AN ASEAN REGION STANDARD FORM OF CONSTRUCTION CONTRACT : THE WAY AHEAD[1]

INTRODUCTION

The complexity of problems surrounding building and civil engineering contracts has led to the development and widespread use of standard forms of contract in many countries of the world. Elaborate standard forms are utilised throughout the Asian-Pacific region for both public and private sector work. Even where formal construction contracts are drafted *ad hoc* for specific projects or alternative methods of procurement, clauses appearing in the common standard conditions are often used by draftsmen as precedents. The influence of the English standard forms of building contract - notably those authorised by the so-called "Joint Contracts Tribunal" [JCT] .and sometimes but inaccurately called "the RIBA forms"-, for works of general building construction, together with the Institution of Civil Engineers' Conditions of Contract and their derivitives for civil engineering works, is all-pervasive in those countries of the Asian - Pacific basin influenced by English law.

In Malaysia, for example, the widely-used PAM/ISM Standard Form of Building Contract, published in 1969, is a clone of the English JCT contract in its 1963 edition.[2] The Malaysian Government Conditions of Contract [PWD 203/203A] are also based on an English model, namely the 1931 edition of what was then correctly called the RIBA contract.

[1]Based on a paper delivered at the First International Conference of Asian-Pacific Contruction Law held in Kuala Lumpur on 25 and 26 June 1991. The writer is grateful to the staff of the law library of the Faculty of Law of the University of Malaya for their ready and expert assistance in tracing reference materials for the preparation of this paper.

[2]The PAM/ISM Form is currently undergoing major revision and it is anticipated that a new edition will be published in 1992. It is believed that the new edition will retain the concepts of the 1969 edition.

The original English model has, of course, been sensibly and inevitably modified to suit local conditions and now has a very Malaysian ethos.[3]

The position was the same in Singapore until 1980 when the Singapore Institute of Architects finally severed its traditional links with the English family of contracts and published an entirely new contract form of startling complexity, both of concept and language. The S.I.A. form is perhaps sound in principle but imposes an extraordinary administrative burden on both architect and contractor.[4]

Standard form contracts are not a peculiar feature of the common law, but in civil law countries they tend to supplement certain mandatory provisions of the Civil Code which govern building contracts and endeavour to strike a fair balance between the legitimate interests of the contracting parties.[5]

In contrast in England and those Commonwealth countries which derive their law and their standard forms from it, they are a kind of self-made law operating within the framework of the common law. These "English" forms tend to redistribute risks in a way which is often thought of as being inimical to the interests of the employer. This is certainly the case as regards the JCT group of contract conditions, which are also drafted in language which is notoriously obscure.[6]

Of course, the case is different where standard forms are drafted unilaterally by Government agencies and, in the nature

[3]Significant improvements have been made to the form as drafted originally. For example, with effect from 30 March 1988 all payments due to nominated subcontractors and nominated suppliers are paid directly to them by the Government as employer, even though such payments are included in the interim and final certificates issued under the main contract. See *A Guide on the Administration of Public Works Contracts*, Public Works Department, Kuala Lumpur, November 1988, pp. 231-232 and Appendices there referred to, for the amendments which must be made to the Conditions and tender documents.

[4]See, for example, *Lojan Properties Pte Ltd* v *Tropicon Contractors Pte Ltd* [1991] 2 MLJ 70, Singapore Court of Appeal. The comments of Thean J at first instance ([1989] 3 MLJ 216) about the convoluted language of certain important clauses should be noted.

[5]In France, for example, see article 1793 of the *Code Civil* which deals with the conditions which must be fulfilled if the contractor claims remuneration for extra work. For an in-depth survey see *International Encyclopaedia of Comparative Law*, Vol. VIII, Chapter 8 *Contracts for Work on Goods and Building Contracts* by Werner Lorenz, 1980.

[6]The most vociferous critic of the English professional standard forms is Mr Duncan Wallace whose considered views on the inequities and manifest defects of

of things, these tend to reallocate risk in favour of the Government body.[7] This trend is in itself a cause of criticism in the developing countries. This emerges very clearly from an important discussion paper published by the World Bank in 1988.[8] The author perceives the lack of "equitable contract documents" as one of the main barriers to the development of the construction industry in developing countries which, evidently, include many countries in the Asian-Pacific region. He says:

> Few developing countries have comprehensive standard contract documents which clearly specify the obligations of the parties to the contract, ensure efficient contract administration and avoid potential disputes. All too often, government authorities as "employers", virtually dictate the content and terms of the contract, heavily weighting the provisions in their favor (*sic*) and adding clauses that shift all the risks to the contractor. They also try to protect the "engineer" against liability by making the contractor responsible for pointing out deficiencies in the construction drawings .... The lack of an equitable contract document which has the force of law and serves as a standard for procurement of works by all public agencies is a serious barrier to the growth of the construction industry.[9]

the English JCT forms may be found in Chapters 29 and 30 of his *Construction Contracts : Principles and Policies in Tort and Contract*, London, 1986. A number of the standard form contracts used within the Asian-Pacific Region have their genesis in the English JCT forms or their predecessors. For example, as stated in the text the PAM Standard Form of Building Contract, 1969 edition, which is the standard form used for private sector work in Malaysia, is effectively a verbatim reprint of the English JCT contract in its 1963 edition. This is also the case in Hong Kong and was the case in Singapore until 1980. A similar situation prevails in Brunei. Lorenz, *op. cit.*,p. 8-11, agrees with the criticisms made by Wallace and summarises five of what he considers to be "prejudicial provisions". All these "prejudicial provisions" are found in the current PAM/ISM form but are likely to be removed in the forthcoming revision.

[7]See, for example, Clause 26(2) of the then current British Government Standard Conditions of Contract CC/Works/1, the effect of which was to make the contractor liable to repair the Works at his own cost even though the damage was caused by the employer's own negligence : *A.E. Farr Ltd* v *The Admiralty* [1953] 2 All ER 512. The clause no longer appears in the current Government *General Conditions of Contract for Building and Civil Engineering* (GC/Works/1), Edition 3, published December 1989 and revised in 1990, which is in the view of the writer, one of the best standard form contracts in the common law world.

[8]Syed S. Kirmani, *The Construction Industry in Development Issues and Options*, Report INU 10, World Bank, Washington D.C., 1988.

[9]*Op. cit.*, p. 73 para. 87.

In the result, the World Bank, in conjunction with the Inter-American Development Bank and the Asian Development Bank, has prepared sample documents which are largely based on an earlier edition the well-known FIDIC Conditions of Contract (International) for Works of Civil Engineering Construction, intended as a model for works of civil engineering financed by the banks.[10]

Although the writer shares the view that there is a need for an equitable international standard form of construction contract - or more specifically for a series of forms for use throughout the Asean region - he does not believe that the FIDIC form or any of the "English" professional domestic standard forms, that is, those of the Joint Contracts Tribunal family should serve as a model.[11]

They are, it is submitted far too English in their approach and their provisions are often at odds with the practice of the local industry. The writer agrees with Professor R.H. Hickling who, writing of Malaysian law says that[12]

[10]*Op. cit.*, paragraph 88. The first edition of the FIDIC Conditions was published in August 1957 and followed very closely the form and wording of the English ICE Conditions of Contract, 4th edition. The second edition of FIDIC was published in July 1969, while the third (on which the World Bank model appears to be based) appeared in March 1977. The Fourth and current edition of the Conditions was published in 1987 and is recommended by its sponsors "for general use for the purpose of construction of [civil engineering] works where tenders are invited on an international basis". Even in the latest edition, the Conditions import a number of concepts derived purely from English law, and the writer shares the opinion of Mr Duncan Wallace: see his *The International Civil Engineering Contract*, London, (1974), pp. 7-8. Although he is commenting on the second edition of FIDIC there remains much force in his view that "at least one primary object in preparing the present international contract was to depart as little as humanly possible from the English conditions ... [The document] remains far too domestically "English" in character and language". The current edition of the FIDIC Conditions is the fourth, published in 1987. See FIDIC's own guide to the Conditions, *The Red Book Guide*, Lausanne, (1989) and E.C. Corbett, *FIDIC 4th - A Practical Legal Guide*, London, (1991).

The World Bank model form is now used in Malaysia for projects funded by the World Bank : see "User Guide for Sample Tender Document for Projects funded by World Bank for International Competitive Building", Public Works Department, Kuala Lumpur, (1990).

[11]For the avoidance of doubt, it is submitted that the use of the current Singapore Institute of Architects' *Articles and Conditions of Building Contract*, should also be avoided as a model. First published in 1980, (since revised) and drafted by Mr Duncan Wallace, that form may well be suited to local conditions in Singapore, but it seeks to transfer many risks from employer to contractor in an unacceptable way, e.g., its inclusive pricing principle : see Article 5; and clause 13(1).

[12]*Malaysian Law*, Kuala Lumpur, (1988), p. 145.

> Sooner or later Malaysian law must break out of the chains, loose though they may be, imposed by history and the adoption of the English common law.

The Asean region as a whole must, it is submitted, break free of the fetters imposed by the standard forms of contract inherited from Europe and evolve forms of its own. In the writer's experience in practice, the English standard forms often prove to be totally unsuitable for use in the entirely different conditions which prevail in the various countries of the region, particularly when local contractors are involved.

THE ASEAN REGION & ITS LAWS

The Association of South East Asian Nations (ASEAN) consists of Brunei, Indonesia, Malaysia, The Philippines, Singapore, and Thailand, and has Malaysia as its epi-centre. Within such a smaller regional grouping in the greater Asian-Pacific region is a logical starting point for a consideration of whether a Regional Standard Form of Contract is either practicable or possible. The incentives for the production of such a standard form (or series of standard conditions for various methods of procurement) are there, but there are also many obstacles. Not least of these is the disparate nature of the legal systems involved, but the writer would like to make a plea a need for an urgent and serious study of the problem of harmonization of laws within the region.[13]

Because of the international nature of construction work and the economic importance of the construction industry within the region, the special problems of building and other construction contracts might well provide a convenient area for some degree of harmonization.

The success of the transnational FIDIC Civil Engineering Conditions - despite their English provenance and flavour -

[13]Vitit Muntarbhorn's *The Challenge of Law - Legal Co-operation among Asean Countries*, Chulalongkorn University, Bangkok, (1986), is a pioneer effort. Considerable strides have also been taken by the Asean Law Association, notably in its 5th General Assembly with the theme "Towards Harmonization of Laws in the Asean Region".

demonstrates that a common set of contract conditions can be used with success, in countries with different legal approaches, provided (of course) provision is made within the conditions for both a governing law and a ruling language.

Of the six member nations of ASEAN, Malaysia, Singapore and Brunei are essentially countries of the common law. Indeed, in Singapore and Brunei there is still a direct input from English law since those countries retain the Judicial Committee of the Privy Council as the final court of appeal. In Malaysia, appeals to the Privy Council were finally abolished by the passage of the Constitution (Amendment) Act of 1983.

However, Malaysia remains firmly a country of the common law, particularly so far as construction law is concerned since all the standard form contracts in common use trace their origins to the English family. Furthermore, English decisions are still of high persuasive value where there are no local precedents in point and are invariably followed in practice. How long this will or should continue is a matter of debate, and Professor Ahmad Ibrahim has advocated the total repeal of section 3 of the Civil Law Act 1956 and its reference to English law.[14]

Indonesia is a civil law country, having come under the legal order of the Dutch in colonial times. Its law of contractual obligations is to be found in Book III of the Civil Code,

[14][1971] 2 MLJ lvii. He concludes at p. lxi: "It is clear that as the law is developed in Malaysia through legislation and judicial decisions, there will be less and less need to rely on the English law to fill lacunae in the law. Perhaps the time has come to consider whether another method of filling in lacunae should not be adopted to recognise the fact that Muslim law is the law of the land in Malaysia. Perhaps a provision can be made in the line of the Egyptian Civil Code of 1948 which states:

'In the absence of an express provision, the judge shall follow the rules of custom; if they do not exist, the principles of Islamic law and if they in turn do not exist he shall follow the principles of natural law and equity'. Perhaps the provision in the earlier Egyptian Code on the Organisation of Native Courts 1883 might be added, that is 'and in commercial matters he shall follow commercial usage'."

See also Sulaiman Abdullah and Mehrun Siraj, "Islamic Law in Malaysia : its impact on civil law", paper presented to the 9th Malaysian Law Conference, Kuala Lumpur, 1991.

which is based largely on the Dutch Civil Code.[15] However, although most commercial contracts in Indonesia are governed by the legal principles and norms contained in the Civil Code, it was noted[16] in 1978 that "contract law in Indonesia today has become something quite different from the contract law we used to know before our independence, although it is still taught in the law schools as if nothing has changed".

The same authority notes that "in the case of transnational contracts ... which are made in the English language, foreign clauses and foreign legal terms have been inserted, causing much confusion in the interpretation of the respective contracts" - which is very apposite from our point of view - and also that a "new national contract law is coming into existence" influenced by, *inter alia*, the ever-increasing use of standard form contracts.[17]

Interestingly, Article 1338 of the Indonesian Civil Code provides that "for the contracting parties all valid contracts are to be regarded as having the force of legislation" : in other words, the contract is regarded as *lex specialis*.[18]

Verrier notes[19] that the effect of the current Presidential Decree No. 29 of 1984 was to lay down a very detailed tendering procedure with obligatory norms and this had an impact on the actual contract terms. He adds, "No contract may contain provisions imposing a sanction on or requirement for restitution from the Indonesian Government. This is understood to prevent any provision for late payment interest.

[15]See S. Gautama & R.H. Hornick, *An Introduction to Indonesian Law*, (revised edition), (1974) : Alumni, Bandung. There is a regrettable shortage of material on Indonesian Law in the English language, although there is no dearth of material in both Bahasa Indonesia and Dutch.

[16]By Professor Sunaryati Hartono, "The Law of Contract in Indonesia", [1978] *Malaya Law Review* 142, 144.

[17]*Ibid.* p. 142.

[18]However, Hartono, *op. cit.*, p. 146, observes that "in foreign investment contracts governmental permission (and not the contract as agreed between the parties *before* governmental permission has been obtained) is the most important document with regard to the rights and duties of the parties, as well as the government".

[19]"Procurement Policies in Indonesia" in [1988] *Malaya Law Review* 440. See also "Government Procurement in Indonesia" in [1988] I.C.L.R. 345, D.M. Sassoon, "Procurement by Developing Countries", *A Lawyer's Guide to International Business Transactions* (2nd edn.), (1980), Part IV.

On the other hand, sanctions for failure to meet contractual obligations under the contract shall be imposed on the contractor, and a figure of 0.1 percent per day is suggested."[20]

Thailand must also be regarded as a country of the civil law. Although never subjected to western colonial domination, Thailand chose to codify its law in the tradition of the civil law and contractual relations are governed by the Civil and Commercial Code issued in 1925, although Thai procedural and evidentiary law is influenced by the common law.

Book I of that Code deals with general principles and contains, in Section 4, what must be one of the most interesting interpretative directions of all time. It deserves to be quoted in full:

> The law must be applied in all cases which come within the letter or the spirit of any of its provisions.
>
> Where no provision is applicable, the case shall be decided according to the local custom.
>
> If there is no such custom, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, *by the general principles of law*.[21]

The effect of this is - to quote an English solicitor with legal experience in Thailand - that:[22]

> In this manner the Thai judges, who are trained in the civil law system as judges, seek guidance first from their own country, and then from the rest of the world. "General principles of law" is interpreted in a wide sense, the Thai judges being in consequence free to range through the legal systems of the world in order to extract an acceptable solution to any problem before them. In short, they are not fettered to any one system.

[20]*Op. cit.*, citing Articles 20(4) and 20(2)(f) of the Presidential Decree and its Elucidation and noting that that the latter "contains the requirement that for building construction the contractor be subject to the warranty provisions of Article 1609 of the Civil Code".

[21]Emphasis supplied. Compare this with the Egyptian approach in note 14, *supra*.

[22]Professor R.H. Hickling, *op. cit.*, p. 145. The mind boggles if such a judicial fishing expedition had to be embarked on in connection with many of the clauses in the English-based standard building conditions of contract. *Cf.*, the Japanese approach to written contracts, as recorded by Professor John Andrews in *Japan : Emerging Super State*, 1971, pp. 69 to 71, in these terms : "The Japanese are even

The Philippines is also a civil law country, although there are common law elements through the former influence of the United States of America. However, despite that influence, as Professor Gamboa points out:[23]

> In our jurisdiction the doctrine of *stare decisis* is not recognised in the sense that it obtains [in countries of the common law] but the new Civil Code provides that judicial decisions applying or interpreting the laws ... shall form part of the legal system of the Philippines.

The law of obligations and contracts in general is to be found mainly in Book IV of the Civil Code of the Philippines 1950, which contains special provisions for building contracts.[24]

The legal background thus set, we may now consider two of the concepts involved in construction contracts and see how they are treated in common law and under the civil law.

SOME CONCEPTS

Construction contracts are contracts for work and materials and under the majority of such contracts the contractor

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more casual about written documents. Where Americans in cases of dispute tend to say "Let us return to the document on which the relationship is based and see what it said", many Japanese would not think the matter of sufficient importance to be mentioned. [For them] the critical issue is the present and past emotional background of a relationship, the personal issues and attributes that led to its creation, and the current power or bargaining situation. The Japanese want to know : what was the ambience of the situation in which the document was signed; what events have occurred since the signing and what are the current relationships of the concerned parties?"

This attitude - surprising to a Western mind at least - certainly appears to pervade Japanese business negotiations and the writer has known of Japanese contractors who have expressed pained surprised when they are told by their lawyers of the common law attitude to the sanctity of the written word.

[23] *Introduction to Philippine Law*, (7th edition), p. 12.

[24] It classifies building contracts, which are contracts for work and materials, under the heading of "lease". Article 1713 defines a contract for a piece of work as one under which "the contractor binds himself to execute a piece of work for the employer, in consideration of a certain price or compensation. The contractor may either employ only his labour or skill or also furnish the material". Other relevant provisions are Articles 1715 to 1722 : see E.P. Syquia, "The Philippines" in *Contractual Remedies in Asian Countries*, Indian Law Institute, New Delhi, (1975), pp. 234-235.

undertakes to supply both the work and the materials. The common law and civil law may give differing answers to the same problem. Tribute must be paid to Professor G.H. Treitel for his masterly comparative analysis of remedies for breach of contract at common law and under the civil law, in which he highlights the different approaches.[25] Such divergence is obviously of significance in considering a subject so complex as construction contracts.

(a) *Liquidated damages and penalties*

Since every standard form construction contract used in the Asean region provides for liquidated damages as the employer's remedy for the contractor's failure to complete on time, this may provide a useful starting point.

English law draws a distinction between liquidated damages and penalties. The former are a monetary amount fixed and agreed by the parties in advance as the damages payable in the event of a specified breach of contract.

In English law - as in Singapore and Brunei - a liquidated damages provision is enforceable only if the amount fixed is a genuine pre-estimate of the loss likely to be caused by the breach or a lesser amount and such liquidated damages are recoverable without proof of loss.

In contrast, a provision amounting to a "penalty" is invalid and unenforceable. The sum stipulated will be a penalty if it is unconscionable in its amount, that is, is extravagant in relation to the greatest possible loss likely to be suffered.[26]

Within the Asean region, this illogical distinction has been done away with in Malaysia by section 75 of the Contracts Act 1950, which provides for the enforcement of penalty clauses, subject to a judicial power of reducing the stipulated amount to a reasonable sum, whether or not actual damage or loss is proved to have been caused by the breach. In

[25] *Remedies for Breach of Contract - A Comparative Account*, Oxford University Press, (1988).

[26] See *per* Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd* v *New Garage Motor Co Ltd* [1915] A.C. 79 for the classic English guidelines for distinguishing between liquidated damages and penalties.

Chung Syn Kheng Electrical Co Bhd v *Regional Construction Sdn Bhd*[27] the effect of section 75 was said to be that,

> The amount provided for liquidated damages will only be enforced in favour of the plaintiff if it can be shown that this amount was a genuine pre-estimate of the damages likely to flow from the specified breach. The amount of loss or damage which has actually occurred must be a major factor in deciding whether the amount provided for was an honest pre-estimate of the likely loss or damage. If the actual loss or damage suffered is very much less than the sum agreed, the court will refuse to enforce the agreement to pay a specified sum by way of liquidated damages.[28]

This common law position, as modified by statute, may be contrasted with the civil law approach. The Philippine Civil Code, for example, contains three articles on liquidated damages one of which provides (Article 2227) that "liquidated damages, whether intended as an indemnity or a penalty, shall be equitably reduced if they are iniquitous or unconscionable".

This appears to be similar to the position in Malaysian law, although in the Philippines the Supreme Court has held that the recovery of liquidated damages, or a penalty, requires no proof of loss.[29] The position is not dissimilar in Indonesia.[30]

(b) *Defective Work*

It is in this vital area that there are very real distinctions, because at common law in contracts for work and materials the liability differs according to whether the defect is in the component or in the services provided. In the cases of services alone, the common law obligation is to carry out such services with 'reasonable care and skill' and in order to establish liability there must be *fault,* that is, breach of a duty of care.

[27][1987] 2 MLJ 763, *per* Roberts CJ.
[28]I.e., the plaintiff must prove the actual damages he has suffered and the amount stipulated represents a maximum : see Professor Dr. Dato' Visu Sinnadurai, *Law of Contract in Malaysia and Singapore : Cases and Commentary,* (2nd edition), (1987), pp. 671ff.
[29]*Castro* v *Ice and Cold Storage Industries* 104 Phil. 1064. If there is only a partial breach - which would not be the case where the contractor failed to complete on time - the court may apparently reduce the amount of liquidated damages payable : see *Joe's Radio & Electrical Supply* v *Alto Electronics* 104 Phil. 333.
[30]See Article 1309 of the Civil Code and *Contractual Remedies in Asian Countries* (1975), p. 80.

In the case of contracts for the supply of goods and services, for example, a building contract, liability may be strict and arise quite independently of fault or proof of negligence. Unless the express terms of the contract otherwise provide, at common law the builder will be strictly liable in respect of latent defects in materials supplied by him and incorporated in the structure.

Two examples will suffice. In *Hancock* v *R.W. Brazier (Anerley) Ltd*[31] a contractor was held liable where he supplied and put into foundations hardcore which, unbeknown to him, contained sodium sulpate. Its subsequent chemical reaction with water caused the concrete raft foundations to disintegrate. The contractor was held responsible for the resultant loss, on the basis that he was in breach of his implied obligation to supply good and proper materials, liability being strict and not dependent on establishing fault.

A like result was reached by the House of Lords in the well-known case of *Young & Marten Ltd* v *McManus Childs Ltd*[32] where a roofing sub-contractor was held liable for defects in roofing tiles supplied by him, even though he had obtained them from the manufacturer specified in the contract - who was the only manufacturer - and the defects were not discoverable by reasonable inspection. However, the employer does not have the right to cancel the contract if the work is defective, although he may have a right to an abatement of the price or be able to recover damages.

In contrast, under Philippine law[33] the contractor's obligation is to execute the work in such a manner that it has the qualities agreed upon and has no defects which destroy or lessen its value or fitness for its stipulated purpose. The employer's remedy is to require the removal of the defective work and its re-execution. If the contractor fails to comply with this obligation, the employer may have the necessary work done at the contractor's cost.

[31][1966] 2 All ER 901 (Court of Appeal).
[32][1969] 1 AC 454.
[33]Article 1715.

Furthermore, in the Philippines,

> In the case of a contract for the construction of a building, the engineer or architect is liable for damages if the building collapses within 15 years by reason of a defect in the plans or specifications. The contractor is likewise liable if the building collapses within the same period on accounts of defects in the construction, or the use of inferior materials by him, or any violation of the terms of the contract.[34]

In Indonesia, one of the sanctions for breach of contract is cancellation of the contract under Article 1266 of the Civil Code. The apparent severity of this very drastic remedy is mitigated by giving the contractor an opportunity to remedy his default, after service of a formal demand, and

> [if] he does not fulfil it within the time specified, or if he does not fulfil it adequately, then - but only then - is there a breach of contract.
>
> A formal demand is not necessary if the contract itself calls for performance within a specified time, or if the time limit, though not specified, is clear from the nature of the act to be performed.[35]

There are, of course, many other areas in which the common law and civil law approaches diverge, but it is submitted that none of these divergences militates against the development of contract forms for regional use.

Even if formal harmonization proves impossible to achieve - for the time may not yet be ripe and the Governments of the member nations are fully occupied with their respective countries' social and economic development it is suggested that there is a need for a Regional Standard Form of Building Contract firmly grounded in the Asean context and adapted to the needs of the construction industry of the twenty-first century. The existing forms of contract are all firmly cast in a mould based on the concepts and principles of the nineteenth century and - in their English versions at least - are for the most part couched in the language of a bygone age.

[34]Gamboa, *op. cit.*, p. 284.
[35]Gautama and Hornick, *op. cit.*, p. 134.

Conceptual problems and legal differences apart, an essential provision in such a contract would be a method of disputes settlement which would move away form the adversarial approach of the West. Mediation, adjudication and conciliation suggest themselves, culturally and historically, as manifestly better than litigation or even arbitration.[36]

(c) *The Next Step*

As a result of this conference, it is to be hoped that qualified representatives of countries of the Asean region may get together to establish a Regional Forum to consider the problems in depth. Its membership should be composed of those experienced in both construction law and practice and if, as a result of its deliberations, concrete proposals for a Regional Form of Contract should emerge, it is to be hoped that such a contract would not be partisan or one-sided, nor yet a compromise document such as the English Joint Contract Tribunal standard forms are. Instead, it should be an equitable document, striking a fair and even balance between the parties, and resulting in a recognition of the realities of construction in this region.[37]

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[36]See Hickling, *op. cit.*, Chapter 10 Conciliation.
[37]The final plenary session of the conference adopted the writer's suggestion and unanimously resolved to explore further the possibility of an ASEAN Regional Form.