A Practical Guide to Construction International Arbitration and Claims management

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ABSTRACT

Construction contracts include Arbitration as a global dispute approach normally involving disputes between contract parties from, either locally or from different nations frequently executing projects in different countries. An Egyptian contractor building an Islamic center in western Africa for the funder from Saudi Arabia as a project owner, may levy a claim for USD 2.0 million, for different causes and pursues Arbitration when the Employer is in default, such case constitutes an international arbitration case, where the Employer, Contractor and the project site are located in different countries. Over the past two decades it became normal to find mega projects in the middle east carried out by Chinese or European construction companies, as the world's economy has become more globalized, many construction companies are working internationally. Recently, due to the stagnant in the Oil and Gas market, disputes in the construction industry have become a feature for many projects, more complicated and rigorous, as the contract parties had become unable to perform their contractual obligation. The projects went into delays caused by the Employer inability to pay for neither the Contractor nor the Engineer, Consequently the Engineer may cease the service and the Contractor starts pacing the work or notifies the Employer of termination in some cases.

Though arbitration is applicable in all construction contracts, it is not appropriate for all project parties, in all projects, it may cause shortcomings on the claimant situation, if not properly managed and prepared before deciding to activate the contractual Arbitration clause as a dispute resolution mechanism.

Different Contracting companies request the insert in the dispute resolution clause , the Arbitration as a contractual approach, to avoid the litigation mechanism with its inherent complications and disadvantages. Arbitration is considered as the most preferred dispute resolution approach for international companies, where the companies negotiate the Arbitration procedures, place, duration, the panel, governing law, specific arbitral institution rules and etc.

The project situation, where multiple claims are potential and the contract parties may seek an Arbitration as a crystalized case that demonstrates core discussions and interests, is to be reviewed and anatomized in this paper.

Key Words: Arbitration- Construction-Claims – FIDIC.

1. Introduction

In recent times, the construction industry suffered a severe downturn, and the number of claims increased with a significant ratio between the contract parties, projects vendors, and suppliers, and even the projects designers and consultants. Consequently, the claims experts, contracts managers, legal consoles, and Arbitrators have become the subject matter involved in managing and resolving the claims and disputes between different parties.

Due to the current tide projects budgets and the doubt of completing the projects between the contract parties, vendors, and suppliers, the construction industry contracts have become a rigor and complicated endeavor while the existing projects need a prudent proactive management in order to close the projects in the win-win situation. If disputes between contract parties start to generate, it is expected to get multiple events causing a claimant to levy multiple claims. In the projects of multinationals parties and project site, are subjected to proceed to international Arbitration for dispute resolution, so the prudent parties should practice high care to settle all or most of the claims before starting the international Arbitration mechanism to resolve the disputed claims. During the start of an Arbitration is process between two contract parties, such as a project Employer and the Contractor, some quarries appear to be viable, mainly include the nature of the potential claims by either the Employer or the Contractor, also, whether it is practical to add new claims to the submitted list of claims. Another quarry may be highlighted, when more than one proceedings commence for claims between the same 2 parties; is it practical and cost efficient?. It will be also discussed in the following sections.

2. Construction claims

The Federal facilities council technical report, Washington[1], No. 149, 2007 defined "CLAIM" as: A claim is a request for compensation not anticipated in the terms of the original contract. The dictionary defines "claim' as 'an assertion of a right' and, under standard building contracts, the word conveys 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 used in respect of the contractor's applications for an award of extensions of time"[2].

[1]Project Owners Proceedings Report, 2007, www.Nationalacademies.org/ffc. Reducing Construction Costs: Uses of Best Dispute Resolution Practices

[2]David Chappell, Derek Marshall, Vincent Powell-Smith, Simon Cavender, Building Contract Dictionary ,Third Edition, the Estate of Vincent Powell-Smith 2001.

2.1 Construction Claims Types

Construction claims are categorized according to different classifications, basically, apart from claims under statutory law, for the purpose of the paper objective to discuss the construction international Arbitration in the case of different claims between the contract parties, this paper will discuss the claims based on the legal base and the contract parties liability.

2.1.1 Claims Under Legal Base

Construction claims may be initiated under one of the four legal and one non-legal perception. The five claims categories are demonstrated in table 1. It shows the base for such claims; A claim under a particular contract clause; an event may be a breach of a particular provision in the contract and no specific remedy in the contract; 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; a claim under the case before signing a contract or the contract is void, is known as quantum meruit claim; and Ex gratia claim (out of kindness)which is the claim appears in case of no enough justification, no legal provisions.

Table 1: Types of Claims in Construction projects(Category I)

No/ code	Claim Category.*CI*	Description	Remarks
1 ***C1I***	**contractual claim**	A claim under a contract clause entitles a part to claim when a certain event occurs	Delay in review for shop drawings entitles the contractor for EOT and additional cost
2 ***C2I***	**A claim arising out of or in connection with the contract**	No particular clause- no designated remedy- the claimant has to establish the claim under the criteria of the applicable law	Delay in payment/monthly invoices, where no explicit clause.
3 ***C3I***	**A claim under the principles of the applicable law**	Arise either by a contract party or against third party, if successful claim, it may result in an award of general damages., depending on the circumstances.	
4 ***C4I***	**Quantum meruit claims**	Where there is no express agreement, there is an agreement to pay a reasonable sum, and in case of quasi contract,	Letter of intent is the frequent cause of this claim category
5 ***C5I***	**Ex gratia claim** meaning out of kindness	Contractor's claim with little chance of success, depending on the Employer's vision for other benefits	An Employer might pay ex-gratia payment to secure the contractor insolvent, instead of termination

2.1.2 Claims under contract party liability

Construction claims liability mainly lays under the liability of a contract party, either under the liability of the Contractor or the Employer, Figure 1. demonstrates the claims liability and type of potential claims for every contract party, category

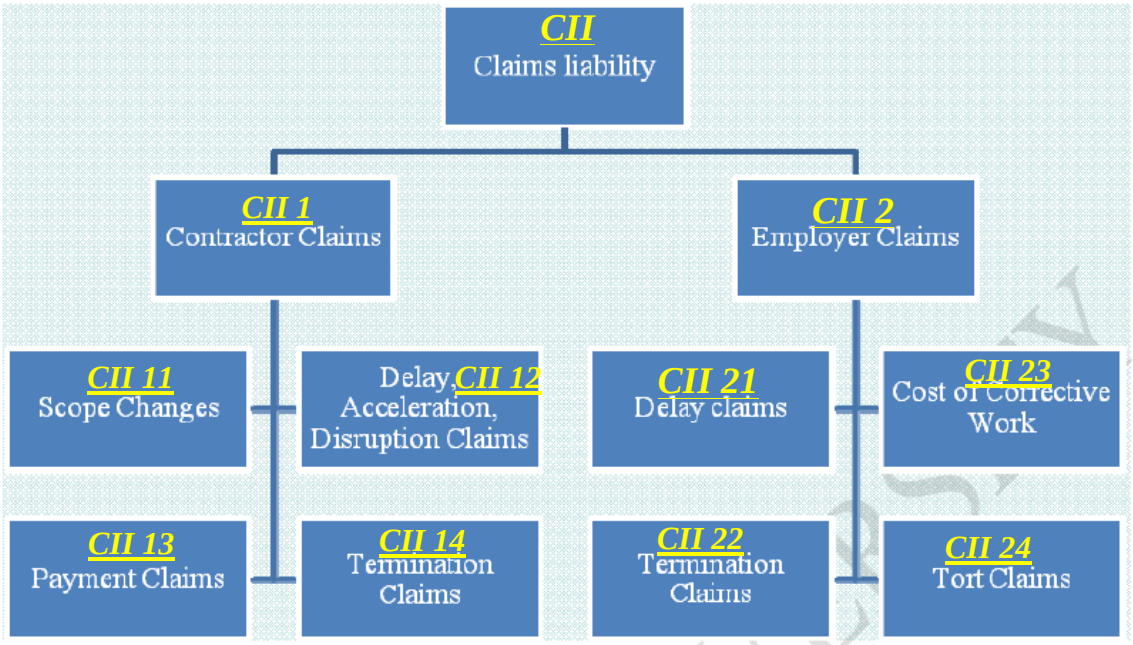

Figure1: Construction Claims Liability and coded types

2.1.3 Claims categories interaction

In this research, the cases of multiple claims in the same Arbitration proceeding for a specific contract and two contract parties are the main course of analysis and review. A simple claims category matrix is presented in table 2 in order to demonstrate the potential claims by each contract party and its interaction inherent with other claims in the highlighted 2 categories above mentioned (I and II).The interaction matrix includes 5 rows of category I and 8 columns representing category II, it constitutes the total of potential the potential cross interaction between every 2 claims types. For example, under the Red FIDIC1999, category C I1 the Employer may present a termination claim CII 22 (Sub-Clause 2.5 and Sub-Clause while the Contractor is claiming for payment delay C II 13 and the event is under C I,

Contractual claims category

The normal claims practice accounts for more complicated events, such as the case of compiling a Contactor claim performing works under letter of intent, design and technical proposal, category C4I, (Quantum meruit claim) and the Employer is defending through a counterclaim for inappropriate performance while providing incomplete proposal of an electrical sub-station that restricted the Employer from performing the appropriate technical evaluation. Such cases including multiple claims between the contract parties, when referred to international Arbitration, for example under the Red FIDIC 1999, Sub-Clause 20.6, Arbitration “Unless settled amicably, any dispute in respect of which the DAB's decision (if

any) has not become final and binding shall be finally settled by international Arbitration", those cases are considered rigorous Arbitration proceedings and need prudent Arbitrators to carry out the roles, in addition the contract parties should be organized with the supporting documents to prevail the proper award.

Table 2: Claims Categories and Types Interactions

Claims Category interaction		Category C II							
		(Contractor) Category C II 1				(Employer) Category C II 2			
		C II 11	CII 12	CII 13	C II 14	CII 21	CII 22	CII 23	CII 24
Category C I	contractual claim C1I	1	1	1	1	1	1	1	1
	A claim arising out of or in connection with the contract C2I	0	1	1	1	0	1	1	1
	A claim under the principles of the applicable law C3I	1	1	1	1	1	1	1	1
	Quantum meruit claims C4I	0	0	1	1	0	0	0	0
	Ex gratia claim meaning out of kindness C5I	1	1	0	0	0	0	0	0
Potential interactive claims		26 claim type							
Idel/ netural claims		14 type							

1 is applicable/relevant claim **0 irrelevant claim**

3. Arbitration Overview

Latham and Watkins[3] guide to International Arbitration, 2014 defined Arbitration as a private form of obligatory dispute resolution, conducted before an independent tribunal, which originates from the agreement of the parties but which is regulated and enforced by the state. .Arbitration is a professional and agreed course between the disputed parties and is commonly practiced as a dispute resolution mechanism in domestic and international disputed contracts and projects. Arbitration as alternative to litigation has many advantages such as; flexible process; confidential, binding decision, specialized Arbitrators, parties can elect the governing law of the dispute, seat of arbitration, arbitration institution, and etc. Additional significant legal and procedural advantages can be achieved through proper and diligent choices by the parties. Arbitration and mediation generally were implemented prior

[3] Latham & Watkins LLP, Guide to International Arbitration, 2014, Boston, USA.

litigation and the Islamic communities as it is complying with the communities traditions and culture to settle the disputes in the family wise by the disputers consensual.

In Indian, Greece, and China, many Arbitration and mediation cases were recorded in the far history. The International Arbitration continued to be implemented in the earlier history, as different agreements became to be normal in the international trades and relationships, which required such smooth mechanism of dispute resolution approach. Within the last 50 years, the international societies had considered the International Arbitration as the primary approach to resolve the rigorous, transitional, and commercial dispute. though Arbitration is not always for all cases and or different disputed parties, each case should be considered and evaluated individually for the decision to the Arbitration choice. When the dispute arises it becomes too late reach an agreement between the disputers to reach an agreement about how to resolve the dispute, so it is recommended to draft the Arbitration contractual clause in the expert manner and by contracts experts.

Two cases are the most important to encourage the parties to provide the Arbitration provision during the contract drafting, the first is when the contract parties are in different jurisdictions or if the contract scope of work might generate to complex technical issues and disputes. The advantages of Arbitration encourages the practitioners to elect the Arbitration for their dispute resolution processes as the Arbitration indicates the following advantages over the court procedural; Enforceability; Impartiality, Technical expertise, and experience of the Arbitrators, Confidentiality, Flexibility and Simplicity, Selection of Arbitrators, those advantages are the main items while time and cost are depending on the case complication and availability of documents and each party suffered circumstances.

Here the parties are encouraged to seek legal advice from their lawyers as to suitable arbitrators and the advantages of Arbitration in the particular dispute. The single Arbitrator is appointed by agreement between the parties in a consensual manner, or, if no agreement is reached within the fixed time, the Arbitrator will be appointed by the chosen appointing authority or court. In the case of three arbitrators are to form the tribunal, two of the Arbitrators are usually nominated by the parties, and the president is to be selected by the two selected Arbitrators in a mutual consent or if no agreement reached, to be appointed by the appointing authority or the case relevant court. The Arbitrator needs not to be neither lawyers nor a specific subject matter expert, for complicated, high costly international disputes, lawyers are recommended. Most of the Arbitration laws does not require specific qualifications or certificates for the Arbitrators, merely it is subject to the consensual of the disputed parties.

The course of identifying the appropriate Arbitrator by each party needs the legal advice by the lawyers to provide the actual required qualifications for the Arbitrator/s, such as; awareness with the governing law and the valid arbitration rules; the nominee's background; and experience, familiarity in the pertinent industry; the language and the arbitration seat. The Arbitration tribunal shall be formed in accordance with a proper drafted contractual clause to ensure most effective alternative dispute resolution mechanism.

3.1 ICC and International Arbitration in Red FIDIC 1999

The Red FIDIC provides the International Arbitration process as a dispute resolution mechanism if a disputed case had been settled neither by DAB nor further 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 International Arbitration will have to get a thorough review of the DAB presentations and negations carried out by the parties during the DAB procedures, and the DAB ' s decision explanations. Before electing to refer a dispute to international arbitration under the International Chamber of Commerce (ICC), the referring party will have to ensure a proper additional submission and evidenced presentation to supersede the DAB reasoning which he didn't accept. The Contractor may need to consult his legal console for legal advice in the complicated events, which may include legal aspects and concerns. 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:

i. Thee Arbitration shall implement rules and procedures of the ICC (International Chamber of Commerce), it may commences during the project course or after the work completion.
ii. According to ICC rules, the Arbitration panel consists of 3 Arbitrators.
iii. As per sub-clause 1.4, the arbitration will be in the language for communications
iv. 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.

3.2 International Arbitration in construction under NEC 3

The New Engineering Contract NEC 3 Option W1, clauses 1.1, 1.3(1), 1.3(2) and 1.3(9) obliges the parties primarily to refer any arising dispute in the first instance for the verdict by an adjudicator[4], the parties are requested to maintain the work progress until the Adjudicator has notified the Parties of his decision, W 1.3(9), by then a party can refer any dispute under or in connection with the contract to the tribunal (arbitration or litigation as nominated by the parties in the contract agreement), W1.4(1). The party can refer the dispute to the tribunal if he is frustrated with a decision of the Adjudicator, the referring process by the dissatisfied party may be only within four weeks of the notification of decisions notification. The tribunal powers and processes for the dispute is managed under W 1.4(4) "The tribunal has the powers to reconsider any decision of the Adjudicator and review and revise any action or inaction of the Project Manager or the Supervisor related to the dispute. A Party is not limited to the tribunal proceedings to the information, evidence or arguments put to the Adjudicator".

[4]Nicholas Gould, NEC3: The Construction Contracts of the Future?8 February 2007, Singapore, Society of Construction Low
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The NEC 3 Arbitration management provides shades on the advantages and the importance of International Arbitration.

3.3 Drafting The Arbitration Clause

The consensual agreement to arbitrate can enable the project parties to oversee and control the process. A properly drafted dispute resolution clause affords confidence to the contributors, as the project parties become aware of the dispute resolution mechanism prior to a dispute. The American Association of Arbitration (AAA) provides some guidance for assisting the drafters in providing practicable clauses for arbitration[5], in addition to a checklist for the most important concerns a contract drafter needs to consider while drafting the dispute resolution clause(DR).

3.3.1 Drafting Guidance for DR

Diligent contract drafting practitioners implements predefined procedure in drafting the contract with a checklist to review and cross check the efficiency of their implemented steps and drafting guidance, a simple sub- heck list may be prepared for the dispute resolution (DR) clauses in order to cover all potential critical concerns in such clauses, such as that concerns provided by the (AAA) which this research compiled and included in a proposed checklist with non-opened questions, for simplifying purpose and the list is demonstrated in tabulated form in Table 3.:

Table 3: Dispute Resolution Clause Checklist

Checks for the proposed DR clauses			
S	**Description**	**Y**	**N**
1	Are all potential disputes covered?		
2	Is specific dispute covered?		
3	Specifies Arbitration clearly no else?		
4	The clause signed by all parties?		
5	Yields a binding decision?		
6	A panel of one or three arbitrator(s)?		
7	Identifies place of Arbitration?		
8	Identifies the governing law?		
9	Procedural Arbitration OR Ad-Hoc?		
10	Time frame of the Arbitration?		
11	Arbitrator qualifications?		
12	Cost sharing between the parties?		
13	Arbitration Milestones?		
14	Customized concerns?		

[5] AAA. Drafting Dispute Resolution Clauses, A Practical Guide, www.adr.org.

I. CIArb. Drafting Guidance

The Chartered institute of Arbitration[6], dispute appointment services department provides a sample clause for different dispute resolution mechanism, in the case of Arbitration it proposes the following clause to be consistent and practical in different contracts: "Any dispute or difference arising out of or in connection with this contract shall be determined by the appointment of a single arbitrator to be agreed between the parties, or failing agreement within fourteen days, after either party has given to the other a written request to concur in the appointment of an arbitrator, by an arbitrator to be appointed by the President or a Vice President of the Chartered Institute of Arbitrators. "This sample clause has proven highly effective in different disputes.

II. "AAA" Drafting Guidance

The AAA provides boilerplate clauses approved by the AAA for general commercial applications:

a) in case of future potential disputes the parties can insert the following clause into their contracts " Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. (the language in the brackets proposes likely alternatives). The proposed clause may be used in part or full based on the parties consensual and case requirements, any modifications requested by one party and accepted by the other party can be added to fulfill the Arbitration purpose and the law.

b) In the case of Arbitration of present disputes can be managed by applying the following clause: " We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial [or other] Arbitration Rules the following controversy: [describe briefly]. We further agree that a judgment of any court having jurisdiction may be entered upon the award.

c) In the construction contracts the AAA proposes[7], the following clause to be inserted into the construction contracts: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s)may be entered in any court having jurisdiction thereof".

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[6]Chartered Institute of Arbitration http:// www.ciarb.org/guidelines-and-ethicsguidelines/practice-guidelines-protocols-and-rules

[7]AAA. Alternative Dispute Resolution (ADR) for Construction Contracts, www.adr.org/construction, July 1, 2015

III. "ICC" Drafting Guidance

The International Chamber of Commerce, ICC offers typical arbitration clauses, that can be used and inserted in the contracts by parties with or without amendment as the case may be or required by any valid law or according to the disputers consensual. The proposed clause by ICC is as follows: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the ICC by one or more arbitrators appointed in accordance with the said Rules."

3.3.2 Optimal DR. Clause Conditions

Prudent contract drafting implies some additional conditions into the dispute resolution clauses, that the parties may also opt to include explicitly in the arbitration clause:

- the law governing the contract;
- the number of arbitrators;
- the place of arbitration; and/or
- the language of the arbitration.

Generally, the above-mentioned items if stipulated in the contract it is possibly adding consistency and attainability to the Arbitration process as a hall.

4. Conclusion

The construction claims domain has rigorous tasks and includes different categories, that concludes a very complicated situation in the construction projects due to the interaction between different contract and legal base categories. The construction Arbitration domestically and internationally, has become the favorable dispute resolution mechanism for several advances, not limited to; finality and confidentiality. Application of Arbitration in different standard forms of contracts was discussed and examples for Red FIDIC 1999 and NEC 3 were demonstrated. Dispute resolution clause was scrutinized in different institutional recommendations for the Arbitration clause to be adopted in the construction contracts to maintain the proper dispute resolution mechanism. The International Arbitration in construction disputes under the Red FIDIC 1999 and NEC3 shall follow a predefined procedure, and follows the stipulated time bars as required in the sub-clause 20.1of the FIDIC and W1.4(1), NEC 3. The Arbitration clause management as discussed in different samples adopted by; CIARB, ICC, AAA, can guide the Construction Arbitration Process. The construction project parties should plan for avoiding , mitigating the impact of construction disputes in the first instance, if escalated to a resolution board or mechanism, the construction Arbitration to be properly planned and inserted in the contract agreement during the drafting phase, preferably to be under the umbrella of an Arbitration Body, Such as, AAA, CIARB, ICC, Saudi Arabian Arbitration law, Cairo Regional Arbitration Center, etc.

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