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Research Article

APPLICATION OF FIDIC CONTRACTS IN CONSTRUCTION CLAIMS AND ARBITRATION

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ABSTRACT

The FIDIC Conditions of contracts are used extensively in international construction projects, particularly for the private sector and large investment companies, and the FIDIC forms are used on projects funded by the World Bank, where the band reviewed the contract drafts. Akin all forms of construction contracts, whether standard forms or tailored contracts, construction claims often arise and construction dispute my develop generating a case which needs dispute resolution technique such as Arbitration to be applied depending on the contract agreement dispute resolution clause. This paper discusses the Clauses under which claims may develop, the responsibilities of each party, and the procedures for dispute adjudication and arbitration in construction contracts. Prudent practitioners and contract parties shall be aware of all particulars and elements may contribute to construction contracts claims and dispute resolution management, delay, changes, and pertinent events. Consequently, protect the project from suffering lengthy and expensive additional technical and administrative work such as meetings, negotiations, corrective actions, and disputes in the extreme. Existing practice includes and provides the process of FIDIC contracts management as a regular practice. In general, the project contract includes the contract documents, which establish and define the relationship among the project parties and creates the basis for all management procedure, including claims and disputes management. In the case of FIDIC contracts claims identified procedure e-claims and dispute resolution mechanism is provided for claims and dispute resolution management, this paper will provide a practical anatomy for different claims and dispute resolution management in FIDIC construction contracts, through some physical case studies. Through this perception, it is thought construction industry practitioners may develop the means to avoid, mitigate, and manage the claims and disputes domain, hence developing more successful projects and relationships for all practitioners.

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INTRODUCTION

Recently the construction industry sustained a severe recession, and the number of claims increased by a significant ratio, consequently it furnished more work and effort required by the contracts and claims consultants. Due to the current recession, the construction industry contracts have become a rigor and complicated endeavor while the ongoing contracts need a comprehensive review, particularly in the articles of claims, risk sharing, and dispute resolution.

The FIDIC forms of contracts accounts for comprehensive contract management procedure which is demonstrated in 20 clauses and 167 sub clause in this paper, due to the limitation of total words requirements the author will establish the contractual review on the "RED BOOK" 1999, FIDIC condition of contract for construction, as it is suitable for all civil works projects where:

1. main responsibility for design lies with Employer or the project designer,
2. The contractor may carry out part of the design.
3. Administration of Contract and supervision by Engineer.
4. Approval of the executed work, payment certified by the Engineer.
5. Work done is measured, payment according to BOQ.
6. Option for payment on lump sum basis.
7. Balanced / fair risk-sharing.

In the past three decades, project construction contract management and consequential claims encountered the consecutive changes in the construction industry approaches to the rapid changes in construction projects types and related contracts, in addition to the progressive requirements and expectations among the industry stakeholders. Accordingly, it became common in construction projects to experience schedule delays, cost overrun, increased risks, construction

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claim, and disputes. The Project Management Institute PMI.org, (PMBOK5) defined the contract as it represents a mutually binding agreement that obligates the contractor to provide something of value and obligates the Employer/owner to provide a valuable compensation.

Contract and claim management process appears as a core process in the project control plan that describes specific processes, procedures, tools and systems which guide and support effective project control. FIDIC forms of contracts undergo a predefined management procedure based on the 167 clauses which imply the different contract parties obligations.

Construction claims

The dictionary defines 'claim' as 'an assertion of a right' and, under standard building contracts, the word convey the concept of additional payment, which a project party seeks to assert outside the contractual procedure for pricing the work itself. In addition, the word is also used in respect of the contractor's applications for an award of extensions of time, for the purposes of this paper, both claims and counterclaims will be referred to as claims.

Construction Claims Types

Construction claims are classified according to different categories, basically, apart from claims under statutory law, construction claims are established on any one of four legal and one non-legal concepts. Therefore, the following five categories demonstrate the base for such claims:

1. A claim under a particular contract clause, a contract party is entitled to claim an identified remedy for certain circumstances, for example, under the Red Book, the contractor is entitled to claim an additional payment for tests in accordance with sub-clause 10.3" Interference with Tests on Completion".
2. An event may be a breach of a particular provision in the contract and no specific remedy in the contract. In such claim arising out of the contract. In the valid claims, the remedy can be under the applicable law, which is the agreed law between the contract parties or the law of the country where the project is executed. Such remedy is evaluated through the consequential damages that the claimant can provide the evidences and justifications to substantiate the claim.

Table 1 Contractor's claims under contract clauses

S/C No.	Sub-Clause no.	Contractor's Claim	Remarks
1.9	Delayed drawings or instructions	Potential claims, include, extension of time, Cost and reasonable profit, when the Engineer fails to issue a due instruction or drawing within a reasonable time	Delay in review for shop drawings
2.1	Right to Access to the Site	Contractor may claim EOT., Cost and reasonable profit if Employer fails to give right of access to Site within time mentioned in the Contract conditions	
4.7	Setting Out	Contractor may claim EOT., Cost and reasonable profit if any errors in original setting-out points, levels of reference exist.	
4.12	Unforeseeable Physical Conditions	Contractor may claim EOT. and Cost when it encounters Unexpected physical conditions	A prompt notice is required
4.24	Fossils	Contractor may claim EOT. and Cost incurred due to an instruction to Contractor to manage any faced unexpected archaeological finding	Employer property findings
7.4	Testing	Contractor may claim time extension, Cost and realistic profit if testing is delayed by (or on behalf of) the Employer	
8.4	Extension of Time for Completion	Contractor may claim extension of time if completion is delayed (Sub-CI 8.2 & 10.1)	Pass tests, complete work, Employer take over
8.5	Delays caused by authorities	EOT claim is levied by the Contractor if The public authority causes Unexpected delay	
8.9	Consequences of suspension	Contractor may claim EOT and Cost if Engineer instructs a suspension of progress	Contractor shall give notice and is entitled subject to Sub-Clause 20.1
10.2	Taking over parts of Works	Contractor may claim Cost with fair profit to the Employer taking over of a part of Works	
10.3	Interference with Tests on Completion	Contractor may claim EOT, Cost and fair profit if Employer interference delays a Test on Completion	
11.8	Contractor to search	Contractor may claim Cost and reasonable profit if instructed to find the cause of a defect not under its responsibility	
12.3	Evaluation	Contractor's entitlement to establish new unit rates for a change in quantities of work.	Item is not specified as a "fixed rate item"
12.4	Omissions	Contractor may claim a Cost which, would not be recovered because the cost element was for an item has been omitted by Variation	Contractor shall provide justified, auditable cost break down
13.2	Value Engineering	Contractor may claim 50% of the cost saving for his redesigned and approved new alternative proposal	Net saving- deducting cost of decreased quality or lifecycle cost.
13.7	Adjustments for Changes in Legislation	Contractor may claim EOT and Cost incurred as a result of a change in the country Laws.	Datum is 28 days before tender opening.
14.4	Schedule of payments	If interim payment and actual progress are not harmonized, actual progress is less than that on which the schedule of payments was identified, the schedule may be revised	
14.8	Delayed payment	Delay in payments entitles the Contractor to claim financing charges.	
16.1	Contractor's Entitlement to Suspend Work	Contractor may claim EOT, Cost, and profit if Engineer and or Employer by action or inaction caused the suspension of work	Failure by the Employer to pay certified payments

3. Based on the grounds of a specific legal rule in the law of tort under the applicable law of the contract, the claim can be established. The claim particular, evidence, and circumstances are the basis for evaluating the reimbursement of a successful claim under the principle of equitable adjustment.
4. A claim under the case before signing a contract or the contract is void, is known as quantum meruit claim. Such claim is established on the principle that the value of work done has to be paid to the performing party. The claimant shall be paid the reasonable amount that compensates the cost of the work and the pertinent overhead and profit.
5. Ex gratia claim (out of kindness) is the claim appear in case of no enough justification, no legal provisions. The claimant is providing a case and presents the damages to the defendant who may evaluate the case in commercial aspects to maintain the relationship with the claimant or to ensure another reimbursement can be earned from the claimant.

Contractor’s Claims in FIDIC 1999

The claim category “I” under article 2.1 above mentioned is demonstrated in ”RED BOOK” 1999, FIDIC condition of contract for construction, which provides different clauses and sub clauses to manage the potential contractor’s claims in the construction projects. The featured clauses for contractor’s claims management in FIDIC are summarized in table 1, where every clause is specified for a certain event or claim that entitles the contractor for a remedy, by virtue of this specific clause/sub clause of the contract. The ”RED BOOK” 1999, FIDIC condition of contract for construction presents 14 clause related to the contractor claims for different aspects, such as; drawings or instructions; right to access to the site, unforeseeable physical conditions; extension of time for completion; omissions; value engineering; variation procedure, adjustment for change in legislation; delayed payment; schedule of payment; and etc.

Mechanism of the Claim Clause

In the Red FIDIC clause different clauses that entitles a contract party to levy a claim are following similar procedure, as shown in Figure 1.

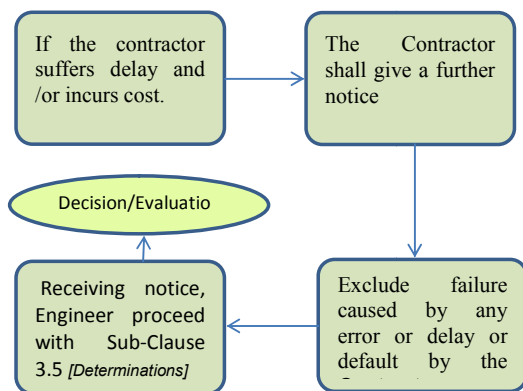


Figure1 Mechanism of Claims Clause

As example, clause 1.9, Delayed Drawings or Instructions presents that if the contractor experience delay and/or suffers cost as a result of a failure of the Engineer to issue the notified

drawing or instruction within a time frame which is practicable and is specified in the notice with supporting details the Contractor shall give a further notice to be sent to the Engineer and will be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to an extension of time and its additional cost complete with reasonable profit.

After receiving this further notice. The Engineer shall ensure according to Sub-Clause, 3.5 [Determinations] to agree or determine these matters.

The Engineer’s decision/ evaluation can be in two cases, the first is for those contractor’s claims under one or more clauses of the contract, as applicable. The other case, when the contractor’s claim is under the applicable law, in which the legal aspect needs a legal advice by a legal console to avoid bad faith and or any sort of misconduct. It is recommended that the Engineer cases of working on the legal based claims unless it merely required referring the claim to arbitration, where the legal experts are available and expert witness is utilized.

Contractors Claims in Red Fidic

The Red Book controls claims for additional payment and reasonably regulates and manages the extension of time claims, in a clear procedure which is recommended to apply within the project course for all contractor’s claims under the contract clauses.

Sub Clause 20.1 manages the contractor's claims in specific procedure, figure 2 demonstrates an example for Extension of time claim under Fidic condition of contracts.

The procedure presented in the Red BOOK provides a specific approach where the Contractor’ s needs a clear understanding of this very sub - clause. It is a sub-clause of core importance concerning to different contractual topics.

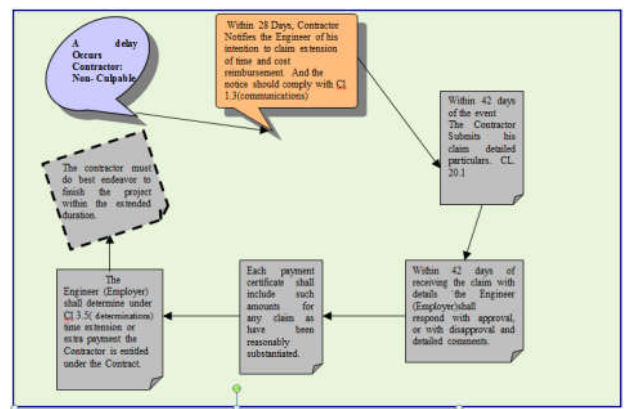


Figure 2

The contractor needs to take all necessary measures to comply with this most important sub-clause as any failure to adhere to its requirements of shall cause damages and injuries to the contractor. As per the sub-clause 20.1 the procedure is as follows:

If the Contractor considers himself to be entitled to an extension of the Time for Completion and/or additional payment under any clause, the Contractor must give notice to the Engineer as soon as practicable and “not later than 28 days after the Contractor became aware, or should have become aware, of the event, called here for the purpose of smooth

information flaw “datum date”. The contractor should ensure the notice is to be sent to the correct address and to the representative entitled to receive such notices as per the contract relevant communication clauses. In this regards it is worthy to emphasise on the previous cases where some contractors, missed the proper notice period as due to negligence by the project team or improper document control system in place. Other cases in the projects showed bad faith by the contractor to avail from the postponement of issuing the claim notice. The first response to an event, lies on the contractor who must give a bare and short notice of claim within 28 days, in this The Contractor does not need to state the details of the claimed amount or time, even the notice doesn't include the contractual basis of the claim. In addition, a separate claims log should be included in the monthly progress reports which is a part of the Contractor's applications for interim payments Sub-Clause 14.3).

Should the contractor fails to provide the notice within 28 days: No extension of time shall be granted and no additional cost or compensation will be due to the contractor and the project employer shall be discharged from any obligations or liabilities related to the claim.

1. When the Contractor gives such a notice, the contractor shall maintain contemporary records deemed necessary to substantiate the claim and make it available for further review and audit by the Engineer and dispute resolution processes as applicable. Those record may be monitored by the Engineer is who can instruct and or advise the Contractor to keep additional contemporary records (Sub-Clause 20.1).
2. If the event is a specific impact and restricted by a certain timeframe, the contractor must submit to the Engineer within 42 days after the “datum date” of the event or circumstance giving rise to the claim, or any other period agreed with the Engineer, a complete detailed and particularized claim including all available supporting data/records of the basis of the claim. For example a delayed approval by the Engineer for a contractor's submittal for a defined period of time may entitle the contractor for an extension of time and additional payment as the case may be as a compensation for the equivalent time that can be demonstrated through time impact analysis and additional cost resulting from the impact of delaying the approval.

If the claim event or circumstance constitutes “a continuing effect”, such as continued delay of the approval/s for the example that became repeatedly or last for long duration, advanced procedures need to be fulfilled, additional records to be contemporary maintained in order to facilitate an interim payment to compensate the contractor for the damages caused by the event which the contractor is inculpable. The contractor may submit monthly interim claims, those interim claims must be totaled and completely submitted not later than 28 days of the last effect of such continual event, it is clear in such continual event that the bar of 42 days is not applicable.

1. The Engineer has to diligently practice his role, within 42 days or within such other period as may be proposed by

the Engineer and approved by the Contractor , after receiving a particularized claim including all required data or any additional data supporting the claim, the Engineer should issue a response “with approval, or with disapproval and detailed comments”. Although the Red FIDIC gives the authority to the Engineer to request for any necessary additional particulars, but the Engineer remains obligated to provide his response on the claim's principles within such 42 days or else as agreed between the contract parties, this baring clause is one of the development of the last FIDIC version as it this is the first time a FIDIC form contract has required the Engineer to respond to the claimant within a specified period.

2. As soon as the Engineer has received a notice of claim, the Engineer shall proceed in accordance with Sub-Clause 3.5 (Determinations). In this stage the Red FIDIC requires the Engineer to consult with each party in an attempt to achieve a mutual agreement. In case of disputed negotiations, the Engineer shall provide a justified fair determination considering all relevant documents, records, and circumstances. The Engineer's determination with its supporting details, shall be considered and acknowledged by each party of the contract unless and until revised unless later revised by the DAB (Dispute Adjudication Board) or arbitration under Clause 20 (Claims, Disputes, and Arbitration). In this regards, it was concluded from past projects that the Engineer shall decide a fair evaluation and provide supporting particulars in the reasonable time and shall not be withheld or delayed for minor causes or bad faith.
3. Prudent Contractor must comply with the claims procedure as demonstrated in Sub-Clause 20. besides to the requirements of the specific clause/ sub-clause that has entitled him the to claim for a certain event under the contract.
4. In the case of failure by the claimant” the Contractor” to comply with sub-clause 20.1 or to implement the requirements of another Sub-Clause managing any contractor's claim, sub- clause 20.1 provides that partial extension of time and/or additional payment shall take account of the extent to which the failure has banned and or biased appropriate justification and investigation of the claim...” The claims settlement shall consider in its evaluation for the partial procedure and partial failure by the Contractor, any damages and losses incurred by the Employer due to incomplete with the required claims procedure. For example, the losses due to negligence by the contractor to carry out the mitigation processes, so the claim settlement within the contractual frame work, shall result in a balanced payment where the Employer will not pay more than the Contractor's entitlement.

Dispute resolution in Red FIDIC

Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 (Obtaining Dispute Adjudication Board's Decision]). The Parties shall jointly appoint aDAB by the date stated in the Appendix to Tender. If the DAB has given its decision and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both parties. In case of dissatisfaction of one or both parties, within

a period of 56 days after giving a notice of dissatisfaction, the parties shall proceed in an attempt to resolve the dispute amicably prior to referring the dispute to arbitration. The Arbitration process may start after 56 days if no amicable settlement is achieved. In the amicable settlement, the parties are free to assemble their meetings and discussions to demonstrate its situation. The amicable settlement is the last chance to save time and potential cost in litigation or Arbitration, the Contractor is usually more likely to be more willing to accept and decide in the negotiations. In the contrary, the governmental Employer is more restrictive to accept the negotiated resolution in the amicable settlement process. The Contractor has to keep records of the negotiations. Any decisions achieved must be documented in details and signed by the contract parties.

Arbitration in Red FIDIC

The Red FIDIC provides the Arbitration process as a dispute resolution approach when a decision of the DAB has not become final and further in case the dispute has not been settled by the amicable settlement provisions of Sub - Clause 20.5, in such case ' then the dispute shall be finally settled by international arbitration' (sub-clause 20.6). The DAB decision will be and evidence and allowable in the Arbitration, therefore the party willing to refer the case to Arbitration will have to get a thorough review of the DAB presentations and negotiations carried out by the parties during the DAB procedures, and the DAB ' s decision justifications. Prior to choosing to refer a dispute to international arbitration, the referring Party will have to ensure proper additional submissions and evidenced presentation to supersede the DAB reasoning which he didn't accept. The referring party can choose only part of DAB decision elements, as applicable and based on the record availability to get different decisions that satisfy his claims.

Competency is the prime feature required for the appointment of the DAB members, where they have to be of previous experience and expertise in the appropriate types of projects and they should have appropriate training courses for in the Arbitration and mediation domain. The Contractor may need to consult his legal counsel for legal advice in the complicated events, which may include legal aspects and concerns. Generally, Arbitration rules/proceedings vary from different Arbitration centers/bodies and are affected by the applicable law in which the contract is executed. Cost and time of Arbitration may be significant, depending on the agreed Arbitration procedures between the contract parties, as per sub-clause 20.6 of the Red FIDIC 1999, the parties are allowed to agree on rules and procedures, or they may accept the requirements of sub- clause 20.6, which organizes the Arbitration approach as follows:

1. The arbitration shall implement rules and procedures of the ICC (International Chamber of Commerce), it may commence during the project course or after the work completion.
2. According to ICC rules, the Arbitration panel consists of 3 Arbitrators.
3. As per sub-clause 1.4, the arbitration will be in the language for communications
4. All communication, documents may be inspected by Arbitrators, the Engineer may be heard as a witness

the claimed events are not restricted by those put before DAB

Arbitration in Red FIDIC 1999- Case study

A case study in one of the mega projects in Egypt; where C the project contractor faced a large number of project change by Employer E which the contractor considered the change to cause a cardinal change and presented a claim requesting to sign a new amendment to account for the large number and amounts of changes. As the claim was complicated, the Engineer and Contractor agreed for 60 days to submit the particularized detailed claim. The Engineer negated the Contractor's records and details several times, which caused a significant delay in the Engineer's decision, in addition to a complete justification and analysis report issued by the Engineer considering the Contractor is disintegrated the claimed costs due to loss of records accuracy and audits requirements. The case was referred to the ARBITRATION. The panel was consisting of three Arbitrator, each party nominated an Arbitrator and the two Arbitrator identified the third Arbitrator who took the role of the panel chair. The parties agreed to share the costs and the Arbitration took place in Cairo regional Arbitration Center. The Arbitration proceeding lasted for 7 months and the claimant "the Contractor" could hardly demonstrate additional information regarding the disruption caused by different delay in the Engineer's decision. The final award emphasized on the lack of records and the Contractor was entitled to partial payment equals to the claim preparation and Arbitration cost.

The project parties should consider the International Arbitration in FIDIC contracts and other forms of contracts, to be the last and rigorous option to be addressed by either of the contract parties, for the complication, cost, and time inherent in the Arbitration approach.

CONCLUSION

The construction claims under the Red FIDIC 1999 shall follow a predefined procedure, starting by a notice of claim within 28 days for there to be a valid claim and shall comply with the time bars required in the sub-clause 20.1 for different stages of the claim procedure. The notice is the means to inform all involved that there is an event or circumstance where extra payment or time may be due to the Contractor. The Twenty-eight (28) days was enough period in previous claims. Contracts appeared to be reluctant to those time barring clauses and always contend the 28 days limiting the entitlement for the claims presentation. It is worthy and cost optimization to implement and activate the DRB which consists of claims experts, subject matter experts, which can manage and mitigate claims and disputes impact in order to minimize the cases that, may end at the International Arbitration through ICC.

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