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A PRACTICAL APPROACH TO THE FIDIC PRINCIPLES

I INTRODUCTION

1. Today projects such as buildings, civil engineering, chemical engineering, mechanical engineering, electrical engineering or a combination of these fields of activity are becoming more and more complex with the result that the contract conditions may also reach a high degree of complexity. In one word there is a need for standardisation of these contract conditions for the benefit of all the parties, i.e. the Financial Institutions, the Employer, the Engineer and the Contractor.

2. In addition, the parties to international contracts do not always share the same contractual and technical culture or the same language and used to work with their own contractual documents and their own local best-practice guides. FIDIC – Fédération Internationale des Ingénieurs-Conseils published already in the 1950s a first edition of the Conditions of Contract for Works of Civil Engineering Construction. The FIDIC Conditions are recognised as a suitable foundation for an international construction contract in that they offer a neutral substitute to the national standard forms of contract and to the jurisdiction of national courts, when using arbitration. The FIDIC is represented in Romania by its member association "The Romanian Association of Consulting Engineers".

3. Over the years, the FIDIC has published a large number of standard forms of contract as well as "best-practice" guidelines. Finally, in 1999, the FIDIC published a new set of books, the first three being intended for major works and the last one for minor works:

   - Conditions of contract for Construction for Building and Engineering Works designed by the Employer: *The Construction Contract* (Red Book)
   - Conditions of Contract for Plant and Design-Build for Electrical and mechanical Plant, and for Building and Engineering Works, designed by the Contractor: *The Plant and Design/Build Contract* (Yellow Book)
   - Conditions of Contract for EPC/Turnkey Projects: *The EPC/Turnkey Contract*[1] (Silver Book)
   - Short form of Contract: *The Short Form* (Green Book)

[1] EPC = Engineering, Procurement, Construction

This set of books was then complemented by the "FIDIC Contracts Guide" in 2000/2001. This guide provides a lot of useful explanations and practical recommendations on how to implement the FIDIC Conditions, when using the Red, the Yellow or the Silver Book. It is therefore highly recommended prior to dealing with the FIDIC Conditions to read and to refer to this guide that provides a high added-value in terms of practical experience.

4. Later, since 2004, the FIDIC extended its offer and published various additional conditions of contract, in particular:

   - An additional version of the Red Book called the "MDB Harmonised Edition 2005", which takes into account the specific needs and requirements set up by the Multilateral Development Banks (MDB).
   - Conditions of Contract for Client/Consultant Model Services Agreement: *The Model Services Agreement* (White Book) – Fourth Edition 2004.
   - Conditions of Contract for Design, Build and Operate Projects: *The DBO Contract* (Golden Book) – provisional Edition.

5. Today, as a result of the FIDIC harmonisation work, the various FIDIC forms of contracts are used all over the world in numerous practical cases and represent approximately one third of the total number of the International Chamber of Commerce (ICC) litigations. In addition, they are recommended by many Multilateral Development Banks. This means that a lot of actors of the building industry representing a large number of experiences are familiar with these conditions.

6. Taking into account the numerous forms of contract set up by the FIDIC today, the Employer is faced with the crucial issue and also the responsibility to select the best appropriate form of contract in accordance with the type of works and services which are required by the project. Actually, in most of the cases, the Contractor has no other alternative than to accept the choice already made by the Employer in terms of type of contract; this means also that the Contractor must be able to identify, in the tender phase, the advantages and drawbacks as well as the consequences in terms of responsibility and costs, of the selected form of contract. A good guidance on the selection of the right form of contract (or the right Book) is given in the Introduction of the FIDIC Contracts Guide.

7. Because of the great variety of the FIDIC contracts, the author focused his approach in this article on the "Conditions of contract for Construction for Building and Engineering Works designed by the Employer - *The Construction Contract* – Edition 1999, (new Red Book)". Among the various FIDIC books, this is one of the most commonly used contract form in practical cases. Taking the main phases of a project as guideline, the author will present below some features regarding the implementation of these documents.

II FEATURES OF THE NEW RED BOOK

8. Although some contracts are still governed by the "old" FIDIC Conditions of Contract (Edition 1987 or before), most probably because the call for tenders had been launched before the year 2000, or sometimes because the Employer gains most of his experiences with these conditions, nowadays and in the future there is no doubt that the new Conditions of Contract (new Red Book) will be used with success, as they must be considered as an improvement of the old Conditions. The new Red Book has been established on the base of numerous practical experiences collected all over the world, in taking into consideration many sources of improvement as they were revealed by these experiences. In other words, the new Red Book is an updated version of the old Red Book.

9. As a matter of introduction it seems interesting to remind the name and the role of the main actors of a FIDIC contract; they are always identified by the same designation, i.e.:

- The "Employer": in most of the cases this is the owner (purchaser or client) of the work, once this has been successfully completed. The Employer is the principal of the contract.
- The "Contractor": this is the company in charge of carrying out the work according to the conditions of contract, the plans and the instructions set up by the Employer or his representative. The Contractor is the tenant of the contract.
- The "Engineer": he is not part of the Contract but he is appointed by the Employer and is therefore acting for the Employer. He is mainly in charge of the supervision and the administration of the contract. In addition, in some cases, he may also be in charge of the design on behalf of the Employer.
- The "Dispute Adjudication Board - DAB": this is the committee appointed by the Parties, in charge of prevention and resolution of dispute.

10. The main features of the FIDIC Red Book are summarised below:

- This is a standard form of contract.
- The work done is measured and payment is established according to the Bill of Quantities (BOQ).
- There is a clear allocation of the risks and responsibilities between the parties.
- Main responsibility for design lies with Employer or his representative.
- The Engineer is in charge of the administration and supervision of the contract. He is acting mainly by the means of notifications, variations and determinations.

- The General Conditions include a clause related to the "Unforeseeable Physical Conditions" whose consequences in terms of risk are to be bear by the Employer.
- The litigation clause proposes a clear procedure structured in three successive steps.

III THE AIM OF THE FIDIC FORMS OF CONTRACTS FOR CONSTRUCTION

11. The Conditions of Contract for Construction (new Red Book) are recommended for building or engineering works designed by the Employer or by his representative, the Engineer (or by another engineer), and where tenderers are invited on an international basis. Modifications may be required according to local jurisdiction, particularly if the Conditions are used on domestic contracts.

12. The Conditions are organised in such a way that the clauses which are considered to be applicable to many contracts and therefore generally applicable, are included in the General Conditions, while some clauses may vary according to the circumstances of each particular contract and are included in the Particular Conditions. For clarity purpose, both the General and the Particular Conditions have the same table of contents and the same numbering.

13. It is therefore recommended not to modify the General Conditions but rather to amend them if necessary, or to delete the clause which is of no application. In the preparation of the Particular Conditions, when amendments or additions are made it is also recommended to take great care to avoid any ambiguity or contradictions that might be created between the General and the Particular Conditions or between two clauses of the same document. The data specific to the project have to be included in the Appendix to Tender or, for technical matters, in the Specification.

14. In publishing *The Construction Contract*, the aim of the FIDIC was clearly to set up a contractual basis with respect to the rules of the open competition. In the Introduction of the *Guide to the Use of FIDIC conditions of Contracts (1989)* one can read the following statement:
"There are obvious advantages to using detailed contract provisions based upon a standard form of contract which holds a reasonable balance between the requirements and interests of the parties concerned and in particular allocates fairly the risks and responsibilities between the contracting parties."
"The use of standard conditions of contract will not only facilitate the successful completion of a contract but will, in all probability, result in lower tender prices, as tenderers will be familiar with the conditions that will apply under the contract. This implies that they will not need to make financial provision for contract conditions with which they are not familiar

and whose consequences they may have difficulty in assessing. The widespread use of standard conditions of contract also provides a stable basis for training and educating personnel responsible for contract management and avoids having to work with ever changing contract conditions."

Allocation of the risks

15. It must be emphasised that the whole process of construction is characterised by a transfer of the risks between the Employer and the Contractor just at the time of the signature of the contract. Actually the Employer and all his consultants bear all the risks in this first phase, i.e. the selection of the main goal, the determination of the requested final result, the quality of the design, the financing of the project, the selection of the appropriate "rules of the game" and finally the selection of the best possible contractor, in view of being able to manage the whole execution process with the greatest probability of success.

16. On the other hand, at the signature of the contract, the Contractor take over most of the risks as he signed a contractual obligation to execute a work and to reach a result, in respecting these "rules of the game". This transfer of risks must be operated in the best possible conditions of communication so that the Employer can be sure that his intentions are clearly understood by the Contractor and that the Contractor receive all necessary information to transform the objective of the Employer into a concrete result. In this respect the FIDIC Conditions represent in fact a valuable tool of communication as they propose a standard set of "Rules of the game", where a common language, common definitions and common procedures are to be used between the parties to the contract. In addition they are known and also recognised as such by the parties, prior to the beginning of any contractual relations between them.

Applicable law

17. According to clause 1.4 of the General Conditions, the Contract shall be governed by the law of the country (or other jurisdiction) stated in the Appendix to Tender. Therefore any international construction contract based on FIDIC Conditions has to be set up under the condition that all issues critical to the allocation of risks and determination of the scope, time and price have been fully assessed both under those Conditions and the applicable law (substantive law). In many cases the law of the place or seat of the arbitration (procedural law) is already decided in the Contract. It is also interesting to mention that some authors seem to recommend leaving the choice of the place of arbitration (and therefore of the procedural law) to the decision of the arbitral tribunal. In the literature, some articles recommend the use of the UNIDROIT rules as a substitute to applicable laws.

IV THE TENDER PHASE

18. The aim of the Employer in preparing the tender documents is without any doubt to get at the end a result, this means a work executed with the required quality, within the required deadlines and at the lowest possible but reasonable price with respect to the costs as they have been calculated by the successful Contractor. To reach this result, beside the quality of the project – good design, clearly drafted technical specifications, realistic programme, precise description of the prices in the bill of quantities and clearly established specific technical requirements – the Employer must also set up a contractual frame of high quality in order to master the proper implementation of the contract up to its full completion.

The role of the Employer (Cl.2)

19. As a matter of fact, a successful project is most probably the result of a satisfactory but complex communication process between the Employer and the Contractor. In other words, the challenge for the Employer is to create the best possible conditions in the tender phase, so as to allow the competitors to prepare the best possible offer in full knowledge of the requirements set up for the project. The Employer will play a capital role in selecting the appropriate form of contract, and in such a case he will be able to allocate all his human resources to manage the right implementation of the contract and to focus on the priorities instead of loosing time with contractual problems coming from non-understandable documents or with the interpretation of ambiguous conditions of contract. This is precisely one of the aims of the FIDIC Conditions to facilitate the task of the Employer and to provide an easily understandable structure to the future contract, when preparing the call for tenders.

The role of the Contractor (Cl. 4)

20. The aim of the Contractor is not only to win the competition but also, in such a case, to reach the required result, to satisfy the needs of his client, to gain a good image and a good reference on the long term and to get a positive financial result, i.e. a reasonable profit. The main challenge for the Contactor is to understand, with the highest possible degree of precision, the nature and the requirements of the work to be done, and, as a consequence, to be able to select the most appropriate method of execution and materials, which are key success factors for a competitive offer. This first condition is necessary but not enough as the Contactor also needs to get the most attractive pricing by limiting the uncertainties. In other words, in such a system, the Contactor is requested to include limited risks in his tender. In this respect, the FIDIC Conditions provide a helpful assistance to the parties as the allocation of the risks is clearly and fairly defined.

The role of the Engineer (Cl. 3)

21. The Engineer is appointed by the Employer and, except as otherwise stated in the Conditions, he is acting for the Employer. The Engineer has no authority to amend the Contract or to relieve either party of any duties, obligations or responsibilities under the Contract. The Contractor shall be

aware that any acts of Engineer, such as approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, etc. shall not relieve him from any responsibility he has under the Contract.

22. In addition to the administration and the supervision of the contract, one important task of the Engineer is to give instructions and to issue additional or modified Drawings to the Contractor, which are necessary for the execution of the Works or the remedying of any defects. The case, where an instruction issued by the Engineer constitutes a Variation, will be treated later in chapter V. A procedure has been set up in order to clarify the role of the Engineer, when the Engineer shall agree or determine any matter according to the Conditions:

- First the Engineer has to consult with each Party in the view to reach an agreement.
- If the agreement is not achieved, the Engineer shall make a fair determination, taking due regard to all relevant events and facts.
- The Engineer shall then give notice to both Parties of each agreement or determination.
- Each Party shall give effect to each agreement or determination. In case of disagreement the injured Party shall give notice to the Engineer, describing the event giving rise to a claim.

Priority of the documents (Cl. 1.5)

23. In any contract, the documents forming the contract have to be considered as a whole with strong relations between the various documents. Despite the fact that contradictions or ambiguity coming from the provisions of the various documents have to be eliminated, the priority of the documents has to be clearly set up for the purpose of interpretation. FIDIC suggests the following sequence:

a) the Contract Agreement,
b) the Letter of acceptance,
c) the Letter of Tender,
d) the Particular Conditions,
e) the General Conditions,
f) the Specifications,
g) the Drawings
h) the Schedules and any other documents forming the Contract. “Schedules” means the documents such as the Bill of Quantities, data, lists and schedules of rates and/or prices, completed by the Contractor and submitted with the Letter of Tender, as included in the Contract.

It is therefore important to underline that when facing an ambiguity or a discrepancy in the analysis of the documents, the Contractor should ask the Engineer for clarification or instruction before submitting his tender.

V THE EXECUTION

24. Once the letter of acceptance has been issued and the contract has been signed by the parties, the process of the execution of the work will start at the Commencement Date. This process is characterised by the fact that a lot of events may happen which will jeopardize the smooth running of the execution and will also have an influence not only on the result of the work but also on the contractual and financial relations between the parties. Many types of events may have an impact on the result, such as:

- project and design modifications
- new technical requirements
- new regulations or modification of the existing regulation
- new priorities set up by the Employer or by the Financial Institutions
- programme modifications
- change in technology
- value engineering
- new events requiring a decision according to the actual situation on site
- problems of manpower or even strikes
- delays of third parties and subcontractors
- climatic conditions
- unforeseeable events
- problems of supply, material, customs, transport
- etc.

Differences

25. All these events may lead to increase of costs, quality variations, programme modifications, possible delays, and are source of differences between the parties. In short, differences must be considered as normal and must not be treated as a bad illness. The key problem is how to settle differences in an appropriate manner to avoid that they become dispute and litigation. Fortunately in many practical situations, differences can be recognised early enough by the parties, then analysed and discussed by the Engineer and the Contractor and finally settled by the mean of an open and fair bargaining and the signature of a transactional agreement, at the satisfaction of both parties.

The contract manager

26. A key success factor for the right implementation of all contractual relations between the parties is the necessity to have an experienced “Contract Manager” both in the Contractor’s team and in the Employer’s team. This task must be considered as a full time job as these “Contract Managers” should master the whole contractual relations resulting from all documents, this means in particular:

- how to deal with the various provisions of the documents,
- the follow-up of the progress of the works on site (monthly reports and contemporary records),
- how and when any required notification should be issued,

- how and when variations should be issued,
- the follow-up of the key milestones or deadlines, including any revision of the programme,
- how to deal with possible delays, and how to prevent them if possible,
- if necessary, what type of acceleration measures should be implemented,
- how and when a claim should be issued,
- how to settle any additional cost,
- what should be done to prevent any dispute or litigation,
- etc.

Drawings (Cl. 1.9)

27. Taking into consideration that in most cases the drawings and the instructions will be issued by the Engineer it seems of high importance for the Contactor and for the Engineer to manage the production of these documents in the form of a specific planning with clear deadlines and milestones. The delivery of drawings and specifications by the Engineer to the Contractor in due time is a critical task, relevant for the organisation of the works and therefore for the respect of the planning by the Contractor. It must be emphasised that the costs calculated by the Contractor are based on production rates coming from his experience and which are relevant for the productivity on site.

28. The FIDIC Conditions specify that the Contractor is entitled to give notice to the Engineer whenever the Works are likely to be delayed or disrupted if any necessary drawings or instruction is not issued to the Contractor within a particular time which shall be reasonable.

Variations (Cl. 13)

29. Even if a project has been thoroughly designed and prepared before the launch of the call for tenders, it is very frequent that the Employer requires modifying his project or the specifications during the execution. It may also happen that the Contractor initiates his own proposal, e.g. to accelerate the completion in modifying the programme or the methods of execution, to reduce the costs or to improve the quality of the Works. In any cases, such modifications of the contractual conditions require a Variation.

30. The FIDIC Conditions provide that Variations can be initiated by any of three ways:

- The Variation may be instructed without prior agreement as to feasibility or price (urgent work)
- The Contractor may initiate his own proposals, which may be approved as a Variation
- A proposal may be requested in an endeavour to reach prior agreement and thereby minimise dispute.

It must be noted that Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate, either by an instruction or by a request for the Contractor to submit a proposal. On the other hand, the Contactor may also at any time submit to the Engineer a written proposal to improve the final result of his work.

31. Any variation may include:
    - changes to the quantities of any item of work included in the Contract (however, such changes do not necessarily constitute a variation),
    - changes to the quality and any other characteristics of any item of the work,
    - changes to the levels, positions and/or dimensions of any part of the Works,
    - omission of any work unless it is to be carried out by others,
    - any additional work, Plant, Materials or services,
    - changes to the sequences or timing of the execution of the Works.

32. In order to minimise the possible source of dispute, the way how a proposal shall be prepared by the Contractor as well as the way how a Variation shall be treated are described in the FIDIC Conditions in the form of specific procedures which have to be implemented by the parties. The Contractor shall execute and be bound by each Variation, unless he gives notice to the Engineer stating that he cannot readily obtain the Goods required for the Variation.

Unforeseeable physical conditions (Cl. 4.12)

33. Base on the fact that the Red Book holds a reasonable balance between the requirements and the interests of the parties and allocates fairly the risks, a specific clause treats the case of the "unforeseeable physical conditions". The adjective "Unforeseeable" is defined as meaning "not reasonably foreseeable by an experienced contractor by the date for submission of the Tender". The physical conditions are defined widely, so as to include natural sub-surface and hydrological conditions, natural and artificial physical obstructions, and the presence of chemical pollutants, for example. Physical conditions exclude climatic conditions at the Site.

34. When the Contractor encounters conditions which he considers to have been unforeseeable, he has to follow a specific procedure:

    a) he must give notice to the Engineer "as soon as practicable",
    b) he shall also continue executing the Works and,
    c) he shall comply with the instructions which the Engineer may give.

    The Contractor has to bear in mind that he has to describe the physical conditions and to set out the reasons why he considers them to be unforeseeable, so as to allow the Engineer to inspect and to investigate them, and to make his determination.

35. To the extend the Contractor encounters unforeseeable physical conditions and suffers delay and/or incurs Cost due to these conditions he shall be entitled to an extension of time for any such delay and payment of any such Cost. In this respect the word "Cost" means all expenditure reasonably incurred or to be incurred by the Contractor, including overhead and similar charges, but does not include profit. When making use of this condition, it is therefore necessary to identify the additional time and resources required, compared with those which would have been involved in the work if it had only comprised foreseeable physical conditions. The calculation of the Cost may include the cost of a work, of a material, of delays and/or of a service and is based on actual costs.

VI CLAIMS, DISPUTES AND ARBITRATION

Claims (Cl. 20.1)

36. It may also happen that a transactional agreement cannot be reached, either because the parties do not agree on the causes / responsibilities or on the quantum, or because the parties' representatives are not able to take a decision, for political, technical or economical reasons. In these cases, if the Contractor is looking for a reasonable compensation in terms of time and/or of money, he has no other choice than to prepare a claim in respecting the "rules of the game". This means that he has to formalise the difference in the form of a written document where he has to put all necessary explanations and proofs / contemporary reports and quantification in order to justify his request. A claim may be issued on the basis of contractual and/or legal grounds. In the first case, the prescriptions of the Red Book are applicable, in the second case, the prescriptions of the law of the Contact are applicable.

37. It is interesting to note that most of the important disputes in construction are the result of delay in the execution of the Works. The table below illustrates the major cause of claims and their frequency:

Origin of the claim:	**%**
Delays in completion	78
Employer's planning / coordination	20
Design changes	20
Delays of third parties, subcontractors	15
Delayed delivery on site	10
Planning errors	9
Increase of manpower, strikes	8
Climatic conditions	9
Acceleration	6

Source: Dr. Ing. H.W. Swoboda

38. In view of setting up a claim, the Contractor has to follow a strict procedure and also to respect the specific prescribed deadlines. Once the Contactor is aware (or should be aware) of an event giving rise to a claim he shall give notice of it to the Engineer within a deadline of 28 days. The non-respect of this deadline by the Contractor has heavy consequences as it will discharge the Employer from all liability in connection with the claim. In parallel the Contractor shall keep all necessary contemporary records to substantiate the claim. The next step for the Contractor is to send a fully detailed claim including full supporting particulars of the basis of the claim, within 42 days after he became aware of the event. If required, this deadline may be negotiated with the Engineer.

39. In practice, many contractors used to prepare their claim on the basis of additional quantities and prices without taking great care in the presentation of the relations of cause and effect which should support their claim. Such an approach is fare too limitative and may lead to a reject of the claim, on the basis either of insufficient justification on the grounds or of lack of clear explanations/justifications on the quantum. Therefore a claim has to be set up with a right methodology, backed by clear references to the contractual provisions aiming at justifying the relations of cause and effect and by a well understandable and realistic assessment of the quantum. The quality of the communication, i.e. pictures, schemes, drawings, tables, references and clear explanations, as well as the good presentation of the supporting evidences are most probably of major importance in the success of such a process.

40. Once the Engineer has received the claim, he has to respond with approval or with disapproval and detailed comments, within a deadline of 42 days. It is interesting to note that, regarding this matter, in the *"new Red Book" the* Engineer is no more playing the role of a first level of decision as it was the case in the *"old Red Book"*, but he is in charge to issue a "fair" determination; this means that he has to analyse the facts in the light of technical and contractual provisions, and to issue a report approving the grounds and the quantum of the claim or not. Another question, more or less frequent in practice, remains open: what happens if the Engineer fails to prepare and/or to issue his determination or if he doesn't respect the deadline? The only answer for the Contractor is actually to refer the case to the Dispute Adjudication Board, providing such a DAB has been previously appointed.

Disputes (Cl. 20.2 – 20.5)

41. In case of dissatisfaction and dispute, the FIDIC conditions provide a settlement process based on the referral of the case to a Dispute Adjudication Board - DAB, which has to be jointly appointed by the Parties at the date stated in the Appendix to Tender; this DAB comprises either one or (as in most cases) three suitably qualified persons ("the members"). Any party may refer a dispute in writing to the DAB for its decision. Within 84 days after receiving the reference the DAB shall give its decision with all necessary explanations. This decision will be binding on both Parties, which means that both Parties have to give effect to it unless and until it shall be

revised in an amicable settlement or an arbitral award. This process has in particular the advantages that the Works will not be interrupted or delayed by the dispute and that the dispute will be treated in confidentiality, with no delay and at a time when the persons, the facts, the documents and the evidences are still easily accessible.

Prevention

42. The DAB, being appointed at the beginning of the contract, must be able to follow the implementation of the contract and the course of the Works by the means of periodical meetings with the Parties on the site and the reading of the monthly reports issued by the Contractor. It must be emphasised that the role of the DAB is not only to act as a first level of settlement in issuing decisions but also to promote the prevention of disputes by offering to the Parties the possibility to ask for informal referrals. In practice, not surprisingly, the use of informal referrals allows the Parties to reach an agreement in 60 to 70 % of the cases without interrupting the progress of the Works on site and without loss of time and money. Another role of the DAB is also to facilitate the good communication and to keep the necessary level of confidence between the Parties.

43. If any party is dissatisfied with the decision, he has to give notice to the other party of its dissatisfaction within 28 days. In such a case the next step, according to the FIDIC conditions, will be for both Parties to attempt to settle the dispute amicably before the commencement of arbitration. However, unless both parties agree otherwise, arbitration may be commenced 56 days after the issuing of the notice of dissatisfaction, even if no attempt at amicable settlement has been made.

Arbitration (Cl. 20.6)

44. If no amicable settlement is reached, any dispute in respect of which the DAB's decision has not become final and binding shall be finally settled by international arbitration. The FIDIC conditions recommend using the Rules of the International Chamber of Commerce - ICC, but the Parties are free to agree on other rules. It must be underlined that in the arbitration proceedings neither party is limited to the evidences or arguments previously put before the DAB or to the reason of dissatisfaction given in the corresponding notice. Arbitration may be commenced prior or after the completion of the Works.

45. The FIDIC conditions also provide a provision when a party fails to comply with the DAB's decision. In such a case, in the event that neither party have given notice of dissatisfaction and the DAB's decision has become final and binding, the other party may refer the failure to arbitration.

46. Despite the fact that the FIDIC Conditions include a litigation clause which has to be implemented according to a specific procedure, it is evident that an Employer is free to adapt any FIDIC contract in using another system of prevention/resolution of disputes, such as:

- an Amicable Dispute Resolution – ADR procedure (e.g. ICC-ADR), as a first level of settlement,
- an arbitration procedure (e.g. ICC – Arbitration), as final settlement

or

- an Amicable Dispute Resolution – ADR procedure (e.g. ICC-ADR), as a first level of settlement,
- a state court procedure, as final settlement

Conclusions

47. The FIDIC Conditions of Contract are today recognised as a suitable contractual package for an international construction contract which provides a valuable neutral substitute to the national standard forms of contract and to the jurisdiction of national courts, when using arbitration. In addition the FIDIC Conditions may also be used, with the required modifications, on domestic markets.

48. As a matter of conclusion, the use the FIDIC Conditions will enable the parties to carry out international and national engineering and construction projects on the basis of clear contractual provisions and therefore with an increased probability of success. This can be illustrated by some major features of these Conditions, such as:
- A clearly structured contractual package including the General conditions, the Conditions of Particular Application and the Appendix.
- A reasonable balance between the requirements and the interests of the parties, as well as a fair allocation of the risks.
- A good communication tool.
- A clear procedure in case of claims, disputes and arbitration.
- A system used all over the world by a lot of actors of the building industry representing a large number of various experiences.

49. Practical experiences show that the challenge for Employers and Contractors in managing contracts is to avoid the loss of time and money which result from disputes arising in their performance. Such situations jeopardise their interests and often lead to a loss of reputation and to severe financial consequences for their business activities. In this respect, it must be underlined that most probably a well structured preparation and management of the contractual package is a first but important attempt in the way of the prevention of disputes.

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