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IV. COMPREHENSIVE CONTRACTS

DIFFERENCES BETWEEN THE PROVISIONS FOR THE CONSTRUCTION OF INDUSTRIAL PLANTS AND THOSE APPLICABLE IN CONTRACTS COVERING BUILDING AND CIVIL ENGINEERING WORK

22. (i) The situation, which is already difficult enough when the various supplies and services mentioned in the preceding chapter have to be combined, becomes even more complicated when these supplies and services have to be combined with the building and civil engineering work. There are, in fact, some quite significant differences on important points between these two categories not only on the nature of the work to be performed but on the contractual provisions applicable. This is true of contract provisions relating to the following matters:

Nature of the guarantee: general guarantee of the construction of buildings and civil engineering work, in the one case, and guarantee for the supply of plant and machinery for the industrial work, as a whole, in the other;

Period of guarantee: different for building and civil engineering work, and for the supply and erection of industrial plants;

Time at which the guarantee commences: completion of the building and civil engineering work in the first case; acceptance of the industrial plant, delivery of the last necessary pieces of equipment or any other date set by the parties, in the second;

Transfer of risks: governed differently for building and civil engineering work, and for the supply and erection of industrial plants;

IV JEDINSTVENI UGOVORI

RAZLIKE IZMEDJU ODREDABA ZA IZGRADNJU INDUSTRIJSKIH POSTROJENJA I ODREDABA KOJE SE PRIMJENJUJU U UGOVORIMA ZA IZVRŠENJE GRADJEVINSKIH RADOVA

22. (i) Situacija koja je već sama po sebi dovoljno složena kad različite usluge i isporuke, spomenute u prethodnom poglavlju, trebaju biti kombinirane, postaje još složenija kad ove isporuke i usluge trebaju biti kombinirane s izvodjenjem gradjevinskih radova. U stvari ovdje postoje neke veoma značajne razlike u važnim točkama izmedju ovih dviju kategorija i to ne samo u prirodi rada koji treba izvršiti, već i u ugovornim odredbama koje treba primijeniti. Ovo vrijedi za ugovorne odredbe koje se odnose na slijedeća pitanja:

Priroda jamstva: opće jamstvo za izvodjenje gradjevinskih radova, s jedne strane, i jamstvo za isporuku postrojenja i opreme za industrijski pogon kao cjelinu, s druge strane;

Razdoblje garancije: različito je za gradjevinske radove od onoga za isporuku i montažu industrijskog postrojenja;

Vrijeme kada garancija počinje: dovršetak gradjevinskih radova u prvom slučaju: prihvat industrijskog postrojenja, isporuka posljednjih potrebnih dijelova opreme ili koji drugi čas odredjen od stranaka, u drugom slučaju;

Prijenos rizika: reguliranje je različito za gradjevinske radove i za isporuku i montažu industrijskih postrojenja;

Liability of the builder: this may sometimes be based on results in the case of the construction of industrial plants but it is usually based on a fault in the case of building and civil engineering work;

Pecuniary consequences of the defect: the extent and possible limits of compensation will not necessarily be determined in the same way for construction of industrial plants and for building and civil engineering work;

Conditions of payment: may vary according to cases.

(ii) The differences indicated above, apart from the problems discussed in the preceding chapter, which also arise in comprehensive contracts, raise problems peculiar to these contracts which will be discussed below.

METHOD OF DRAWING UP COMPREHENSIVE CONTRACTS

23. (i) Consequently, in contract which cover both the supply of industrial plants and building and civil engineering work, it would seem reasonable to include separate chapters for each of these operations and -as previously suggested in paragraphs 1 (iii) and 6-to base the wording of such chapters on the provisions commonly used in international business practice for the type of operation involved. In this way, the parties will be better able to respect the general principles set forth in paragraph 6 which are intended to draw their attention to the inadvisability of imposing on the holder of the main contract or on his sub-contractors responsibilities which are not suited to the type of work they have to perform. The parties can specify, in separate chapters, for the different opera-

Odgovornost izvodjača: ona može ponekad biti temeljena na rezultatima u slučaju izgradnje industrijskih postrojenja, ali se obično temelji na grešci u slučaju izvodjenja gradjevinskih radova;

Novčane posljedice nedostataka: opseg i opće granice naknade neće nužno biti odredjene na isti način kod izvodjenja gradjevinskih radova kako je to učinjeno kod izgradnje industrijskih postrojenja;

Uvjeti plaćanja: mogu biti različiti od slučaja do slučaja.

(ii) Gore navedene razlike, odvojeno od problema razmatranih u prethodnom poglavlju, koje se takodjer pojavljuju kod jedinstvenih ugovora, dovode do problema specifičnih za ove ugovore, a razmatrat ćemo ih u daljnjem tekstu.

NAČIN SASTAVLJANJA JEDINSTVENIH UGOVORA

23. (i) Dosljedno tome, u ugovoru koji obuhvaća i isporuku industrijskog postrojenja i izvodjenje gradjevinskih radova, bit će razumno uključiti odvojena poglavlja za svaku od ovih radnji i - kao što je prije i preporučeno u paragrafu 1 (iii) i 6 - upotrijebiti onu terminologiju u odgovarajućim poglavljima koja se općenito upotrebljava u medjunarodnoj poslovnoj praksi za onu vrstu djelatnosti o kojoj se u konkretnom dijelu ugovora radi. Na taj način stranke će biti u boljem položaju da poštuju opće principe navedene u paragrafu 6, kojega je namjera da skrene pažnju na činjenicu da se ne preporuča nametanje odgovornosti nosiocu glavnog ugovora ili njegovom podugovaraču koje odgovornosti ne odgovaraju onoj vrsti radova koje oni

tions making up the project as a whole, the provisions normally applicable to the type of work covered by the chapter.

(ii) This solution can be adopted for all types of comprehensive contracts however the work may be distributed among the client's various contracting parties and whether the client concludes the main contract with the supplier of the industrial plant or with the building and civil engineering contractor. This formula will be equally valid whether one or other of the two types of operations represents the bulk of the transaction or whether the two parts are more or less equal in importance.

(iii) Lastly, if comprehensive contracts are drawn up according to the formula suggested in the preceding sub-paragraphs, this will simplify relations between the holder of the main contract and his sub-contractors. If the obligations and responsibilities of the parties are defined, according to the nature of the operation involved, in the chapter relating to that type of operation, it will be easier for the holder of the main contract to harmonize his own obligations and responsibilities with those he is in a position to have accepted by his sub-contractors. The general lines of these various obligations and responsibilities will then in fact have already been laid down in the relations between the holder of the main contract and the client, on the basis of the provisions commonly used in international business practice for the type of operation to which the sub-contracts relate.

24. It remains to be considered whether this method of dividing a comprehensive contract into separate chapters, each covering a homogeneous set of operations forming part of the contract as a whole, is also applicable in the

moraju izvršiti. Stranke mogu odrediti, u posebnim poglavljima, za različite vrste radova koje čine cijeli objekat, one odredbe koje se redovito primjenjuju na vrstu radova o kojoj se u konkretnom poglavlju radi.

(ii) Ovo rješenje može biti prihvaćeno za sve vrste jedinstvenih ugovora bez obzira na to kako će se rad razdijeliti izmedju različitih ugovornih stranaka, i da li će investitor zaključiti glavni ugovor s isporučiteljem industrijskog postrojenja ili s izvodjačem gradjevinskih radova. Ova će formula biti jednako važeća bez obzira da li jedna ili druga vrsta radova predstavlja glavninu radova koje treba izvršiti, ili su obje vrste radova manje-više jednako važne.

(iii) Konačno ako se jedinstveni ugovori sastavljaju u skladu s formulom preporučenom u prethodnom potparagrafu, to će pojednostaviti odnose izmedju nosioca glavnog ugovora i njegovih podugovarača. Ako su obveze i odgovornosti stranaka definirane u skladu s prirodom djelatnosti o kojoj se radi, u poglavlju u kojem se obradjuje odredjena vrsta radova bit će jednostavnije za nosioca glavnog ugovora da uskladi svoje vlastite obveze i odgovornosti s onima koje su prihvatili njegovi podugovarači. Opći pravac ovih različitih obveza i odgovornosti tada će već u stvari biti položen u odnosima izmedju nosioca glavnoga ugovora i investitora, i to na osnovi odredaba koje se općenito primjenjuju u medjunarodnoj poslovnoj praksi na onu vrstu radova na koju se odnosi konkretni podugovor.

24. Preostaje da se razmotri da li je ovaj način dijeljenja jedinstvenog ugovora u odvojena poglavlja od kojih svako obuhvaća homogenu vrstu djelatnosti, a koja čini dio cijelog ugovora može takodjer primijeniti i u slučaju ugovora "ključ u ruke", kod kojega je prva

case of a "turnkey contract", the first obvious feature of which is the total responsibility of the holder of the main contract.

V. TURNKEY CONTRACTS

TOTAL RESPONSIBILITY OF THE HOLDER OF A TURNKEY CONTRACT

25. (i) In a full turnkey contract, i.e. a transaction in which the client's contracting party-referred to in this Guide as the "holder of the turnkey contract" -assumes vis-à-vis the client responsibility for construction of the industrial works and takes the client's place vis-à-vis the other participants in the project, the responsibility cannot be divided up in terms of the various operations which this holder of the turnkey contract must perform in order to hand over to the client an industrial plant capable of operating in accordance with the contract terms, specifications and guarantees. The holder of the turnkey contract can avoid this responsibility only by establishing that a failure of the plant is due, as indicated in paragraph 26 (iii) below, to non-performance or faulty performance by the client of his contractual obligations, or to force majeure, which it would be advisable for parties to define in their contracts.[3)]

3) In drafting contractual clauses on force majeure, the parties may be guided by the solution adopted for this problem in the various General Conditions Nos. 188, 188 A, 188 B, 188 D, 574, 574 A, 574 B, 574 D and 730, drawn up under the auspices of the Economic Commission for Europe.

očigledna karakteristika potpuna odgovornost nosioca glavnog ugovora.

V UGOVORI "KLJUČ U RUKE"

POTPUNA ODGOVORNOST NOSIOCA UGOVORA[x)] "KLJUČ U RUKE"

25. (i) Kod potpunog ugovora "ključ u ruke", tj. u transakciji u kojoj ugovorna strana investitora - koji se u ovom Vodiču naziva nosilac ugovora "ključ u ruke" - preuzima prema investitoru odgovornost za izgradnju industrijskog postrojenja i uzima mjesto investitora u odnosu prema drugim suradnicima u projektu; odgovornost ne može biti podijeljena prema različitim radnjama koje takav nosilac ugovora "ključ u ruke" mora izvršiti da bi uspio investitoru predati industrijsko postrojenje spremno za rad u skladu s uvjetima ugovora, specifikacijama i garancijama. Nosilac ugovora "ključ u ruke" može izbjeći ovu odgovornost samo na taj način ako dokaže da je nedostatak postrojenja uzrokovan, kao što je to navedeno u paragrafu 26. (iii) niže dolje, neizvršenjem ili pogrešnim izvršenjem ugovornih obaveza od strane samog investitora, ili zbog "više sile" za koju se preporuča strankama da ju definiraju u svom ugovoru.[3)]

x) Termin "nosilac ugovora" nije uobičajen u našoj terminologiji. Kod nas se upotrebljavaju izrazi kao "nosilac posla" ili "izvodjač". (Opaska prev.).

3) U sastavljanju ugovora odredbe o "višoj sili" mogu se preuzeti iz rješenja danih u različitim Općim uvjetima br. 188, 188 A, 188 B, 188 D, 574, 574 A, 574 B, 574 D i 730 koji su sastavljeni pod pokroviteljstvom Ekonomske komisije za Evropu.

(ii) The full turnkey contract normally covers the supply to the client by the holder of the turnkey contract of the design for the plant and the technical documentation, and instructions on the operation of the industrial works. A turnkey contract sometimes also includes supplementary arrangements for the provision of technical assistance in the initial stages of operation, staff training or other forms of industrial co-operation. Arrangements of this kind may also be made by separate agreements. The aim of all these supplementary arrangements is to help the client himself to manage, in the proper way, the industrial works.

(iii) It therefore appears essential for the parties to make clear in their contracts which system of contractual relations they intend to adopt. In view of the uncertainty which prevails in practice regarding the very definition of the turnkey contract, they might be well advised to specify in their contracts the division of responsibility between the client and the holder of the turnkey contract.

(iv) The parties should also be informed that it is advisable for the holder of the turnkey contract to see to the organization and co-ordination of the work, since he will have to bear the consequences of any lack of co-ordination.

(v) In a true turnkey contract it is again the holder of the turnkey contract who must accept the consequences of any discrepancy which may-and undoubtedly will-exist between the total responsibility he assumes vis-à-vis the client and the separate responsibilities he can pass on to his sub-contractors, according to the normal liability rules applicable to the different types of sub-contract work.

(ii) Potpuni ugovor "ključ u ruke" redovito obuhvaća isporuku investitoru od strane nosioca takvog ugovora projekta za postrojenje i tehničku dokumentaciju, kao i upute za rad samoga industrijskog postrojenja. Ugovor "ključ u ruke" ponekad u sebi uključuje i dodatne sporazume o davanju tehničke pomoći u početnom razdoblju rada, izobrazbu osoblja ili druge načine industrijske suradnje. Dogovori ove vrsti mogu takodjer biti izvršeni i putem odvojenih ugovora. Cilj svih tih dodatnih dogovora je da se investitoru pomogne pri upravljanju, na ispravni način, s industrijskim postrojenjem.

(iii) Zbog toga je bitno da stranke učine jasnim u svojim ugovorima koji sistem ugovornih odgovornosti one namjeravaju prihvatiti. U svjetlu nesigurnosti koja prevladava u praksi u pogledu same definicije ugovora "ključ u ruke", strankama se može savjetovati da u svojim ugovorima pobliže odrede podjelu odgovornosti izmedju investitora i nosioca ugovora "ključ u ruke".

(iv) Stranke takodjer trebaju biti obaviještene da se preporuča da nosilac ugovora "ključ u ruke" preuzme organizaciju, koordinaciju rada, budući da će on snositi posljedice nedostatka koordinacije.

(v) Kod ugovora "ključ u ruke" ponovo je nosilac toga ugovora onaj koji mora prihvatiti posljedice nesuglasnosti koje mogu - i nesumnjivo će - postojati izmedju potpune odgovornosti koju on preuzima u odnosu prema investitoru i odvojene odgovornosti koje on može prenijeti na svoje podugovarače u skladu s normalnim pravilima o odgovornosti koje se primjenjuju na različite vrste podugovora.

THE CLIENT'S RESPONSIBILITY

26. (i) It should be noted that even in the most "complete" interpretation of the turnkey contract, certain matters will still be the responsibility of the client.

(ii) Where a complete factory has to be set up in a foreign country, turnkey contracts frequently make the client responsible for providing the additional labour required for the construction work, the labour employed in operating the factory, and the raw materials, services and utilities necessary for the acceptance tests and for the operation of the plant under guarantee. In some contracts the client also assumes responsibility for the choice of the site in accordance with practices similar to those described in paragraph 4 (iv).

(iii) Consequently, if the holder of the turnkey contract can prove that a defect in the plant is due to one of the factors for which the client is responsible, he will be able to avoid, or at least reduce, his liability for it. Nevertheless, except in these specific cases-which incidentally should be expressly defined in the contract if the holder of the turnkey contract is to be able to invoke them in order to avoid liability-his responsibility is "total", unless the contract provides for limited liability, and cannot (unless the very concept of the turnkey contract is to be meaningless) be regarded as merely the juxtaposition of a series of obligations which vary according to the types of operation constituting the contract (cf. paragraph 23).

INVESTITOROVA ODGOVORNOST

26. (i) Treba napomenuti da će i u "najpotpunijem" tumačenju ugovora "ključ u ruke" odredjena pitanja još ostati investitorova odgovornost.

(ii) U slučajevima kad kompletna tvornica treba biti izgradjena u stranoj zemlji, ugovori "ključ u ruke" često čine investitora odgovornim da osigura dodatnu radnu snagu potrebnu za izvodjenje radova, radnu snagu koja će se zaposliti u radu tvornice, sirovine, usluge i opskrbu onim predmetima koji su potrebni za pokuse, za preuzimanje i za rad postrojenja u garantnom razdoblju. U nekim ugovorima investitor takodjer preuzima odgovornost za izbor radilišta u skladu s praksom sličnom onoj opisanoj u paragrafu 4. (iv).

(iii) Dosljedno tome, ako nosilac ugovora "ključ u ruke" može dokazati da je do nedostatka u postrojenju došlo zbog jednog od činilaca za kojega je odgovoran investitor, on će biti u položaju izbjeći, ili u najmanju ruku smanjiti, svoju odgovornost za takav nedostatak. Ipak, osim u ovim posebnim slučajevima koji, uzgred budi rečeno, trebaju biti izričito definirani u ugovoru, ako se nosilac ugovora "ključ u ruke" želi na njih pozvati da bi izbjegao svoju odgovornost - njegova odgovornost je "potpuna", osim ako ugovor ne bi predvidjao ograničenu odgovornost, i ne može (osim ako sam pojam ugovora "ključ u ruke" nema nikakvo značenje) biti smatran kao samo ponavljanje niza obveza koje variraju već prema vrsti radova koji čine ugovor (paragraf 23).

RISKS INCURRED BY THE HOLDER OF A FULL TURNKEY CONTRACT

27. (i) The position of the holder of a full turnkey contract closely resembles, therefore, that of the client who uses the separate contract formula.

(ii) The risks assumed by the holder of a full turnkey contract are considerably greater even than those faced by the client in an extreme case of separate contracts, in that the client can hope to cover his risks with the profits from the long-term operation of the plant which becomes his property, whereas the only compensation on which the holder of the turnkey contract can count for his similar risks is the profit he can make from the performance of the contract.

(iii) It must be pointed out that the additional risks of the holder of the turnkey contract, by comparison with those incurred by the client in the case of separate contracts, or with the risks incurred by the suppliers and, in the case of comprehensive contracts, resulting from the reversal of the onus of proof, are not at present catered for under any satisfactory system of insuring the "design fault" risk.

LIMITATION OF CHOICE OF SUB-CONTRACTORS BY THE HOLDER OF A TURNKEY CONTRACT

28. (i) In addition to the above-mentioned considerations, other factors make it difficult to use the full turnkey formula in international contracts for the construction of large industrial works. Such is the case, in particular, in countries where part of the operations involved in the construction of large industrial works, especially in the civil engineering work sector, but sometimes also the

RIZICI PUNOG UGOVORA "KLJUČ U RUKE"

27. (i) Položaj nosioca punog ugovora "ključ u ruke" veoma sliči, zbog toga, položaju investitora koji upotrebljava formulu odvojenih ugovora.

(ii) Rizici koje preuzima nosilac punog ugovora "ključ u ruke" mnogo su veći pa i od onih koje preuzima investitor u ekstremnom slučaju odvojenih ugovora, i to u tom pogledu da se investitor može nadati da će pokriti svoje rizike s dobiti iz dugoročnog rada postrojenja koje postaje njegova imovina, a jedina naknada na koju može računati nosilac ugovora "ključ u ruke" za svoje slične rizike je dobit koju može ostvariti iz izvršenja ugovora.

(iii) Treba napomenuti da dodatni rizici nosioca ugovora "ključ u ruke", u usporedbi s onima koje preuzima investitor u slučaju odvojenih ugovora, ili s rizicima koje preuzima isporučilac ili, u slučaju jedinstvenog ugovora, koji nastaju zbog prebacivanja tereta dokaza, nisu u ovom času preuzeti ni pod jednim zadovoljavajućim sistemom osiguranja rizika zbog "greške u projektu".

OGRANIČENJE PODUGOVARAČEVA IZBORA OD STRANE NOSIOCA UGOVORA "KLJUČ U RUKE"

28. (i) U dodatku gore navedenim razmatranjima, drugi činioci otežavaju upotrebu formule punog ugovora "ključ u ruke" u međunarodnoj ugovornoj praksi za izgradnju velikih industrijskih postrojenja. Ovo je osobito slučaj u zemljama gdje dio radova koji se moraju izvesti u izgradnji velikih industrijskih postrojenja, a osobito u području gradjevinarstva, ali ponekad isto tako i kod isporuke

supply of certain equipment, is reserved for domestic undertakings. This may compel the holder of a turnkey contract to contract out of a major part of supplies and essential services with undertakings which he is not entirely free to choose.

(ii) This limitation on his freedom of choice of subcontractors may lead him to seek to limit his liability in respect of the work, supplies and services which he will, in the circumstances, have been obliged to contract out to local undertakings whose competence he may not have been able to investigate. The transaction is thus, in part at least, reduced from the turnkey type of contract to that of other comprehensive contracts in which the responsibilities of the holder of the main contract differ according to the type of work constituting the whole transaction.

EVALUATION OF FULL TURNKEY CONTRACTS

29. (i) The difficulties that have just been pointed out must not, however, obscure the fact that the extension of the obligations carried by the holder of the turnkey contract, in particular with regard to the co-ordination of supplies and work as well as the client's mere ability to pass on to him the risks involved in the construction of a complete factory in a foreign country, may be for the client a decisive advantage for which he may be willing to pay a higher price than he would have to pay if he himself had accepted these obligations and risks of the operation. This applies particularly to relations between contracting parties with different technical experience, especially where the turnkey contract is combined with contracts for technical assistance in the initial operation, for staff training or for other forms of industrial co-operation.

opreme, treba biti povjeren domaćim poduzećima. Ovo može prisiliti nosioca ugovora "ključ u ruke" da ugovara glavni dio isporuka i bitne usluge s poduzećima koja nije potpuno slobodan birati.

(ii) Ovo ograničenje slobode u izboru podugovarača može ga navesti da traži ograničenje odgovornosti u pogledu onih radova, isporuka i usluga koje će, ovisno o okolnostima slučaja morati ugovoriti s lokalnim poduzećima o kojih stručnosti nije se mogao uvjeriti. Posao je zbog toga, u najmanju ruku djelomično, sveden od vrste ugovora "ključ u ruke" na jedinstveni ugovor u kojem odgovornosti nosioca glavnoga ugovora mogu biti različite, ovisno o vrsti radova od kojih se sastoji cijeli posao.

OCJENA PUNOG UGOVORA "KLJUČ U RUKE"

29. (i) Poteškoće koje smo gore istakli ne smiju, medjutim, zamračiti činjenicu da proširenje obveza koje treba ispuniti nosilac ugovora "ključ u ruke", posebno u pogledu koordinacije isporuka i rada kao i položaj investitora da njemu prepusti rizike povezane s izgradnjom kompletnog postrojenja u stranoj zemlji, mogu za investitora predstavljati odlučujuću prednost za koju je on moguće spreman platiti višu cijenu nego što bi ju platio kad bi on sam preuzeo te obveze i rizike. To se osobito odnosi na odnos izmedju ugovornih stranaka s različitim stupnjem tehničkog iskustva, a osobito kad je ugovor "ključ u ruke" povezan s ugovorima za tehničku pomoć u početnom stanju rada postrojenja, za izobrazbu osoblja i za druge načine industrijske suradnje.

(ii) These difficulties may, however, be reduced if the risks are shared between the client and the holder of the turnkey contract: if, for instance, the contract prescribes a limit, by way of penalty or automatic compensation, for the consequences deriving from the total responsibility which under the contract fall prima facie on the holder of the turnkey contract.

x
x x

30. Sub-contracts play an important part in the construction of large industrial works in foreign countries, including turnkey contracts. Some aspects of these sub-contracting problems are discussed in the next chapter.

VI. SUB-CONTRACTING

FREE CHOICE OF THE SUB-CONTRACTOR

31. In its simplest form sub-contracting is a contractual relationship between one of the client's contracting parties and the sub-contractor, the latter being freely chosen by the former and the client playing no part whatever in the choice or in the resulting contractual relationship. Naturally in this case the contracting party remains, under the contract, solely liable to the client for any consequences not only of his own acts or omissions, but also of those of his sub-contractor.

(ii) Ove poteškoće mogu, medjutim, biti umanjene ako se rizici dijele izmedju investitora i nosioca ugovora "ključ u ruke": ako npr. ugovor predvidja jednu granicu, u vidu penala ili automatske naknade, za posljedice do kojih dolazi kod potpune odgovornosti koja u smislu ugovora "prima facie" leži na nosiocu ugovora "ključ u ruke".

x
x x

30. Podugovori imaju važnu ulogu u izgradnji velikih industrijskih postrojenja u inozemstvu, uključujući i ugovore "ključ u ruke". Neki aspekti problema vezanih uz podugovaranje razmatraju se u idućem poglavlju.

VI PODUGOVARANJE

PODUGOVARAČEV SLOBODNI IZBOR

31. U svom najjednostavnijem obliku podugovaranje je ugovorni odnos izmedju ugovorne strane investitora i podugovarača time da je ovaj posljednji slobodno izabran od onoga prednjeg, i da sam investitor nema nikakve uloge u izboru ili u rezultatima toga ugovornog odnosa. Samo se po sebi razumije da u ovom slučaju ugovorna strana ostaje, u smislu ugovora, isključivo odgovorna investitoru za bilo kakve posljedice ne samo vlastitih čina ili propusta već i propusta svoga podugovarača.

LIMITED INTERVENTIONS BY THE CLIENT IN SUB-CONTRACTING

32. (i) Sometimes, however, the client wishes to be kept informed of the sub-contracts concluded by the contracting party while leaving him free to choose his sub-contractors.

(ii) In certain cases the client specifies that sub-contractors may be chosen and sub-contracts may be concluded by the contracting party only with his approval.

(iii) The client may even designate a sub-contractor for his contracting party. In that case contracts widely used in practice normally provide for the client's contracting party to be able to object to such designation or to enter reservations about it, in particular when the sub-contractor designated by the client refuses or is unable to assume the same obligations vis-à-vis the client's contracting party and to give the same guarantees for the sub-contract work as the contracting party must provide.

(iv) Normally, however, the requirement that the sub-contractor shall be acceptable to the client, like the designation of the sub-contractor by the client when the client's contracting party does not object to such designation or when he has no reservations about it, does not imply any shifting of liability. The contracting party is still liable to the client for the work for which he is awarded the contract, including that part of it which he has sub-contracted to an undertaking approved or designated by the client. There are still contractual relationships between the client and the contracting party on the one hand, and between the latter and the sub-contractor on the other; but there is no legal relationship between the client and the sub-contractor.

OGRANIČENO INVESTITOROVO UPLETANJE U PODUGOVARANJE

32. (i) Ponekad, medjutim, investitor želi biti informiran o podugovorima koje zaključuje ugovorna strana ostavljajući investitoru slobodu da izabere svoje podugovarače.

(ii) U odredjenim slučajevima investitor odredjuje da podugovarači mogu biti izabrani i da se podugovori mogu zaključiti od strane ugovorne strane samo s njegovim odobrenjem.

(iii) Investitor može odrediti i podugovarača svome ugovornom partneru. U ovom slučaju ugovori koji se široko upotrebljavaju u praksi predvidjaju da investitorova ugovorna strana može prigovoriti takvom izboru ili staviti rezerve na njega, a naročito kad podugovarač kojega je odredio investitor odbije ili nije u mogućnosti da preuzme iste obaveze u odnosu prema investitorovoj ugovornoj strani, i da dade iste garancije za rad koji treba izvesti na temelju podugovora koji ugovorna strana mora preuzeti.

(iv) U pravilu, medjutim, zahtjev da podugovarač treba biti prihvatljiv investitoru, isto kao i odredjivanje podugovarača od strane investitora u slučajevima kada investitorova ugovorna strana ne stavlja prigovor na ovakvo odredjivanje ili kada nema rezerve na njega, ne predstavlja i ne implicira prenošenje odgovornosti. Ugovorna strana još uvijek je odgovorna investitoru za rad koji je ugovoren, uključujući i onaj njegov dio koji je podugovorio poduzeću koje je odobrio ili odredio investitor. Još uvijek postoje ugovorni odnosi izmedju investitora i ugovorne strane s jedne strane, i izmedju ovoga posljednjeg i podugovarača s druge strane; ali ne postoji pravni odnos izmedju investitora i podugovarača.

JOINT LIABILITY OF THE CLIENT'S CONTRACTING PARTY AND HIS SUB-CONTRACTOR

33. In practice, another method of sub-contracting is encountered under which the sub-contractor assumes direct liability vis-à-vis the client jointly with the client's contracting party for the part of the work which is sub-contracted. Under this system the client obtains an additional guarantee in that, for the part of the work which is sub-contracted, he can claim directly, on the basis of the contract, not only against his own contracting party, but against the contracting party and the sub-contractor jointly. There is no change, however, in the liability of the client's contracting party who is still fully liable vis-à-vis the client for the performance of both his own obligations and those of his sub-contractor.

SUB-CONTRACTOR IMPOSED BY THE CLIENT

34. The situation is different, however, when the client intervenes more radically, in particular when the sub-contractor is imposed upon the client's contracting party; the latter might in some circumstances (cf. paragraph 7 (i) and (ii), perhaps be prepared to assume liability for the work of such a sub-contractor subject to special limitations which would depend on the type of sub-contract involved. However, the consequences of sub-contract work carried out by a party not selected by the holder of the main contract might too seriously affect the results of the entire project for the latter to be in a position to cover them under his over-all liability. The question should in any case be clearly specified in the contract.

ZAJEDNIČKA ODGOVORNOST INVESTITOROVE UGOVORNE STRANE I NJEGOVOG PODUGOVARAČA

33. U praksi se susreće jedan bolji način podugovaranja po kojemu podugovarač preuzima direktnu odgovornost u odnosu prema investitoru zajedno s investitorovom ugovornom stranom za dio radova koji se podugovara. Po ovom sistemu investitor dobiva dodatnu garanciju i to tako da za onaj dio rada koji je podugovoren on može postavljati zahtjeve direktno, na temelju ugovora, ne samo prema svojoj ugovornoj stranci, već i prema ugovornoj stranci i podugovaraču zajedno. Medjutim u ovom slučaju nema promjene u odgovornosti investitorove ugovorne strane koja je uvijek u cijelosti odgovorna u odnosu prema investitoru za izvršenje i njenih obveza i obveza svojeg podugovarača.

PODUGOVARAČ NAMETNUT OD INVESTITORA

34. Položaj je, medjutim, različit kad investitor intervenira temeljitije, a naročito kad je podugovarač nametnut investitorovoj ugovornoj strani; investitorova ugovorna strana može u odredjenim okolnostima (vidi paragraf 7. (i) i (iii)), biti spremna preuzeti odgovornost za rad i takvog podugovarača ovisno o posebnim ograničenjima koja će ovisiti o vrsti podugovora. Medjutim posljedice koje proizlaze iz činjenice da podugovoreni rad vrši strana koja nije izabrana od nosioca glavnog ugovora, može previše ozbiljno djelovati na rezultate cijelog projekta da bi ta ugovorna strana bila u stanju da pokrije te rizike u okviru svoje opće odgovornosti. Ovo pitanje u svakom slučaju mora u ugovoru biti jasno odredjeno.

VALUE OF SUB-CONTRACTING IN CONCLUDING CONTRACTS FOR LARGE INDUSTRIAL WORKS

35. It therefore appears that, in the case of turnkey contracts, the client's contracting party cannot always transfer the appropriate part of the over-all liability to his sub-contractors. Consequently, it might sometimes be suitable to go beyond simple sub-contracting and to envisage more integrated formulas, such as the constitution of a joint venture.

VII. JOINT VENTURES[4]

GENERAL PRINCIPLES OF THE LIABILITY OF JOINT VENTURES

36. (i) Whatever legal form a joint venture established for the purposes of the construction of a large industrial works may take-whether a legal form peculiar to a particular national law, such as a temporary association or an economic grouping, or a simple contract combining a series of undertakings into an association-it will always be based economically on the desire of the participants to carry out the supplies and works in the best possible conditions as well as on a sharing of the risks of the operations by the participating parties, while the joint venture will assume liability vis-à-vis the client for all these risks accepted under the contract.

4) The words "joint venture" are used in this Guide not in a strictly legal sense but in broad terms to include all forms of "grouping of enterprises" whether they have a legal personality or not.

VRIJEDNOST PODUGOVORA U ZAKLJUČIVANJU UGOVORA ZA VELIKA INDUSTRIJSKA POSTROJENJA

35. Zbog svega tpga čini se da u slučajevima ugovora "ključ u ruke" investitorova ugovorna strana ne može uvijek prenijeti odgovarajući dio svoje opće odgovornosti na svog podugovarača. Dosljedno tome nekad može odgovarati da se ide i dalje od jednostavnog podugovaranja i da se predvide i povezaniji oblici kao što je to na primjer stvaranje zajedničkog pothvata (Joint Venture).

VII ZAJEDNIČKI POTHVATI[4]

OPĆI PRINCIPI ODGOVORNOSTI ZAJEDNIČKIH POTHVATA

36. (i) Kojigod pravni oblik jedan zajednički pothvat osnovan u cilju izgradnje velikog industrijskog postrojenja može imati - bez obzira da li se radi o pravnom obliku svojstvenom nekom nacionalnom zakonodavstvu, kao što je to slučaj kod privremenog udruživanja ili ekonomskog udruživanja, ili jednostavnog ugovora koji udružuje niz poduzeća u jedno udruženje - ono će se uvijek zasnivati, u ekonomskom smislu, prema želji suradnika da izvrše isporuku i radove u najboljim uvjetima kao i u dijeljenju rizika pothvata od strane stranaka koje sudjeluju, a zajednički će pothvat preuzeti odgovornost prema investitoru za sve rizike preuzete ugovorom.

4) Izraz"Joint Venture" upotrebljava se u ovom Vodiču ne u strogo pravnom smislu već u širem smislu tako da uključuje sve vrste "grupiranja poduzeća" bez obzira na to da li imaju svojstvo pravne osobe ili nemaju.

(ii) A joint venture with legal personality shall be represented to the client as a single contracting party. A joint venture without legal personality may be represented by one of its members, who is appointed by the joint venture for this purpose. The latter will be answerable to the client for the obligations which the joint venture assumes, it being understood that, in specific cases, he may be assisted, in negotiations with the client, by the member or members of the joint venture who are directly concerned by the claims of the client. The members of the joint venture may also agree to accept joint liability towards the client. However, this latter solution might be difficult to accept for the members of the joint venture who are only minimally involved in the work as a whole. These solutions may also be applied even when, as often occurs, the client reserves the right to notice of the membership of the joint venture.

(iii) Within the joint venture, it is recommended that there should be a distribution of liabilities among its members which will enable the joint venture to accept under a turnkey contract, on terms involving less risk for each of its members, the over-all liability which an individual party would find it more difficult to accept.

DISTRIBUTION OF LIABILITY WITHIN THE JOINT VENTURE

37. (i) The principles according to which the over-all liability under a turnkey contract is distributed among the members of a joint venture may vary from case to case. As a general rule, each member of the joint venture is ultimately liable for the consequences of its own work.

(ii) If the individual liability of one of its members

(ii) Zajednički pothvat sa svojstvom pravne osobe bit će u odnosu prema investitoru kao jedna jedinstvena ugovorna strana. Zajednički pothvat bez svojstva pravne osobe može biti predstavljan po jednom od svojih članova koji je u tu svrhu imenovan od zajedničkog pothvata. Ovaj će biti odgovoran investitoru za obveze koje preuzme zajednički pothvat, podrazumijevajući da, u odredjenim slučajevima, njega mogu pomagati, u pregovorima s investitorom, ostali članovi zajedničkog pothvata koji su direktno zainteresirani u vezi s investitorovim zahtjevima. Članovi zajedničkog pothvata mogu se takodjer složiti da preuzmu zajedničku odgovornost u odnosu prema investitoru. Medjutim ovo posljednje rješenje može biti teško prihvatljivo za one članove zajedničkog pothvata koji su u malom opsegu uključeni u sav posao. Ova rješenja mogu se takodjer primijeniti i onda kada, što se često dešava, investitor zadrži pravo da stavlja primjedbe na članstvo zajedničkog pothvata.

(iii) Unutar zajedničkog pothvata preporuča se da se utvrdi podjela odgovornosti izmedju članova koji će omogućiti zajedničkom pothvatu da prihvati u opsegu ugovora "ključ u ruke" - a pod uvjetima koji predstavljaju manji riziko za svakog člana - opću odgovornost koju bi stranke pojedinačno našle mnogo težom da ju preuzmu.

PODJELA ODGOVORNOSTI UNUTAR ZAJEDNIČKOG POTHVATA

37. (i) Principi prema kojima se dijeli opća odgovornost izmedju članova zajedničkog pothvata u slučaju ugovora "ključ u ruke" može se razlikovati od slučaja do slučaja. Kao opće pravilo svaki član zajedničkog pothvata u krajnjoj liniji odgovoran je za posljedice vlastitog rada.

(ii) Ako se pojedinačna odgovornost jednog od članova

cannot be determined (for example, liability for an unknown cause) or if there is a prima facie evidence of the joint venture's over-all liability; as a whole, which exceeds the sum of the liabilities under the provisions applicable to the various works forming part of the industrial works, the liability which the joint venture must assume is generally shared among the members in proportion to the volume of work assigned to each one.

(iii) Although this distribution of liabilities and risks among the members of the joint venture according to the size of their participation in the work carried out reduces the burden which full liability under a turnkey contract would impose on a single contracting party, it may nevertheless be viewed as still constituting too heavy a burden for those members of the joint venture whose contribution to the project as a whole is very small.

(iv) Some joint venture agreements therefore include arrangements under which parties whose participation does not exceed a certain percentage of the entire cost share only up to a certain limit in the consequences of the joint venture's liability-whether or not the consequences arise from their own work. The share of liability of a party whose participation exceeds this limit is again divided among the other members of the joint venture, also in proportion to their participation in the work carried out by the joint venture.

(v) In other arrangements, however, in order to avoid the complications which might be caused by such a regulation of relations between the members of a joint venture, and to ensure a better balance between the services and the liabilities of the members of the joint venture, a distinction is made between those parties which will play an important

ne može utvrditi (na primjer, odgovornost koja nastaje iz nepoznatih uzroka) ili ako postoji "prima facie" dokaz o općoj odgovornosti zajedničkog pothvata kao cjeline, koja prelazi iznos odgovornosti prema odredbama koje se primjenjuju na različite radove koji čine dio industrijskog postrojenja, odgovornost koju zajednički pothvat mora preuzeti općenito se dijeli izmedju članova u razmjeru s opsegom preuzetih radova od svakog pojedinog člana.

(iii) Iako ova podjela odgovornosti i rizika medju članovima zajedničkog pothvata, prema opsegu njihova sudjelovanja u radovima koji se izvode, smanjuje teret koji bi puna odgovornost prema ugovoru "ključ u ruke" nametnula jednoj ugovornoj strani, ipak se može smatrati da to predstavlja preteški teret za one članove zajedničkog pothvata kojih je sudjelovanje u cijelom projektu ograničenog opsega.

(iv) Neki sporazumi o zajedničkom pothvatu zbog toga uključuju dogovor prema kojemu one stranke kojih sudjelovanje ne prelazi odredjeni postotak ukupnih troškova sudjeluju samo do odredjene granice u posljedicama odgovornosti zajedničkog pothvata - bez obzira da li posljedice nastanu iz njihovog vlastitog rada ili ne. Dio odgovornosti stranke koje sudjelovanje prelazi ovu granicu ponovo se dijeli izmedju drugih članova zajeničkog pothvata, također u razmjeru njihovog sudjelovanja u poslu koji izvodi zajednički pothvat.

(v) Medjutim, u drugim sporazumima, u cilju izbjegavanja komplikacija koje mogu nastati zbog ovakovog odredjivanja odnosa izmedju članova zajedničkog pothvata, i u cilju osiguranja bolje ravnoteže izmedju usluga i odgovornosti članova zajedničkog pothvata, čini se razlika izmedju onih stranaka koje će imati važnu ulogu u izgradnji

part in the construction of the large industrial works planned and those which will make only a small contribution to the project or whose work will have no repercussions on the over-all liability of the joint venture. Only the former join the joint venture as members sharing in the profits and the risks according to the volume of their work, while the others merely conclude sub-contracts with it.

(vi) The formulas described above are certainly not easy to apply. They call for very careful and detailed drafting, with precise stipulation of the rights and obligations of all the parties involved. Even the best-drafted contracts will not prevent difficulties from arising in the performance of work which technically, financially and legally is clearly very complex; it therefore seems necessary to include in all such contracts, and especially in turnkey contracts which a client concludes with a joint venture, particularly detailed procedures for the settlement of any disputes, such as those described in chapter XI.

VIII. GUARANTEES, DAMAGES, PENALTIES AND TERMINATION

CONSEQUENCES OF NON-PERFORMANCE OF THE CONTRACT

38. (i) Clauses specifying the consequences which the contracting parties intend to apply to the non-performance of the contract on the part of one or the other party are often to be found in industrial contracts. The parties consider such clauses to be necessary because of the differences in various national laws in this respect and the difficulties to which inadequate choice of applicable law

velikog industrijskog postrojenja i onih koje će dati samo mali prilog projektu ili kojih rad neće imati odraza na opću odgovornost zajedničkog pothvata. Samo oni prvi članovi pridružuju se zajedničkom pothvatu kao članovi koji dijele dobit i rizike u razmjeru s opsegom njihovog rada, a drugi samo zaključuju sa zajedničkim pothvatom podugovore.

(vi) Gore opisane formule sigurno nije jednostavno primijeniti. One iziskuju vrlo pažljivo i detaljno sastavljanje ugovora, s preciznim odredbama o pravima i obvezama svih stranaka. Pa i oni ugovori koji su veoma pomno sastavljeni neće uvijek moći izbjeći poteškoće koje nastaju u izvršenju radova koje su i u tehničkom i u financijskom i pravnom pogledu vrlo složeni; zbog toga se čini potrebnim uključiti u sve takve ugovore, a posebno u ugovore "ključ u ruke", koje investitor zaključuje sa zajedničkim pothvatom, osobito detaljni postupak za rješavanje bilo kojih sporova kao što su to oni opisani u poglavlju XI.

VIII GARANCIJE, NAKNADA ŠTETE, UGOVORNA KAZNA I RASKID UGOVORA

POSLJEDICE NEIZVRŠENJA UGOVORA

38. (i) U ugovorima ove vrsti često se nalaze odredbe koje pobliže određuju posljedice koje ugovorne stranke predvidjaju i koje će primijeniti u slučaju neizvršenja ugovora. Stranke smatraju takve odredbe potrebnima zbog toga jer pojedina nacionalna zakonodavstva sadrže razlike u specifičnim rješenjima u ovim pitanjima kao i od poteškoća koje mogu nastati zbog neodgovarajućeg izbora prava koje će se

or the absence of such choice in the contract might therefore give rise. The importance of this problem appears to be particularly marked in international contracts for large industrial works, because of the extent of the damages that may result from the non-performance of the contract and the specific problems presented by the guarantee of attainment of the parameters specified in the contract.

(ii) In some contracts, the parties merely stipulate that the non-performance of the contract by one of the parties entails the responsibility of that party to indemnify the other party for damages actually sustained. However, in many cases, a general provision of this kind is insufficient to prevent the difficulties to which the problems of the applicable law, of proof and of the amount of damages give rise in certain cases. Hence, the parties to industrial contracts, particularly complex contracts for large industrial works, often find it necessary to establish in their contract either lump-sum amounts of damages or penalties to be applied to the non-fulfilment of contractual obligations. When the parties select this method they should take into account the law applicable to the contract in solving this particular difficult question, because the various national legislations differ considerably in scope from the various clauses mentioned above.

DELAYS IN PAYMENT

39. (i) The clauses providing for lump-sum damages or penalties are usually drawn up in terms of the categories of non-performance to which they are intended to apply. In contracts relating to large industrial works, the categories of non-performance are essentially delays in payment

primijeniti ili zbog odsustva takvog izbora u ugovoru. Značaj ovoga pitanja naročito je velik u medjunarodnim ugovorima za izgradnju velikih industrijskih objekata zbog opsega šteta koje mogu nastati od neizvršenja ugovora i specifičnih problema koji nastaju u vezi s garancijama učina odredjenih u ugovoru.

(ii) U nekim ugovorima stranke samo ugovore da neizvršenje ugovora sa strane jedne od ugovornih stranka stvara odgovornost te stranke i njenu dužnost da drugoj strani naknadi štetu koja je stvarno nastala. Medjutim, u mnogim slučajevima, jedna opća odredba te vrsti nije dovoljna da bi spriječila poteškoće do kojih dovodi pitanje prava koje će se primijeniti, dokazivanja i iznose štete do kojih može doći u pojedinim slučajevima. Zbog toga stranke u ovoj vrsti ugovora, a naročito ako se radi o složenim ugovorima za izgradnju velikih industrijskih objekata, često nalaze potrebno da u svojim ugovorima utvrde i paušalni iznos šteta ili ugovorne kazne koja će se primijeniti u slučaju neizvršenja ugovornih obveza. Kad stranke izaberu ovu metodu, one trebaju uzeti u obzir pravo koje će se primijeniti na ugovor u rješavanju ovoga naročito teškog pitanja zbog toga što različita nacionalna zakonodavstva sadrže značajne razlike u opsegu od različitih gore navedenih odredaba.

ZAKAŠNJENJA U PLAĆANJU

39. (i) Odredbe koje predvidjaju paušalnu naknadu štete ili ugovornu kaznu obično obuhvaćaju pojedine kategorije neizvršenja na koje se iste odnose. U ugovorima za izgradnju velikih industrijskih postrojenja, kategorije neizvršenja uglavnom su zakašnjenja u plaćanju sa strane

on the part of the client and delay in construction and non-attainment of parameters specified in the contract on the part of the client's contracting parties.

(ii) When delays in payment are governed by the payment of moratory interest on the sums in arrears, in view of the differences in the legal rates of moratory interest in the various countries, it will be in the interest of the parties to apply the conditions adopted in this connexion in the General Conditions for the Supply and Erection of Plant and Machinery and to establish in their contract the interest rate to be applied.

DELAY IN DELIVERY AND COMPLETION OF WORKS

40. (i) In the case of contracts for the supply of single items of equipment, the penalties for delay are normally calculated as a percentage of the price of the delayed item. In the case of comprehensive or turnkey contracts for large industrial works, the parties may choose either to establish time-limits and penalties separately for each part of the installation and then to calculate penalties in relation to the price of the parts of the works which are delayed, or simply to use only the date for completion of the works and apply the penalties, calculated in relation to the over-all price of the contract, from the time at which the client's contracting party has failed to meet the contractual completion date. In certain contracts, the parties combine the two systems by providing that, if deliveries or partial works are in arrears but this fact does not affect the date of over-all completion, the penalties paid for delayed items will be reimbursed to the client's contracting party.

investitora i zakašnjenja u izvodjenju radova, te nepostizanju učina odredjenih u ugovoru od investitorove ugovorne strane.

(ii) U onim slučajevima kad zakašnjenje u plaćanju ima za posljedicu plaćanje zateznih kamata na iznos koji je zakasnio, u svjetlu razlika u iznosu zateznih kamata u raznim zemljama, u interesu je stranaka da primijene uvjete prihvaćene s tim u vezi u Općim uvjetima za dobavu i montažu opreme i postrojenja Evropske ekonomske komisije, te da utvrde kamatnu stopu za takav slučaj u samom ugovoru.

ZAKAŠNJENJA U ISPORUCI I U DOVRŠETKU RADOVA

40. (i) U ugovorima za isporuku pojedinačne opreme ugovorna kazna za zakašnjenje u pravilu obračunava se u postotku od cijene zakašnjelog predmeta. U slučaju jedinstvenih ugovora ili ugovora "ključ u ruke", za velika industrijska postrojenja, stranke mogu izabrati ili utvrditi vremensku granicu i ugovornu kaznu odvojeno za svaki dio postrojenja, i da tada izračunaju ugovornu kaznu u odnosu prema cijeni dijelova rada koji je zakasnio, ili da jednostavno koriste samo dan dovršetka radova i da primijene ugovornu kaznu izračunavajući ju u odnosu prema konačnoj cijeni ugovora i to od časa kad je investitorova ugovorna strana propustila ispuniti ugovoreni dan dovršetka radova. U nekim ugovorima stranke povezuju ova dva načina predvidjajući ako dodje do zakašnjenja u isporukama ili u dijelu radova, iako ta činjenica nema utjecaja na dan završetka cijelog objekta, da će tada ugovorna kazna biti vraćena investitorovoj ugovornoj strani.

(ii) In view of the importance of the establishment of this date of over-all completion, the parties would certainly be well advised to establish this date in the contract with all necessary precision. In some contracts, the effective date of over-all completion is considered as the date on which the works have successfully passed the acceptance tests. When this completion is later than the date provided for in the contract, the penalties for delay will be applicable between the contractual date and the date of the successful acceptance tests. A difficult problem might arise in the case of disagreement between the parties on the results of acceptance when, as sometimes happens, the client proceeds to put the works into operation despite such disagreement and despite the fact that he has made reservations on the quality of the works. On this point, the parties could provide for a solution to this problem in their contract either by deciding that the penalties for delay will cease from the time the works are put into operation or that such penalties will continue to apply up to the date of the successful acceptance test or of the client's acceptance of the works with parameters inferior to those of the contract.

(iii) Industrial contracts often provide for conventional limitation of penalties for delay to a certain maximum. It is sometimes provided that the client has the right to terminate the contract when penalties have reached this maximum. Such a termination clause gives rise to a number of difficult questions which are dealt with in paragraph 42, as regards both delay in delivery and non-attainment of the parameters stipulated in the contract.

(ii) U svjetlu važnosti utvrdjenja ovog dana završetka cijelog objekta, stranke bi sigurno učinile vrlo dobro kad bi taj dan utvrdile u ugovoru sa svom potrebnom pažnjom. U nekim ugovorima dan dovršetka cijelog objekta smatra se u biti onaj dan kad je cijeli objekat uspješno prošao pokuse u svrhu preuzimanja. Kad ovaj dan završetka padne nakon dana predvidjenog u ugovoru, ugovorna kazna za zakašnjenje primijenit će se tada izmedju ugovorenog dana i dana uspješnih pokusa u cilju preuzimanja. Teži problem može nastati u slučaju neslaganja izmedju stranaka o rezultatima prihvaćanja kad, kao što se ponekad događja, investitor nastavi puštanje radova u pogon usprkos takvom neslaganju i usprkos činjenici da je stavio rezerve na kvalitet radova. U vezi s tim pitanjem stranke mogu predvidjeti u ugovoru i rješenje toga problema i to bilo da odluče da će se ugovorna kazna za zakašnjenje ukinuti od časa kad su radovi pušteni u pogon, ili da će se ugovorna kazna nastaviti primjenjivati sve do dana uspješnih proba u cilju preuzimanja, ili od časa investitorovog prihvata radova s učinima nižim od ugovorenih.

(iii) Industrijski ugovori često predvidjaju konvencionalno i uobičajeno ograničenje ugovorne kazne za zakašnjenje do odredjenog maksimuma. Predvidja se ponekad da investitor ima pravo raskinuti ugovor kad ugovorna kazna dostigne taj maksimum. Takva odredba o raskidu daje osnovu za brojna teška pitanja koja razmatramo u paragrafu 42. i to kako u pogledu zakašnjenja u isporuci, tako i u pogledu nepostizanja ugovorenih učina.

GUARANTEE

41. (i) In addition to penalties for delay, contracts for large industrial works sometimes also carry penalties for non-attainment of the parameters specified in the contract. The first obligation of an industrial works supplier who has assumed contractual responsibility for attaining a certain performance but who, at the first test, is unable to do so, although the client has fulfilled all his obligations, is to undertake at his expense the necessary repairs and improvements to attain the performance specified in the contract. If, in repeated acceptance tests, he is unable to attain the contractual parameters, the parties sometimes agree that the work shall be accepted with parameters below those specified in the contract, but that the price shall be reduced accordingly.

(ii) The attainment, at the time of the acceptance tests, of the parameters specified in the contract does not necessarily end the responsibilities of the client's contracting party for proper performance of the contract. However, the provision by the client's contracting party of a guarantee for the works beyond the time of successful passing of the acceptance tests raises extremely complex and awkward problems which are difficult to solve in the absence of clear indications by the parties regarding them. It is therefore on this point that the parties would be particularly well advised to include in their contract as detailed an explanation as possible of the purpose of the guarantee, its duration, the time at which it commences and any other particulars.

GARANCIJE

41. (i) Pored ugovorne kazne za zakašnjenje, ugovori za izgradnju velikih industrijskih postrojenja ponekad sadrže i ugovornu kaznu zbog nepostizanja učina predvidjenih ugovorom. Prva obveza isporučitelja industrijskog postrojenja koji je preuzeo ugovornu odgovornost za postizanje odredjenih učina, ali koji prilikom prvih pokusa u cilju preuzimanja nije u mogućnosti da te učine postigne, iako je investitor ispunio sve svoje obveze, dužan je na vlastiti trošak poduzeti sve popravke i poboljšanja da bi postigao učine predvidjene ugovorom. Ukoliko u ponovljenim pokusima u cilju preuzimanja on ne bi bio u mogućnosti postići ugovorene učine, stranke se ponekad slažu da će radovi biti preuzeti s učinima nižim od onih predvidjenih ugovorom, ali da će ugovorna cijena biti razmjerno smanjena.

(ii) Postizanje učina u vrijeme izvodjenja pokusa radi preuzimanja ne znači nužno kraj odgovornosti investitorove ugovorne strane za pravilno izvršenje ugovora. Medjutim odredbe o jamstvu od strane investitorove ugovorne strane, nakon vremena uspješnog izvršenja pokusa zbog preuzimanja, postavlja niz veoma složenih i teških problema koje je veoma teško riješiti u odsustvu jasne indikacije stranaka u tom pogledu. Zbog toga se na ovo pitanje skreće posebna pažnja strankama da u svoj ugovor uključe, koliko god je to moguće, detaljnije objašnjenje cilja garancije, njeno trajanje, čas kada ona počinje kao i druge pojedinosti.

TERMINATION

42. (i) As in the case of penalties for delay, penalties for the non-attainment of the parameters stipulated in the contract are often fixed within a certain percentage representing the maximum amount of price reduction. However, whenever this limitation of penalty is designed above all as a measure of protection for the client's contracting party, the client will often find himself unprotected when delay or lowering of parameters has exceeded the limits provided for in the contract. The situation will be particularly serious in the case of a lowering of parameters beyond the limits provided for in the contract, since it could completely upset the basis of the transaction.

(ii) In this extreme case, the client might consider that what has been supplied is entirely different from the object of the contract and seek remedies in the provisions governing termination of the applicable law. However, such provisions differ greatly from country and are sometimes vague. Hence the parties often undertake to set out in their contracts the terms and consequences of termination. Termination usually entails the obligation of the client's contracting party to compensate the client for damages actually sustained. In some cases the determination of the amount of actual damages is left wholly to the arbitrators; in others, it is limited.

(iii) Whatever the solution adopted by the parties in this connexion, the consequences of termination are particularly serious for the client's contracting party. They may also be disastrous for the client, particularly where the damages resulting from termination, as is often the

RASKID UGOVORA

42. (i) Isto kao i u slučaju ugovorne kazne za zakašnjenje, ugovorna kazna za nepostizanje ugovorenih učina često je odredjena unutar odredjenog postotka koji predstavlja najveći iznos do kojega se cijena može smanjiti. Medjutim kad god je ovo ograničenje ugovorne kazne usmjereno kao mjera zaštite investitorove ugovorne strane, investitor će često biti nezaštićen kad je zakašnjenje ili sniženje učina prešlo granicu predvidjenu ugovorom. Ova će situacija biti osobito ozbiljna u onim slučajevima kada sniženje učina bude veće od granica predvidjenih ugovorom, jer se u takvim slučajevima može dogoditi da se poremeti osnova na kojoj je cijeli posao bio zasnovan.

(ii) U ovakvom krajnjem slučaju investitor može smatrati da ono što je isporučeno predstavlja nešto što je potpuno različito od svrhe ugovora, te da traži sredstva i zaštitu u odredbama koje rezultiraju raskidom ugovora, a koje se nalaze u pravu i pravnom sistemu odredjenom za primjenu u takvim slučajevima. Medjutim ove odredbe često se znatno razlikuju od zemlje do zemlje i često su neodredjene. Zbog toga stranke često odredjuju u ugovorima uvjete i posljedice raskida ugovora. Raskid ugovora obično nameće obvezu ugovornoj strani investitorovoj da naknadi štetu koju je investitor stvarno imao. U nekim slučajevima odredjivanje iznosa za štetu u cijelosti je prepušteno arbitrima; u drugim ono je ograničeno.

(iii) Bez obzira na rješenje koje stranke usvoje u ovom pitanju, posljedice raskida su naročito ozbiljne za investitorovu ugovornu stranku. One takodjer mogu biti razorne i za samog investitora, naročito kada bi šteta do koje dolazi zbog raskida, a što je često slučaj, bila

case, are limited to a certain maximum. Thus it would appear that, before thinking of termination, to be considered as an extreme measure, the parties would be well advised to consider other remedies, for example by asking qualified technical experts, at the expense and risk of the client's contracting party, to determine how the works could be overhauled, repaired or adapted so as to obtain or approximate to the expected parameters.

(iv) Owing to the serious consequences which might result from the non-attainment of parameters stipulated in the contract, the parties should take particular care to determine and specify in detail the technical conditions on which their transaction is based. The client's contracting parties should, among other things, be particularly aware of their responsibilities when establishing parameters which they agree to guarantee and should make only such commitments as they really believe they can fulfil under the conditions of industrial works construction abroad.

IX. MONETARY CLAUSES AND PRICE REVISION

MONETARY CLAUSES

43. It will be in the best interest of the contracting parties to specify beyond any doubt-account being taken of any payment agreements between countries as well as of the monetary regulations in force in the countries concerned-the currency or currencies in which prices are stated and that or those in which payments must be made, with a distinction being made, where applicable, between the various supplies and services covered by the contract, depending on their origin. Such prices and payments may be

ograničena do odredjenog maksimuma. Proizlazi, dakle da bi prije razmišljanja o raskidu ugovora, što treba uzeti u razmatranje kao krajnju mjeru, stranke dobro učinile da razmotre druga sredstva, kao na primjer da zatraže da tehnički stručnjak, na trošak i riziko investitorove ugovorne strane, odredi kako radovi mogu biti preuredjeni, popravljeni, ili prilagodjeni tako da se približe očekivanim parametrima.

(iv) Zbog ozbiljnih posljedica koje mogu nastati od nepostizanja ugovorom utvrdjenih parametara, stranke trebaju naročitom pažnjom utvrditi i detaljno navesti tehničke uvjete na kojima se osniva njihova transakcija. Ugovorne strane investitorove trebaju, izmedju ostalog, biti posebno svjesne svoje odgovornosti pri utvrdjivanju parametara za koje garantiraju i treba da preuzmu samo takve obveze za koje stvarno vjeruju da će ih moći ispuniti pod uvjetima izvodjenja industrijskih objekata u inozemstvu.

IX MONETARNE ODREDBE I REVIZIJA CIJENA

MONETARNE ODREDBE

43. Bit će u najboljem interesu ugovornih stranaka da nedvojbeno odrede - uzimajući pri tome u obzir eventualne platne sporazume izmedju pojedinih zemalja kao i monetarne propise odredjenih zemalja - valutu ili valute u kojima su izražene cijene kao i onu u kojoj se imaju izvršiti plaćanja, s razlikovanjem kada tome ima mjesta, izmedju različitih isporuka i usluga obuhvaćenih ugovorom, ovisno o njihovom porijeklu. Ove cijene i plaćanja mogu biti izračunati ili temeljeni i na valuti neke treće zemlje. U

calculated in or based on the currency of a third country. In view of the possible uncertainty of the international monetary situation, however, the contracting parties should take particular care in drafting monetary clauses.

PRICE REVISION CLAUSES

44. In a number of contracts for large industrial works, the contracting parties stipulate fixed prices. However, they may agree to include in their contracts price revision clauses such as those contained in the annex to the General Conditions relating to plant and machinery, for supplies and services relating to industrial plants or other formulas for the building and civil engineering work.

X. APPLICABLE LAW

DETERMINATION OF THE APPLICABLE LAW

45. (i) It will be in the best interest of the contracting parties to determine in advance the law which will be applicable in the case of a dispute. This point should therefore be specified in the contract.

(ii) The contracting parties sometimes stipulate that the contract is governed by the law of the country of the client's contracting party. This solution, whereby the supplier may easily be informed of the provisions of the applicable law, is, however, subject to derogations from the obligatory provisions of the law of the place where the industrial work is situated (provisions on working conditions, social security, work safety, taxes, etc.).

(iii) The parties, deeming the centre of the operations relating to the construction of industrial works to be in the country where the plant is to be constructed, sometimes

svjetlu moguće nesigurnosti u medjunarodnoj monetarnoj situaciji, medjutim, ugovorne strane treba da budu naročito pažljive u sastavljanju monetarnih ugovornih odredaba.

ODREDBE O REVIZIJI CIJENA

44. U nizu ugovora za izgradnju velikih industrijskih objekata, ugovorne strane ugovaraju čvrste cijene. Medjutim one se mogu složiti da uključe u svoje ugovore odredbe o reviziji cijena kao što su one sadržane u Općim uvjetima koji se odnose na postrojenja i opremu, za dobave i usluge koje se odnose na industrijsko postrojenje ili druge formule za gradjevinske radove.

X VAŽEĆE PRAVO

ODREDJIVANJE VAŽEĆEG PRAVA

45. (i) U interesu je ugovornih strana da unaprijed odrede pravo koje će se primijeniti u slučaju spora. Ovo pitanje zbog toga treba riješiti u ugovoru.

(ii) Ugovorne strane ponekad ugovaraju da će ugovor biti podvrgnut pravu zemlje iz koje je investitorova ugovorna strana. Ovo rješenje, prema kojem se isporučitelj može veoma lagano informirati o odredbama važećeg prava, podložno je, medjutim, iznimkama u slučajevima obvezne primjene prava mjesta u kojem se nalazi industrijski objekat koji se gradi (kao npr. odredbe o radnim uvjetima, socijalnom osiguranju, mjerama zaštite na radu, porezima, itd).

(iii) Stranke, smatrajući da se centar radnji usmjerenih na izgradnju industrijskog postrojenja nalazi u zemlji

adopt the law of the place where the plant is situated. However, the drawback to this solution is that this law and the jurisprudence might not be well known to the client's contracting party. This choice might also make it more difficult to determine the relationship between the holder of the main contract and his sub-contractors.

(iv) An alternate solution is to specify in the contract that the applicable law will be the law of a third country. However, the law of a third country may also run counter to the provisions of the law of the place where the industrial works is situated.

(v) Another alternate solution is to divide the contract so as to have, for the various supplies and services, applicable laws corresponding to the location of the various operations (seller's law for supplies, buyer's law for the erection or construction of buildings, etc.). The disadvantage of this solution is that the application of several laws might create contradictory situations.

(vi) Where such an arrangement is permitted under the applicable laws and international conventions, the parties may also authorize the arbitrators to act as amiables compositeurs. However, this solution does not always produce the expected results because of uncertainty about the very concept of amialbe composition.

(vii) In view of the difficulties involved in the choice of the applicable law, the parties might ultimately prefer to settle for the solution of Article VII of the European Convention on International Commercial Arbitration of 1961, and leave the arbitrators to decide on the applicable law, it being understood that the arbitrators would take into account the terms of the contract and the practices in the sector of trade in question. This solution would

u kojoj se postrojenje izgradjuje, ponekad usvajaju pravo mjesta gdje je smješteno postrojenje. Medjutim nezgodna strana toga rješenja je u tome da investitorova ugovorna strana ne mora biti dobro upoznata s tim pravom i pravnom praksom. Ovaj izbor može isto tako učiniti težim odredjivanje odnosa izmedju nosioca glavnoga ugovora i njegovih podugovarača.

(iv) Jedno od alternativnih rješenja sastoji se u tome da se ugovorom odredi da će se primjenjivati pravo koje treće zemlje. Medjutim pravo te treće zemlje može biti protivno pravu zemlje u kojoj je smješten industrijski objekat.

(v) Jedno drugo alternativno rješenje je da se ugovor podjeli na taj način da se za različite isporuke i usluge odredi važeće pravo ovisno o mjestu odvijanja različitih radnji (pravo prodavaoca za isporuke, kupca za montažu i gradjevinske radove, itd). Nezgodna strana ovoga rješenja je u tome što primjena različitih prava može stvoriti kontradiktorne situacije.

(vi) U slučajevima kad je takvo rješenje dopustivo po važećem pravu i medjunarodnim konvencijama, stranke mogu takodjer ovlastiti arbitre da djeluju kao "amiables compositeurs". Medjutim ovo rješenje ne daje uvijek očekivani rezultat zbog nesigurnosti samog pojma "amiable composition".

(vii) U svjetlu poteškoća koje se javljaju u vezi s izborom važećeg prava, stranke mogu na kraju pristati da izaberu rješenje sadržano u Članu VII Evropske konvencije o medjunarodnoj trgovačkoj arbitraži iz 1961. godine, i da ostave arbitrima da riješe pitanje važećeg prava, podrazumijevajući da će arbitri uzeti u obzir odredbe ugovora i trgovačku praksu u odnosnoj trgovačkoj grani. Ovo

mot, however, enable the parties to know in advance the law which would be applied in the case of a dispute. It may therefore be recommended to the parties, in deciding in their contract on the law which should apply in the case of disputes, to draw up contracts in a sufficiently specific and detailed manner so that, if a dispute should arise, recourse to a national law would be necessary only in exceptional cases.

IDENTITY OF THE LAWS APPLICABLE IN RELATIONS BETWEEN THE HOLDER OF THE MAIN CONTRACT AND THE CLIENT, IN THE ONE CASE, AND HIS MAIN SUB-CONTRACTORS, IN THE OTHER

46. In the case of comprehensive or turnkey contracts, it will be in the interest of the holder of the main contract to ensure that, in his relations with the client, the applicable law is the same as the law applicable in his relations with sub-contractors or the other contracting parties with whom he shares liability.

XI. SETTLEMENT OF DISPUTES

NEED TO SUBMIT DISPUTES ARISING FROM THE CONSTRUCTION OF LARGE INDUSTRIAL WORKS TO THE SAME ARBITRATION PROCEDURES

47. (i) Like virtually all international contracts, contracts for the construction of large industrial works generally contain arbitration clauses for the settlement of any dispute among the parties. On this subject international business practice offers to those concerned a sufficient variety of arbitration procedures for them to be able to select the one best suited to the particular case.

(ii) The relationships established between the different parties involved in the construction of large indus-

rješenje, medjutim, ne bi strankama omogućilo da unaprijed znaju koje bi se pravo primijenilo u slučaju spora. Zbog toga se može strankama preporučiti da prilikom donošenja odluke o važećem pravu u slučaju spora sastave ugovor na dovoljno odredjeni način tako da u slučaju spora primjena nekog nacionalnog prava bude potrebna samo u iznimnim slučajevima.

PRIMJENA ISTOG VAŽEĆEG PRAVA U ODNOSIMA IZMEDJU GLAVNOG UGOVARAČA I INVESTITORA S JEDNE STRANE, I NJEGOVIH GLAVNIH PODUGOVARAČA S DRUGE STRANE

46. Kod jedinstvenih ugovora ili kod ugovora "ključ u ruke" u interesu je glavnog ugovarača osigurati da u njegovim odnosima s investitorom važeće pravo bude isto kao i važeće pravo za njegove odnose s podugovaračima, ili s drugim ugovornim stranama s kojima on dijeli odgovornost.

XI RJEŠAVANJE SPOROVA

POTREBA DA SE SPOROVI KOJI NASTAJU KOD IZGRADNJE VELIKIH INDUSTRIJSKIH POSTROJENJA PODVRGNU ISTIM ARBITRAŽNIM POSTUPCIMA

47. (i) Kao gotovo svi medjunarodni ugovori, ugovori za izgradnju velikih industrijskih postrojenja uglavnom sadrže arbitražne klauzule za rješavanje svih sporova medju strankama. U ovom području medjunarodna poslovna praksa nudi zainteresiranima dovoljni izbor arbitražnih postupaka od kojih oni mogu izabrati onaj koji im najbolje odgovara u svakom pojedinom slučaju.

(ii) Odnosi koji se uspostavljaju izmedju različitih stranaka koje sudjeluju u izgradnji velikih industrijskih

trial works are, however, of many different kinds; and this creates special problems as regards arbitration in contracts relating to such projects.

(iii) The difficulties which may arise between the client and the holder of the main contract during the performance of such contracts may, in many cases, be paralleled by identical difficulties in relations between the holder of the main contract and his sub-contractors or associates. Consequently, in order to avoid conflicts between different arbitral or judicial decisions, it would seem desirable for all disputes arising in the performance of contracts for large industrial works to be made subject when possible, to identical procedures before the same arbitrators, whoever the parties to the disputes may be. Thus, the parties would either have to agree in advance, when signing the contract, on the choice of the arbitrators to settle their disputes, or the appointment of all the arbitrators would have to be left to the discretion of the arbitration body responsible for settling the parties' disputes. However, even with such solutions, the contents of the various contracts which constitute such transactions might give rise to different arbitral decisions before the same arbitrators, depending on whether the dispute was between the client and the holder of the main contract, or between the holder of the main contract and one or several other contracting parties participating in the project.

(iv) The situation is not different where, for carrying out such a project, the client concludes separate contracts with a number of contracting parties each of which is liable for one part of the total project, or where the client concludes turnkey contracts with a joint venture. The solution proposed in the preceding sub-paragraph might also be applied to these cases, where possible.

objekata različitog su karaktera; ovo stvara posebne probleme u pogledu arbitraže u ugovorima koji se odnose na takve objekte.

(iii) Poteškoće do kojih može doći izmedju investitora i glavnog ugovarača u toku izvodjenja takvih ugovora mogu se, u mnogim slučajevima, odvijati istovremeno s isto takvim poteškoćama u odnosima izmedju glavnog ugovarača i njegovih podugovarača i partnera. Dosljedno tome, da bi se izbjegli sukobi izmedju različitih arbitražnih ili sudskih odluka, čini se poželjnim da svi sporovi do kojih dolazi u izvršenju ugovora za izgradnju velikih industrijskih postrojenja budu podvrgnuti, kad god je to moguće, istom postupku i pred istim arbitrima, bez obzira na to koje su stranke u pojedinom sporu. Na taj način stranke se ili moraju unaprijed složiti kad potpisuju ugovor o izboru arbitara koji će rješavati njihove buduće sporove, ili imenovanje svih arbitara treba biti prepušteno odluci arbitražnog tijela odgovornog za rješavanje sporova. Medjutim i kod ovakvih rješenja sadržaji različitih ugovora koji čine sastavni dio cijele transakcije mogu dati osnovu za različite arbitražne odluke ma i pred istim arbitrima, ovisno o tome da li se radilo o ugovoru izmedju investitora i glavnoga ugovarača, ili izmedju glavnoga ugovarača i jednoga ili nekoliko ugovornih stranaka koje sudjeluju u izgradnji objekta.

(iv) Situacija nije različita niti u onim slučajevima kad investitor zaključi odvojene ugovore s različitim ugovornim stranama od kojih je svaka odgovorna za dio cijelog objekta, ili kad investitor zaključi ugovor "ključ u ruke" sa zajedničkim pothvatom (joint venture). Rješenje predloženo u prethodnom podparagrafu može se primijeniti i na ove slučajeve kad je to moguće.

(v) Standardization of arbitration procedures in contracts for large industrial works, which would seem to be necessitated by the inter-related character of the different operations making up the over-all project, may however involve certain procedural difficulties. It might, for instance, be difficult to organize a single arbitral procedure in the case of a contract which is international in regard to relations between the client and a holder of the main contract, a number of contracting parties or a joint venture, but purely domestic in regard to relations between the holder of the main contract and his sub-contractors or between the participants in the joint venture, as the case may be. This is why two different arbitral procedures are generally used: the first for the settlement of disputes between the client and the holder of the main contract or between the client and the joint venture, and the second for the settlement of disputes between the members of the joint venture. In fact, however, the existence of these two procedures ceases to be a source of difficulty when the sub-contractors or the members of the joint venture agree, and provide for this principle in their contracts or in the agreement establishing the joint venture, that arbitral decisions in disputes between the holder of the main contract or the joint venture, on the one hand, and the client, on the other, will also apply to the holder of the main contract and his sub-contractors or to the members of the joint venture in their relations between themselves, provided, however, that it was possible for the sub-contractors or the members of the joint venture to be associated with the arbitral procedure between the holder of the main contract or the joint venture and the client.

(vi) There is a need to harmonize arbitral procedures

(v) Ujednačenje arbitražnih postupaka u ugovorima za velike industrijske objekte, koje je čini se potrebno zbog medjuovisnog karaktera različitih operacija od kojih se sastoji izgradnja cijelog objekta, može izazvati odredjene postupne poteškoće. Može npr. biti teško organizirati jedan arbitražni postupak u slučaju ugovora koji ima medjunarodni karakter u odnosima izmedju investitora i glavnog ugovarača, odredjenog broja ugovornih stranaka ili jednoga zajedničkog pothvata, ali koji imaju isključivo unutarnji - domaći karakter u pogledu odnosa izmedju glavnog ugovarača i njegovih podugovarača, ili izmedju suradnika u zajedničkom pothvatu, već prema okolnostima slučaja. Ovo je razlog zbog kojeg se često primjenjuju dva različita arbitražna postupka: prvi za rješavanje sporova izmedju investitora i glavnog ugovarača ili izmedju investitora i zajedničkog pothvata, i drugi za rješavanje sporova izmedju članova zajedničkog pothvata. U stvari postojanje ovih dvaju postupaka prestaje biti izvor poteškoća kad se podugovarači ili članovi zajedničkog pothvata slože i kad prihvate princip u svojim ugovorima ili u sporazumu o osnivanju zajedničkog pothvata da će se arbitražna odluka u sporovima izmedju glavnog ugovarača ili zajedničkog pothvata s jedne strane i investitora s druge strane takodjer primijeniti na glavnog ugovarača i njegove podugovarače ili na članove zajedničkog pothvata u njihovim medjusobnim odnosima, pod uvjetom da se omogući podugovaračima ili članovima zajedničkog pothvata da sudjeluju u arbitražnom postupku izmedju glavnoga ugovarača ili zajedničkog pothvata i investitora.

(vi) Postoji potreba da se usklade arbitražni postupci

in order to avoid any conflict of decisions not only in the case of disputes between the parties with regard to legal issues, but also with regard to issues relating to the technical quality and capacity of a large industrial works for which separate, comprehensive or turnkey contracts have been concluded.

TECHNICAL APPRAISAL

48. (i) In this connexion, it may be noted that, in recent experience of international commercial arbitration, many disputes between parties to contracts for delivery of equipment or industrial plants arise from disagreements concerning the quality of the supplies, their conformity with the contract cpecifications, the capacity of the plant or its performance. In arbitral procedure in most international contract cases, the technical questions at issue in these disputes come before the arbitrators long after the technical difficulties arise. Even if, as usually happens, the arbitrators appoint technical experts, these are called upon to give their opinion at a stage when on-the-spot verification, which might have been necessary, has become more difficult.

(ii) In the case of industrial buildings, it might be suggested to the parties that they should agree in advance on the appointment of technical experts to whom would be submitted, without delay, disagreements arising during the construction work, at the time of the acceptance of industrial plants or during the period of the guarantee of functioning. If the parties themselves cannot reach agreement on the choice of the experts, they may request that the experts should be appointed by a specialized institution selected by agreement between the parties. If a solution

zbog izbjegavanja sukoba odluka i to ne samo u slučajevima sporova izmedju stranaka u pogledu pravnih pitanja, već i u pogledu tehničkih pitanja koja se odnose na kvalitet i kapacitet velikih industrijskih postrojenja koja se grade temeljem zaključenih odvojenih, jedinstvenih ugovora ili ugovora "ključ u ruke".

TEHNIČKO VJEŠTAČENJE

48. (i) S tim u vezi može se istaći da novija iskustva u medjunarodnoj trgovačkoj arbitražnoj praksi pokazuju da mnogi sporovi izmedju stranaka koji proizlaze iz ugovora o isporuci opreme ili industrijskih postrojenja nastaju zbog nesporazuma u pogledu kvaliteta isporuka, njihova prilagodjivanja uvjetima ugovora, kapaciteta postrojenja ili njegova učina. U arbitražnom postupku u većini medjunarodnih ugovornih slučajeva sporna tehnička pitanja ne dolaze pred arbitre dugo nakon što se pojave same tehničke poteškoće. Pa i u najčešćim slučajevima kad arbitri imenuju tehničke stručnjake i ovi budu pozvani da dadu svoje mišljenje u fazi kad utvrdjivanje činjenica na mjestu dogadjaja, koje je moglo biti potrebno, bude znatno otežano.

(ii) U slučajevima industrijskih zgrada moglo bi se savjetovati strankama da treba da se spprazumiju unaprijed o imenovanju tehničkog stručnjaka kojem bi se bez odlaganja podnijeli na razmatranje nesporazumi do kojih može doći tokom izvodjenja gradjevinskih radova, u času primopredaje industrijskog postrojenja, ili za vrijeme garancije djelovanja. Ako se stranke same ne mogu složiti o izboru stručnjaka, one mogu zatražiti da stručnjak bude imenovan od koje specijalizirane ustanove izabrane sporazumom stranaka.

of this kind was acceptable to the parties in specific cases, it would undoubtedly be useful for the same solution to be adopted in all contracts for the construction of a large industrial works. In this way it would be possible to avoid, on a basic issue, a possible conflict of arbitral decisions concerning the construction of such a works.

(iii) To avoid any uncertainty as to the actual implication of the opinions given by the expert or experts requested to make technical observations during, or at the end of, operations, it would be useful for the parties to specify this implication in their contract, clearly stating whether these opinions should be considered as final or whether they should merely constitute evidence with a certain weight in subsequent arbitral procedures. In the absence of such a stipulation, it should be assumed that the opinion of the expert will not be binding on the arbitrator.

(iv) With regard to building and civil engineering work, certain international contracts provide that the consulting engineer responsible for the supervision of the work may also, without prejudice to subsequent arbitration which may be requested by either of the parties, make observations or take decisions concerning issues giving rise to disputes between the parties.

Ako je takvo rješenje bilo prihvatljivo strankama u odredjenim slučajevima, bilo bi nesumnjivo korisno da se isto rješenje usvoji u svim ugovorima za izgradnju velikih industrijskih postrojenja. Na taj bi način bilo moguće izbjeći, u jednom od osnovnih područja, mogući sukob izmedju arbitražnih odluka u vezi s izvodjenjem ovakvih radova.

(iii) Da bi se izbjegla neizvjesnost u vezi s implikacijama mišljenja danih od stručnjaka od kojih se zatražilo da izvrše tehnički uvid za vrijeme ili na kraju radova, bilo bi korisno da stranke pobliže odrede te implikacije u svome ugovoru, jasno odredjujući da li će se ta mišljenja smatrati konačnim ili će samo predstavljati dokaz s odredjenom težinom u budućim arbitražnim postupcima. U odsustvu takve odredbe treba pretpostaviti da mišljenje stručnjaka neće biti obvezno za arbitra.

(iv) U pogledu gradjevinskih radova odredjeni medjunarodni ugovori predvidjaju da savjetodavni inženjer odgovoran za nadzor nad radovima može takodjer, bez utjecaja na predstojeću arbitražu koju može zatražiti bilo koja od ugovornih stranaka, stavljati opaske ili donositi odluke koje se odnose na pitanja koja predstavljaju uzrok sporova izmedju stranaka.

Preveo: B.V.