

Evaluating the FIDIC's termination for convenience clause in General Conditions under common law in Iranian civil law system for Construction Contracts

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ABSTRACT

The Iran civil code is based mainly on the Egyptian Civil Law (ECL), which is itself derived from two principal sources like French civil law and Islamic law. On the other hand the general conditions of contracts published by the Fédération Internationale des Ingénieurs-Conseils or International Federation of Consulting Engineers (FIDIC), which based on common law principles and this standard form of contract, have been applied in large construction projects in Iran. Due to the Iran legal system is rooted in civil law, FIDIC forms of contract may face serious challenges. This research, through a comparative method, has analyzed the Egypt Civil Code (ECC) and Iran (as two members of the Islamic legal system) for better decisions in FIDIC-based contracts. Our study offers some strategies for modification of the FIDIC 1999 Red Book [FIDIC (CONS)] and also Iran Civil Code for construction contracts, which are associated with the termination for convenience clause. Therefore, with a better understanding of the termination for convenience by the employer clause, which has referred to in many contractual claims in arbitration centers and courts, can be prevented disputes. Moreover, this study is useful for other Middle East countries because most of them follow the civil law jurisdictions.

KEYWORDS

Termination for Convenience by the Employer, FIDIC (CONS), General Conditions in Construction Contract, Common Law, Civil Law

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Introduction

Although Iran has a legal structure according to Civil Code, the FIDIC contracts are founded based on legal concepts rooted in the common legal system. Typically, jurisdictions with Civil Code recognize a general right to terminate the contract for convenience by the employers [1]. Hence, common-law-based employers and contractors are strongly advised to carefully examine the relevant law of context to recognize whether they find mandatory rules allowing for termination for the convenience by the employer [2]. In this way, significant financial losses will be avoided when disputes caused by termination for the convenience are avoided owing to a better understanding of this Article from the current research [3].

The present research is aimed at investigating the laws of termination for convenience provisions according to the FIDIC based on common law in the framework of the Iranian Civil Code and given its differences and similarities with the Egyptian Civil Code (E.C.C). Accordingly, this study's objectives include (1) highlighting the similarities and differences between the relevant regulations in the FIDIC (CONS) and Iranian Civil Code with regard to the ECC and (2) providing suggestions for amending the relevant regulations in the FIDIC (CONS) and the Iranian Civil Code. Accordingly, this study provides suggestions to amend the provision related to the termination for convenience by the employer in the FIDIC (CONS) besides the way to compensate the contractor's loss in case of termination for convenience by the employer in the Iranian Civil Code.

Methodology

The present research initially addresses the significance and necessity of considering the provisions of the law on the termination of contracts by examining 142 dispute cases in construction projects in Iran [3, 4]; subsequently, the Article of termination for the convenience in the FIDIC (CONS) is discussed. Thirdly, the same Article is examined in the Egyptian and Iranian Civil Code. Fourthly, the applicability of termination for convenience in the FIDIC (CONS) based on Egyptian and Iranian Civil Code as the contract's governing law is critically analyzed by the authors. Ultimately, suggestions on the amendments required for this provision in the FIDIC (CONS) and Civil Code are provided by the authors. The steps and research method are all exhibited in Figure 1.

By considering the 100 cases reviewed in the country's courts and Iran's arbitration chamber, it could be inferred that, most of the disputes in construction contracts occurred after the termination of the contract

(Figure 2). 42 cases out of 100 identified cases that were filed after the dissolution of contract shown a significant impact of this clause as a root cause in construction contract disputes.

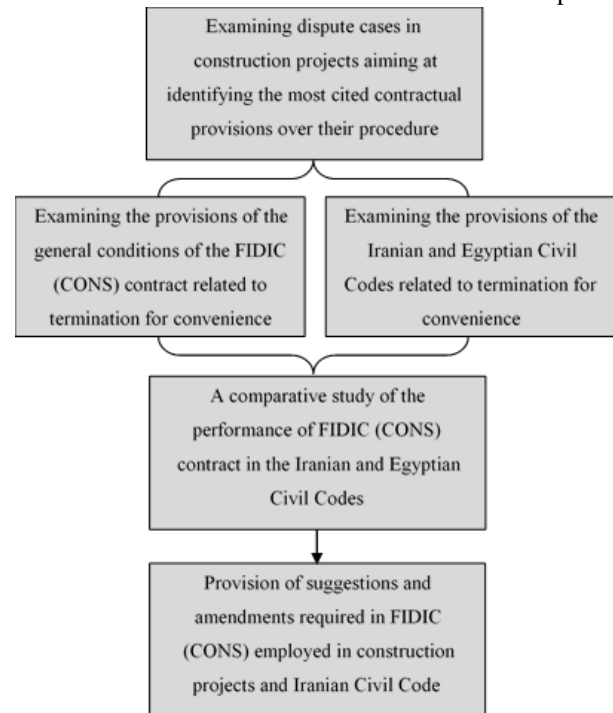


Figure 1. Diagram of the research method

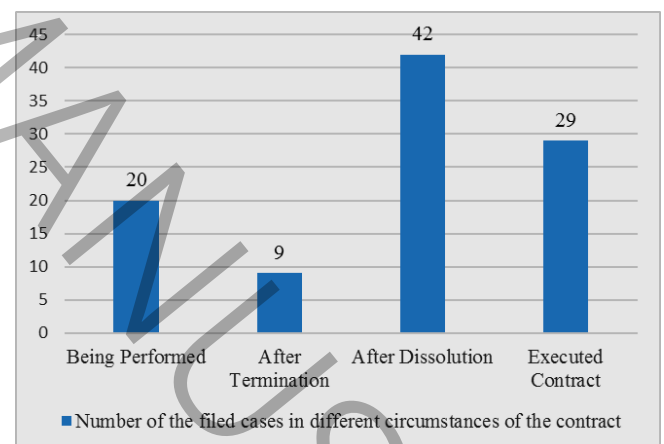


Figure 2. Time registration of the plea in 100 cases reviewed in courts and arbitration centers

Results and Discussion

Concerning the suggestions for the amendments in the FIDIC (CONS), it was previously mentioned that the lack of the contractor's right to demand for loss of prospective profit in case of termination for convenience by the employer, in Clause 15.5 of the FIDIC (CONS) does not appear logical since the employer uses such a right is in his own interest and not for the contractor's mistake. Hence, it is suggested to amend such an provision like the

amendment contained in the Harmonized Edition of the Multilateral Development Bank (MDB), and add the loss of profit as part of the losses experienced by the contractor due to this termination.

Regarding the suggestions related to the amendments in Iranian Civil Code, the lack of an Article similar to Article 663 of ECC, the right of termination for convenience (by the employer), and Article 221 and 222/1 of ECC regarding the method of compensation in case of non-fulfillment of the obligation, is felt in Iranian laws. Moral damage is accepted in ECC and the compensation methods, which can also be in cash based on the circumstances, are left to the judge's discretion, the issue not been specifically addressed in Iranian law [5]. Moreover, Article 147 of ECC accepts the possibility of judicial adjustment and the silence of the domestic legislator does not imply the non-acceptance of judicial adjustment of the contract, although not preventing the demand of this right based on correct jurisprudential principles like the rules of negating hardship, prohibition of detriment, and the loss occurring (in the contract) [6]. However, it is suggested to the legislature to take action in the generalization of provision of Article 171 of the Constitution to the explanation of this issue similar to the ECC. Furthermore, in the ECC, the employer does not have the right to suspend the work for his convenience. Thus, it is recommended to add a provision with the compensation for the contractor's loss to the Iranian and ECCs.

Conclusion

Given the statistical data presented by this paper, indicating the importance of this Article in most construction contracts, the Article of termination for convenience was studied in the FIDIC (CONS) contract in accordance with the common law in the framework of the Iranian Civil Code. The similarities and differences between the provisions contained in the FIDIC (CONS) contract and the Civil Code were identified. It was concluded that some solutions related to the right of termination for the convenience of the employer in the FIDIC (CONS) are not provided in the Iranian Civil Code.

These studies resulted in the presentation of a number of proposals in the Iranian Civil Code, such as specifying how to compensate the contractors' loss when the contract is terminated for convenience by the employer or its suspension at the request of the employer, besides the contractor's right to claim the loss of prospective profit in the FIDIC Red Book (1999) the FIDIC (CONS) regarding the Article of termination for convenience by the employer.

The present research may help international contractors better understand how to terminate for

convenience under the FIDIC conditions concerning projects concluded based on the Iranian Civil Code. This can be effective in declining disputes related to or caused by the regulations governing these contracts as much as possible. In construction contract disputes, since the contract termination Article is cited mostly in the courts and arbitration authorities, the contractors may be expected to prevent disputes in this field through a better understanding of the Clause of termination for convenience by the employer in their contracts.

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