

# FIDIC contract: Application in Construction Claims

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**Abstract**—Man has been having commercial freedom of entering into contract, ever since the beginning of Barter system. It was exchange of goods and/or services by people for their convenience. Over a period, it became necessary that the habitat had to grow and require many more persons to be engaged for construction activities. This required a system which was commercially viable for exchange of promises. This resulted into evolving a draft contract as document of legal enforceability. Different groups proposed different drafts and therefore various types of disputes arose with respect to legal interpretation of different clauses. Different countries and different organizations came out with different drafts of contracts. This exercise got regionalized and therefore it did not have international commercialization of contracts. Over a period, many countries thought to have a standard form of contract and this required for an internationally acceptable draft for contracting business.

**Keywords**— . Contracts, FIDIC, Legal Aspects, Claims.

## I. INTRODUCTION

Man has been having commercial freedom of entering into contract, ever since the beginning of Barter system. It was exchange of goods and/or services by people for their convenience. Over a period, it became necessary that the habitat had to grow and require many more persons to be engaged for construction activities. This led to a system of contracting between a group desiring to have a constructed object and skilled and unskilled workers used to offer their services. Slowly but surely, it grew into a system when the project owners used to invite tenders and require the competitors to bid for the job.

Beginning with oral contracts, the system of contracts developed to written contracts. These contracts used to have different terms and conditions governing the obligations for the parties.

Over last few hundred years; variety of contracts came to be used as model for contracting for engineering works. Different countries and different organizations came out with different drafts of contracts. This exercise got regionalized and therefore it did not have international commercialization of contracts. Over a period, many countries thought to have a standard form of contract and this required for an internationally acceptable draft for contracting business. The FIDIC contract is a system of such internationally acceptable drafts of contract.

The acronym FIDIC stands for Federation Internationale des Ingenieurs-Conseil. These are books with different types of contract drafts built into them. Over a period it has grown into what is known as 'rainbow of FIDIC' with different colors of books used for different purposes. The original edition was a Red Book, published in 1957. Over last few years, FIDIC has published many versions of new contracts, the first amongst them was Orange Book for design build contracts in 1995. In 1999, FIDIC published some more contracts, a Green Book as a short form of contract and a Silver Book for Turnkey contracts. In 2007, it published the Gold Book for design, build and operate contracts. The FIDIC forms can be used for a range of contracts. Progressively, the clauses in contracts are capable of more clear interpretation of law. The Green Book first published in 1999 has Agreement, General conditions, Rules of adjudication and Notes for guidance. It is the Red Book which is provision for introducing a section or 'Conditions of Particular Application' - COPA, whereby one can use it for a specific purpose.

As the FIDIC suite of contracts are used for defining the contractual legal obligations of parties to contract, it is necessary to study the techno-legal aspects for the purpose of interpretation of various obligations. Different countries have to some extent difference in their contractual culture and hence the contract law. In keeping with the legal system in which the contract is required to be held valid, the clauses are interpreted.

## II. SCOPE

To interpret a clause in a contract one has to break it into number of statements and correlate them with other statements. In this process, one has to form logical sequence for justification of insertion of such statements. It is through such logical thought process that one can interpret the intention of providing a contract clause. Justification of such clauses is called techno-legal study.

It is intention of this study to focus on most popular of FIDIC contracts to study various clauses with emphasis on important clauses like Scope, Variations, and Extra items, Extension of time and Method of adjudication. The study is intended to find out how the clause is legally enforceable in many jurisdictions. The knowledge of techno-legal analysis of FIDIC clauses gives Contract Administrators a tool to judge respective obligations. It is the knowledge of respective obligations that lead to harmonious relationships between the parties and hence one can hope to deliver the zero dispute performance.

## III. THE NEED OF FIDIC:

To interpret a clause in a contract one has to break it into number of statements and correlate them with other statements. In this process, one has to form logical sequence for justification of insertion of such statements. It is through such logical thought process that one can interpret the intention of providing a contract clause. Justification of such clauses is called techno-legal study. It is intention of this study to focus on most popular of FIDIC contracts to study various clauses with emphasis on important clauses like Scope, Variations, Extra items, Extension of time and Method of adjudication. The study is intended to find out how the clause is legally enforceable in many jurisdictions. The knowledge of techno-legal analysis of FIDIC clauses give Contract Administrators a tool to judge respective obligations. It is the knowledge of respective obligations that lead to harmonious relationships between the parties and hence one can hope to deliver the zero dispute performance.

It provides a basic legal framework evidencing the legal relationship between parties. it also establishes a mechanism that regulates the conduct of the commercial relationship between the parties. The ambit of powers and responsibilities of the contract administrator and parties are to be clearly established. FIDIC initiate administrative procedures necessary to effect the legal and commercial relationship between the parties for achieving the purpose of the contract.

## IV. LITERATURE REVIEW

### 4.1 Variations

It (Dr.P.C.Markanda, 1983) states that It is hardly possible that a project as conceived could be executed without any change, alteration, addition or omission. Such changes are called variations to the contract. The variations can be in terms of modification of design, quality and quantity of work. These modifications or changes can be in respect to execution parameters also viz. access to site, limitation of working place, limitation of working hours or execution or performance of the contract in terms of specific order.

The "extras" to the Contract means all works and activities which were not originally contemplated. The legal definition of "extra" has been as below

- All the works and activities which are outside the scope of work contract.
- Such works should be ordered by Owner or Employer.
- The Owner should by words or conduct agree to pay for that.
- Such work should not have been executed voluntarily.
- Such work should not have come up as a result of fault of Contractor.
- There should have been no waiver to the right to be paid by Contractor.

There are certain needs/requirements or variations

- Changes at the option of Employer, wanting extra or different work to be carried out.
- The physical conditions being different may necessitate change.

- External factors may bring or compel extra or change order.

There are certain conditions attached to extras. These are as below

- Contractor must obtain permission to carry out extra in writing.
- Such order must be signed.
- Order must have been given before the work is undertaken.
- Order must be given before the work is completed.
- Progress Report in respect of Change must be given.

Such powers to vary and change the work are implied in Contract. However they are better if expressly provided to reduce the disputes. Otherwise, there are implied obligations to order variations. There are general principles for entitling a Contractor to receive the payment.

- Such work as variation should be outside the scope of agreed work.
- Should have been ordered by the Owner.
- Such order should be in writing.
- Price and Time should have been fixed for performance.

#### 4.2 Liquidated Damage

Apart from Hudson and Emden, there has been classical work on contract titled "Keating on building Contract" (HON.SIR Anthony May, 1955) published by Sweet and Maxwell. The first edition was published in 1955 and covers all modern concepts on issue of time for completion and liquidated damage. The construction contracts require completion to be done within a fixed framework and usually it contains a clause, "time as an essence of contract". This is governed by section 55 of Indian contract Act that is why the treatment on the subject assumes greater importance for all the studies related to construction contract. Where a reasonable time of performance has elapsed and time was not originally of essence, by serving a notice to that effect. In event a party fails to comply with the time essence, a compensation clause as liquidated damages is generally introduced. The parties often agree compensation in terms of fixed and agreed amount is included in the contract. Failure to comply with time essence clause, the departing party has to abide by liquidated damage clause. Sometime the proof of damage is extremely complex and difficult and expensive. In that event the named amount serves the purpose of being accepted as reasonable compensation. It must be remembered that if the sum so named is in nature of penalty the court will not enforce the same. The interpretation of the liquidated damage clause depends on its construction, however it is certain that the clause serves as being exhaustive and exclusive. Once the clause is provided, the party cannot recover any sum in excess of the provision of contract nor can demand any other compensation than the one as clearly provided. Where in building contract, clause providing for liquidated damages for delay is provided it will normally operate as limitation as contractor's liability. The defense against liquidated damage to show and prove it as an amount as penalty rather than compensation. Sometime there is a forfeiture clause of bank guarantee towards recovery. In case no notice is served nor any recovery is affected, the action may be treated as waiver. In case any extension of time is granted without notifying that the time as an essence, time will cease to be of essence. FIDIC set of contract includes time as essence clause and also compensation of failure to meet the time. In that case, the law as operated above would be operated.

The book (CHIRELSTEIN, 1970) includes that Awarding damages is practice so as to give the court authority. This allows the parties to agree on their own damages to be paid. So due to which considering the need prior agreement on damages may avoid litigation cost and will save the time of court as well as juries. So that damages are predetermined by the contracts and that damage for breach may be liquidated.

According to the author of (HUGHES, 1981) it is predetermined sum which the party has to pay to another party if the contract breaches. Most construction contracts consist of such clauses where the contractor fails to complete the work on completion date shall pay certain amount of liquidated damages.

Operation and effects of L.D clauses are below

- The clause is not a penalty
- There is a particular date fixed for completion of the work where if not completed a damages is to be given. So in latter cases procedures for extension time must be properly given under the provision of extension clauses.
- Proper specified contractual procedures are to be mentioned
- The Employer has not waived the right to deduct L.D

The paper (Fawzy1, Islam H. El-adaway, & Perreau-Saussine3, Analyzing Termination for Convenience Provision under Common Law FIDIC using a Civil Law Perspective, 2018) Large scale infrastructure projects are executed by Egyptian government. Most of the projects are based on FIDIC, later there are lots of problems faced i.e instability and challenges. So the FIDIC as well as Egyptian civil laws (ECL) is critically analyzed. The papers gives the idea that the clauses in ECL are more advantageous over FIDIC as it gives the provision for profit and losses in the compensation of damages. it gives the idea about the similarities and difference between the FIDIC and ECL. Authors even suggest some recommendation which is to be provided in ECL and FIDIC in related to termination of projects. So further possible, disputes associated to it can be avoided.

#### 4.3 Dispute resolution:

The book (SCHONINGER, DRAFTING CONSTRUCTION CONTRACTS STRATEGY AND FORMS FOR CONTRACTORS, 1963) of refers to, Dispute that arises when interpretation are not satisfied. it can be solved by arbitration It states that all the disputes, claims or questions arising by virtue of the agreement or work on the project shall be subject to arbitration and shall be submitted to arbitration. All the questions arising in arbitration are solved unless the parties mutually agree. Later the judgment may be entered in accordance with the law applicable. Later the award is made.

The paper (S.S.Banhatti, 2010) deals with FIDIC conditions of contract and features such as for alteration, addition & omission clauses, Commencement and delays, Variation and Settlement and Dispute. This clause is the main defense of Engineer/Employer to reject the claims of the contractor if notice is not given. It claims to be an expert in understanding or interpretation of FIDIC .the Engineer is to give his decision on any opinion, instruction, determination, certificate or valuation done by engineer as per the terms in contract the author suggests to incorporate FIDIC conditions in the contract, the foreign contractors will come to India

#### 4.4 Extra items:

The (SCHONINGER, DRAFTING CONSTRUCTION CONTRACTS STRATEGY AND FORMS FOR CONTRACTS, 1963) asserts that any alteration or deviation in performance of work or in standards of materials from the data given or described in specification provided in contract can only be changed by the order of the owner signed by one its duly authorized officers. The contracts cannot be changed orally. Any increase or decrease in contract price resulting from the change in the contract is to be agreed in writing.

The papers (Shafik1, Qodsi2, Engy Serag, & Helmi4, 2016) focuses on the issues faced by the Arab countries such as the force majeure, termination, interest charges, and subcontracting to manifest the similarities and differences between the FIDIC clauses and the ECC articles and explain how a contract in such conditions would be administered. Many mega structures are funded by World Bank, so the standard clauses of the FIDIC are also used. The paper guides that it provides clear interpretation of FIDIC clauses, thus, minimizing the conflicts arising out of misinterpretation.

The author of this (Fawzy1, Islam H. El-adaway, & Perreau-Saussine3, Analyzing Termination for Convenience Provisions under Common Law FIDIC Using a Civil Law Perspective, 2018) papers says that Large scale infrastructure projects are executed by Egyptian government. Most of the projects are based on FIDIC, later there are lots of problems faced i.e instability and challenges. So the FIDIC as well as Egyptian civil laws are studied the conditions in the ECL are more advantageous to the contractor due to the existence of the provision for loss of profit in the compensation for damages to which the contractor would be entitled under such termination and the absence of such provision under the FIDIC (CONS).

The paper (Fawzy1, Islam H. El-adaway, & Perreau-Saussine3, Claims for Extension of Time and Additional Payment under Common Law FIDIC: Civil Law Analysis, 2018) gives the idea about construction contracts mainly using the standard condition of FIDIC for international projects. The paper uses a multistep interpretation of FIDIC provision of extension of time and additional payment in context of ECL. The author thus do a comparative analysis study the similarities and differences. Later identifies the gap providing recommendations to amend the relevant provision under ECL and/or under the FIDIC. The author studies various provisions that make the statement contradictory and subcontracting under the ECC. Based on that study, the authors made recommendations at the end of each section, proposing the points to be modified in FIDIC to avoid such contradiction.

#### 4.5 Time Extension:

The author describes (FIDIC World bank general conditions, 2010) that Contractor shall be entitled subject to sub-clause 20.1 (Contractor's Claims) to an extension of time for completion if & to the extent that completion for the purpose will be delayed by any of following clauses:

- Variation or other substantial change in quantity of an item of work included in contract.
- A cause of delay giving an entitlement to extension of time under sub-clause of these conditions.
- Exceptionally adverse climatic conditions.
- Unforeseeable shortages in the availability of personnel or goods caused by epidemic or government actions.
- Any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Contractor.

If the contractor considers himself to be entitled to an extension of time for completion the contractor shall give notice to the engineer in accordance with contractor's claims. When determining each extension of time the engineer shall review previous determinations may increase but shall not decrease.

### V. CONCLUSION

In search of appropriate contract documents, various draft contracts were scanned or thought of. However being aware of most of the World Bank finance contracts as also those financed by agencies abroad, FIDIC draft was selected for analyzing various clauses. These clauses covered very accurately the concept of Handing over of site, change orders, variations, and payment clause and closure procedure.

The questionnaire drafted was circulated amongst the Industry professionals and found that it is FIDIC which offer just and fair terms for both, the Employer and the Contractor. Most of those who responded to the questionnaire concluded that adoption of FIDIC will be welcome step for Contracts in India.

Studying a few cases it is seen that the terms being fair it was not difficult to resolve dispute between the parties. In short the study concludes that the FIDIC contract being all inclusive and flexible is ideal for construction Industry and that is why it is one of the most popular worlds over. The conclusion of the study testifies that adopting FIDIC is advantageous for the growth of proper relationship between Employer and Contractor.

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