

## Construction Insights

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### FIDIC forms of contract, multi-tier dispute resolution and interim relief against bond calls

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#### I. Introduction

The International Federation of Consulting Engineers (commonly known as “FIDIC”)<sup>1</sup> publishes standard form of conditions of contract which are widely used for international construction contracts, recognized as balanced forms of contract. Parties in the construction industry secure risks through specific instruments, such as bank guarantees – bonds. Often disputes arise in relation to bond calls and the parties, especially the contractor, are called to consider the available options in defending against potential forfeiture. This article provides an overview of some general aspects of the FIDIC forms of contract and its multi-tier dispute resolution mechanism, as well as the available ways through which a contractor under a FIDIC contract can challenge a bond call by the employer.

#### II. Fidic forms of contract and multi-tier dispute resolution mechanism

FIDIC forms entail a special contract structure and some special characteristics that make them useful and capable of being used worldwide by parties of different nationalities in any legal jurisdiction. The forms have mainly a common law background, although some of its features may be influenced by civil law.<sup>2</sup> It is also supported that, although some FIDIC concepts or clauses originating from common law are unknown or differently regulated in some other civil law jurisdictions, they can finally lead to the same legal and contract law principles and in some cases in the same results.<sup>3</sup> The fundamental importance of the words of the contract itself (contract is the law of the parties), and thus of the FIDIC forms, is effectually reflected on the following statement about a debate on the existence of *lex constructionis*:<sup>4</sup> “Finally, deep in the night, with no one else around, most lawyers in their heart of hearts will admit – the contract usually decides the issues, despite what the law is”.<sup>5</sup>

<sup>1</sup> Originating by its French name “*Fédération Internationale Des Ingénieurs-Conseils*”.

<sup>2</sup> FIDIC – A Guide for Practitioners, Axel-Volkmar Jaeger, Gotz-Sebastian Hok, 2010, p. 99, 102.

<sup>3</sup> FIDIC - An Analysis of International Construction Contracts, Wolfgang Rosener, Gerhard Dorner, Kluwer Law International, 2005, p. 125.

<sup>4</sup> Construction and FIDIC authors are wondering whether there are universally accepted principles of

construction law, a “*lex constructionis*”, and what such lex would consist of, given that there are many differences between the legal jurisdictions in the use of FIDIC contracts, see FIDIC Contracts in Europe - A Practical Guide to Application, edited by Donald Charrett, 2023, Donald Charrett, p. 11 et. seq.

<sup>5</sup> FIDIC Contracts in Europe - A Practical Guide to Application, p. 12. FIDIC - An Analysis of International

In addition, FIDIC has identified which contractual principles of each form FIDIC considers to be inviolable and sacrosanct. These principles are referred to as the “*FIDIC Golden Principles*” (GPs).<sup>6</sup> The Golden Principles also provide guidance on how to modify the General Conditions in the Particular Conditions.

However, the effect of the governing law of the contract should not be underestimated, even in the FIDIC standardized contractual context.<sup>7</sup> Parties must keep in mind to get proper legal advice in advance to ensure that FIDIC terms comply with or/and are consistent with the relevant governing law of the FIDIC contract.

Construction projects entail an extremely large matrix of risks and hazards giving rise to claims and disputes in relation to time, money and other reliefs. FIDIC is keeping a close eye on and enhancing the procedures that are the most effective to deal with such risks and claims. At a very early stage FIDIC has adopted the concept of alternative dispute resolution.<sup>8</sup> In this respect, FIDIC also adopts a multi-tier dispute resolution mechanism aiming at avoiding or resolving disputes as early as possible, even during the implementation phase of a project.

Dispute boards play a pivotal role in this process<sup>9</sup>. FIDIC Books recommend dispute adjudication as a regular means of dispute resolution before recourse to arbitration. Golden Principle 5 provides that “*Unless there is a conflict with the governing law of the Contract, all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.*”

FIDIC’s approach is that an independent and impartial DAB/DAAB plays an important role in resolving disputes under a fair and balanced contract.<sup>10</sup> The most effective dispute boards will be beneficial to the parties in avoiding disputes and when this is not possible to engage in the expeditious, efficient, and cost-effective resolution of these disputes.<sup>11</sup>

However, some FIDIC users disregard the importance and the advantages of a dispute adjudication board and attempt to avoid such adjudication through various ways.<sup>12</sup> As it is noted by FIDIC regarding dispute avoidance, parties either are not aware of the dispute avoidance function of the dispute board or underestimate the value of appointing a board at

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Construction Contracts, Robert Knutson, Kluwer Law International, 2005, xix.

<sup>6</sup> FIDIC Golden Principles (2019), p. 6.

<sup>7</sup> In this respect see also indicatively, [FIDIC Construction Contracts and Arbitration: The Role of Dispute Adjudication Boards and the Importance of Governing Law](#), Alexandros Tsirigos, Evi Georgiadi, Tasos Kollas, 26 September 2017, Kluwer Arbitration Blog.

<sup>8</sup> Since 1995 the Orange Book provides Dispute Adjudication as a regular feature of dispute resolution. See FIDIC – A Guide for Practitioners, p. 393.

<sup>9</sup> FIDIC Dispute Avoidance and Adjudication Forum, Practice Note I, Dispute Avoidance – focusing on dispute boards, Issue no.1, version 1, 2023, p. 9, par. 2.

<sup>10</sup> FIDIC Contracts in Europe - A Practical Guide to Application, p. 51.

<sup>11</sup> FIDIC, Practice Note I, Dispute Avoidance – focusing on dispute boards, Issue no.1, version 1, 2023, p. 9.

<sup>12</sup> See in this respect, FIDIC – A Guide for Practitioners, p. 407-408.

an early stage, basically to avoid additional costs. The experience though has shown that the advantages and benefits of appointing a dispute board often outweighs the costs involved.<sup>13</sup>

### III. Bond calls and interim relief

FIDIC forms include a number of sample forms of securities, attached as an appendix. As already noted, construction projects entail various and significant risks which are allocated between the parties. Thus, the participants (more often the contractors) in a construction contract secure risks through further specific instruments, such as letters of credit and bank guarantees – bonds. In the international construction industry, the bank guarantee is a popular instrument that appears in most standard forms of contracts in large construction projects. It is based on the principle that the bank will pay to the contractor or employer at their request -usually on *first*

*demand*- a pre-agreed sum that will compensate adverse implications of the failure to act or of defective performance by either of the parties should the contractor or the employer fail to meet their obligations under the contract.<sup>14</sup> Given that disputes arise very often in construction projects, bond calls are often disputed as well.<sup>15</sup>

In the context of a FIDIC contract and under a DAB procedure,<sup>16</sup> the contractor has in principle three options in seeking to defeat a first-demand bond call by the employer and seek protection under an interim relief through: (a) the DAB, (b) the emergency arbitrator (or the arbitral tribunal) and (c) the state courts. Such requests fall in principle under the category of interim relief of preserving “*status quo*”.<sup>17</sup>

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<sup>13</sup> FIDIC, Practice Note I, Dispute Avoidance – focusing on dispute boards, Issue no.1, version 1, 2023, p. 10, par. 7.

<sup>14</sup> International Construction Contract Law, Second Edition, Lukas Klee, John Wiley & Sons Ltd, 2018, p. 703.

<sup>15</sup> Regarding the enforcement of bond and guarantees, see a very useful summary in International Comparative Legal Guide, Construction & Engineering Laws and Regulations Bonds and Guarantees in the Construction Sector 2023, chapter “Bonds and Guarantees in the Construction Sector” published at [www.iclg.com](http://www.iclg.com), David Nitek, Nick Downing, Becky Johnson, Noe Minamikata, par. 5.

<sup>16</sup> FIDIC, Practice Note I, Dispute Avoidance – focusing on dispute boards, Issue no.1, version 1, 2023, par. 5, provides a very useful summary in this respect: “*FIDIC introduced the standing dispute board, with dispute avoidance function, in 1995 with the publication of the FIDIC Orange Book. In 1996, FIDIC published a supplement to the FIDIC 1987 4th edition, which adopted a standing dispute board. Then followed the*

*FIDIC 1999 Red Book and a slightly enhanced dispute avoidance role in the Pink Book. In 2008, the Gold Book introduced a separate Sub-Clause dedicated to dispute avoidance in Sub-Clause 20.5 and still more prominence was given to dispute avoidance in the 2017 Forms, which is maintained in the 2022 Reprint. In 2017, there was an addition of an “A” for Avoidance, making the ‘DAB’ a ‘DAAB’ and it became mandatory for the parties to appoint a standing DAAB across the 2017 FIDIC Rainbow Suite, maintained in the 2022 Reprint. In addition, FIDIC rendered the importance of the appointment of a dispute board as one of its Golden Principles. The World Bank in their Particular Conditions (COPA), which supplement the FIDIC General Conditions of 2017 Forms as Reprinted in 2022, went one step further by making the appointment of the standing DAAB a condition precedent to the commencement of the Works.”.*

<sup>17</sup> See also ICC International Court of Arbitration Bulletin Vol. 25 No. 1, *Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*, Andrea Carlevaris and José Ricardo Feris.

## (a) Dispute Adjudication Boards (DAB)

First, interim relief preventing a bond call can be granted by a decision of a DAB. For example, a dispute adjudication agreement under the FIDIC 1999 Red Book empowers the DAB to decide upon any provisional relief such as interim or conservatory measures.<sup>18</sup> The matters of dispute between the contractor and the employer often relate to engineer's determinations under the contract and employer's claims against the contractor; in case such matters are submitted for adjudication before the DAB, the contractor may argue that there is an imminent risk that the employer will call the Performance Security to effect settlement of sums payable under it even before the DAB issues its decision on the merits.

Thus, following a request of the contractor, the DAB is empowered to grant an interim relief based on which the employer may be temporarily barred from calling the bond prior to the issuance of the DAB's decision on the dispute referred to it. This option is often neglected by contractors and practitioners, although it may prove extremely effective.

## (b) Emergency arbitration or interim measures by the tribunal

ICC Rules of Arbitration (the "ICC Rules")<sup>19</sup> are by default or commonly used in FIDIC contracts. According to article 29 of the ICC Rules, a party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V

of the ICC Rules (the "EA Rules"). A party wishing to have recourse to an emergency arbitrator pursuant to Article 29 of the ICC Rules shall submit its Application for Emergency Measures to the Secretariat Pursuant to Article 29(2) of the ICC Rules; the emergency arbitrator's decision shall take the form of an order.

Potential disadvantages of the emergency arbitration process may arise in the context of bond forfeiture. If the interim measure is requested to be granted against the issuer of the bond, the issuer would not be bound by the arbitration clause unless the bond includes an arbitration clause. As a result, the emergency arbitrator would lack jurisdiction to order the issuer accordingly. In addition, according to Article 6 (1) of the EA Rules "*The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days from the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.*". This requirement may create difficulties as the relevant party may not be ready to submit a request for arbitration, or the main dispute (under which the interim relief is requested) may be already pending before the DAB for adjudication. In the last case, it may be appropriate for the parties to have recourse to the DAB.

In addition, Article 28 of the ICC Rules provides that unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it

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<sup>18</sup> Sub-Clause 20.4 and Procedural Rules Annex appended to the General Conditions of the Dispute Adjudication Agreement, paragraph 8 (g), FIDIC 1999 Red Book.

<sup>19</sup> ICC Rules of Arbitration entered into force on 1 January 2021.

deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate. A bond call can be challenged also within the framework of the said procedure.<sup>20</sup>

### (c) State courts

An interim relief regarding a bond call challenge can be obtained also from local courts in the jurisdiction of the issuer or/and the employer based also on the relevant governing law of the contract.

In this respect, Article 28 (2) of the ICC Rules provides that before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any

measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

Recourse to state courts would be in principle necessary in cases where the issuer of the bond is a third party not bound by the arbitration clause. Depending on the nature of the interim relief being requested, recourse to DAB or emergency arbitrator or arbitration may not be sufficient as the DAB or the arbitrator do not have the power to order a third party, such as the bank. In such cases, recourse to state courts would be appropriate.<sup>21</sup>

### IV. The Greek perspective

In Greece, there are no industry standard forms of private construction contracts. The use of FIDIC forms of contracts is not very common. However, especially where a contracting party is a foreign investor or a state-controlled entity, FIDIC forms may be used in major, or industry large-scale, projects based on freedom of contract principle or as benchmark for the

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<sup>20</sup> See an order of the ICC International Court of Arbitration dealt with a bond call challenge by a contractor under Article 28(1) of the ICC Rules in *General Electric International Inc. and Mytilineos SA (formerly Metka SA) v. Société Algérienne de Production de l'Electricité*, ICC Case No. 25317/DDA. The contractors (claimants) were threatened with a call on bank guarantees by the respondent (employer) in the event that the contractors do not accept an amicable settlement agreement set by the respondent and the termination of the ICC arbitration proceedings. The tribunal granted the claimants an interim relief based on which -among others- ordered

the respondent to (i) withdraw, with immediate effect, any claim for payment submitted to the bank under the performance guarantee and to instruct the bank not to make the requested payment until the Court of Arbitration has ruled on the merits of the case, or in the alternative, to return to the bank the amounts for which it has been credited and (ii) keep the Court of Arbitration promptly informed of the full implementation of the order.

<sup>21</sup> GAR, *The Guide to Construction Arbitration*, Fifth Edition, Chapter 14, Bar & Karrer Ltd, p. 244.

formulation and negotiation of construction contracts.<sup>22</sup>

Parties in private construction contracts are free to agree on the dispute-resolution procedure applicable to the dispute. Disputes are resolved in principle by litigation with recourse to the national courts or by (domestic or international) arbitration. Alternative forms of dispute resolution, such as mediation or adjudication by expert, may also apply. Under the Greek legal system, there is no statutory adjudication process in construction contracts, nor is it common place to use standard industry practice adjudication process, such as the DAB under FIDIC contracts.<sup>23</sup> However, as a matter of contract, parties are free to agree on a relevant adjudication procedure and/or an expert determination process, subject to the provisions of mandatory law, and provided that the rights of access to justice and judicial protection are not violated.<sup>24</sup> To the best of our knowledge there is no publicly available information regarding bond call challenges or requests for forfeiture of a bank guarantee under a FIDIC Contract governed by Greek law.

In terms of state court intervention, under Greek law, the forfeiture of a first demand bank guarantee will occur if the conditions set out in the text of the bank guarantee are fulfilled; defending against bond forfeiture would be challenging.

Yet, it is supported -based on the prevailing position in theory - that the debtor is entitled under very limited circumstances and subject to strict conditions (e.g. where the right to call the bond is abusive and is exercised where no real reason for forfeiture exists) to pursue the prohibition of the forfeiture of the bank guarantee by its creditor or the prohibition of payment by the bank under the procedure of interim measures before state courts.

## V. Concluding remarks

The multi-tiered dispute resolution approach is a long-standing tradition in the FIDIC forms of contract and a primary feature of the forms which entrust the dispute adjudication boards with dispute avoidance and dispute resolution adjudication powers. Parties are encouraged by FIDIC to engage in dispute avoidance as early as possible and during the implementation phase of a project in order to achieve a successful completion of the project and maintain amicable and fruitful business relationships, avoiding unnecessary additional costs. One of the most favorably commented aspect of FIDIC contracts relates to its dispute settlement process through the dispute adjudication boards. Such boards may be useful and very effective even in cases where the contractor wishes to challenge a bond call by the employer as analyzed above.

Last but not least, parties must keep in mind to get proper legal advice in advance to ensure that

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<sup>22</sup> It is noted that public works contracts and procurement are regulated by specific legislation, in principle by Greek Law 4412/2016 (as amended and in force) which, inter alia, transposed the EU Directives on public procurement 2014/24/EU and 2014/25/EU.

<sup>23</sup> See in International Comparative Legal Guide, Construction & Engineering Laws and Regulations

2023, chapter for Greece, published at [www.iclg.com](http://www.iclg.com), Tasos Kollas – Alexandros Tsirigos, question 4.2.

<sup>24</sup> In this respect and as the compatibility of DAABs under the 2017 Second Editions of the rainbow suite with Greek law, see FIDIC Contracts in Europe - A Practical Guide to Application, edited by Donald Charrett, 2023, Ioannis Vassardanis, Giouli Katsarou, p. 347.

FIDIC terms comply with or/and are consistent with the relevant governing law of the FIDIC contract in the relevant jurisdiction.

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