.

Clause 64 - Urgent Repairs

Line one of this clause should be interpreted as including not only events occurring but also threatened. The remedial work etc. must be urgently necessary for the protection and preservation of the Works, its neighbourhood and personnel.

Clause 65 - Special Risks

The Contractor is a licensee who is temporarily on the Site in order to enable him to execute the Works. The contract in Clause 20 lays down the Contractor's responsibility for the care of the Works and lists the risks for which he is not responsible. He is obliged to repair and make good any damage loss or injury happening from any of the Excepted Risks to the extent required by the Engineer at the cost of the Employer. Article 65 in effect sets out the liabilities of the Employer to the Contractor as the licensee of the Site of the Employer in the event of the Contractor being affected by Special Risks. The European Experts consider that, on the whole, these clauses provide the protection that a licensee (almost invariably a foreign enterprise) is entitled to expect under general principles of law, from the Employer (almost invariably a national of the country where the Works are being constructed). The European Experts further consider that the ICE conditions, in contrast with these international conditions, being a contract designed for work in the UK, subject to known UK laws on, inter alia, occupier's liability between an Employer and a Contractor, usually of the same nationality (subject to the EEC Treaty) is therefore not an appropriate precedent when considering these conditions (see comment on Clause 12).

The Arab Experts, however, consider that the nuclear and pressure waves risks defined in Clause 20 (2) should be included in the list of Excepted Risks but should be excluded from the list of Special Risks where they occur in isolation (i.e., not as part of another Special Risk such as war) as such circumstances do not justify the Employer having to make all the payments to the Contractor envisaged by Clause 65. The European Experts were unable to agree for the reasons given in the preceding paragraph.

The Arab Experts consider that riot commotion and disorder should be excluded from the list of Special Risks. As Clause 65 (5) qualifies these risks "insofar as

it relates to the country in which the Works are being or are to be executed or maintained", and as the Contractor has to prove that they have caused him harm or have given rise to claims etc. - see Clause 65 (1) -, the European Experts consider that these risks should be retained in Clause 65 (5).

Article 65 (5) is intended to list the Special Risks occurring during the currency of the contract, i.e. the period from the award of the contract until the Contractor has completed his obligations and has no further liabilities.

The Arab Experts consider that war, hostilities (whether war be declared or not) invasion and act of foreign enemies should only be defined as Special Risks when involving the country in which the Works are being or are to be executed or maintained. The European Experts consider that war etc., in a country other than that of the neutral country where the Works are being executed, could lead to the destruction of plant, etc. difficulty of access and other problems. It therefore considers that these Special Risks should not be limited only to the occasions when they involve the country in which the Works are being executed.

The Arab Experts consider that in Clause 65 (2) the Contractor should remain responsible for his own property. The European Experts take the view that the Contractor should receive payment for any such property destroyed or damaged by any of the Special Risks.

The Group noted the implications of the words "necessary for the completion of the Works" in Clause 65 (2). Under Clause 51 the Engineer may vary the form, quality or quantity of the Works thus reducing the amount for which the Employer would be liable under Clause 65 (2) (b) and (c). As an alternative, the Engineer could order suspension under Clause 40 (1) (d) when, it is submitted, there would be no repayments due under Clause 65 (4).

The Arab Experts consider that Clause 65 (3) should only apply to explosions etc. happening during the currency of the Contract and the occurrence of a Special Risk in the country of the Site of the Works. The European Experts consider that the sub-clause should be and is limited to the currency of the contract but should not be limited to an occurence only in the country of the site of the Works. Explosives when used by the Contractor for the execution of the Works are not within the scope of this sub-clause.

The Arab Experts consider the wording, "in any way whatsoever connected with" to be too wide. The European Experts were unable to propose a more satisfactory alternative but considered that this could be clarified by the parties in part II.

With regard to Clause 65 (6), the Arab Experts consider that :

a) "in any part of the World" should be restricted to the countries of the Employer and the Contractor. The European Experts, however, wish to retain the wording because it is adequately qualified by the phrase "which financially or otherwise, materially affects the execution of the Works".

b) the right of the Employer to terminate should be extended to an act of foreign enemies, an invasion, a civil war or a rebellion in the country of the Site. The European Experts observed that this could usefully be inserted in Part II by agreement between the parties.

c) the Contractor shall instead of using best endeavours "continue, so far as physically possible, to execute the Works". The European Experts consider that "best endeavours" should be maintained as being an effective legal term and giving flexibility to the arbitrator or judge in the interests of both parties. The Arab Experts however consider that in view of all the payments to which the Contractor is entitled under the Clause he must be required to exert more than best endeavours such that the only justification for him failing to complete would be physical impossibility.

Clause 66 - Frustration

The Arab Experts consider that it is inequitable for the Employer to make payments in accordance with Clause 65 (8) when under the rules as ordinary law the Contractor would, in case of frustration, have a claim for quantum meruit but not damages.

The European Experts consider that for the sake of certainty the payments to be made to the Contractor in the event of frustration, if Clause 65 (8) is not used as a basis, should be clearly specified in Part II.

Clause 67 - Settlement of Disputes

The Arab Experts were not entirely convinced that litigation or arbitration will always provide an immediate solution for the settlement of disputes and suggested bearing in mind other remedies for the non-performance of contractual obligations, such as the automatic return of half the performance bond after a set time limit for the issuing of the certificate of completion or instructions in terms of Clause 48. It was noted that conciliation and arbitration are the subject matter of Chapter 4.

Clause 68 - Notices

It was agreed that the addresses required under Clause 68 (1) should be recorded in the Appendix to the Tender. In certain countries a local address is necessary.

If considered necessary, a requirement to use registered post may be inserted in individual contracts.

Clause 69 - Default of Employer

In Clause 69 (1) (a) the Group considers that the certificates referred to here mean interim or final certificates for which, in the case of interim certificates, a minimum has been laid down in the Appendix. Payments under this clause are subject to any deduction of sums the Employer is entitled to make under the contract. Any deduction by the Employer which is disputed by the Contractor is subject to the provisions of Clause 67. The Arab Experts were not entirely certain that other clauses in the contract provided adequate remedy in the event of frivolous termination by the Contractor in the event of sums being in dispute.

The Group agreed that in Part II it would be equitable to insert at the beginning of Clause 69 (1) (b) the words : "despite previous notices in writing from the Contractor, unjustifiably .....".

The Arab Experts suggested that the last few words in 69 (1) (d) should be "does not intend to proceed with his contractual obligations", which is a right of the Employer under the Civil Code in certain Arab countries. They stressed that this basis of

termination gives the Contractor the right to damages equivalent to those Clause 69 provides. The European Experts observed that this wording had been inserted at the request of the World Bank.

It was agreed that the notice in Clause 69 (1) was a warning notice and if the Employer takes the necessary remedial action within the specified period then the Contractor cannot terminate. It was unanimously considered that the fourteen days should run from the date of receipt.

Clause 70 - Changes in Costs and Legislation

Sub-Clause 1

It was noted that there is a presumption that the contract price will fluctuate. However, the Group agreed that provision could be made for a fixed price contract by a suitable amendment in Part II.

Sub-Clause 2

The Arab Experts thought that the sub-clause would enable a contractor to claim in respect of all Government posted price increases, rather than rely on the price adjustment formula restricted to a limited number of indices, if any. They desired consideration to be given to restricting the price changes to listed items except where the price changes of other items exceeded a threshold level below which cost increases, taken together, would be borne by the Contractor ; the parties should also carefully consider if any increases or reductions resulting from Government action should be excluded from the operation of the sub-clause. The European Experts were of the opinion that because the range of possible legislative measures in the country of the project was unforseeable and could, alone or together, significantly affect the project, it would not be equitable to expect a foreign contractor to bear the consequential cost increases nor to retain any consequential cost decreases. Where there was a cost escalation clause, as in Clause 70 (1) the consequences of local legislation on the items covered by the cost escalation formula would, as stated, be included in the rise or fall calculations undertaken in respect of those items. The European Experts could not agree that remaining elements affected by such legislation should be excluded from the scope of Clause 70 (2). This would be a complete reversal of the current provisions.

Clause 71 - Currency Restrictions

The Arab Experts queried whether there were any practical steps which the Employer could take in the event of such restrictions being imposed which make it impossible for the Employer to transfer sums. The European Experts explained that the provision was necessary, in the event of such impossibility, to enable the Contractor to obtain cover from his export credit organization.

Clause 72 - Rates of Exchange

The Group agreed that the actual sums, required in currency other than that of the Employer, should be fixed at the time of tendering. Any conversion of such sums into the currency of the Employer is for the purpose of tendering only and should not be contrued as affecting the amount actually required to be paid in foreign currency.

VOLUME III

Chapter I

General Conditions for the Supply and Erection of Industrial Plant and Machinery for Import and Export

Contracts for the supply and erection of Industrial Plant and Machinery will become increasingly important in the economic development of the Arab States. It is essential that such contracts should be undertaken on conditions which hold a fair balance between the interests of Purchaser and Contractor. Whilst it must always be open to the contracting parties to adopt conditions of their own choice, the specialised group is of the opinion that the "General Conditions for the Supply and Erection of Plant and Machinery for Import and Export No. 188A", prepared under the auspices of the United Nations Economic Commission for Europe, will be a suitable basis for Contracts between Arab Purchasers and European Contractors for Plant and Machinery.

In considering Conditions 188A the parties are invited to take account of the following agreed observations and comments.

Paragraph 2.1

In contracts arranged by correspondence the time required for the passage of communications makes it particularly important to determine when the contract is formed. The Group agrees that the date of dispatch should be the determining date but that there should be a time limit (eg. one week) for the acceptance to reach its destination whether this acceptance comes from the Contractor under Article 2.1 or from the Purchaser under Article 2.2. It is important in either case that notice of receipt of the acceptance within the time limit be given promptly in order that the parties know that the Contract has been entered into.

Paragraph 2.2

Acceptance by telex is considered to be an acceptance in writing but if the parties choose this method of communication they should confirm the telex acceptance by letter.

Paragraph 3.1

It is vital, for the sake of clarity, that the parties should make it clear whether they consider that any such documents form part of the contract.

Paragraph 3.2

For the avoidance of doubt the parties should agree and set out in the contract any other cases in which technical documents and drawings become the property of the Purchaser.

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Paragraph 4

It is accepted that, in view of the many methods of delivery available eg. road, sea and air and the variety of packing required for the different methods of transport, it is practical for the Contractor to give, in his price lists and catalogues, prices which are for unpacked plant.

Paragraph 5.1

It is the Contractor's responsibility to seek information on local laws and regulations by his own means and through his local consultants, agents or partners. He should therefore adopt a positive attitude by actively seeking such information. The Purchaser should however, if asked by the Contractor, help the Contractor for this purpose.

Paragraph 5.2

It is recommended that the parties, in accordance with normal practice, agree the extent to which changes in the cost of erection caused by changes in local laws and regulations should be borne by or allowed to either party.

Paragraph 6.1

The matter of providing housing and/or board and lodging and medical facilities for the Contractor's staff should be expressly dealt with in the tender and in the contract and it should be stipulated whether it is the responsibility of the Contractor or the Purchaser.

In some cases it will be clear to the Contractor by reason of the nature of the contract and/or the site of the works that the conditions listed in paragraphs (a-e) will not be fulfilled.

Paragraphs 7.1 and 7.2

The Arab Experts consider that the Contractor should only be entitled to charge waiting time, in the case of contracts where erection is carried out on a time basis, if this arises through any cause for which the Purchaser or any of his contractors other than the Contractor is responsible (as is the case under Article 7.2 for lump-sum erection).

The European Experts consider that the hourly rates should not include contingencies for any other circumstances for which the Contractor is not responsible under the contract. This would be overcome by the parties agreeing that erection should be charged partly on lump-sum basis and partly on a time basis.

Paragraph 8.1

The Group accepts that the Purchaser should have the right to inspect, check and test the Plant. However the parties are recommended to agree the details of the procedures for this purpose.

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Paragraph 8.3

If no other technical requirements are specified in the contract, the Contractor should consider whether there are any International Standards which are applicable, in addition to the general practices obtaining in his own country and the Purchasers country.

Paragraph 8.4

If the Purchaser has not attended the tests he should be entitled within a time limit to be agreed, to raise objections to the accuracy of the test report.

Paragraph 9

This article defines the time when the risk of loss of or damage to the plant passes by reference to the International Rules for the Interpretation of Trade Terms (INCOTERMS). The parties therefore should be careful to choose an INCOTERM which reflects the rights and obligations of the parties under the contract in relation to the modalities of delivery as well as enabling the time of passing of risk to be accurately ascertained preferably by reference to an actual act of delivery.

Paragraph 10.2

The Purchaser is not entitled to rely on Article 25 if a circumstance falling within that Article arises after the Contractor has served the notice requiring the Purchaser to accept delivery unless otherwise agreed.

Paragraph 14

To avoid any doubts it is recommended that the parties state specifically which party is to bear the cost of wages of additional labour provided by the Purchaser whether or not the need for such additional labour was foreseen under the contract.

If the Contractor finds that he needs local labour additional to the requirements specified in the Contract it will be the Contractor's responsibility to provide the labour, although the Purchaser will give the Contractor whatever help he can.

It should be noted that many Arab countries suffer from shortages of labour, even unskilled labour.

Paragraph 15.3

The Contractor should also inform the Purchaser of any special dangers which the operation of the Plant may entail.

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Paragraph 20.1

It is always open to the parties to agree that some date other than a date determined in accordance with the provisions of this clause, should be the date from which the Completion Period should run.

Paragraph 20.3

Where the parties have agreed that there should be a reduction of the price, in accordance with paragraph D of the Appendix, when the Contractor fails to complete within the time for completion or any extension of that time, the Purchaser should not be required to prove that he has suffered loss.

Paragraph 20.5

The Group recommends that the parties consider that the contract should provide that the Purchaser is entitled to terminate the Contract, where the Contractor has failed to comply with the Purchaser's notice requiring the Contractor to complete an outstanding item of plant within a reasonable time, if the uncompleted item is a vital portion of the works.

The Contractor is not entitled to rely on Article 25 (Reliefs) if a circumstance falling within that Article arises after the Purchaser has served the notice fixing a final time for completion of the works, unless otherwise agreed.

The Group has however been unable to reach agreement on the subject of damage caused to the Purchaser and going beyond the maximum fixed amount or the part of the price attributable to the uncompleted portion where no maximum fixed amount is agreed.

The European Experts' view is that the Article entitles the Purchaser to consequential damages and direct damages up to a limit to be agreed and stated in paragraph F of the Appendix or if no limit is stated up to the value of the parts of the works which cannot be used because of the Contractors failure. This is considered to be a fair limitation because the Contractor seeks his return only from the sale of the Plant and the Purchaser, who seeks his return from the sale of the product of the works, must be expected to face some risks, i.e. loss of production or loss of Contracts. The Article as drafted does enable the Purchaser to claim such consequential losses or damage up to the limit applicable.

The Arab Experts' view is that in the circumstances envisaged by the clause there should be no limitation of the Contractors liability unless the parties so agree. The Arab Experts' view is based on the fact that the Purchaser may suffer major losses in case of termination, even partial especially if he has already entered into contracts for the sale of the products of the plant which had not been delivered in time by the Contractor.

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Paragraph 21.1

The comments on Article 8.3 also applies to this Article.

Paragraphs 21 and 22

In cases where, owing to the nature of the plant and machinery and/or the purpose of the contract the electrical or mechanical taking over tests should be completed by a test of production the details of these tests should be specified in the contract.

Paragraphs 23.7 and 23.8

It is recommended that the parties provide in the contract that the cost and risk of transport of defective, repaired or replacement parts should be borne by the Contractor. If the Purchaser is entitled under the contract to refix the repaired parts on site the reasonable costs should be borne by the Contractor.

Paragraph 23.9

It is recommended that the parties provide that the expenses reasonable costs and risks mentioned in this Article should be borne by the Contractor.

Paragraph 23.12

It is recommended that the parties agree that the obligations under Article 23 should apply to materials and designs provided by the Purchaser if the Contractor expressly states that the materials and designs are technically acceptable. It was agreed that, nevertheless, the Purchaser should accept responsibility for latent defects in such materials.

Paragraph 23.14

The Group recommends that the parties agree that this Article 23.14 applies to all defects which appear during the guarantee period whether or not the cause of the defect arose before taking over.

It also recommends that liability for personal injury occuring after taking over should not be dependent upon the Contractor being guilty of gross misconduct.

Paragraph 24 (1)

The burden of proof in any particular case will depend upon the applicable law.

Thus in most cases, if there is prima facie evidence to show that the damage or loss must have resulted from a negligent act or omission of the Contractor it will be for him to prove otherwise.

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If the damage occurs whilst the plant is under the control of the Contractor there would be a presumption that the damage was the fault of the Contractor.

In contracts where (for example) the Contractor is supplying plant and machinery for incorporation into an existing factory of the Purchaser, control of the work will normally remain with the Purchaser. However where the Contractor is providing plant and machinery for a whole factory or production process, control will normally remain with the Contractor who is usually responsible for all loss or damage occuring before taking over unless he can show the loss or damage arose as a result of the negligence of the Purchaser or of persons for whom the Purchaser was responsible, or a result of circumstances beyond the Contractors control. After taking over, the Purchaser is normally responsible for loss or damage occurring unless he can show that the Contractor caused the loss or damage.

Paragraph 25.1

The Article gives examples of some circumstances which are beyond the control of the parties. It is not an exhaustive list. If the contract contains a price revision clause we recommend that the Contractor should not be entitled to claim escalation during any period when the Contractor is entitled to relief because of industrial disputes. We also recommend that the parties should discuss the extent to which increased costs arising under any escalation clause should be shared if those costs are higher because either party has been entitled to rely on clause 25.

Paragraph 26.1

The reference in this clause to the damages foreseeable by the Party in default means that it must be foreseeable by a reasonable Purchaser or Contractor, as the case may be.

If either party considers that he will suffer losses of a special nature, which would not normally be foreseeable by the other party, if the other party fails to fulfill any particular obligations, the possibility of such losses should be specifically drawn to the attention of the other party at the tender stage.

Any contractual limitation of damages may not be effective, under the applicable law, to limit liability ex delicto (i.e. in tort).

Paragraph 27

We recommend that the parties make specific provision in their contracts detailing their respective rights in the different circumstances under which the contract might be terminated. Alternatively the parties might agree that their respective rights on termination should be determined in accordance with the applicable law.

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Paragraph 28

The law applicable is covered in Chapter 6 and conciliation and arbitration in Chapter 7.of Volume I.

Appendix

The parties may wish to fix in advance a period of delay in completion which will entitle the Purchaser to terminate the contract after the maximum percentage reduction in price agreed under paragraph E has been reached. If so, an additional item should be added to the list contained in the Appendix.

Supplementary Clause Price Revision

In cases where the supplementary clause is used.

(a) The Contractor should not be entitled to recover any increases in cost resulting from the default or negligence of the Contractor.

(b) It is recommended that the clause should not apply to any period during which the Contractor is entitled to relief under Article 25 by reason of industrial disputes.

(c) The parties should also agree in the contract to which other cases of relief the supplementary clause should or should not apply.

(d) The parties may also wish to fix a ceiling to the supplementary clause.

(e) The parties should take care to choose indices which reflect changes in cost, of the Plant or Machinery concerned and the materials used in the construction and in wages, as closely as possible to the subject matter of the contract.

Performance and Consumption Guarantees

Production and performance guarantees of Industrial Plant are of major importance to Arab Purchasers. When Arab Purchasers require such guarantees it is recommended that the parties take account of the following guidelines in reaching agreement.

1. The performance and consumption figures which are to be guaranteed should be specified in the contract. These figures should be achieved under normal conditions (which should be specified) and for a period to be agreed.

2. A schedule of tests designed to prove that the plant is capable of attaining the guaranteed figures should be agreed and specified in the contract and a timetable for the tests agreed.

3. The contract should provide that if the guarantees are not met within the period agreed, the Contractor should be given an opportunity to carry out at his own risk and expense any alteration to or rectification of the works he considers necessary and to repeat the tests

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within a further period specified in the contract.

4. If the Contractor fails to prove within this further period that the plant is capable of achieving the guaranteed figures then the Purchaser should be entitled to an agreed reduction in the price of the works. If the Plant fails to achieve an agreed minimum standard the Purchaser should have the option either to reject the Plant or to have a further reduction in price to be agreed, or if not agreed the reduction of price to be fixed by the Court or Arbitrator having jurisdiction.

5. We recommend that in adopting provisions for reductions of price in the cases envisaged in paragraph above the parties seek to agree the following in the contract as a means of determining the reduction :

   (a) A tolerance of (... % to be agreed) in the guaranteed figures should be accepted by the Purchaser without any reduction of price being given by the Contractor.

   (b) If this "grace" tolerance is exceeded the price of the works should be reduced by a sum to be agreed for each ... % deficiency. A minimum standard (i.e. the maximum deficiency acceptable) should also be agreed.

6. For certain Plant and Machinery, the parties may agree that if the production and consumption figures are substantially improved, throughout the guarantee period or other agreed period, the Contractor should be remunerated by an increase to be agreed upon, in the contract price. This increase would in this case be determined in a manner similar to that described in paragraph above.

Locally manufactured Products

Arab Purchasers may wish to have some items within the scope of the contract manufactured by local manufacturers but not as sub-contractors to the Contractor.

In such cases we recommend that the parties make specific provisions in the contract taking account of the following guidelines :

(a) The possibility of the requirement must be made known at the tender stage.

(b) The Contractor should state the price he would charge for each of these items separately in the tender and contract.

(c) If the Purchaser requires any of the items to be manufactured locally the Contractor's price for the items in question should be deducted from the total contract price.

(d) The Contractor should submit to the Purchaser working drawings and technical documentation required for the items to be manufactured locally within time limits to be specified in the contract.

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(e) The contract should make provision for safeguards, whenever appropriate, in respect of the use of technical information and documentation which is required for the purposes of the contract.

(f) The Contractor should be required at the Purchaser's expense to inspect and test items manufactured locally at the manufacturer's works in the Purchaser's country at times to be agreed, to ensure that the items are in accordance with the drawings and technical documentation.

(g) Any guarantees given by the Contractor in the contract, and the obligations of the Contractor in relation to defects in the plant as a whole should be unaffected, subject to (h) below and so long as the items manufactured locally are in accordance with the drawings and technical documentation.

(h) The Purchaser should be responsible for any defects in the workmanship or materials of locally manufactured items including latent defects.

Chapter 2

Commentary on the second Edition (1980) of "Conditions of Contract (International) for Electrical and mechanical Works (including erection on site) with forms of tender and agreement" ("the Conditions") in conjunction with "Notes on Documents for Electrical and Mechanical works contracts". ("Notes").

Mechanical and Electrical Contracts play and will continue to play an important part in the development of Arab States. It is essential that such contracts should be undertaken on conditions which hold a fair balance between the interests of the Employer and Contractor, and upon conditions which respect the role to be played by the Engineer. In some Arab countries the Engineer may be an official from an appropriate Ministry.

These conditions are suitable for contracts in which, within the limits of the Specification, the Contractor is responsible for design and would not normally be suitable for contracts where the responsibility for design is wholly or substantially of a third party.

As erection on site is a major element of these Conditions, the title is somewhat misleading when it refers to "erection on site" in small letters between brackets.

The Arab Experts questioned the adequacy of the powers of the Engineer throughout the Contract and was of the opinion that certain legal principles, on which the conditions are based, needed examination to ascertain that they were consistent with the established legal principles and practices prevailing in the Arab countries. Forfeiture under Clause 44 only provides an ultimate remedy before which less drastic remedies should be available.

General comments

These conditions have been aligned, as far as possible, with the FIDIC Conditions of Contract (International) for Works of Civil Engineering Construction (1977). Part I of the Conditions is intended to provide a framework for Mechanical and Electrical works contracts on the basis of which the parties can conclude a contract required by the Employer. Thus, the parties should prepare Part II to suit the particular requirements of the contract Works. The Notes on Part II and the items listed on pages , and of the Conditions (in the English Language edition) are by no means exhaustive. Part II should also contain the specific details of any modifications required by the parties to the general provisions of Part I.

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The following comments are to be understood on the above basis. Clauses, on which no expert wished to comment, have been omitted from the Report.

It was noted that clauses 7.1 and 10.2 contained the expression "execute" and "executing". In order to make the intention clear, the Group suggests inserting "and complete" and "and completing" after these words and possibly in other clauses in which the expression occurs.

Clause 1 - Definitions

1.1. a. In relation to assignment by the Employer, see the comments on Clause 3. The present wording should be changed accordingly to read "and his permitted assigns" instead of "but not except etc." which should be deleted.

j. This definition presents some difficulty and could be amended in part II as follows :

"Time for Completion" means the period for completion of the Works or any defined Section thereof as stated in the Contract (or as extended under clause 30) and shall be calculated from the Commencement Date. It would then be necessary to include a definition of Commencement Date referring to Part II for the specific terms agreed between the parties.

l. "Plant". This definition excludes not only Contractor's Equipment but also services included in the Works. It describes items which are to form a permanent part of the Works.

r. It is vital that as precise a description as possible of the "Site" be given in Part II or the preamble to the specification with sketch maps where appropriate.

t. It is essential to be precise as to the calendar intended, when referring to "Month".

1.5. Where the word "Cost" is used in the Conditions it is taken to exclude profit. The use of this word throughout the contract should be checked to ensure that it is used in a consistent manner.

Clause 2 - Engineer and Engineer's representative

2.1. It is in the common interest of the parties to refer in Part II to the laws, regulations or decrees entailing any limitation of the Engineer's powers, notwithstanding that it is the Contractor's duty to familiarize himself with the relevant legal consequences. The Group agreed that this clause required no amendment.

Clause 3 - Assignment and Subletting

The Group notes that under 1.1. a. of Clause 1, the Contractor's consent is required to any assignment by the Employer. It was thus recommended to include rules for assignment by the Employer as follows under clause 3.

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(i) Where the Employer is in the private sector and proposes to assign, the consent of the Contractor is not to be unreasonably withheld.

(ii) The Contractor's consent would not be required if, during the negotiations leading to the contract, it was made clear that the ministry or state agency in charge of the negotiations would assign performance of the contract to a public body or corporation under the control of the State. Nevertheless,the Contractor must be notified in advance of the date of assignment.

(iii) The Contractor's consent would not be required if the contract was assigned from one ministry or state agency to another within the public sector. Nevertheless, the Contractor must be notified of the assignment in advance.

(iv) If during the execution of the Contract, the Employer, being a ministry or state agency, wishes to assign the contract to a body or corporation within the public sector, the Contractor will be entitled to receive a notification from the Employer assuring the Contractor that the assignee is in a position to honour the original Employer's obligations under the contract. This is especially so where credit terms have been made available to the Employer or where the Contractor has taken out credit assurance in respect of the original Employer (the assigner). The earliest possible advance notice of any such assignment should be given to the Contractor. With regard to sub-clause 3.2. the Employer may wish to retain for himself, rather than for the Engineer, the power to consent to sub-letting, in such a case this should be recorded in Part II.
Part II should include provisions where consent is required for the placing of sub-contracts for major materials. It should be emphasized, with regard to this sub-clause, that the Contractor is responsible for all his sub-Contractors whether they are those of his own choice or Nominated Sub-Contractors chosen by the Employer and appointed in accordance with clause 39.

Clause 4 - Contract Documents

4.1. For particular contracts, it may be required to use Arabic for the text of the Contract Agreement (in the form set out-on page of the Conditions) and for some correspondence to be exchanged between the parties during the period of the Contract.

The designation of the Ruling Language or Languages must be clearly defined in Part II but the parties should wherever possible, within the requirements of the applicable law, agree on such language or languages acceptable to both parties.

4.2. Applicable law is discussed in Chapter .

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4.3. The group recommends that the precedence of all contract documents forming the contract should be clearly set out in the details of the Contract Agreement.

If the Engineer's power to adjust discrepancies or ambiguities without reference to the Employer, is to be limited then specific reference to this limitation should be made in part II envisaged by clause 2.1 of part I.

If compliance with the instruction decreases the Contract's costs, an adjustment in favour of the Employer should be made.

Clause 5 - Drawings

The conditions fail to deal with the copyright and ownership of drawings and other technical documents.

Copyright, as defined in international conventions, in documents vests in the Contractor, if they were prepared by him or in the Employer or Engineer, if they were prepared by them.

All documents prepared by the Contractor for use in the manufacture or erection of the Works or any part thereof and submitted to the Employer during the currency of the Contract may be used by him for the purpose of completing, maintaining, modifying replacing and repairing the Works.

Specific provision must be made in Part II if design documents, drawings and specifications submitted to the Employer or the Engineer are to become the property of the Employer to use in any way he sees fit, not only for the carrying out of the Works but also for any other similar projects subject, however, to any conditions regarding patents and registered designs pertinent to these documents.

All documents intended for the design, manufacture and erection of the Works or any part thereof and submitted to the Contractor by the Employer prior to or during the currency of the Contract remain the property of the Employer. They may not, without the written consent of the Employer, be utilized copied, reproduced, transmitted or communicated to a third party by the Contractor for any other purpose.

Clause 6 - Mistakes in Drawings and information

6.3. The extra costs envisaged in this clause shall be paid to the Contractor only in respect of incorrect information which could not have been verified or discovered by an experienced Contractor.

Clause 7 - Obligations of Contractor

7.1.
This Sub-clause describes the Contractor's basic obligation to complete the Works which, however, is qualified in other clauses namely 10.1, 10.2, 15, 24, 30 and 47.

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It is agreed that a specific reference to "execute and complete" be included in the first line of clause 7.1.

The Employer, during the negotiations, will help the Contractor to identify any established customs in the Employer's country which the Employer would expect the Contractor to observe in carrying out the Contract, the Contractor being responsible for their evaluation in so far as they affect his contractual obligations, notwithstanding the Contractor's duty to familiarize himself with the said customs.

It should be noted that there may be mandatory provisions concerning the period of liability in the law of the country where the Works are executed, from which the parties cannot derogate. The Employer should during the contract negotiations draw the attention of the Contractor to such provisions.

7.2. On the sixth line the Group considers that the word "progress" should be replaced by "execution".

Clause 8 - Contract Documents

The Group noted that, after the tenderer is selected and before the Contract enters into force, documents will have to be signed by both parties. They are advised to include in this document the date of the coming into force of the Contract and the order of precedence of the several documents forming the Contract. See also note on clause 4.3.

Clause 9 - Performance Bond or Surety

In some Arab States, the bond or surety must be provided by or through a national bank of the state concerned. Any such requirement should be stated in the Instructions to tenderers or in Part II. The parties should establish whether it is the Employer or some other authority who determines if the Contractor has or has not remedied a default under clause 9.2. Performance Bonds and Guarantees are considered in Chapter .

Clause 11 - Engineer's Decisions

This clause is an essential prerequisite to arbitration under article 49. The express duty, on the last line of clause 11 (b), to confirm, reverse or vary a decision must not be delegated and must be supported by written reasons.

It ought to be made clear in Part II that the Contractor has an obligation to question a decision given by the Engineer, which, as an experienced contractor, he knows or ought to know is incorrect.

The clause gives precision and formalizes the dialogue between the Engineer and the Contractor and governs the relations between them for all aspects of the contract for which an Engineer's decision is necessary.

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Clause 12 - Programme

Pre-contractual negotiations with the successful tenderer should include the establishment of a preliminary programme of Works.

12.1. Where the scope of the programme required under this sub-clause is inadequate the requirements, including any necessary technical data, may be detailed in Part II.

In case the Contractor fails to provide the programme within the time stated in Part II of these conditions it may be appropriate in some cases to provide in Article 31.1 that the date for provision of the programme should be a "key date" involving a specific daily penalty or liquidated damages in the event of delay. Alternatively, the timely provision of the programme may be a condition for the payment of any Advance Payment. The import licences referred to are for Plant and not for Contractor's Equipment.

12.2. The Engineer's approval of the programme should not, unless expressly agreed by the parties, bind the Employer in respect of any of the intermediary dates stated therein except the commencement and completion dates in the contract.

12.3. In the event of the circumstances arising as described in this sub-clause, the Contractor should submit his proposals including, if necessary, the provision of additional labour and Contractor's Equipment, for the Engineer's approval showing the methods by which he will overtake the delay and at the Contractor's cost. Further consideration should be given to the introduction of sanctions designed to ensure that the Contractor complies with request from the Engineer, particularly in those cases where delay would affect critical completion dates within the Contract programme.

Clause 13 - Contractor's Superintendence

13.2. It is noted that there is no remedy, other than the ultimate remedy of termination, if the Contractor fails to comply with Engineer's instructions concerning the Contractor's superintendence. The parties may consider it desirable to agree on an appropriate remedy in Part II, eg. daily penalty or liquidated damages.

Clause 14 - Transportation to Site

In appropriate cases the parties may consider inserting in Part II, clause 30 (mutatis mutandis) of the Conditions of Contract for Works of civil Engineering Construction which deals with the Contractor's obligations in respect of transportation to Site.

Clause 15.1. (b) - Liability for Accidents and Damage

Subparagraph (v), in fact, lays down the general definition of "excepted risks" as "any occurrences that an experienced contractor could not foresee or, if foreseeable, could not reasonably make provision for or insure against". The other sub-paragraphs are thus subordinate. "Use or occupation by the Employer of any part of the Works" in sub-paragraph (i) and the entire sub-paragraph (ii) are

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examples of occurrences which are only "excepted risks". This illustrative and non-exhaustive list may be added to or subtracted from in Part II in accordance with the characteristics of a specific contract and the insurance cover available. The remainder of sub-paragraph (i) and the entire sub-paragraphs (iii) and (iv) are also "special risks" as defined in article 47.5.

It is clear that, when loss or damage is caused to the Works by an occurrence which can only be defined as an "excepted risk", the procedure under clause 15.2 is to be followed. When,it is caused by an occurrence which can also be defined as a "special risk" the procedure under clauses 47.2 and 47.4 appears to be intended.

The contractual position arising in the event of loss or damage due to the occurrence of a risk included in both Clause 15.1 (b) and clause 47.5 is however not clear particularly as no precedence is given for the different resulting procedures under clause 15.2 on the one hand and clauses 47.2 and 47.4 of the other.

This matter is further commented by the Group under clause 47".

The Group was of the opinion that, to avoid unnecessary delay, the provisions of clause 15.2 should make it clear that the Contractor must immediately give effect to orders for making good loss or damage and that in the absence of agreement on price, the Engineer shall determine and certify the price to be paid for the remedial work.

15.3./4./5. The Employer should ensure that the Contractor has full third party insurance including but not limited to the damage envisaged by these sub-clauses.

The liability of the Contractor to indemnify the Employer in respect of damage to persons and property under these sub-clauses combined with sub-clause 16.4 is understood to mean that the Contractor's obligations under the Contract terminate, under clause 37.11, on the issue of the last final certificate. This is without prejudice to liability, under the applicable law, for the consequence of latent defects.

Clause 16 - Damage

16.2. The operation of this sub-clause would appear to give rise to difficulty with regard to the interpretation of the words "could reasonably have foreseen".

16.4. This period should be reconciled with the periods given in Part II against sub-clauses 33.1 and 33.11.

In specific cases, the parties may wish to include in Part II an addition to clause 16.4. including some or all of the provisions of clause 22 (1) of the Contract for Works of Civil Engineering Construction (examined in volume II).

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Clause 17 - Insurance Provisions

Clauses 17.1 to 17.3 make provision for three types of insurance which, taken together, are intended to provide sufficient cover to protect the Contractor's areas of responsibility for loss, damage or injury under the terms of the contract and give the indemnities that he is required to provide to the Employer. The insurance market, particularly in London, has developed separate policies of insurance which cover the three sets of obligations and the Contractor can accordingly select the insurer giving the cover required at the most economic rates. Both sides noted that an efficient contractor with a good insurance record will enjoy lower premiums and better cover, which will improve his competitive position against other contractors, the cost benefit being passed on to the Employer.

For a given project consideration should be given to creating a combined and comprehensive policy in the names of the Employer, all Contractors and all Sub-contractors, to eliminate gaps in cover and disputes between insurers regarding the liabilities of their respective policy holders.

Consideration must be given to the role of national insurance companies in accordance with the law of the country where the Contract is performed.

The Group particularly stressed the importance of the selection of the insurers and the terms of policies.

It is considered that a sub-clause should be added to the effect that the Contractor is responsible for notifying the insurance companies of any matter or event which, by the terms of such insurances, are required to be notified and in the manner and time specified in the insurance policies. A second sub-clause should be added to the effect that any monies received under the policies shall be paid to the Employer or Financing Agency for the account of the claimant and then, where appropriate paid by the Employer or Financing Agency in such amounts and at such times as shall be certified by the Engineer as being fair and reasonable in view of the progress made by the Contractor in making good the damage or loss aforesaid. If and in so far as such monies shall be insufficient for the purposes aforesaid, the deficiency shall be borne by the Contractor subject to any limitation agreed between the parties under this clause.

17.1. It was noted that the Contractor must insure for a value agreed between him and the Employer, against all loss or damage to the Works (other than due to the uninsurable Excepted Risks) not only during the period from the date of shipment of plant (or earlier date) to the date of taking-over but also whenever the Contractor is on the Site after the date of taking over for the purposes of carrying out work during the defects liability period. The attention of the Employer is drawn to the need to examine the legal consequences of being the joint insured in the policy covering Plant whilst it is in the process of manufacture or in the custody of the Contractor prior to the date of delivery on Site. See also comment on clause 35.

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Bearing in mind that the taking-over procedure may be related to Sections (and even Portions) of the Works, it is important for the parties that insurance arrangements cover all the requirements and avoid gaps in cover.

It is essential for the Engineer's taking-over procedure to include provision for giving the Employer adequate notice of each expected date of taking-over and of the value thereof so that the Employer may effect his own insurance arrangements at the proper time. Consideration should be given by the Employer to arranging his insurance cover for normal commercial operations to be effective preferably from the date of starting the Tests on completion or alternatively not later than the date of completing the tests.

Insurance against "all loss or damage from whatsoever cause arising" is understood to include cover for loss or damage arising as a result of covering any part of the Works being manufactured with materials or workmanship not in accordance with the requirements of the Contract, although that particular part cannot itself be replaced under the policy.

Because the policy is in the joint names of the Employer and Contractor, and subject to the Employer's approval, it should be endorsed to the effect that the Contractor, as the policy holder, cannot cancel nor make any changes to the policy without the prior written consent of the Employer.

17.2. It should be noted that there may be mandatory provisions in the law of the country where the Works are executed which should be taken into account for the purposes of third party insurance. See also comment on clause 7.1.

17.4. After the word "Employer" in the second line add the words "after due notice has been served on the Contractor".

17.5. After the word "Contractor" in the seventh line add words "after due notice has been served on the Employer".

Clause 18 - Compliance with Statutes, Regulations etc...

To this clause should be added a requirement for the Contractor to give all notices and pay all fees, including stamp duties, required by National or State Statute, Ordinance or other law, or any regulation or bye-laws of any local or other duly constituted authority which may be applicable to the Works and by the rules and regulations of all public bodies and companies whose property or rights are affected or may be affected in any way by the Works.

18.2. this sub-clause is subject to the provisions of sub-clause 10.2.

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Clause 19 - Patent Rights

The Contractor should warrant that he will obtain all necessary intellectual property licences for the Employer to enable him use the plant.

In sub-clause 19.1. in the fourth line, the group recommends that the words "at the date of the contract" be understood to mean also "during the currency of the contract".

In the fifth line after the words "Plant is to be" insert the words "manufactured or".

In the last two lines the text commencing "or any infringement" requires qualification.

Clause 20 - General obligation of the Employer

This clause is important as it deals with access and the Employer's duty to obtain consents, way leaves and approvals required not only from local or other authority but also from land owners and others capable of preventing access.

The group recommends that the Employer, the Engineer and the Contractor cooperate very closely in the implementation of the obligations laid down by this clause as they are essential for the timely completion of the Works and any delay in the execution of these obligations may result in claims - extension of time (clause 30) and additional costs (sub-clause 34.4) - by the Contractor.

In sub-clause 20.1. in order to avoid uncertainty in the interpretation of the words "in reasonable time" in the second line, the group recommends that the time table for the Contractor's access to and possession of the site be included in the programme required by clause 12.

With regard to sub-clause 20.2 the group noted that the Contractor has an obligation to provide in a timely way the specification and basic design data related to the plant which require to be incorporated in the building, structure foundation or access.

The requirement in this sub-clause is that the work by the Employer or his other Contractors on the building structure, foundation and approach shall be in a sufficient state of advancement that the Contractor is able to transport, deliver, instal and maintain the plant and complete the Works.

In sub-clause 20.6. the following sentence should be inserted at the commencement of the sub-clause with consequential modifications : "The Contractor shall submit to the Employer full details of Plant and Contractor's Equipment to enable the Employer to obtain all import permits...".

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Clause 21 - Hours of Works and Rate of Progress

21.2. It is suggested that, for greater clarity with regard to night or weekend working, the following sentence be added to the end of the sub-clause : "The Contractor shall not be entitled to any additional payment for taking such steps".

Nuisance claims as a result of night and weekend working are insurable risks under clause 17.2.

The Group recommends that the provisions of this sub-clause shall not be applicable in the case of any work which it is customary to carry out by rotating or double-shift.

Sub-clause 21.3. Empowers the Engineer to require the Contractor to expedite progress so that the Works will be complete by the time of Completion in the case where the Contractor is falling behind and is not entitled to an extension of time. In this connection see also clause 12.3 and clause 44.

Clause 22 - Labour

In order to ensure truly comparable tenders, the documents accompanying the invitations to tender should state clearly the Employer's requirements in respect of housing, welfare, etc, for the Contractor's employees and labour. The Employer can in this way ensure that adequate standards are provided whichever tenderer is awarded the Contract without running the risk of disturbing work relations.

The words "if required by the Engineer" appearing in sub-clause 22.10 can be deleted in Part II if the proper law so requires.

Statistical data, if required by law, will be mentioned in Part II.

It was agreed that a reference to returns of sub-contractor's Labour would be included where appropriate.

Additions to this clause, should be set out in Part II covering the following :

a) the Labour provided by the Contractor must be adequate in number and competent for the nature of the work. It should be the Contractor's responsibility to apply for the necessary work permits and licences for expatriates and the Employer's responsibility to clear the applications through the appropriate authorities.

b) the supervisory staff provided by the Contractor must be well qualified by previous experience and adequate in number to ensure expeditious work of the best quality.

c) in some Arab States, it is a requirement to keep proper time sheets and wagebooks and produce them on demand of the Engineer or other authorities.

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d) the Contractor must provide adequate first aid and medical services for his staff and labour in accordance with State Laws and Regulations and, in any case, in accordance with established good practice.

Clause 24 - Adverse physical conditions

It would appear that the physical conditions referred to are those on Site only, whereas the artificial obstructions may be on or off Site. It would not appear possible to prepare an exhaustive definition of physical conditions and artificial obstructions.

Clause 25 - Inspection Testing and Rejection

Details of the Engineer's procedures and stage control certification, required for the implementation of the requirements of these sub-clauses, should be given in Part II.

It should be stated in this area of the Conditions that the Employer or the Engineer has the right to employ an independent inspection authority to examine and witness tests of materials, workmanship and performances of completed items of Plant. Such inspection authority should be notified in writing by the Engineer to the Contractor giving details of the Engineer's delegated authority.

In sub-clause 25.1 it should be emphasized that whilst the Engineer may have a duty to the Employer to inspect Plant during manufacture and to witness testing, it is nevertheless the Contractor's obligation to inspect and supervise all the processes of manufacture and to establish a proper and adequate system of quality control so as to ensure that the requirements of the approved drawings and specification are met in full.

In sub-clause 25.2 the Group recommends provisions requiring the Contractor within an agreed period of the Commencement Date to prepare and submit to the Engineer a programme indicating the main activities of inspection and testing of the Plant at the Manufacturer's Works.

With regard to sub-clause 25.5 the attention of parties is drawn to the possibility of the timely use of clause 28, which permits the replacement of defective Plant and sub-clause 29.6, which provides for its rejection.

Clause 26 - Delivery and Delay

The Group recognizes the need and importance of the certificate to be issued by the Engineer in accordance with Sub-clause 25.4 both as regards its affirmation that Plant declared thereon has passed out of the Engineer's inspection control prior to delivery and also its possible use as one of the documents to be presented by the Contractor for obtaining an interim payment for Plant delivered or shipped.

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The Group is however apprehensive that the inclusion of the reference to this certificate in Sub-Clause 26.1 as a means of controlling the delivery of Plant to the Site will cause unnecessary delay in delivery and expose the Employer to contentious claims for extensions of time and additional costs.

The Group is of the view that, unless the Employer or the Engineer has specifically directed that the delivery is to be delayed, Plant should be delivered and shipped, in accordance with the Contractor's programme, as soon as it has satisfied the inspection procedures under Clause 25. The communication between the Engineer and the Contractor should permit delivery to be made where appropriate without waiting for the issue of the certificate under Sub-Clause 25.4.

The Group therefore recommends that the terms of Sub-Clause 26.1 should be changed so as to reflect this less rigid requirement.

In Sub-Clause 26.2 the Group recommends that the definition of "delayed Plant" should be changed as follows :

"Delayed Plant means either (a) Plant which by written direction of the Employer or the Engineer is required to be delayed either as regards delivery or erection, or (b) Plant which the Contractor is prevented from delivering or erecting by reason of any cause solely due to the Employer, the Engineer or the Employer's other Contractors provided that the Contractor shall have served due notice on the Employer or the Engineer that delay has occurred".

Sub-Clause 26-4 (d) is intended to limit the period in which the Contractor continues to have obligations for Delayed Plant.

The consequences of this limitation vary in accordance with the importance and magnitude of the Delayed Plant in question for the Works.

Therefore in certain cases, it will be advisable for the parties to adapt the contract to meet the needs of the new situation with particular regard to the successful completion and testing of the Works.

Sub-Clause 26.4 (e) is also a limitation provision and will require consequential limitation if the parties adapt the preceding paragraph (d) to meet a new situation.

Under Sub-Clause 26.5 both parties are advised to ensure that no Plant is delivered to the Site until the Contractor has provided reasonably suitable premises for receiving and storing such Plant (see comment on Sub-Clause 26.1), the Group considers that provision should be made for the situation where the Employer does not wish to assume responsibility for storing and insuring Delayed Plant on the Site of the Works. In this case, the Contractor shall assume the responsibility and the Employer shall reimburse the Contractor for additional expenses incurred.

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In Sub-Clause 26.6 in the first line after the words "notice to proceed" add the words "or when the Contractor is no longer prevented from delivery or erection on Site", this amendment applies when the cause of delay does not originate from an order given by the Employer or the Engineer.

Under Clause 26, any additional Costs and or extension of time claims shall be ascertained by the Engineer to be reasonable having due regard to all relevant circumstances.

Clause 27 - Suspension of Works

A suspension order may sometimes be required as a result of force majeure. In many Arab States, where a national Civil Code applies, the risks resulting from force majeure are divided between the contracting parties, each bearing its own costs and losses without recourse to the other. This is not a matter of public policy and thus parties can make valid agreements otherwise apportioning the risks. Such apportionment of risks may lead to Contractors increasing prices to cover contingencies.

In Sub-Clause 27.1 (c) "normal climatic conditions" includes seasonal conditions which render work impossible.

In Sub-Clause 27.1 (d) the words "proper execution of the Works" must be interpreted as including compliance with safety regulations and measures for the safety of persons, either workmen or third parties.

Sub-Clause 27.2, in the opinion of the Group, concerns payment on suspension of work on the Plant during manufacture or on completion of manufacture but before delivery.

The Group considers that the words, in the seventh and eighth lines of this Sub-Clause "without prejudice to the provisions of Clause 26.4 (b)" concern payment on the delay of already manufactured Plant as a result of the circumstances envisaged in Sub-Clause 26.2.

Thus the provisions of this Sub-Clause are more or less equivalent to provisions in Clause 26. Clauses 26 and 27 being, in the view of the Group, mutually exclusive.

In Sub-Clause 27.3, the Group noted that it was unlikely that many Employers would accept abandonment of the contract after the 90 + 28 days from the date of suspension and considered that after the 90 days period the Employer and Contractor should discuss all possible ways and means of resuming the Works or agree a new course of action. If no agreement is reached there should be set a time limit beyond which the Contractor has a right to invoke the procedure in the last four lines of this Sub-Clause.

Clause 29 - Tests on completion

Sub-Clauses 29.1 - 29.5 make it necessary to provide within the Specification, the details of the so-called Tests on Completion which must be satisfactorily performed as a prerequisite to the issue of a Taking-Over Certificate under Clause 32.

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Within the scope of Sub-Clauses 29.1 - 29.5 there is however no mention of tests which are required to be carried out on Site prior to performance of the Test-on-Completion. Nor is there any guidance given as to the scope of the Tests-on-Completion.

It is considered that the scope of this clause should be expanded considerably so as provide a clear and logical step by step procedure for the stages prior to the issue of the Taking-Over Certificate.

The tests should be defined in the Technical Specifications in respect of :

1. Their nature and objectives,
2. Their duration,
3. The responsibilities of the Employer and the Contractor with regard to their conduct.

There must be laid down a period during which adjustment must be completed after which the Taking-Over Certificate is issued and the property in the Plant passes to the Employer.

Clause 30 - Time for Completion

Time for Completion is the period which begins on the Commencement Date defined in Part II - see comment on Sub-Clause 1.1.(j) - and, subject to specific provisions in respect of extension of time, continues for the exact number of days set down in the Appendix to the Tender.

Sub-Clause 7.1 requires the Contractor to "execute and complete" the Works within this period - see comment on Clause 7 - and to be ready to carry out his obligations in respect of defects during the Defects Liability Period.

Sub-Clause 33.1 defines the Defects Liability Period as either the period stated in Part II or the period of 12 months calculated from the date on which the Works have been completed, have passed the Tests-on-Completion and shall be deemed to have been taken over by the Employer, as certified in the Taking-Over Certificate issued in accordance with Clause 32.

Sub-Clause 31.1 dealing with Delay on Completion commences with the words "If the Contractor shall fail to complete the Works or sections thereof in accordance with the Contract (save as regards ... such tests as are to be made in accordance with Clause 29 - Tests on Completion -) within the Time for Completion, the Employer shall be entitled ...

Page 17 of the FIDIC Notes states that the definition of Time for Completion in Clause 1.1 (j) covers the period up to the moment when the Contractor has made the Works ready for the Tests-on-Completion.

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In view of the foregoing scattered provisions and obscurity in drafting, the Group advises the Contracting parties to ascertain the meaning of the Time for Completion and whether it is intended to include or exclude the priod for Tests-on-Completion. They are also advised to include in the Contract for a Certificate to be requested by the Contractor and issued by the Engineer to the effect that "the Works are complete and ready for Tests-on-Completion" within Clause 29 and include for a set time during which the Contractor proves that the Works have passed successfully the Tests-on-Completion.

This Clause is concerned only with extension of time when the Contractor has been delayed by any cause, except as provided in the contract, beyond his control. It provides a list which can be modified in Part II. It should be emphasized that the Clause is not concerned with claims involving extra cost which have to be dealt with either under Clause 34.4 or under any other relevant Clause giving entitlement to the Contractor.

The following additions and amendments to the list are suggested :

a) to be added :
"ordered in writing by the Engineer under Clause 34 (Variation)"

b) to be interpreted to mean exceptional adverse weather conditions which materially affect the performance of the Works.

c) this Sub-Clause is already covered by Sub-Clause (a) as amended above and therefore it could be omitted.

f) to be interpreted to mean any suspension of the Works under Clause 27 except suspension under Sub-Clause 27.1 (a) to (d).

g) to be interpreted to mean industrial disputes beyond the Contractor's control.

h) to be interpreted to mean any cause not attributable to the Contractor or his Sub-Contractors.

It is recommended that, as a matter of prudent practice, where the Contractor anticipates any delay under this Clause he should immediately give written notice of the possible cause to the Employer or the Engineer.

The Contractor should give written notice within one week of the occurrence of a cause of delay to the Employer or Engineer so that steps can be taken to remove or reduce the effect of the occurrence.

The submission by the Contractor of written notice of claim for an extension of time together with supporting particulars should follow in accordance with the terms of this Clause.

With respect to the last sentence of the Clause, the Group considers that the Contractors right to claim an extension of time for occurrences causing delay on the part of a Sub-Contractor is inherent in the Contract. The Group, therefore, is of the opinion that this

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reference to Sub-Contractors may adversely affect the Contractor's right to claims arising under other provisions of the Contract in relation to work which has been sub-contracted.

The Group considered that in order to reduce or eliminate the effect of any extension of time to which the Contractor would otherwise be entitled, provision should be made under this Clause enabling the Engineer to order an acceleration of the work (subject to agreed additional payment) provided that such acceleration is practicable and in the interests of the Employer.

Clause 31 - Delay in Completion

With regard to "the Time for Completion" see the comments on Clause 30.

31.1. In the first sentence of this sub-Clause the closing words "unless ... suffered no loss" require the Contractor to prove that the Employer has suffered no loss. As the Time for Completion is a major factor in the selection of tenderers, some Employers will require deductions to be made regardless of whether or not the Employer has suffered any loss. In this case, these words will have to be deleted in Part II.

The parties should provide for the method and timing of the sum payable to the Employer, arising from the reduction of the Contract Sum, to be clarified in Part II. Consideration could be given to expressing the reduction in terms of an amount instead of a percentage of the Contract Price subject to maximum limit.

31.2. The Group stressed the importance of agreeing the maximum liability.

Clause 32 - Taking-Over

32.1. Apart from the "minor respects" of which the Engineer shall be the sole Judge, the Works to be taken over must be complete, tested and free from known defects. The Taking-Over Certificate should contain no exceptions whatever and the items of outstanding work forming the basis of the term "minor respects" should be listed in the certificate together with the Contractors signed undertaking to complete them within an agreed period or periods of time notwithstandings that the defects liability period for the Works defined on the certificate shall commence to run on the date of the certificate.

The responsibility and care of the Works during the carrying out of the Tests on Completion according to Clause 15.1 (a) lies with the Contractor. As the Tests on Completion may involve operation by the Employer, the Group draws the attention of the parties to the need for ensuring that there are no gaps in liability or insurance during the period of the tests. (See comment on Clause 17.1).

32.4. This sub-clause applies if after the expiry of the period of notice in Clause 29.1 the Contractor is prevented from carrying out the Tests on Completion.

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Clause 33 - Defects after Taking-Over

The Group noted that there is no provision in this clause like that in Sub-Clause 29.6 (b) if the defects prove irremediable.

33.7. The costs of further tests are borne by the Contractor.

33.11. It was noted that this Sub-Clause concerns the Contractor's liability for damage to or loss of property not forming part of the Works, arising after the Defects Liability Period. When considering the period of liability under this Sub-Clause, parties should also have regard to Sub-Clauses 15.3, 15.4, 15.5 and 16.4.

Clause 34 - Variations

The clause does not prevent the Contractor from drawing the attention of the Engineer to improvements in technique and plant which would contribute to the Works.

34.1. Where the Engineer directs a variation it may be advisable for him to give the Contractor a time limit within which the Contractor must inform the Engineer if the variation involves an addition to, or reduction from, the Contract Sum.

15 % may not be appropriate for all contracts. The percentage should preferably be determined in Part II.

34.4. The context implies that this provision applies only to claim for additional payments arising under this Clause.

Clause 35 - Vesting of Plant

35.1. The parties are advised to establish in Part II when the property in the plant shall pass, bearing in mind the passing of the various risks (see in particular clauses 15, 32 and 47).

Clause 37 - Certificates and Payment

If the terms of payment agreed by the parties differ from those set out in Clause 40, the necessary changes to Clause 37 must be specified in Part II.

37.3. It is understood that the Contractor must first submit a correct application and thereafter will have recourse to Sub-Clause 41.3. only after invoking Sub-Clause 41.2 and if the Engineer cannot justify his failure to issue an interim certificate.

37.5. The Group understands that an interim certificate issued on Taking-Over shall not include the value of any minor outstanding uncompleted work.

37.8. to 11. The parties may wish to provide in Part II that the Final Certificate should certify :

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- the sufficiency of the Works defined therein and their value.
- that the Defects liability has been discharged and
- that all the Contractor's obligations under the Contract relating to the said Works have been discharged.

37.11. This Sub-Clause provides that, save in the case of fraud or dishonesty, a Final Certificate is conclusive evidence of satisfactory performance by the Contractor and the total amount he is to be paid, unless proceedings have been commenced before the Final Certificate has been issued or within three months thereafter. The Final Certificate and the time limit of three months after its issue are intended to act as a barrier to claims from the Employer should anything go wrong with the Plant after this time limit has expired. The attention of the parties is drawn to the problem, under various legal systems, of hidden defects coming to light subsequently.

Clause 39 - Nominated Sub-Contractors

The Group noted that, whilst the Contractor is not obliged to employ a firm nominated by the Employer or the Engineer that is not willing to comply with the provisions under Clause 39.2, a Nominated Sub-Contractor once appointed by the Contractor under direction of the Employer or the Engineer is in the same legal position as a Sub-Contractor approved and appointed under the provisions of Clause 3.2.

There is no privity of contract between the Employer and the Nominated Sub-Contractor, but great care must however be taken to ensure that nominated sub-contracts are undertaken by firms of proven ability and experience and in whom all parties can have complete confidence. Failure of a Nominated Sub-Contractor to perform, could have serious consequences both for the Employer and the Contractor.

39.2. The Group considers it of the utmost importance that the Nominated Sub-Contractor not only undertakes in his sub-contract with the Contractor an arbitration clause identical with that in the contract between the Employer and the Contractor but also adds a provision by virtue of which, when there is arbitration between the Employer and the Contractor, the Contractor can, in order to invoke sub-clause 39.2, join the Nominated Sub-Contractor in the arbitration proceedings each time the Contractor considers his responsibilities to the Employer have been affected by the acts or omissions of the Nominated Sub-Contractor.

Clause 41 - Suspension and Termination

41.2 and 41.3. See comment on Sub-Clause 37.3.

Clause 43 - Rates Exchange

In view of the variability of exchange rates the parties are advised to consider carefully the questions of currency of account, currency of payment and rates of exchange in respect of each contract.

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Clause 44 - Contractor's Default

44.1. The Group suggests that the first line of this clause should include a reference to the total sub-letting of the whole of the Works which is prohibited under Sub-Clause 3.2. This Sub-Clause is intended to cover failure to make reasonable and satisfactory progress in the execution of the work in accordance with the contract time and failure to supply sufficient or suitable contractor's equipment, labour, materials, or things (see Sub-Clause 7.1.).

44.1 (c) "warnings in writing by the Engineer" is clearly intended to mean notification by the Engineer himself in writing warning the Contractor that he is not executing the contract with due care and diligence, or is persistently neglecting to carry out his fundamental contractual obligations and that he must take such steps as are necessary and as the Engineer may approve. Such notification must lay down a reasonable period within which the breach should be remedied. Such warning notifications, if disregarded, would entitle the Employer to issue the fourteen day notice in writing prior to entry on Site.

The Employer's right under Clause 44.1 to expel the defaulting Contractor and have the works completed is without prejudice to the Employer's right under the proper law of the Contract to terminate the Contract for fundamental breach. Such termination entitles him to claim the appropriate damages.

Where clause 44.1 is invoked the Contract is not voided nor is the Contractor released from any of his obligations or liabilities under the Contract. The Employer recovers the Site or that part of it which was delivered to the Contractor under Clause 20.1 temporarily to enable him to execute the Works.

As the Contractor is still bound by his liabilities and obligations under the Contract, the Group suggests that each sub-contract should contain a clause which permits it to be assigned to the Employer or any Contractor nominated by him in the event of Clause 44.1 being invoked.

Clause 45 - Bankruptcy

This clause is intended to apply to bankruptcy and legal situations equivalent to bankruptcy, e.g. "règlement judiciaire" etc. It is possible that in some countries the Employer's rights against the Contractor may not prevail against a trustee in bankruptcy or a liquidator on grounds of public policy. Thus it would be prudent when invoking Clause 45 not to rely on bankruptcy and equivalent legal situations alone but also to cite other breaches.

It is necessary to provide in Part II for the Employer to acquire possession of the Contractor's Equipment referred to in Clause 36 to ensure their continuing in use to complete the Works.

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Clause 46 - War

This clause only takes effect if the war materially affects the execution of the Works financially or otherwise.

In view of the provisions of Clause 48 the Group considered that the scope of Clause 46 should be limited to an outbreak of war (whether war is declared or not) involved either or both the states of the two contracting parties.

46.1. Neither the Employer nor the Contractor should exercise the right to terminate before both parties have taken all reasonable steps to complete the execution of the Works.

Clause 47 - Special Risks

The Group referred to their earlier comments on Clauses 15.1 and 15.2 which deal with the subject of "excepted risks".

When considering the details of Clause 47 which deals with the subject of "Special Risks" the Group observed that many of the defined risks are both an "excepted risk" and a "Special Risk" but the contractual and financial consequences of the occurrence of such a risk are quite different.

From Clause 15.2 it was noted that the Employer is responsible for the costs of making good loss or damage caused by any of the Excepted Risks (which are not Special Risks) but this responsibility is limited to the extent that such making good is specifically required by the Employer.

For the "Special Risks" defined jn Clause 47.5 the Employer's responsibility is not limited in this way and includes compensation to the Contractor for all third party claims arising from the event, payment for all Works and materials damaged or destroyed, payment for replacement and making good and for any additional costs arising from the event.

The Group considers that these provisions for "excepted" and "Special" risks should be combined and clarified by the parties in Part II so as to express the agreed intentions of the parties and to avoid the need for duplication and cross referencing.

Clause 48 - Frustation

The Group considers it advisable to define "circumstances outside the control of both parties" (Force majeure) as those circumstances including, without being limited to, fire, mobilization, requisition, embargo, currency restrictions, insurrection, shortage of transport, general shortage of materials and restrictions in the use of powers, which :

- either totally frustrate the execution of the contract - when Clause 48 applies.

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or temporarily impede the execution of the contract - when Clauses 27 and 30 apply.

Clause 49 - Disputes and Arbitration

Settlement of Disputes, Conciliation and Arbitration is the subject of a separate report.

Clause 51 - Default of the Employer

The Arab side draws the attention of Arab Public Sector Employers to the possible problem of incompatibility between certain provisions of this Clause and their respective national laws.

51.1. (a) The period of 30 days should normally commence to run after the period of 60 days in Sub-Clause 41.1. has expired.

Clause 52 - Cost and Legislation

52.2. The parties should consider whether or not to exclude the country of manufacture of the Plant from this Sub-Clause.

Clause 53 - Customs

53.2. The obligations and procedures should be detailed in Part II.

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