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Contemporary Methods of Resolving Disputes Arising from FIDIC Construction Contracts Between the Employer and Contractor³

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Abstract

This article aims to explore the key features of these amicable mechanisms within FIDIC contracts involving governmental administrations, with the goal of providing recommendations that can contribute to the development of comprehensive regulatory frameworks. The issue to be examined in this article is the level of regulation provided by the FIDIC contract texts regarding administrative construction procedures. The methodology employed for this article involved a descriptive analytical approach, which focused on analysing legislative texts relevant to the topic and examining all articles within the FIDIC contract that pertain to our research objective. This analysis allowed us to describe these provisions with an ultimate goal of finding a solution to address the problem under investigation. A key discovery was that the FIDIC construction contract only briefly mentioned amicable resolution methods in one article, without providing specific details. Based on this observation, a set of recommendations has been proposed, including the establishment of a dispute resolution council consisting of at least three persons. This approach is believed to enhance dispute resolution through amicable means by promoting discussion and consultation among its members and ultimately avoiding unnecessary complications.

Keywords: construction, FIDIC, management, contractor, settlement, dispute.

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Współczesne metody rozwiązywania sporów wynikających z kontraktów budowlanych FIDIC pomiędzy zamawiającym a wykonawcą⁴

Streszczenie

W niniejszym artykule przeanalizowano kilka kluczowych cech polubownych mechanizmów rozwiązywania sporów w kontraktach FIDIC z udziałem administracji rządowej. Celem analizy było opracowanie rekomendacji, które mogą przyczynić się do stworzenia pomocnych kompleksowych ram regulacyjnych. Kwestia, która zostanie szczegółowo przeanalizowana dotyczy poziomu regulacji zapewnionej przez teksty kontraktów FIDIC w kontekście procedur administracyjnych w branży budowlanej. Metodologia zastosowana w artykule bazuje na podejściu analityczno-opisowym, które polegało na analizie tekstów legislacyjnych związanych z omawianym tematem oraz wszystkich artykułów w kontrakcie FIDIC dotyczących przyjętego celu badawczego. Analiza ta pozwoliła autorom opisać odpowiednie przepisy, co przyczyniło się też do poszukiwań rozwiązania problemu będącego przedmiotem badania. Kluczowym odkryciem było to, że w kontrakcie budowlanym FIDIC pojawiła się jedynie krótka wzmianka o metodach polubownego rozwiązywania sporów – w jednym artykule, bez konkretnych szczegółów. Na podstawie tego odkrycia zaproponowano szereg rekomendacji, w tym ustanowienie rady ds. rozstrzygania sporów składającej się z co najmniej trzech osób. Uważa się, że takie podejście może usprawnić rozwiązywanie sporów w sposób polubowny poprzez promowanie dyskusji i konsultacji wśród członków rady, co ostatecznie pozwoli uniknąć dalszych problemów i komplikacji.

Słowa kluczowe: budownictwo, FIDIC, zarządzanie, wykonawca,
rozwiązywanie sporów, spór

⁴ Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

Introduction

FIDIC, short for International Federation of Consulting Engineers, pertains to a federation comprising associations of consulting engineers in various countries. Initially established in 1913 by European associations such as the Belgian, French, and Swiss Associations specifically representing French-speaking nations, FIDIC has become widely recognised.⁵ The second FIDIC conference was subsequently hosted in Bern, during which the role of a consulting engineer was defined as someone possessing scientific, technical, and professional expertise.⁶ FIDIC (the International Federation of Consulting Engineers) seeks to examine and address various issues faced by its member engineers.⁷ Additionally, it aims to foster strong connections among consulting engineers hailing from diverse linguistic backgrounds and nations. Furthermore, the organisation endeavours to establish guidelines and regulations that promote optimal performance by consulting engineers.⁸

As per the perspective of certain legal experts, contracts based on the FIDIC (International Federation of Consulting Engineers) standard are an amalgamation of pre-drafted provisions that address the same matter, all of which have been consented to by the involved parties.⁹

As per the French legal precedent, contract templates may serve as evidence against those who opt to use them for their contractual agreements. On the other hand, under Egyptian legal norms, a contract template refers to a preconceived set of clauses drawn up by one party, which is later incorporated into an agreement on the same matter by all parties involved.¹⁰

As per the findings of the researchers, a FIDIC contract cannot be deemed as a contract in the strict and exact sense of the term. It does not involve an agreement between two parties to produce a particular legal outcome. Rather, it serves as a reference for upcoming contracts and offers guidance to parties on what should

⁵ A.M. Al-Qudah, *The powers of the supervising engineer in the works contract*, Master Thesis, Jordan.

⁶ E.A. Al-Bahji, *FIDIC contracts*, Alexandria, Egypt 2008, p. 17.

⁷ O. Kandil, N. Yehia, *Design Liability under FIDIC Red Book and Some Civil Law Jurisdictions*, "Journal of Legal Affairs and Dispute Resolution in Engineering and Construction" 2003, 14(1).

⁸ *Ibidem*, p. 18.

⁹ S.A. Saad, *Model contracts and the reasons for their spread*, Cairo, Egypt 2005, p. 12.

¹⁰ *Ibidem*, p. 13.

be included in their agreement.¹¹ Such contracts have proven to be beneficial in resolving disputes that arise in construction contracts. They are considered as templates that aid parties in creating a contract and preventing future disagreements. This is crucial because construction contracts can give rise to numerous concerns pertaining to rights, obligations, and other issues.

The International Federation of Consulting Engineers created a model contract in 1957, known as the Conditions of Contracting for Civil Engineering Works. This contract is recognised as the standard for contractual conditions used on an international level.¹²

The authority of the employer, particularly in FIDIC construction contracts, is not absolute. The contractor has rights and guarantees to seek protection against any abuse of power by the administration. These guarantees exist both during the term of the contract and before the contract is established, ensuring that any issues are addressed smoothly. It can be argued that these protection measures are not simply a matter of favouring one party over another or out of courtesy, but rather they are essential for justice and balance between the parties. Jurisprudence supports this approach. The judiciary aims to limit these powers and address them by offering assurances that provide contracting parties with effective protection. These assurances are achieved through methods such as amicable settlement, arbitration, financial compensation, and compensation in cases where the administration fails to meet its obligations. In this discussion, we will focus on two topics: first, amicable dispute resolution methods within FIDIC; second, the process of arbitration.

As for the research problem, the issue in question pertains to the disparities in power between the administration and contracting party within construction contracts. It is crucial, therefore, to establish comprehensive contractual terms that account for the involvement of both parties. Consequently, this article aims to assess how effectively FIDIC contract clauses govern administrative construction procedures. In this discussion, the authors will focus on the objective of this article, which is to provide insights into whether the key amicable methods utilised are used to resolve disputes in FIDIC contracts involving the administration – with the aim of identifying the characteristics of these contracts and formulating constructive recommendations that can contribute to the development of comprehensive regulatory frameworks. As for the methodology employed for this article, the authors recognise the significance of making use of an analytical and descriptive methodology to analyse all relevant articles within a FIDIC contract. This approach

¹¹ Z. Tong, *Recovering Loss of Productivity under FIDIC Contracts*, "Journal of Legal Affairs and Dispute Resolution in Engineering and Construction" 2021, 14(1).

¹² J. Nassar, M. Hulusi, *Law, legislation and contracts of the International Federation of Consulting Engineers*, Beirut, Lebanon 1999, p. 121.

allows for a thorough understanding of the subject matter and aids in solving the research problem at hand. For discussing this topic, the article is divided into two sections. The first section focuses on the methods of amicable settlement in the FIDIC contract, while the second section explores the arbitration methods for resolving disputes that arise from FIDIC contracts.

Mechanisms for Peaceful Resolution in FIDIC Contract Disputes

Peaceful settlement is a method of resolving conflicts that has been regulated by legislation to provide solutions between the contractor and administrative authorities. Due to their distinct nature and organisation, the matter will be examined as two separate sections: In the Red Book, there was no mention of the concept of dispute within the framework of FIDIC contracts. To address this gap, a reference can be made to the Golden Book on Design, Build and Operate (DBO) published in 2008, which defines a dispute as “a situation where: A – one party asserts a claim against another party B – The latter rejects or partially accepts the claim C – The first party does not comply with this rejection.”

In light of this perspective, various amicable methods have emerged to resolve disputes in the construction sector. The FIDIC Red Contract, in Article (20/5), recognises the importance of attempting an amicable resolution before resorting to arbitration. This section will provide a brief overview of two significant means: negotiation and conciliation, as well as the Dispute Resolution Council.

Negotiation and conciliation in FIDIC contract disputes

Negotiation serves as the initial stage towards pursuing amicable resolutions, enabling parties to engage in discussion and dialogue in an atmosphere of friendliness and cooperation. It is commonly chosen by parties as the preferred approach for resolving disputes, whether related to the application or interpretation of contractual provisions. Some legal experts define negotiation as a process where each party endeavours to reach an agreement directly with one another without involving any third party. This method is often seen as the most straightforward and expedient means to achieve resolution.¹³ The Jordanian Court of Cassation ruled that: “...it is necessary to settle matters by amicable means in order to preserve fraternal and family relations, since the actions that were committed were in viola-

¹³ M. Badran, *Construction contract*, Cairo, Egypt 2001, p. 295.

tion of the law” (Decision of the Jordanian Court of Cassation, No. 1954/2017). The judiciary placed a strong emphasis on the necessity of using peaceful methods to keep the parties’ relationship at this level, particularly between the administration and its contractors, without exerting any pressure on them. In a statement of reasons, the Supreme Administrative Court of Egypt indicated that it effortlessly assists in fostering a relationship between the government and the other side. It ruled that: “...that arises between the association and the administrative authority to settle it amicably, provided that in the event that the association issues a decision violating the law, the administrative authority has the right to ask the association to withdraw its violating decision, and if it does not withdraw it, the administrative authority has to present the matter to the committee mentioned” (Egyptian Supreme Administrative, No. 47474, Judicial Year 61, 2019).

Negotiation is commonly defined as a consultative process used by parties to resolve disputes that arise between them. This method is widely regarded as one of the most expedient and efficient ways to reach a resolution in conflicts.¹⁴

It is also commonly defined as a communicative process between involved parties aimed at reaching consensus, resolution, or termination of a relationship through persuasive dialogue.¹⁵ Scholars contend that the aforementioned definition accurately captures the essence of dispute settlement by emphasising open discussion and negotiation for achieving an agreement. This approach is employed by parties entering into FIDIC contracts with the objective of finding a mutually satisfactory solution during dispute stages or even to proactively prevent disputes from arising altogether. Consequently, this method aligns with the principles of comprehension and persuasion within an established framework.

Negotiations can occur during the drafting stage of a contract, where terms and conditions are specified, or after the contract is concluded during its implementation. This process may involve the parties reaching an agreement among themselves or seeking assistance from a neutral third party. The objective is to facilitate mutual understanding and find a solution that satisfies both parties.¹⁶

The mediator thoroughly analyses the details of the dispute, identifies contrasting perspectives, and endeavours to bridge them by presenting settlement proposals. The parties have the option to accept or reject these proposals. It is important to note that the mediator does not possess any authoritative power over the involved parties; their role is solely focused on seeking an amicable resolution for the arising disagreement. Furthermore, it should be emphasised that any decision made by

¹⁴ M. Al-Hayari, *Implications of the FIDIC Contracting Contract*, Amman, Jordan, 2012, p. 396.

¹⁵ E.A. Al-Bahji, *FIDIC contracts*, Alexandria, Egypt 2008, p. 35.

¹⁶ M. Al-Habashi, *Financial balance in international construction contracts*, Cairo, Egypt 2008, p. 471.

the mediator lacks a binding capacity.¹⁷ This is what the judiciary confirmed in one of its rulings, stating: "...amicable solutions, mediation, and amicable settlement of disputes are not governed by the arbitration law, but rather by general rules and unwritten customs, and what is reached is not binding on the parties, unlike the arbitration rulings..." (Decision of the Jordanian Court of Cassation, No. 4695/2019). The previous ruling made it clear that the results of peaceful means, such as negotiations, are not legally binding on the parties (the contracting party and the administration), but rather are implemented at the discretion of the parties with their consent. This is consistent with the nature of those means that give the parties complete freedom to choose whether to use those methods or not in terms of application and implementation.

It is important to recognise that the negotiation method, which relies on good faith and transparency, aims to achieve successful outcomes. As part of this process, it is incumbent upon the parties involved and the negotiator to maintain confidentiality regarding any information obtained during negotiations in order to arrive at mutually satisfactory solutions. By addressing conflicting interests, it becomes essential for FIDIC contract parties to establish clear guidelines for organising the negotiation phase, including its timing and location.¹⁸

Once the negotiations have concluded, it is preferable to reach a mutually agreeable solution to the dispute without having to resort to alternative measures such as arbitration. However, this resolution must be documented and approved by all parties involved in order for it to be binding. Should an agreement not be reached through negotiation alone, other methods of conflict resolution should then be considered.¹⁹

The authors argue that the administration and its contractor have the option to engage in negotiations as a means of resolving disputes arising from FIDIC contracts. This approach offers an efficient resolution process for mitigating conflicts between them, particularly given the complexity and lengthy procedures associated with alternative dispute settlement methods. Such time-consuming processes can potentially jeopardise the interests of both parties involved.²⁰

¹⁷ I. Matar, *FIDIC contracts for civil engineering contracting and works and means of resolving disputes arising from them*, New University House, Cairo, Egypt 2009, p. 424.

¹⁸ K.H. Al-Salhi, means of settling disputes in B.O.T contracts in amicable ways (arbitration as a model), a research paper in the eighteenth conference on building and construction contracts between traditional legal rules and new legal systems, nd., p. 179.

¹⁹ J. Zahida, *Legal means of resolving FIDIC contract disputes*, Master Thesis, University of Jordan, Amman 2015, p. 150.

²⁰ A. Elham *et al.*, *Granting Enforcement to the FIDIC Dispute Adjudication Board's Decision by the Amendment of the New York Convention 1958*, "Journal of Legal Affairs and Dispute Resolution in Engineering and Construction" 2021, 13(2).

Regarding conciliation, it refers to a confidential and private meeting between the disputing parties. This meeting is facilitated by a neutral person who possesses expertise and qualifications in this area. The objective of the facilitator is to assist the parties involved in reaching a mutually acceptable agreement).²¹

This approach is alternatively referred to as “a structured process that occurs through a dedicated meeting involving the conflicting parties and their representatives, overseen by an impartial and qualified individual who facilitates dialogue between the parties and guides them towards a mutually acceptable agreement”.²² In our article’s context, the authors define conciliation as an advanced stage of negotiation (reconciliation), which entails the involvement of a third party responsible for reconciling differing viewpoints between the administration and its contractor in order to achieve resolution for disputes arising from breaches of obligations under FIDIC contracts. The objective is to assist both parties in finding a satisfactory solution that meets their needs. The Egyptian judiciary has emphasised that a “...lawsuit can only be considered by the court if the dispute in question is covered by the provisions of this law. Before submitting a lawsuit, a request for conciliation must be made to the relevant committee, and the recommended time period must have passed...”. It is important to note that a lawsuit may not be accepted to resolve a dispute between parties if conciliation has not been attempted first (Supreme Administrative Court of Egypt Decision No. 19350, Judicial Year 55, 2017).

The mediator engages in separate discussions with each party involved, aiming to narrow down the dispute between them. However, the mediator does not make a legally binding decision. During these discussions, the mediator listens to each party’s perspective, explains their understanding of the issues at hand and the potential risks associated with not reaching a resolution. The mediator proposes solutions to both parties and encourages them to reach a settlement while facilitating reconciliation efforts. In case an agreement is reached, it will be formalised through a written document signed by all parties involved and the mediator. This agreement will then be considered as finalised between both parties.²³

In accordance with Article 3 of the Mediation Law, the case management judge has the power to refer cases to either a mediation judge or a private mediator upon request of the disputants. It is important for the judge to take into account the mutual agreement of both parties when appointing a mediator in all instances.²⁴

²¹ A. Masa’ada, *Mediation as a means of resolving civil disputes*, “Journal of Human Sciences” 2004, Jordan.

²² S. Mohammed Freeh, *Dispute resolution*, Cairo, Egypt 2007.

²³ J. Zahida, *Legal means of resolving FIDIC contract disputes*, Master Thesis, University of Jordan, Amman 2015, p. 55.

²⁴ See: Article (3) of the Mediation Law for the Settlement of Civil Disputes No. (12) of 2006, published in the Official Gazette No. 4751, dated 3/16/2006, p. 738.

In accordance with the directives of the case management judge, the disputing parties have the option to engage in mediation as a means of resolving their dispute. They are granted full discretion in selecting a mediator whom they believe to be suitable for this purpose. Should the mediator successfully achieve a settlement, whether comprehensive or partial, it is imperative that they submit a report to the case management judge along with a signed copy of said settlement reached between both parties. Following approval from the judge, this settlement agreement will subsequently be regarded as final and binding.²⁵

The authors propose that disputes between the administration and its contractor regarding delay fines can be effectively resolved through mediation if attempts at reconciliation fail. Mediation procedures are deemed appropriate for resolving such disputes due to their simplicity and efficiency, particularly with the implementation of the Jordanian Judicial Mediation Law for Dispute Resolution. This law provides detailed guidance on mediation methods, procedures, and levels of involvement.

The function of the overseeing engineer (presently referred to as dispute settlement councils)

According to legal experts, an overseeing engineer is responsible for managing and supervising the execution of a project, including matters related to contractor expenses. They also certify these expenses and disburse payments owed to contractors.²⁶

The concept of dispute resolution in the FIDIC contract model has evolved over time. In the fourth edition of 1987, this role was assigned to the engineer overseeing the project on behalf of the employer. However, in the latest edition of 1999, decision-making authority replaced that role. According to Article 67 of the FIDIC contract model's fourth edition from 1987, any disputes arising from or related to the contract or execution of works must be resolved through a specified process regardless of when they occur – during or after completion and before or after termination. If any dispute arises, including disputes related to an opinion, order, decision, certificate, or evaluation made by the engineer/consulting engineer in accordance with the FIDIC contract terms, it is required that the injured party first refers the matter in writing to the engineer. A copy of this letter should also be sent to the other involved party so that a decision can be issued within 84 days. The contractor must continue carrying out their entrusted work during this period

²⁵ A. Sharaf El-Din, *Settlement of international construction contract disputes*, Cairo, Egypt 2005, p. 55.

²⁶ J.O. Al-Mabrouk, *Legal System of the FIDIC Dispute Resolution Council (FIDC) Analytical study*, "Journal of the Academy of Humanities and Social Sciences" 2019, 71.

unless otherwise specified in the FIDIC contract. If arbitration becomes necessary and is stated as such in the letter according to provisions outlined in the FIDIC contract terms, it may commence within 56 days following notification and attempt at amicable settlement – unless agreed upon differently or if no agreement for an amicable resolution was reached prior.

If either the employer or contractor fails to provide notice of their intent to commence arbitration within the specified timeframe, which is 70 days after the end of the 84-day period following submission of the dispute to the engineer, then any decision made by said engineer shall be binding on both parties. It should be noted that this decision cannot be appealed before said engineer. The arbitration process will remain confidential and does not prevent either party from seeking redress through appropriate national legal channels, provided that they do so within the applicable statute of limitations.²⁷

The legal responsibilities of engineers do not provide sufficient qualifications for effectively resolving disputes between parties. As a result, consulting engineers have been replaced by dispute settlement councils as a more effective means of handling such issues in FIDIC contracts. A 1996 amendment to the fourth edition of FIDIC introduced an alternative text to Article 67, which previously governed dispute resolution through engineers. This amendment established the use of dispute resolution councils known as DABs. The updated 1999 edition further solidified the authority and organisation structure of these boards.²⁸

The idea of the transfer of authority to consider disputes from the engineer to a dispute resolution council is supported by both researchers. This shift in responsibility stems from various issues associated with the engineer, primarily their lack of complete impartiality between parties. It can be argued that they are affiliated with the employer, as it is typically the employer who appoints them and oversees their work related to instructions and orders. The engineer also receives remuneration from the employer, further reinforcing this subordination. These factors inevitably result in a less fair approach when resolving disputes, as there is a clear bias towards supporting the employer over other involved parties.²⁹

From a legal standpoint, the Dispute Resolution Council can be referred to as an amicable settlement mechanism. It is entrusted to a neutral third party who is

²⁷ M. Sadat, *Mechanisms for resolving disputes arising from FIDIC contracts*. Research presented at the 18th Conference on Building and Construction Contracts between traditional legal rules and modern legal systems, nd., p. 693.

²⁸ A. Al-Yami, *Dispute resolution in FIDIC contracts*, Master Thesis, University of Jordan, Amman 2011, p. 30.

²⁹ O. Elshamy et al., *Contractor Entitlement to Time Extension under Civil and Administrative Laws and Their Applicability under FIDIC 2017*, "Journal of Legal Affairs and Dispute Resolution in Engineering and Construction" 2023, 16(1).

not directly involved in the dispute and gains the trust of both parties. The primary role of this council is to receive and analyse disputes between parties comprehensively with the aim of reaching a resolution through issuing decisions.³⁰ This approach serves as a temporary and limited means for resolving conflicts by appointing an independent arbitrator who works towards concluding the dispute.³¹

Alternatively, it is commonly understood as a field approach aimed at addressing disputes arising from FIDIC contracts. These disputes are brought before the council shortly after their occurrence, allowing for thorough examination while the circumstances leading to their emergence remain evident.³² However, some scholars argue that these definitions lack clarity regarding the composition and establishment process of said council. Instead, they solely focus on its role in resolving disputes presented within the context of the FIDIC construction contract.

Article (1-1-2-9) of FIDIC International Construction Contracts (1999) defines this council as: "One or three persons who are specified under the contract or appointed based on sub-clause (20-2) or who are appointed pursuant to sub-clause (20-3) for failure to agree on a dispute resolution council."

The Dispute Settlement Council in FIDIC disputes is described as a contemporary entity comprised of impartial individuals who are mutually approved by the parties. Its purpose is to resolve conflicts that may arise between the project management and the contractor, both during and after the contract period. The inclusion of this council in the FIDIC contract aims to facilitate amicable resolution of disputes with efficiency, expediency, and cost-effectiveness.

According to the FIDIC contract, both the employer and contractor are required to appoint members of the Dispute Resolution Council in accordance with Article (20/4). The council can be comprised of either one member or three members, depending on mutual arrangements made between the parties. If three members are chosen, the employer selects one member while the contractor selects another. Both parties must then consult with these two selected members to reach a consensus on appointing a third member in accordance with Article (20/2) of the FIDIC Red Contract.³³

³⁰ M. Al-Attar, *The adequacy of the legal organization of the dispute resolution council in the FIDIC Red contract*, Master Thesis. Middle East University, Amman 2011, p. 20.

³¹ J.A. Pickavance, *Practical Guide to Construction Adjudication*, Blackwell, 2016, p. 3.

³² H.M. Globe, *Legal regulation of the corresponding obligations of management and the contractor in the FIDIC contract*, Master Thesis, University of Baghdad, Baghdad 2017, p. 177; D.S. Khalaf, *Dispute Resolution Council and amicable settlement methods*, Printing Press Workers Cooperative Association: Amman, Jordan 2005, p. 39.

³³ I. Al-Shawabkeh, H. Al-Qabailat, *The effect of the prince's business theory on the financial balance of the FIDIC contract*, "Jordanian Journal of Law" 2009, 4(2); G. Owen, *The Working of Dispute Adjudication Board (DAB) Under New FIDIC (New Red Book)*, June 2003. Available from: www.fidic.org/sites/default/files.

The establishment of the Dispute Resolution Council is primarily voluntary, and its formation is contingent upon two agreements. Firstly, a mutual agreement must be reached between the parties involved to establish an independent and neutral council. Secondly, another agreement must take place between the parties of the construction contract and the members of the council. According to this agreement, the council is obligated to provide technical and advisory services to both parties. Hence, it can be inferred that the nature of this council is contractual.³⁴

In the event of a dispute arising from or relating to the FIDIC contract, either party has the option to submit a written request to the Dispute Settlement Council for resolution. A copy of this request must be sent to both parties and the engineer involved, with explicit mention that it is in accordance with Article (20/4) of the FIDIC Red Contract.³⁵

In the event that the two parties involved in an international construction project cannot reach a consensus regarding the selection of the Council, or fail to designate a representative for themselves on said Council, or struggle to agree upon choosing a third member, or if one of the appointed members becomes incapacitated due to reasons such as death, disability, resignation, or termination of appointment, it is then required by authority that either party invokes Article (20/3) of the FIDIC contract. This article empowers them to request the appointment of a Council member through an official person designated in special conditions. Such appointment will be final and enforceable under contractual obligations.³⁶

The Dispute Settlement Council is required to make its decision within 84 days of receiving the referral letter, or within a mutually agreed upon period as stated in Article 20/4 of the FIDIC contract. The decision must be supported by reasons and is binding on both parties. If either party does not object to the council's decision and remains unsatisfied with it within 28 days from receipt, they must notify the other party of their intent to seek arbitration.³⁷ Furthermore, if the council fails to issue its decision within 84 days following receipt of the referral request, either party has an additional strict 28-day time frame in which they can inform the other party about their non-acceptance along with providing reasons for such action.

Based on the previous discussion, it is deemed acceptable for both the administration and contractor within the FIDIC contract to seek resolution of disputes

³⁴ A.I. Baghdadi, *The extent to which FIDIC contract disputes are settled through mediation and the role of the Dispute Resolution Council therein*, Master Thesis, Jerash University, Jordan 2017, p. 84.

³⁵ A. Al-Yami, *Dispute resolution in FIDIC contracts*, Master Thesis, University of Jordan, Amman 2011, p. 34.

³⁶ A. Sharaf El-Din, *Settlement of international construction contract disputes*, Cairo, Egypt 2005, p. 59.

³⁷ Al Hajri M.A., *The impact of the emergence of dispute resolution boards on the erosion of the quasi-arbitration role of the consulting engineer in the FIDIC civil engineering contract: A study in contractual dispute mechanisms according to the amendments of the latest version of the FIDIC contract*, "Law Journal" 2007, 31(1), p. 118.

through the Dispute Settlement Council. Both parties should adhere to the relevant provisions outlined in the contract, such as appointing council members and formally submitting written dispute referrals. Failure to do so may complicate matters. The council members have expertise, knowledge, and a comprehensive understanding of dispute subjects. Consequently, they can facilitate an amicable resolution between both parties without resorting to lengthy and intricate legal procedures. This provides reassurance that a neutral technical body will ensure fair judgement in resolving any disagreements between the contracting party and administration. Hence, there is a proposal to incorporate a chapter in international construction contracts called Administrative Construction Contracts that focuses on the contractual parties, including the administration. This would serve as a comprehensive guide for countries and their institutions wishing to adopt FIDIC contracts in construction due to their significant provisions, particularly those related to amicable dispute resolution methods. It should be noted that the Dispute Resolution Council has already implemented Article No. 20/2 of the Jordanian Unified Contracting Contract regarding general conditions. Arbitration is an exceptional way to resolve disputes that are originally within the exclusive jurisdiction of the courts, and arbitrators derive their authority to consider the dispute from this agreement. The Jordanian Court of Cassation ruled as follows: „In order to ensure clarity and specificity in the disputes to be resolved by the arbitrators, both parties to the dispute must include a reference to arbitration on a page containing an arbitration instrument that specifies the disputes agreed upon. This will help to maintain a clear and focused approach to resolving the disputes.” (Decision of the Jordanian Court of Cassation, No. 452/1993). The ruling previously mentioned leaves no doubt that the parties were granted a great deal of freedom when it came to utilising the agreement-based arbitration process. Without this agreement, the arbitrator will not be able to fulfil their responsibilities, and any decisions they make would be deemed unlawful.

The Mechanism of Arbitration in FIDIC Contract Conflicts

Arbitration is employed as a final recourse by either party, namely the contractor or the employer, to resolve disputes that remain unresolved despite efforts made by the Dispute Resolution Council.³⁸ Alternatively, parties may directly engage in

³⁸ M. Sadat, *Mechanisms for resolving disputes arising from FIDIC contracts*. Research presented at the 18th Conference on Building and Construction Contracts between traditional legal rules and modern legal systems, nd., p. 633.

arbitration if it has been previously stipulated in the contract or agreed upon mutually.

It is important to note that initially, under the first edition of the FIDIC contract from 1957, arbitration was used as a means to resolve disputes according to the applicable laws of the country where construction projects were carried out. However, with the release of the second edition of the Red Book in 1969, there was a shift from ad-hoc arbitration to institutionalised arbitration based on International Chamber of Commerce (ICC) rules of conciliation and arbitration.³⁹

Arbitration is a procedure in which the parties involved in a specific dispute agree to submit their differences to an arbitrator of their choosing. The arbitrator's authority to make decisions between them is determined, and both parties commit to accepting and abiding by the resulting arbitral award.⁴⁰ In construction contracting contracts, arbitration refers to resolving disputes that arise from or during implementation through mutual agreement between the contractor and employer. This agreement can be reached at various stages – before or after the contract is concluded but once a dispute has arisen.⁴¹

While the Jordanian judiciary defined it as: “the adversaries resorting to one or more people to settle the dispute between them” (Decision of the Jordanian Court of Cassation No. 37, of 1972),^tThe authors observed that the prior decision only provided a cursory definition of arbitration; it did not mention the types of disputes that could arise between the parties. The Jordanian legislator also defined it as: “a written agreement that includes referring existing or upcoming disputes to arbitration, whether in the name of the arbitrator or arbitrators is mentioned in the agreement, or not” (Jordanian Arbitration Law No. 31 of 2001).

The authors believe that arbitration is a procedure in which the administration and its contractor agree to submit the dispute arising between them under the FIDIC contract to an arbitrator of their choice. To resolve that dispute and abide by its decision.

The question that arises in this regard is: Is it permissible to resort to arbitration in administrative contract disputes? The Jordanian legislator responded explicitly to this by allowing parties to resort to arbitration in administrative contracts, as Article Three of the Arbitration Law stipulated the following: “The provisions of this law apply to every consensual arbitration conducted in the Kingdom related to a civil or commercial dispute between parties of persons. Public law, or private law, regardless of the nature of the legal relationship around which the dispute

³⁹ H.M. Globe, *Legal regulation of the corresponding obligations of management and the contractor in the FIDIC contract*, Master Thesis, University of Baghdad, Baghdad 2017, p. 211.

⁴⁰ M. Shafiq, *FIDIC contracts*, Cairo, Egypt 1993, p. 19.

⁴¹ Al-Hayari M., *Implications of the FIDIC...*, p. 425.

revolves, whether contractual or non-contractual” (Jordanian Arbitration Law No. 31 of 2001). “It is not permissible to agree on arbitration except by a natural or legal person who has the right to dispose of his rights,” the Jordanian Court of Cassation continued (Decision of the Jordanian Court of Cassation, No. 1783/2010). Thus, the preceding decision leads us to the conclusion that the judiciary granted the arbitrator the authority to investigate. Additionally, the judiciary addressed the question of whether the actions taken by the administration in its capacity as a legal entity may be covered by arbitration or not. The judiciary also connected the question to a crucial point regarding who owns the action in question.

The authors believe that the Jordanian legislator has permitted the two parties to resort, in the event of a dispute between them, to arbitration in administrative contracts to which the administration is a party. Therefore, the administration and its contractor in the FIDIC contract may resort to arbitration to resolve the dispute between them. Because resorting to it is easier than resorting to the judiciary.

As for the FIDIC contract, arbitration procedures have been organised to resolve disputes related to this contract in accordance with Article (20/6) of the General Conditions of the FIDIC Contract, where the procedures are as follows:

Article 20/6 of the Jordanian Unified Contract of Contracting (FIDIC), under the heading of arbitration, stipulates that “unless disputes have been settled amicably, any dispute that follows the Council’s decision regarding it and has not become final and binding shall be settled by arbitration through the Jordanian Arbitration Law.” Unless the two parties agree otherwise, the arbitration panel shall be formed from one member, or three members appointed in accordance with the applicable law, and arbitration procedures shall be conducted in the language of communication specified in Article (1/4) of the FIDIC contract).

The arbitration panel has full authority to disclose, review and revise any certificate, estimates, instructions, opinions, or evaluation issued by the engineer, and any decision issued by the Dispute Resolution Council in relation to the dispute.⁴² It becomes clear to the authors from the above text that it is obligatory for the dispute to be referred initially through amicable means, as previously mentioned. If the referred dispute is not successful in achieving a resolution, it will be referred to arbitration.

As per Article (7/20) of the FIDIC contract, certain procedures must be followed in case of non-compliance with the decision of the Dispute Resolution Council. If any party fails to send a notice of dissatisfaction within the specified period, the matter may be referred to arbitration. Once the Council’s decision on the dispute becomes final and neither party complies with it, the other party can refer the

⁴² A. Al-Yami, *Dispute resolution in FIDIC contracts*, Master Thesis, University of Jordan, Amman 2011, p. 38.

issue of non-compliance to arbitration as per Article (20/6). In such a scenario, the provisions of Article (20/4) related to the Council's decision do not apply, but Article (20/5) related to amicable settlement remains applicable.

Based on the findings, the authors suggest amending the articles of the FIDIC contract to require parties to implement decisions made by the Dispute Resolution Council without any choice on their part. This is due to the significant importance of the decision and the need for a speedy resolution to the dispute. It is important to maintain a positive relationship between parties in an amicable manner. Referring the dispute to another method would cause delays in resolving the issue, which could negatively impact their relationship and cause damage to public facilities.

The question that arises in this regard is: Is the arbitration award binding on the parties, or are they free to accept it or not?

The arbitrators' award shall have the force of *res judicata*, upon the expiry of the time limit for filing the invalidation claim, as the Jordanian Court of Cassation ruled the following: "... It is useful from the text of Article 53/A of the Arbitration Law of 2001 that the request to implement the arbitration award is not accepted if there is no deadline." "Filing a lawsuit to invalidate the judgement has expired... even if it became clear that this request was submitted before the expiry of the deadline for filing the invalidation lawsuit, it ruled to dismiss it in form..." (Decision of the Jordanian Court of Cassation, No. 3522 of 2007).

Article (52) of the Jordanian Arbitration Law stipulates that: "Arbitrators' rulings issued in accordance with this law shall have the force of *res judicata* and shall be enforceable taking into account the provisions stipulated therein."

Based on the earlier decision, the authors conclude that the parties must file their request for the implementation of the arbitration award after the invalidation suit's deadline has passed for it to be granted; otherwise, it will be denied. We concur with this view because it makes it reasonable that no party may ask the court to enforce the terms of the arbitration agreement if it is submitted prior to the deadline for submitting an invalidation lawsuit. This is because the arbitration agreement partly pertains to the parties' obligations. Additionally, the Supreme Administrative Court of Egypt ruled that, "...although an appeal of an arbitration award may be filed on the grounds of invalidity, this procedure should only be used in cases that fall under the legal definition of 'arbitration agreement absence' or 'arbitration agreement void at term's expiration,' as stated in Article 53 of the relevant legislation." (Egyptian Supreme Administrative, No. 115403, Judicial Year 65, 2021).

In accordance with the Egyptian Arbitration Law, once an arbitration award is issued, it carries the authority of a *res judicata*, whether it is a domestic or inter-

national arbitration. This authority remains even if the award is subject to appeal. It is established before the implementation formula is put in place.⁴³

The Dubai Court of Cassation recently made a ruling regarding the effectiveness of incorporating arbitration clauses in contracts using the FIDIC Contract's General Conditions, which include an arbitration clause. In this specific case, the parties agreed that the General Conditions of Contract in the FIDIC Red Book would govern the transaction terms. Clause No. 67 of the General Conditions in the FIDIC Red Book 1987 contains a multi-party dispute resolution clause that requires disputes to be resolved by the engineer and then referred to arbitration under the International Chamber of Commerce rules. The Dubai Court of Appeal had determined that the inclusion of an arbitration clause through general reference to the general terms and conditions in the FIDIC Red Book 1987 was sufficient to bind the parties to the arbitration clause. However, the Court of Cassation overturned this decision and stated that the Dubai Court was competent to hear the case and that the arbitration clause was unenforceable. The court ruled that the arbitration clause cannot be referred to by general reference to the FIDIC General Conditions if it is only mentioned in passing without specifically mentioning the arbitration clause, which would demonstrate the parties' awareness of its existence. As a result, arbitration is not seen as something that the contract parties agreed upon. The ruling issued by the Dubai Court of Cassation on 04/07/2021 in Appeal No. 48 of 2021 on a commercial appeal, was published on 8/5/2021.

The key aspect of this provision is that it mandates that a reference to an arbitration clause must be precise and linked to a particular condition mentioned in another document. Given the potential challenges associated with applying arbitration clauses in the Emirates, it is crucial to explicitly mention the arbitration clause from the relevant document to avoid any jurisdictional issues that may arise during a dispute. This is especially important if the parties wish to refer to the terms contained in another document, and those terms include an arbitration clause.

Conclusion

Our findings demonstrate the need of alternative dispute resolution techniques for contractors working on FIDIC construction contracts. These techniques are widely used in many nations as an alternative to the legal system for resolving conflicts since they have many positive legal, social, and economic effects. These

⁴³ N. Bashir, *Penalty for delay in administrative contract*, Doctoral dissertation, Cairo University, Cairo 1998, p. 233.

techniques support justice and fairness for all parties concerned while lessening the load on the court system. These techniques also facilitate the understanding and improve the communication between the participants, which can lessen tension and stress in general. In the end, our investigation produced a number of important conclusions and suggestions, which we have outlined. Firstly, the FIDIC construction contract texts lack the organisation of amicable means in an integrated and required manner, as they confined themselves to this subject in one article, formulated at a general level without going into its details. Secondly, the FIDIC construction contract stipulates the establishment of a dispute resolution council composed of one or three persons appointed by the parties to the contract. Management and contractors. Finally, the method of arbitration has been organised to settle the dispute between the parties to the contract, and this method has several advantages that lead to it being included among the means of resolving the dispute, the most important of which are: Whoever conducts arbitration has sufficient knowledge, expertise, and practical experience, which saves time and effort without resorting to the judiciary.

Recommendations

The authors hope FIDIC contracts will be made clearer by outlining amicable means for parties to understand and implement with ease. In addition, the authors hope that the texts of international construction contracts (FIDIC) will be amended and that it will be stipulated that the members of the Dispute Resolution Council must be no less than three people with experience and knowledge in the work assigned to them, because one person is likely to lead to not reaching the resolution of the dispute in the required manner, while when there are three of them, then they consult and discuss among themselves an issue presented to the Council. Finally, the state and its institutions should adopt FIDIC construction contracts or develop a special chapter for administrative construction in projects.

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