

## **Guide for drawing up international contracts on consulting engineering including some related aspects of technical assistance**

Topic: Construction, installation of plant, engineering  
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### Part I

#### General

##### 1. Introduction

1. The present guide deals with consulting engineering, and some aspects of technical assistance, by means of a checklist and sections relating to the consideration of the main contract provisions. The present guide is a recommendation whose purpose is to facilitate the drawing up of international contracts in this field by drawing the attention of users to certain aspects peculiar to this type of transaction. It may usefully be read in conjunction with the numerous general conditions, model forms, guides, manuals, standards of professional conduct, and codes of ethics which have been drawn up and adopted by professional associations of consulting engineers and by other international organizations and which are in current use.

2. This guide is one in a series of interconnected guides which have been drawn up under the auspices of the Economic Commission for Europe, including: guide for use in drawing up contracts relating to the international transfer of know-how in the engineering industry (TRADE/222/Rev.I); Guide on drawing up contracts for large industrial works (ECE/TRADE/117); Guide on drawing up international contracts on industrial co-operation (ECE/TRADE/124); and Guide for drawing up international contracts between parties associated for the purpose of executing a specific project (ECE/TRADE/131).

##### II. Concepts of engineering and technical assistance

3. A distinction must be made between complex engineering and consulting engineering. Taken as a whole (complex engineering), the engineering contract governs the set of actions and supplies which result in the completion of an industrial installation or civil works (it might be a hospital complex, airport, railway or public transport network, etc.) that is the set of conceptual and operational tasks falling within the sphere of technical and engineering science and needed for the completion of the project. It can also be extended by assistance contracts in the broad sense whereby the installation when constructed is operated for a certain period of time, or the products manufactured by the installation are even marketed ("sold product" contract). In conclusion, complex engineering, in the broad sense, covers:

- Consulting engineering, which relates essentially to intellectual contributions (supply of services) connected with the design of the plant, the preparation of projects and blueprints and the supervision of the work;
- Process engineering, which relates to the granting, to the principal, of the process or processes needed for the construction of an industrial complex and its operation (know-how, process-transfer and patent granting contracts); and
- General contracting which basically relates to the design and supply of equipment and material and/or the fitting up of installations, including, where necessary, civil engineering work.

4. Consulting engineering relates essentially to the intellectual services rendered by an individual or a group, with or without a legal personality, of engineers, technicians and specialists in various disciplines, organized in permanent teams and having the necessary means at their disposal for

carrying out certain functions of research design, and supervision in the area of economic development in general and the construction of installations and industrial or other complexes in particular. These functions thus involve the supply of design, supervision and possibly management services with a view to completing an industrial project or civil works, but do not include any building, the supply of equipment, granting of licences or transfer of manufacturing processes. The terms "consulting engineering" and "pure engineering" are synonymous: they cover all consulting engineering functions and the contracts governing them. Only these contracts are covered by the present guide.

5. Consulting engineering contracts can cover "complete functions" or "partial functions", according to whether the consulting engineer is entrusted with the entire range of tasks which are normally within his competence or whether he is entrusted with only some of them such as, for example, the over-all design and general plans, or a quantity-control or quality-control function. In other words, consulting engineering services may extend to all these stages of a project or may be restricted to a part or to one stage only - for instance, the pre-investment stage. For the purpose of this guide, "project" means the overall idea and the physical structure of work to be carried out (and therefore project should be distinguished from the scope of a particular contract).

6. All tasks and functions entrusted to the consulting engineer, whether the services are to be complete or partial, must be clearly described in the contractual document (generally in an annex to the contract). The more precisely the tasks and functions are described, the easier it is to determine whether there is any departure from the contractual obligations.

7. Consulting engineering contracts may, or may not, be supplemented with co-operation elements - for instance, combined research or trial production or marketing by joint technical assistance or training components.

8. Although the arrangements between the consulting engineer and his client constitute an independent relationship, the background is often one where the client is party (again, usually as client) to a whole set of agreements which form what in this guide is referred to as the project. The consulting engineer may often play a special role in these contractual arrangements. Even if he does not, it is important to define the consulting engineer's role with regard to the project as a whole and the contractual parties involved (see para. 30).

9. Technical assistance is a service, or a set of services, rendered during the execution of a project and/or afterwards. It consists essentially of assistance given in the effective transfer of technology and, as such, concerns use, maintenance and repair. Technical assistance, therefore, is offered by the general contractor or by the provider of technology or by the consultant. When it is offered by the general contractor (which is usually the case) or by the provider of technology, the consultant is often adviser to the client and sometimes agent for the client. The consultant's role between the general contractor, as the provider of technical assistance, and the client, as the recipient of such assistance, is of importance. In some instances, however, the consultant may offer technical assistance directly, and it is only these instances which are relevant to the subject-matter of the present guide. Details about technical assistance offered by the consultant are provided in paragraphs 52-57 below.

### III. Consulting engineering contract

#### Types

##### (a) Consulting engineering contract for a project as a whole

10. A contract for a project as a whole provides for services relating to all the stages of a project. However, it is sometimes difficult to foresee, with reasonable accuracy, the entire scope of consulting services which may be called for in the later stages, and the duties of the consultant may, in one contract, be divided and defined in consecutive stages of the project.

11. The most-frequently-occurring instances would seem to be those where the consultant is engaged by the client in one contract covering a project as a whole whereby the provision of consulting services is made dependent on certain conditions. Under a contract of this type, the rights and duties of the consultant rendering services following the pre-investment stage do not become operative unless the results of the previous stage are judged to be satisfactory by the client. Similarly, in special circumstances, a consulting firm which has completed a feasibility study for the same project, or which is under contract for design of a project and has already carried out work satisfactorily for the client, may be approved for continuing services.

##### (b) Consulting engineering contract for a part of a project

12. In consulting engineering practice, contracts may be concluded at various stages of a project, for each individual stage independently of the others. Negotiation of such contracts permits the client to remain flexible in his relationship with consultants.

13. A project evolves gradually, beginning with identification of objectives and concepts and continuing through successive stages. Each succeeding stage is undertaken only after the previous stage has been fully considered; undertaking successive stages is dependent on successful completion of preceding ones. In a series of contracts successively concluded, each of the parties has the right to refuse to conclude a contract relating to the subsequent project stage. Therefore, the parties usually make provision in their contract as to whether or not the consulting services will continue in the next stage or stages.

#### Main contract documents

14. Agreement between client and consultant may be effected not only through a written consulting engineering contract but also through certain documents to be complied with during implementation of the contract. A statement of consulting work with detailed essential services and facilities in each stage of a project, including general work plans, is usually annexed to a consulting engineering contract. A distinction is made between different types of such documents. They should be expressly referred to and listed in the written contract by the parties if the latter wish the documents to govern their contractual relations - for example:

(i) basic general conditions of a technical character such as general condition, vis-a-vis the client, professional organizations, the lending bank, and the host government; and

(ii) already-existing documentation, such as feasibility studies, planning bases, terms of reference, etc. Specifically, reference to these documents should indicate which parts of them should be considered as having been included in the contract.

15. If, after conclusion of the contract, the parties produce additional documents, they should ensure that these do not contradict earlier ones. Since, however, the parties may also wish to revise the scope of work or change some of the technical parameters of the project, they should avoid ambiguity in attempting to make such revisions.

#### IV. Selection of a consultant

16. Practice suggests that there is no universally-accepted procedure for selection of consultants. First, the choice of consultant may be informal: the client contacts a consultant already known, or who has been made known to him, and entrusts the work to that consultant.

17. There are, however, more extensive and formal procedures for the selection of consulting engineers. Before the actual selection takes place, it is assumed that the client has defined the project, has established a procedure for selection, and has authorized a person or persons (selection board) to select or recommend consulting engineers.

18. The formal selection process begins with the preparation of a list of consultants or firms claiming expertise in the specific field for which the client may contact professional associations of consultants, diplomatic and commercial representations, chambers of commerce, etc. Some banks, government agencies and investors maintain a register of consultants. It is at this stage that the first contact between client and consultant is made. On the basis of information obtained and after preliminary inquiries, a short list (three to five individual names or firms) is established.

19. In the selection of a consultant, the decisive factors may be his professional knowledge, experience and reputation. Many international organizations have established rules which are applied when they finance a project and which, in most cases, contain a rating scale for qualification.

#### V. Client-consultant relationship

20. Although the contractual relationship between client and consultant is the same during all stages of a project, the services rendered by the consultant vary from stage to stage. Hence, the legal consequences of noncompliance with an obligation also vary in terms of services concerned.

21. Once the decision to proceed with a project has been taken and all preliminary studies in the pre-investment stage have been completed, the client selects the method of project achievement. The four principal methods are: conventional; in-house; project management; and turnkey. The consultant's position with regard to the client depends on the scope of work and his functions.

(a) Conventional method

22. The conventional method of project achievement occurs when the client retains a consulting engineer to act as his professional adviser, to prepare plans and specifications for a project, and to receive tenders from general contractors and suppliers for carrying out construction work, as well as to inspect and supervise construction of the project. In addition, the consulting engineer may be mandated to act as authorized representative of the client in negotiating with contractors and suppliers or in concluding contracts on the instructions and on behalf of the client.

(b) In-house project achievement

23. In-house project achievement involves substantial or total use of the client's in-house staff. Members of the client's organization handle project management, concept design, and sometimes even construction. Whilst no client is in a position to manufacture or to produce all the materials or supplies required for a sizeable project, some elect to recruit sufficient staff to handle the major part of project achievement internally; the in-house staff must be sufficiently well qualified and capable of handling the work as well as having the ability to plan, organize and execute the project. In-house project achievement therefore usually involves minimal use of independent external consulting engineers. The role of the latter is limited to consultations or assistance on specific aspects of the project for which the client's inhouse staff do not have sufficient skills or experience.

(c) Project management method of project achievement

24. The project management method of project achievement entails a single contract between the client and a firm of consulting engineers which handles project planning, project management, design services, procurement, construction management, commissioning and such other aspects as assistance in arranging finance. The services provided are generally limited to professional services and do not include actual project construction. Unlike the usual methods, project management involves much greater management efforts and employs multiple contracts for construction, materials and equipment supplies.

25. The consulting engineering firm using the project management method negotiates and prepares contracts with all entities involved in the construction process, and manages the actual construction work. In these activities, the firm acts as the client's agent; it does not function as contractor, as in the case of turnkey methods.

26. One variation of this approach is the use, grouped under one head, of several consulting engineering firms, or a combination of such firms and a contractor, to perform the project and construction management services. This may involve the use of one consulting engineering firm on design services, a second consulting engineering firm or a contractor for construction management services, and perhaps a third firm for over-all project management.

(d) Turnkey method of project achievement

27. The turnkey method of project achievement involves a contract with a single entity (corporation, group, consortium, etc.) for the design and construction of a complete project ready for operation, with some responsibility for subsequent efficient operation. In some instances, this arrangement may include provisions for financing the project. The owner or ultimate client retains the responsibility for maintenance and operation of the facility. In turnkey project achievement there are two separate roles which may be filled by the consulting engineer: the one is a consulting role as adviser to the owner, assisting the latter to define clearly his ultimate requirements and evaluating offers submitted by turnkey entities; the other is a role as subcontractor to the turnkey entity, acting as adviser of that company, or as part of a contracting consortium. (See also para. 3.)

Part two: specific

I. Check-list of contract provisions

28. A general check-list, which is not intended to be comprehensive, is given below. Its provisions are those most frequently encountered in a contract on consulting engineering :

- (1) Parties (paras. 30-31)
- (2) Preamble (para. 32)
- (3) Definitions of terms used in the contract (para. 33)
- (4) Object and scope of contract (para. 34)
- (5) Starting and completion dates of consulting services (paras. 35-36)
- (6) Transfer of consultant's contractual rights and obligations (para. 37)

- (7) Sub-contracting (paras. 38-41)
- (8) Transfer of client's contractual rights and obligations (para. 42)
- (9) Obligations of the parties (paras. 43-51, 58)
- (10) Technical assistance as a possible obligation of the consultant (paras. 52-57)
- (11) Performance and services by third parties (para. 59)
- (12) Failure to perform obligations under the contract (paras. 60-65)
- (13) Consequences in case of failure to perform contractual obligations (paras. 66-79)
- (14) Relief from liability for consequences of failure to perform contractual obligations (paras. 80-87)
- (15) Changed circumstances and adaptation of the contract (paras. 88-90)
- (16) Financial matters:
- (17) Methods of calculation of the fee to be paid to the consultant (paras. 91-99)
- (18) Rise in prices and price adjustments (para. 100)
- (19) Payment of sums due to consultant (paras. 101-103)
- (20) Payment of interest on delayed payment (para. 104)
- (21) Bonus for completion of work ahead of schedule (para. 105)
- (22) Fees of sub-consultants (para. 106)
- (23) Withholding of payments (para. 107)
- (24) Performance bond (para. 108)
- (25) Transfer of sums due to consultant (para. 109)
- (26) Currency and place of payment, and exchange rates (paras. 110-112)
- (27) Guarantee of payment (para. 113)
- (28) Taxation, other levies and customs duties (paras. 114-116)
- (29) Intellectual property and proprietary information:
- (30) Use of documents produced by a consultant for completion of the project (paras. 117-118)
- (31) Repeated use of a design (paras. 119-120)
- (32) Licensing of industrial property (para. 121)
- (33) Inventions and improvements (para. 122)
- (34) Secrecy (paras. 123-124)
- (35) Insurance (para. 125)
- (36) Entry into force of and alterations to the contract (paras. 126-128)
- (37) End of contract (para. 129)
- (38) Unilateral suspension and termination (paras. 130-134)
- (39) Languages (para. 135)
- (40) Applicable technical standards (para. 136)
- (41) Applicable law and related matters (paras. 137-139)
- (42) Settlement of disputes (paras. 140-143)

29. The parties should pay due attention (when drafting contracts) to the present methods of contractual practice, which consist in grouping provisions listed in paragraph 28 above in three categories: those of a technical character; those of a financial character; and those of a specifically legal character.

## II. Consideration of the main contract provisions

### Parties (Check-list item No. (1))

30. The first part of the contract should comprise a clear definition of the parties with a description of their legal status, capacity and/or authorization with regard to conclusion of the contract. Many persons, including enterprises, financial institutions, government agencies, etc., may be involved in a project. They may be called parties in a wide sense. This does not mean, however, that they are all parties to one and the same contract. Several contracts relating to the same project may be concluded. It is therefore important to specify in each and every contract who precisely (in a legal sense) is a party to it. If there should be more than one party on each side, the responsibility of each one (for example, joint or individual) should be stated clearly in the contract (see para. 8).

31. The consultant can generally be placed in one of the following categories: individual consultant; firm of independent consulting engineers; firm which combines the functions of consulting engineers with those of general contractors, or firm which is associated with, or is a subsidiary or affiliate of, or is owned by, general contractors; or consulting engineers who are affiliates of manufacturing firms, or

who are employed within a department or design office of such firms. If the client is required to deal with a party comprising several members (joint venture, association without juridical personality, consortium, etc.) the relations between each member of such party and vis-à-vis the client should be defined in the contract. Clarification of the subject of liability - that is, whether the liability is individual or joint or joint and several - is essential.

Preamble (Check-list item No. (2))

32. The preamble usually contains a review of the investment background and defines the intentions and interest of the parties in the project. The parties should be aware that the formulation of the preamble can have considerable legal significance.

Definitions of terms used in the contract (Check-list item No. (3))

33. Sometimes the parties insert in a consulting engineering contract a section containing definitions of terms used in it in order to ensure uniform interpretation. Should several documents form part of the contract, this fact might be noted (and their order of priority defined) in the above-mentioned section of the contract.

Object and scope of contract (Check-list item No. (4))

34. It is essential in consulting engineering contracts to define precisely the nature, extent, location and objectives of the project, followed by a definition of the scope of the contract. These may be used as terms of reference in attempts to reach eventual agreement between the client, a possible funding or financing agency, and any other relevant agencies on the fundamental issues of the proposed project. Practice suggests that most discussions, disagreements and/or disputes relate to the subject of scope of contract.

Starting and completion dates of consulting services (Check-list item No. (5))

35. The time-schedule is an important element in project description, and the starting and completion dates of consulting services should be stated as precisely as possible in the contract. These dates depend both on the extent of services which the consultant is obliged to provide and on the date of entry into force of the contract. If the services are to be provided in stages, the dates for each stage should be agreed separately. If official approval or third-party agreement is requested, the parties should provide for the contract to enter into force only after such an approval or agreement has been obtained.

36. A distinction is made between the date of entry into force of the consulting engineering contract and the date of commencement of services. Since the latter may be dependent on the former, the parties should make provision for the consultant to commence his services within a specific number of weeks after the contract has come into force. The parties should also provide for the services to be concluded within a specific number of months of their commencement.

Transfer of consultant's contractual rights and obligations (Check-list item No. (6))

37. Generally, the parties may agree in their contract as to whether the consultant may assign the contract or a part thereof. Normally, the consultant may not in any way assign or transfer his contract without the prior written consent of the client. On the assumption that an assignment has been agreed with the consent of the client, one legal consequence would be the establishment of a direct relationship between the client and the assignee in respect of the contract or that part of it which has been assigned.

Subcontracting (Check-list item No. (7))

38. Sub-contracting, which is frequent in engineering practice, is subject to certain conditions. The client and the consultant often agree on the proposal of one of them as to whom the consultant will employ as subconsultant; and this is included in the consultancy contract. In other words, the consultant may not be permitted to select sub-consultants without the prior express consent of the client; the client, in turn, may base his consent on possible restrictions, and may even impose sub-consultants. The consultant, however, may request the client to provide for the fees of subconsultants in the contract (see para. 106). If utilized, sub-contracting produces no legal consequences vis-à-vis the client since the sub-consultant does not enter into a direct contractual relationship with the latter. In the absence of such a relationship, sub-contracting means in effect a relationship between consultant and sub-consultant.

39. Sometimes the client refuses a request by the consultant to subcontract, or disagrees with the consultant's choice of sub-consultant. In principle, the client approves the sub-consultant selected by

the consultant on the understanding that approval does not relieve the consultant of any of the obligations under the contract and that the terms of any sub-contract are subject to, and in conformity with, the provisions of the consultancy contract. The consultant, therefore, is liable for the acts of his subconsultant.

40. Instances where the client has retained the right not only to propose but to impose or choose sub-consultants may cause many difficulties, and even disputes, between client and consultant : liability is then at stake. In principle, the consultant should incur no liability concerning acts of a subconsultant imposed on him. Nevertheless, in international practice, some clients hold the consultant liable for acts of the sub-consultant despite the fact that it is they who have imposed that sub-consultant. Therefore, the main issue here is whether the consultant accepts a sub-consultant imposed by the client. If the client insists on his right to impose sub-consultants and if the consultant accepts this right, then the latter may attempt to protect himself by having certain safeguard clauses inserted in both the consultancy and the sub-consultancy contracts. These clauses are, in fact, reservations concerning possible over-pricing and the consequences of the subconsultant's non-observance of time-limits and quality requirements.

41. Finally, the client usually permits the consultant to recruit specialists for certain specialized technical services (for example, those of geologists, topographers, radiographers, etc.). In some cases, the consultant informs the client, with reference to the respective contract provision, that a specialist has been recruited by him. The client may reserve the right to approve the appointment of any specialist(s) by the consultant on the basis of the former's qualifications.

Transfer of client's contractual rights and obligations (Check-list item No. (8))

42. The parties should also agree in their contract whether and under what conditions the client may transfer his rights and obligations under a consultancy contract to a third party.

Obligations of the parties (Check-list item No. (9))

#### A. General remarks

43. Determination of contractual obligations is the starting point for assessing whether there has been failure to perform in any respect. There is a direct link between contractual obligations, failure to perform and consequences of failure to perform.

44. In the following paragraphs are listed those obligations on the part of both consultant and client which should be considered during the negotiation of a contract on consulting engineering.

#### Consultant

##### Obligations of the consultant

#### B. Specific remarks

45. It is essential for the parties to describe in the contract tasks in the various stages of project evolution and to define the assignments of the consulting engineer or consultant. In this connection, reference may be made to paragraph 6 (detailed essential services) and paragraph 34 (object and scope of contract) above. Contracts contain provisions to ensure that the consultant (or consulting engineer) performs his services with all skill, care, diligence and efficiency and carries out all his tasks in conformity with recognized professional standards. It should be noted that frequent use is made of standard contracts or general conditions in both national and international projects. The code of ethics of the consultant's association may also play an important part in determining the obligations of the former.

46. The tasks of the consulting engineer or consultant involve the intellectual contributions assimilated in the "supply of services". Some of these contributions are embodied in documents (e.g. engineering designs, plans, studies, drawings, and technical reports, etc.). These documents, however, are material evidence only of a contribution whose intellectual character remains unaltered. Consequently, the legal nature of such contributions remains unchanged. Although specific features of some contributions may, in certain cases, entail differences in degree of responsibility, the nature of obligations deriving from all tasks of a consultant remains exclusively that for the furnishing of services ("obligations of means").

47. The tasks and, consequently, the obligations of the consulting engineer or consultant are those specified in the contract; the most important of these are:

- Preliminary feasibility and schematic design studies;
- Planning and preparation of layouts and cost estimates; Basic planning and programme of financing;

- Preparation of preliminary sketches;
- Preparation of engineering designs, drawings and specifications; Preparation of detailed drawings;
- Invitations to tender;
- Evaluation of bids for construction of facilities; Evaluation of bids for equipment;
- Advice to the client on all tenders, tenderers, prices and estimates for carrying out the works;
- Construction supervision;
- Supervision of equipment manufacture;
- Supervision of equipment erection and connections; Issue of directives and instructions to - contractors;
- Notification of errors and omissions in the instructions of the client;
- Recruitment of personnel, depending on whether the consultant is to perform the tasks by himself or together with his staff, or whether he may assign these tasks to others;
- Availability for discussions with the client; Progress reports;
- Co-ordination of activities of other participants in the project;
- Technical assistance (in as far as this comprises services in the framework of consulting engineering);
- Delivery to the client, on completion of the project, of records of work carried out.

All these obligations may be amended and/or supplemented by the parties subject to particular provisions of the contract. It is necessary that the consultant co-operate with the client to enable the latter to perform his obligations under the contract.

48. During the construction stage, the consultant may perform several tasks of a contract management nature - for example, he may issue variation orders, authorize payments and issue completion and final certificates in connection with the works. When the consultant is engaged to inspect and supervise a project, it is important for the parties to make provision in the contract for procedures by which the consultant informs the client and obtains instructions and authorization from him.

49. In addition to normal services-obligations of the consultant referred to in paragraph 47 above, the parties sometimes agree that the consultant should provide one or more full-time project representatives and render such additional services as performance of financial feasibility studies or other special studies ; preparation of designs relating to future facilities, systems and equipment which are not intended to be provided as part of the project; and preparation of documents concerning alternative tenders for out-of-sequence services requested by the client. If such additional services are provided in the contract at the request of the client, additional compensation is required to be paid to the consultant for them.

50. Consulting engineering contracts usually pay due attention to documentation two aspects of which are of particular importance : procedures of delivery of documents ; and completeness of documents and their acceptance by the client. In the context of the procedure of acceptance of a document received by the client from the consultant, the parties may, inter alia, provide for both the possibility of organizing a checking of documentation by representatives of the consultant in the client's country or the country where the project is to be implemented and the conditions for such a checking (participants, place of checking, legal effects of the protocol on acceptance of the documentation).

51. The consulting engineering contract usually contains a warning that the documents provided by the consultant do not infringe the rights of third parties such as patents, copyrights or industrial or intellectual property. It also usually provides for the consultant's role in case of third-party claims.

Technical assistance as a possible obligation of the consultant (Check-list item No. (10))

#### General

52. Since technical assistance covers a wide range of activities, the present Guide is limited to those aspects which are inherent in or related to consulting engineering only. Technical assistance by consulting engineers has often been considered part of the more general term "transfer of technology" and, in most cases, involves professional training. In other words, the effective transfer of technology presupposes technical assistance and training. The success of such technical assistance depends on the ability to apply acquired foreign technologies to different user conditions. Provisions concerning technical assistance may form part of a consultancy contract but they are usually embodied in a separate document.

Types of technical assistance offered by the consultant



53. Two types of technical assistance are usually encountered: technical assistance in connection with the preparation of specific projects; technical assistance in connection with education in schools, colleges, other educational institutions, or places of work.

#### Technical assistance for projects

54. The main purpose of technical assistance regarding specific projects is often the training of the client's personnel. This assistance includes not only the training necessary for a specific project or operation but that which enables trainees to assess critically their own work decisions as well as those of other persons. International practice indicates that technical assistance on projects is usually confined to training in the preparation and execution of a project, and possibly in the operation stage.

55. When rendering technical assistance on projects, the consultants make arrangements for the vocational training of foremen and/or engineers and for recruiting key personnel. For this purpose, the contract specifies the terms and conditions of such assistance: scope of services; the place where it is to be utilized (on site, or elsewhere); the period during which assistance is envisaged; the number of trainees and instructors (and qualifications of both); the terms of training in relation to operation of the works where the training is to be given; measures to prevent leakage of confidential information; working conditions, accommodation, transport and insurance for the staff concerned; remuneration of instructors; working languages; liabilities; arbitration; and other related matters<sup>1</sup>.

#### Technical assistance in education

56. Consultants may from time to time be requested to provide professional personnel to give training in specific engineering subjects. In such cases, the assistance mainly comprises selection of suitable personnel and their posting to the client's country and, in some cases, preparation of curricula for the courses and professional support from the home office during the contract period.

57. Contracts concerning this kind of technical assistance by the consultant should, in addition to those items listed in paragraph 55 above, include clauses regarding ownership of educational materials, replacement of experts in case of illness and/or accidents, requisite visas and working permits, taxes and duties, interpretation, tools, storage, notification of dispatch of personnel, restrictions on employment of personnel, replacement of experts by the consultant (either at his own request or at the request of the client), and other relevant matters.

### Client

#### Obligations of the client

58. The obligations of the client (like those of the consultant) are specified in the contract. The most important of these include:

- Prompt action in giving instructions;
- Furnishing of data and information, and availability of documentation know-how, space, sites, premises and equipment;
- Furnishing of information concerning local legislation in the field of industrial and social relations and all other information necessary to the consultant to fulfil the contract within the framework given in it;
- Provision of special services (geological, hydrological, meteorological, etc.);
- Provision of services by others;
- Rendering of local assistance to consultant, and personnel and dependents, such as issuance of visas and permits. Customs clearance, access to all sites and locations involved in implementation of the project;
- Provision of own counterpart and supporting personnel;
- Submission to the consultant of a bank guarantee, if requested; and
- Payment for all the consultant's services according to the agreed terms.

All these obligations may be amended and/or supplemented by the parties subject to particular provisions of the contract. It is necessary that the client co-operate with the consultant to enable the latter to perform his obligations under the contract.

#### C. Performance and services by third parties (Check-list item No. (11))

59. If the performance of the contractual obligations of either the consultant or the client depends on assignments to be carried out by third parties, the results of such assignments and the time-limits

within which these are to be carried out should be specified. It should also be specified whether the consultant or the client, if any, has to bear the consequences of nonfulfilment of such assignments. Failure to perform obligations under the contract (Check-list item No. (12))

#### A. Among the parties

60. Failure to carry out a contract correctly may constitute breach of contract. It is therefore important that due attention be paid to what constitutes failure to perform. Failure to perform in any instance implies the liability of the defaulting party; and this liability may entail pecuniary and/or other consequences. For the affected party, such consequences may be seen as remedies and means of redress. In certain circumstances, the consequences for the defaulting party may be either limited or excluded. The parties may, for example, agree that circumstances of an extraordinary kind which hinder proper performance permit the invoking party to deliver at a later date or to suspend the contractual obligation to perform. In this case, there is technically no breach of contract and, thus, no liability for failure to perform. However, there then remains a discrepancy with regard to the original contract, and the parties may therefore wish to regulate distribution of additional costs, etc. during suspension of contractual obligations. Cases where either party fails to perform its contractual obligations owing to changed circumstances might be considered as the kind of anticipated breach of contract dealt with in paragraphs 88-91.

#### Consultant

61. Under the terms of reference assigned to him, the consultant must perform all his contractual obligations. He may be held liable for failure in performance of his obligations, i.e. for non-conformity to the contract, or all or part of services to be rendered, and/or when the client has sustained damage due to the consultant.

62. The consultant's failure to perform his obligations under the contract may virtually be constituted by: delay, total non-fulfilment, partial nonfulfilment and/or defective fulfilment. Nevertheless, no consequences derive from such a failure if there are grounds for relief (see pares. 80-87).

#### Client

63. The client must meet all his contractual obligations. He may be held liable for failure to perform his obligations provided in the contract.

64. The client's failure to meet his obligations under the contract may in effect be constituted by delay (e.g. lateness in issuing instructions to consultant); non-fulfilment (e.g. failure to provide local assistance or to make payment with regard to a consultant's invoice); or defective fulfilment (e.g. when special laboratory tests carried out by the client prove to be inaccurate, or when data furnished to the consultant are incorrect) - but no consequences would result from such failure if there were grounds for relief (see pares. 80-87).

#### B. By third parties

65. The parties should consider how failure to perform by third parties might affect their contractual relationship. The consultant may be liable for the failure of a third party to whom he has assigned the contract, or a part thereof, with the consent of the client (see pares. 37-41). The client is liable for the failure of a third party imposed or chosen by him. The consultant and the client may agree which of them should be liable finally for the failure of third parties, and may accordingly arrange for insurance of their respective liabilities (see pare. 86). Nevertheless, a limitation of the total financial liability as provided for in paragraph 71 does apply also if the consultant has sub-contracted some of his services in accordance with the contract.

Consequences in case of failure to perform contractual obligations (Check-list item No. (13))

#### A. General

66. The parties should provide in their contract what are the consequences of failure to perform contractual obligations although the consequences of such a failure may be found in the applicable law. One advantage of this approach is that the consequences accord with the degree of seriousness of the breach of contract in each particular relationship. In particular, the parties may draw a distinction between failures of a significant and of an insignificant nature.

#### B. Consultant

Consequences of the consultant's failure to perform

67. If the consultant fails to meet any of his obligations under the contract, the client may have recourse to remedies described below, including the right to claim damages except in cases of relief. In

practice, the consultant generally has the right and the duty to remedy any damage which is his fault by carrying out - free of charge - work which has not been performed, or has been partly performed, or has been performed with defects, or has been performed in disregard of terms and/or time-limits provided in the contract. The parties may limit the period during which the consultant remedies damage - for example, until the work has been accepted by the client, or until a certain period of time has elapsed after commissioning or starting up operation of the project.

68. The client's remedies vary according to whether the consultant's failure is significant or insignificant. These remedies may include:

In case of delay - if there is an anticipated delay, the client may request that the consultant perform his obligations without delay and may insist that the consultant expend more efforts, without the right to additional remuneration; if delay has actually occurred, the consultant is liable to pay compensation for damage sustained by the client or to pay a penalty or liquidated damages according to the contract.

In case of total non-fulfilment - the consultant has to pay damages.

In case of partial non-fulfilment or defective fulfilment - the client's remedies are by means of requests for completion, or correction of performance, or substitute delivery. If such remedies are not possible, or if the consultant does not agree to carry them out, then he must pay compensation for damages sustained by the client.

69. With regard to all arrangements concerning the client's remedies, account should be taken of the specificities of the respective services of the consultant.

70. If none of these remedies results in the fulfilment of contractual obligations by the consultant, the last resort of the client is to have the contract terminated. Termination of the contract by the client does not, however, release the consultant from the obligation to pay compensation for damage. (For aspects of termination on grounds other than failure, see paragraph 129.) If failure is constituted by a very short delay, insignificant partial non-fulfilment, or defects which are not serious, arbitral or judicial practice suggests that, in such cases, there are insufficient reasons for termination.

Limitation of consultant's pecuniary liability

71. It is generally accepted in practice that the total financial consequences of the consultant's failure should not be borne by him and that an equitable balance of interests of client and consultant should be secured, provided that the financial consequences for the consultant remain in fair relationship to his fee. The parties should agree in their contract that the total financial liability of the consultant should be limited to a certain amount, defined in absolute figures or as a percentage indicated in the contract, thereby determining a specific ceiling for that liability. Very often this ceiling is defined by the provision that the compensation which the consultant has to pay to the client should not be in excess of the consultant's fee or a percentage thereof. However, the right of the parties to limit the consultant's pecuniary liability may be subject to rules in the applicable law (limitation is not very often applied in cases of gross negligence, for example).

C. Client

Consequences of the client's failure to perform

72. If the client fails to perform any of his obligations under the contract, the consultant may require him to perform his obligations and/or to resort to other remedies for failure including compensation for losses sustained. The consultant may determine an additional period of time for performance by the client of his obligations. In that case, the period during which the consultant has to fulfil his obligations is proportionally extended. It is for the parties to agree in the contract whether the client should pay interest on delayed payments (see paragraph 104).

73. If the client does not, within the extended period of time, meet his obligation(s), the consultant is not deemed to be in default and has the right to terminate the contract. The client then has to pay for damage sustained by the consultant, unless relieved of that obligation.

D. Procedure in case of failure by either party to perform its contractual obligations

74. Normally, the contract provides for procedures in case of failure by either of the parties to perform its obligations under the contract. There may be different procedures according to whether the failure is significant or insignificant. The parties may, therefore, make a distinction in the contract between significant and insignificant failures; and may also specify the period which must elapse before a remedy can be exercised and the conditions under which a remedy, including any right to terminate the contract and/or to recover damages, may be exercised.

75. The following procedures may be followed : in case of failure by the consultant to fulfil his obligations under the contract, the client - subject to the contract and the applicable law - usually transmits to the consultant written notification of the nature of the alleged failure and invites the latter to remedy such failure within a certain time-limit. If, within a fixed period after the receipt of the client's written notification, the consultant does not agree or does not start to remedy such failure (although this is in the opinion of the client a significant failure), the client may, by means of a second written notification to the consultant, terminate the whole contract or such part or parts thereof in respect of which the consultant is in default. In the case of insignificant failure by the consultant, notification does not necessarily result in termination of the contract. The same procedure applies in cases where the client fails to perform his obligations towards the consultant under the contract.

#### E. Damages and penalties (liquidated damages)

76. The parties utilize penalties as a means of pressure which one exerts on the other in order to cause the latter to perform its contractual obligations in time. A distinction should be made between two situations:

- (i) when the consultant has undertaken a specific task within a strict time-limit; and
- (ii) when the consultant's assignments are of a more or less general nature. In the former situation, the inclusion of penalties in a contract would seem natural, whilst in the latter it would not.

77. In some contracts, the parties merely stipulate that failure to meet obligations by one of the parties entails the liability of that party to pay compensation to the other party for damages actually sustained. Usually, however, a general provision of this kind is inadequate to prevent difficulties to which problems of applicable law, of proof and of amount of damages give rise in certain cases. There are existing contracts which provide for payment of penalties by the consultant without obligation by the client to prove that he has sustained damage: in such cases, payment of a penalty may substitute for payment of damages. There are also contracts which provide for payment of both penalties and damages: in such instances, penalties may be additional to the payment for damages. Taking all variations into account, it would seem that the parties should provide for either payment of damages or penalties. If clauses are inserted in a contract concerning both payment for damages and penalties, the relationship between these two categories should be clearly defined. It should be pointed out that in some countries penalties are deemed to be contrary to public order or may be controlled as to amount by the courts. Liquidated damages are then used and are considered to protect in advance what might be losses for one party owing to the other party's failure to meet its obligations.

78. With regard to amounts of liquidated damages or penalties, parties often find it necessary to establish in the contract a lump-sum amount of liquidated damages or penalties to be applied in case of failure of performance of contractual obligations. The clauses providing for lump-sum liquidated damages or penalties are usually expressed in terms of the categories of failure to which they are intended to apply (delay, nonfulfilment, defective fulfilment). When parties select this method, they should take into account the law applicable to the contract since national legislation varies.

79. The penalty or liquidated damages for a consultant may be computed per day or per week of delay, or as a percentage of the consultant's fee; but the fee for a consultant's services relating to other stages of the project which have been completed in time is calculated and paid separately.

Relief from liability for consequences of failure to perform contractual obligations (Check-list item No. (14))

#### (a) General principles

80. The parties should provide in their contract for those situations which might bring relief from liability for consequences of failure by one of them to perform its obligations. In the absence of such a provision, solution should be sought in the applicable law.

81. There is usually a clause specifying that a party is not liable for failure to perform any of its obligations if it can prove that the failure was due to an impediment occurring after the signing of the contract, and which was beyond its control, and that it could not reasonably have been expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome it or its consequences. Examples of such situations are: war, civil strife, interference by public authorities, fire, natural disasters, etc.

#### (b) Procedure in cases when a party invokes relief from liability for consequences of failure

82. The party which fails to perform must give notice to the other party, not later than on a date agreed in the contract, of the impediment and of its inability to perform without delay. If notice is not given within the timelimit established in the contract, the party invoking relief is liable for damages resulting from such omission or even prevented from taking this action.

83. The parties may provide in their contract that the existence of an impediment must be confirmed by the Chamber of Commerce and Industry or other competent organization of the country in which such impediment occurred. The parties may also provide for the fact that the receiving party, after appraisal of information received, might object to the assertion of the invoking party that the event concerned had really constituted an impediment to the performance of the latter's obligations. In such a case, a solution may be sought by negotiation or, failing a satisfactory result thereof, by the appropriate means for settlement of disputes (e.g. by arbitration, if so agreed, or in court).

(c) Effects of relief from liability for failure

84. Generally, the effects of relief from liability are: extension of the time necessary for meeting the obligation which had become impossible without prejudice to the application of clauses for adaptation of the contract; compensation by the client of extra costs; the fact that no party is liable to compensate for damage which the other party may have sustained on this account; non-payment of fees to the consultant for those obligations which have not been met; and unilateral termination of the contract by either party. The contract should specify how long an event constituting an impediment may be tolerated before the parties are required to take a decision on the future status of the contract. Relief has effect for the period during which the impediment exists plus a reasonable time for remobilization.

85. A party may not rely on failure by the other party to perform contractual obligations to the extent that such failure was caused by the first party's act or omission. Thus, the consultant does not bear the consequences of his failure if it was due to an act or omission by the client, and vice versa.

86. More difficult is the situation where the failure of a party to meet its obligations under a consulting engineering contract has been caused by a third party. If the first party's failure is due to failure by a third party whom the former had engaged to perform the whole or a part of the contract, that party is exempt from liability only if it complies with the conditions described in paragraphs 80-81 above, and the third party whom it had engaged would be exempt if the provisions of those paragraphs were applicable to it. If the consultant's failure is due to failure by a third party involved in the performance of the consultant's obligations, the parties should provide in the contract for distribution of risk. If, on the other hand, such third party was imposed by the client, the consultant should be exempt from liability (see *pare.* 65).

87. The parties may agree in their contract that, during a period of suspension, they will share the costs required for continuation of the performance of the contractual obligations. They may also agree that settlement of these costs be made either when the event releasing from liability has taken place or during settlement of accounts in the case of termination of the contract on expiry of the period of suspension. Usually, the parties agree to retain the benefits of their reciprocal work carried out earlier. In that case, they should account to each other : one party would be required to account to the other for benefits received and maintained under the partially-performed contract, with the reservation that the sums due do not exceed the cost of services rendered by the consultant. Account is taken of payments already made by the client in execution of the terminated contract.

Changed circumstances and adaptation of the contract (Check-list item No. (15))

88. In their contract the parties may describe any events and circumstances leading to grossly unfair situations which, strictly speaking, might not fall under *pare.* 80-87 but which might result in disturbance of its initial economic and financial equilibrium or make performance impracticable.

89. If the parties do not succeed in determining in advance events which might be defined as likely to affect the contract, they may make provision in their contract for negotiation and settlement of any problem which might otherwise lead to amendment of the contract.

90. To make provision for possible non-agreement between the parties, the contract might specify the degree of importance of effects of changes in circumstances; and those changes which would give rise to alteration only in the contract and those which could result in its cancellation, with all the consequences thereof. The first group of changes would comprise fundamental changes in circumstances which are essential for achieving the objective of the contract. When these changes occur, the adversely-affected party might propose to the other party a re-negotiation of the contract and

its reasonable adaptation to changed circumstances. The second group of changes would comprise those which might prevent the achievement of the objective of the contract, even if the latter were to be re-negotiated and amended. When these changes occur, and when at the same time the other party does not accept proposals for re-negotiation, the adversely-affected party may unilaterally reject the contract. Obviously, amendment or cancellation of the contract occurs only when certain tolerances, to be specified in the contract, are exceeded. Equally, it might be stated in the contract that, if the parties fail to reach agreement on the effect which a change of circumstances might have on the contract, the matter of amendment or cancellation should be submitted to a third party (if that is the form of settlement of disputes adopted). Should the parties agree to entrust amendment of the contract to the arbitrator, they should ascertain whether, in their respective countries, amendment of a contract by a third party - even with the authorization of the other parties - is legally valid. Cancellation of the contract, in the manner decided by the parties, whether by mutual agreement or by decision of the arbitrator, involves a requirement for settlement of the relationship between the parties. (This, however is a general question which is discussed in the section dealing with the termination of contracts (see pares. 129 and 130-134).)

Financial matters (Check-list item No. (16))

(a) Methods of calculation of the fee to be paid to the consultant (Check-list item No. (17))

91. The charges made for the consultant's services constitute reimbursement for a variety of costs represented by the technical payroll, administrative and clerical assistance, fringe benefits, equipment, supplies, office space, taxes, other general items, and an appropriate margin of profit for the consultant. Generally, engineering charges are specified in an annex to the contract. The parties may at a later stage modify the provision relating to charges; practice indicates that this is not always carried out in the way which the contract specifies. The parties should therefore ensure that, if charges are agreed beyond those established in the original contract, these should be implemented in accordance with the procedure for amendments to the contract (see pare. 128). Charges are usually computed on one of the following bases, or by a combination of two or more, with appropriate modifications in specific cases (and there may be other methods):

- Time;
- Payroll cost multiplied by an overhead factor plus direct expenses;
- Lump sum;
- Percentage of the project's construction cost;
- Cost plus a percentage fee, or cost plus a fixed fee;
- Retainer.

Time

92. This method is based on the time which the consultant devotes to services for the client, plus reimbursement of direct expenses.

93. The parties establish a tariff providing for monthly, weekly, daily or hourly rates (man-month, man-week, man-day, man-hour) as well as extra charges for all categories of staff. Additionally to the specification of all expenses, the parties provide that the time spent on travelling in conjunction with the execution of the contract is the client's responsibility.

Payroll cost multiplied by an overhead factor plus direct expenses

94. This method is based on the payroll cost of the staff employed on the project, multiplied by an overhead, plus direct expenses incurred. The size of the multiplier varies with the type of work, organization and experience of the consultant, the area in which his office is located, and other relevant circumstances. The overhead factor covers fixed operating costs and profits.

Lump sum

95. The parties which apply this method decide on a lump sum in consideration of the consultant's total obligations, with expenses either included or not included. This method of compensating consultants is used frequently in investigations and studies and for basic services in design-type projects when the scope of assignments to be undertaken, as well as the duration of services, can be clearly and fully defined.

Percentage of the project's construction cost

96. This method is widely used for determining the fees of consultants in assignments of which the principal task is the design of various works and the preparation of drawings, specifications and other

contract documents necessary for a description of facilities to be constructed. They do not cover feasibility studies and allied services, such as assistance in start-up or vocational training, which are generally paid for on the basis of hourly rates or salary costs. The project's construction cost - to be used as the basis for determining the consultant's fee - is the total cost or estimated cost to the client of all works arising from whatever cause - including any payments made to the general contractor by way of bonus, incentive or settlement of claims, and before deduction of liquidated damages or penalties, if any, payable by the contractor to the client. The percentage-forming basis for payment to the consultant should be stated in the contract, together with details of reimbursable expenses.

Cost plus a percentage fee, or cost plus a fixed fee

97. By this method, the consultant is reimbursed for the actual cost of all his services. The actual costs consist of three items - namely, the payroll costs (salaries plus social security), overheads which are often expressed as a percentage of the payroll costs, and out-of-pocket expenses. To these is added a fee expressed as a percentage of payroll costs and overheads covering such items as contingencies, readiness to perform, and profit. The consultant's fee may, however, be determined in the form of a lump sum instead of a percentage.

Retainer

98. This method is employed when the services of a consultant are expected to be required at intervals over a period of time. It is frequently practised by clients who, inter alia, wish to be assured of always having available the services of a certain consultant. The method is often used in connection with advisory services - for example, concerning litigation, ad hoc services on a part-time basis over a period of years, or additional services in continuation of a separate design contract.

99. The amount of a retainer varies according to the type and value of the services to the client; it is paid either during the entire term of the contract, or monthly, or on some other mutually-agreed basis, with per diem or hourly rates in addition for time incurred at the request of the client. A retainer can be considered as compensation additional to fees computed under the time or percentage-of-the-project construction cost methods.

(b) Rise in prices and price adjustments (Check-list item No. (18))

100. It is for the parties to decide whether the contract should be at fixed prices, which may or may not be revised. The project price and the consultant's fee may be affected by various factors such as changes, modifications and/or additions to the project; and changes in prices of primary products, services, wages, etc. All these factors have an impact on the rights and obligations of the parties, and may cause variations in the project price and, consequently, the consultant's fee. Many contracts therefore contain a price adaptation clause, i.e. one related to the possibility of a change of tariff for basic services. Inflation (escalation) is not usually listed in any schedule of cost elements since it is incorporated in many different elements. Price revision clauses may be very detailed and may include, inter alia, those variations in prices which are taken into account in comparisons of tenders, the reference date for prices contained in the consultant's tender, statements as to whether the price revision applies to the interim payment or to the final balance or to the difference between the initial amount of such interim payment of balance and the amount of the advance granted, and similar.

(c) Payment of sums due to consultant (Check-list item No. (19))

Advance payment

101. Under the time-payment method, the client usually makes an advance payment in favour of the consultant amounting to a fixed percentage of the estimated figure of the latter's fee.

Payment plan

102. Under the lump-sum method, the parties devise a payment plan establishing the dates when advance and interim payments become due.

Auditing

103. The parties may agree in their contract that, in the case of the timepayment method, the client should carry out an audit of the accounts of the consultant or should appoint an auditing firm to do so. Advance written notice of not less than a prescribed period should be given to the consultant by the client, or by the auditing firm appointed, of an audit to be carried out during normal working hours at the place where records are maintained.

(d) Payment of interest on delayed payment (Check-list item No. (20))

104. The parties should specify in their contract whether interest will accrue on a delayed payment to the consultant and, in the affirmative, the rate and the method of calculating and paying such interest. Applicable law does not always permit interest on delayed payments or does not admit claims to that effect without a formal clause providing for interest to a specified amount for delayed payments.

(e) Bonus for completion of work ahead of schedule (Check-list item No. (21))

105. A bonus may be provided for in the contract for specific works completed by the consultant ahead of schedule whenever there is an interest in having such works carried out ahead of schedule.

(f) Fees of sub-consultants (Check-list item No. (22))

106. Normally, the contract between the client and the consultant makes provision for payment to sub-consultants. If there is no specific clause to that effect, however, sub-consultants are paid by the consultant (see para. 38). In addition to the sub-consultant's fees, the consultant normally receives compensation to cover services in respect of co-ordination, supervision, liability, expenses incurred in payment to sub-consultants' accounts, etc.

(g) Withholding of payments (Check-list item No. (23))

107. The parties may agree in the contract that, in certain exceptional circumstances, the client may withhold fixed amounts from the consultant's fee. If they so agree, the parties should state clearly on what grounds the client may withhold these amounts, how much, for how long the procedure and the consequences for both parties. The client should justify, in every instance, to the consultant his decision to withhold payment. Before withholding any sum, the client should give notice that he is withholding payment; and the consultant has the right to reply within a prescribed period. However, if the client should wrongly withhold payment, this would be considered as breach of contract.

(h) Performance bond (Check-list item No. (24))

108. In connection with the performance of the consultant's obligations and with withholding payments to him, the contract may exceptionally provide that the consultant be required to execute a performance bond regarding the fulfilment of his contractual obligations.

(i) Transfer of sums due to consultant (Check-list item No. (25))

109. The parties should pay due attention to regulations governing the transfer of money. If necessary, the client should assist the consultant in obtaining authorization for transfer.

(j) Currency and place of payment, and exchange rates (Check-list item No. (26))

110. Payment to the consultant is made in a currency agreed by the parties; it may be made in more than one currency.

111. Since it is important to know where effective payment is to be made (e.g. bearing in mind currency restrictions), the parties should stipulate in the contract the place of payment, i.e. designation and location of bank(s) where payment is to be effected.

112. The parties should consider problems of exchange rates in their contract and, whenever it is necessary to evaluate one currency in terms of another for purposes of payment of the consultant's fee or of reimbursable expenses, should provide for a choice of applicable exchange rates or should agree on an applicable rate; and should agree on who should bear the risk connected with any changes in exchange rates and any adjustment of differences in exchange rates. Parties frequently agree that, for purposes of computation of a conversion rate, reference be made to a basic rate. They may also regulate the effects of possible devaluation or revaluation of currencies. Such provisions should not be identified with those on changed circumstances entailing alteration or cancellation of the contract (see paras. 88-90).

(k) Guarantee of payment (Check-list item No. (27))

113. The parties may agree that the client should submit to the consultant - within a certain period of time from the entry into force of the contract - a bank guarantee, issued by a mutually-recognized bank.

Taxation, other levies and customs duties (Check-list item No. (28))

114. The following matters relating to taxes and other levies should be considered: specific taxes and levies to be paid, and by which party; avoidance of double-taxation; tax exemption; taxes on turnover, such as value-added and profit taxes; corporation taxes; personal income taxes; and specific local taxes (luxury tax, development tax, etc.). Examples of other levies, for which the consultant may be liable for various reasons, are stamp duty on contracts, invoices and other documents; authorizations, such as



work permits; and overtime, transit, social security and other charges for personnel working in a foreign country.

115. Avoidance of double taxation is usually regulated by means of appropriate treaties entered into by the governments concerned; in this context, matters of tax exemption arise. The parties should seek advice on these and other tax problems from tax specialists located in the country concerned. Mention may be made here of the fact that a consultant who has met his obligations in a foreign country for several months might have sufficient grounds for consideration by the authorities in that country as having, for fiscal purposes, a permanent establishment in that country.

116. Concerning Customs duties, contracts normally state who pays these duties.

Intellectual property and proprietary information (Check-list item No. (29))

(a) Use of documents produced by a consultant for completion of the project (Check-list item No. (30))

117. It is in the client's interest to obtain a project in fully-operating conditions. If therefore the consultant does not, for some reason, perform complete services up to the construction management and start-up stages, the client should not be precluded - in order to complete the project or to have it completed - from making use of all relevant material produced by the consultant for that project.

118. It is in the consultant's interest further to develop and utilize his knowledge and capabilities. He should not therefore be precluded from making use of any technology developed by him.

(b) Repeated use of a design (Check-list item No. (31))

119. It is for the parties to decide whether designs should not be re-used by either party, for other projects or extensions to the current project. Since repeated use may involve computer programmes and other similar elements, the parties should establish in the contract whether the consultant's copyright includes a computer programme and, if so, for what purpose, and in this connection the limitations subject to which a programme developed by the consultant may be used by the client (e.g. for scrutiny only, not to be re-used, or made available to third parties, etc.).

120. However, since not all drawings are made for one project only, the parties may - if simple designs in actual engineering practice destined for use in several projects are concerned - provide in the contract conditions for the repeated use of such designs (for example, the parties may agree on which conditions the consultant may re-use certain simple designs for other projects).

(c) Licensing of industrial property (Check-list item No. (32))

121. If patents and licences of industrial property rights might become involved in the performance of the consultant's services, the parties should first regulate the problem in the contract: they may, in particular, stipulate who bears the costs arising from the use of any patent or licence.

(d) Inventions and improvements (Check-list item No. (33))

122. The parties should agree on the right of either to utilize developments for which patent applications are filed by the other party. The right depends on the client-consultant relationship and the method employed for project achievement (see paras. 10-12 and 20-27). The usual solution would be for each party to retain its rights to drawings and developments. When the client needs to make use of results developed by the consultant in the course of discharging his duties, he should have the right to use these free of charge for regular operation, repair and maintenance only. This right depends on the applicable law and should be specifically stated in the consultancy contract.

(e) Secrecy (Check-list item No. (34))

123. The consultancy contract should state that both the client and the consultant are precluded from revealing confidential information. The latter covers all facts relating to the subject of the contract, including not only technical but also commercial aspects of the project (e.g. terms of contract, prices), except those facts which are generally known or must be revealed to carry out the project, such as information to be contained in tender documents. Both the client and the consultant should bind to secrecy all persons concerned with the execution of the project, including their employees. Finally, the parties should agree on how long secrecy should be maintained. Normally, secrecy provisions go beyond the term of the contract - often for an unlimited period. (Cf. Guide for use in drawing up contracts relating to international transfer of knowhow in the engineering industry (paras. 15-22, 44) ; Guide for drawing up international contracts between parties associated for the purpose of executing a specific project (para. 6 9) ; and Guide on drawing up international contracts on industrial co-operation (para. 13)).

124. Violation of secrecy provisions entails consequences such as those resulting from breach of contract. It may be agreed that in respect of each and every such violation the party in breach would be bound to pay damages, penalties or liquidated damages.

Insurance (Check-list item No. (35))

125. The parties should in their contract take account of the interrelationship between total risk, their liabilities and the insurance of these liabilities.

In this context, it is important to avoid lack of insurance, and especially double or treble insurance between the client, the consultant and several contractors. Therefore at times the consultant should be requested to advise on this matter. The consultant usually obtains, at his own expense:

- (i) professional insurance covering his own work (since, in certain countries, he could be sued for product liability);
- (ii) insurance against loss of or damage to the equipment used in the execution of his duties;
- (iii) insurance covering sickness or industrial accidents affecting his own staff; and
- (iv) third-party liability insurance, including the client and any employee of the client, for damage due to death, bodily injury, or property damage resulting from the performance of the contract. Normally, the consultant has to maintain insurance coverage from the start of performance of the contract throughout its duration. There are instances, however, when the consultant may be required to maintain insurance coverage for a certain period of time only. When drafting the contract, the parties should take into account that, in some countries, it is obligatory when concluding insurance arrangements to deal with an insurance company in the country of the client.

Entry into force of and alterations to the contract (Check-list item No. (36))

(a) Entry into force

126. Normally, consultancy contracts enter into force upon signature. The parties may, however, provide that their contract shall enter into force on a fixed date following signature or upon performance of a certain act (e.g. payment of first instalment) (see paras. 10-13 and 35-36).

127. Entry into force of contracts involving government agencies, international organizations or bodies corporate as clients and/or companies as consultants is often subject to the approval of the competent authorities and financial institutions having an interest in the matter, provided that a time limit for approval is fixed. In such cases, the contract enters into force on the date when approval by all competent authorities and institutions has been given. Both parties should make all efforts necessary in commercial matters in order to obtain the necessary approval within a fixed time-limit, and should bear all related expenses. The parties are bound to notify each other without delay about receipt or refusal of the approval sought. Once the time-limit referred to above has expired and if no notification has been received, the contract is considered as being no longer valid. However, if the consultant has already begun the preliminary work and the contract is not approved, the parties are referred to the applicable law concerning eventual payment of compensation to the consultant in the absence of a contract. The parties should, therefore, provide for a solution to this problem in their contract.

(b) Alterations

128. Alterations to the contract should be made in writing. The parties should, to the extent possible, define any specific circumstances which might call for alterations to the contract.

End of contract (Check-list item No. (37))

129. The parties should indicate in their contract how it is expected to end. The contract normally expires on the date of completion of respective obligations. The contract may end before the expiry date through unilateral termination in the event of failure of a party to perform its contractual obligations (see paras. 66-73) or, in the event that the parties have agreed on the possibility of the contract being unilaterally terminated, when the conditions specified in paragraph 130 below have been met. The termination of a consultancy contract may result from relief from liability or changed circumstances subject to paras. 84 and 89-90. Finally, the parties should specify in the contract the document assessing events by which the contract might be terminated (certificate of delivery or of successful test run or of anticipated termination agreed upon by the parties, etc.).

Unilateral suspension and termination (Check-list item No. (38))

(a) Conditions and procedures

130. The parties should stipulate specific circumstances or special reasons for termination of the contract, and ways in which either of them might unilaterally suspend or terminate it. One reason

might be suspension or termination of the main contract. As to the method, it might be agreed that the party wishing unilaterally to suspend or to terminate the contract may do so only by written notice and by observing a specified term. This right is in addition to the right of suspension and termination arising from failure of a party to perform its contractual obligations (see paras. 70-72) and relief from liability for consequences of such failure.

(b) Effects of unilateral suspension

131. When unilateral suspension is made possible, the parties should indicate how its consequences are to be dealt with. They may agree in the contract that, when a consultant's assignment is suspended after work on the assignment has commenced, the consultant is entitled to expect - in addition to a fee for work performed prior to the suspension - reimbursement for expenses which he incurs as a result of the suspension of the assignment, including salaries for redundant labour and leasing of redundant offices. The consultant should keep such expenses to a minimum.

132. The parties may also agree that, when a consultant's assignment which had been suspended is later resumed, the consultant should be entitled to expect a fee for the extra work involved in any resumption of work.

133. Finally, the contract may provide that, when a consultant's assignment is suspended by the client for a period specified in the contract, the consultant is entitled to consider the assignment to have been terminated.

(c) Effects of unilateral termination

134. Practice suggests that the consequences of unilateral termination, when this is made possible (as mentioned in paragraph 130), differ from those of unilateral suspension of the contract. When the contract is unilaterally terminated, the consultant should take steps to bring services to a conclusion in a prompt and orderly manner. He is then entitled to reimbursement in full for work actually done and such costs as have been incurred prior to the date of termination and for costs incidental to the orderly termination of his work, including return travel of his personnel. In addition, the parties should establish in the contract whether the consultant would also be entitled to a proportional amount of the fees which he would have obtained had the contract not been unilaterally terminated (lost profit). Upon payment, the consultant should deliver to the client all completed drawings, specifications and other similar documents relevant to the project that are in his possession. The consultant might be permitted, subject to paragraphs 117-124, to retain copies of any document so delivered to the client.

Languages (Check-list item No. (39))

135. If the contract is drawn up in more than one language, the ruling language used should be defined. If the language (or languages) of the pertinent documentation of the contract as well as of the reports, drawings, calculations and correspondence is different from the contract language or the ruling language, such language (or languages) should also be defined. The language arrangements of the parties relate also to the language of the technical instructions to be handed over and/or to the language of verbal consultancy services in connection with the contract. In fact, the consultant is often in a special situation when drawing up documents of tender and preparing specifications as well as managing the works in one language which may be neither that of his client nor that of the contractors nor (possibly) his own. The contract should also stipulate in which language any arbitration proceedings would take place.

Applicable technical standards (Check-list item No. (40))

136. Often it is the specific task of the consultant to advise the client on standards and norms to be used in connection with the project.

Technical standards may be those of the client's country, or of the consultant's country, or of the country in which the project is carried out, or of a third country. These are usually detailed in the documents of tender. The parties should specify the system of measurement (metric system or any other system of measurement). The parties may agree that, should the consultant not be familiar with the standards and norms with which he has to comply in the fulfilment of his contractual obligations, the client would be bound to obtain, and to transmit and describe to the consultant, these standards and norms.

Applicable law and related matters (Check-list item No. (41))

137. The parties should agree in their contract on the law which governs the contract and in accordance with which the contract is to be construed. If the parties wish other rules, such as general conditions,

model forms, or standards of professional conduct, to be applied, they should make reference to these rules in the contract and expressly state their acceptance of them. A consultant is usually bound by the codes of ethics and other professional rules of the association to which he belongs.

138. Whichever law is chosen to govern the contract, there are mandatory rules arising from those specific rules of a legal system which directly influence the activities of the parties and which the parties cannot ignore. Such rules apply to the contract itself (e.g. form, conclusion), to the operation of the project (e.g. currency regulations, administrative requirements concerning workmen's compensation and product liability) and to the actual project (e.g. tendering procedures for which applicable law is that of the country in which the tender is issued). Certain provisions of a consultancy contract may thus be invalidated if these are found to be illegal under the laws applicable in the case.

139. The parties should agree in their contract as to how the consultant should acquaint himself with the mandatory rules in the relevant country. In that connection reference is made to paragraph 58.

Settlement of disputes (Check-list item No. (42))

140. Regarding any dispute or difference arising out of or in connection with the interpretation or execution of the contract, the parties should try to negotiate amicably before having recourse to arbitration. Should, however, the parties be unable to settle such dispute or difference within a period of time to be agreed upon in the contract, international business practice presents adequate conciliation and arbitration procedures to enable them to select one appropriate to a particular case.

141. The parties should be aware that arbitration procedures concerning disputes connected with interpretation or execution of a consultancy contract may differ from arbitration procedures for disputes arising as a result of relationships with other participants in the project (for example, with regard to issues relating to the quality of technology and services rendered). If the parties wish, they may harmonize arbitration procedures for all disputes connected with the project.

142. In this connection, recent experience in international commercial arbitration indicates that many disputes between the parties to industrial transactions arise from technical disagreements. In a normal international arbitration procedure, the technical problems at issue come before the arbitrators long after technical difficulties have arisen. Even if, as usually occurs, the arbitrators appoint technical experts, the latter are called upon to give their opinion at a time when on-the-spot verification (which might be necessary) has become more difficult. Therefore, some parties agree in advance on the appointment of technical experts to whom would be submitted, without delay, any disagreements which arise over the problems referred to above. If the parties themselves cannot reach agreement on choice of experts, they usually request that experts be appointed by a specialized institution selected by agreement between the parties.

143. The parties generally specify in the contract the opinion of a technical expert or experts, clearly stating whether such an opinion should be considered as final or whether it would merely constitute evidence with a certain weight in any subsequent arbitration proceedings. In the absence of such a stipulation, it is assumed that the opinion of the expert(s) would not be binding on the arbitrator.

<sup>1</sup> See guide for use in drawing up contracts relating to the international transfer of know-how in the engineering industry, para. 39.