MÜFTÜOĞLU

HUKUK BÜROSU - LAW OFFICE

2023 Construction Law Journal

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INTRODUCTION

With the best wishes for the newly-arrived-year, this 2023 Construction Law Journal casts a look at certain developments took place in 2023 related to construction, infrastructure, and energy sectors. The developments touched upon throughout this Construction Law Journal concern events took place at both the national level and the international arena.

We start our journey with review of the international scope both at the organizational level -with specific reference to one of the pioneers in the sector- and also at states level with a view to address a significant legislative enactment took place during 2023. In that scope, as an initial step we evaluate the changes introduced to the three books of the suite of contracts issued by FIDIC with the Amendments introduced in 2022 together with the Second Edition thereof to take effect as of 2023 together with several contemporary news regarding the realm of FIDIC. Afterwards, by considering the 2030 Vision of the Kingdom of Saudi Arabia, and the extent ofthe construction projects taking place therein, we turn our focus to the Kingdom's newly adopted law on civil transactions that codifies the applications of principles under Saudi law and provides further legal clarity and certainty for the construction sector and scrutinize certain provisions thereof relevant to construction contracts in a comparative approach with Turkish law.

Subsequently, as a topic gaining further and further importance in the international dynamics we evaluate the year with a view to sustainability.

Accordingly, we review two reports that are reflecting on the global aspiration towards a more sustainable future, namely "Decarbonisation of the Infrastructure Sector" and "Developing Tomorrow's Sustainable Energy Systems", issued within 2023 by FIDIC. Additionally, European Union's State Energy Report and the decisions published at the end of 2023 with respect to the Determination of the Standards of the Turkish Sustainability Reporting are also touched upon given increasing popularity of the issue due to increasing effects of the global climate change and the energy crisis.

After finishing the review of the international scope, we zoom into Türkiye and evaluate some of the changes in the national construction legislation that took place as a natural extension of the devastating February 6th earthquakes affecting thirteen cities in eastern Türkiye by review of certain amendments on land zoning in planned areas with a critical view. Finally, we wrap our journey up with the analysis of various Supreme Court decisions rendered by the 6th Civil Chamber, which is responsible for hearing cases related to construction contracts after the closure of the 15th Civil Chamber, accompanied with brief summaries.

We hope you find this publication useful in addressing some of the important news regarding the construction and energy market in the previous year. With the wish of 2024 leading to a better, safer, and more sustainably operated world,

Sincerely,

Müftüoğlu Law Office

AN OVERVIEW OF FIDIC 2022 REPRINT

In November 2022, Fédération Internationale des Ingénieurs Conseils (the International Federation of Consulting Engineers - "**FIDIC**") made a number of amendments in the Second Edition of Red, Yellow and Silver Books with effect as of January 2023 ("**2022 Amendments**").

Among these amendments, some are for abbreviation purposes or for providing a better understanding, while some have major importance in understanding the General Conditions and hence are worth to scrutinize in detail. The information provided herein is prepared based upon the amendments made on the Silver Book, so the terminology used below is in line with the Silver Book, which is only for convenience purposes given the nuances between the three books.

This preference over the terminology has no substantial effect over the narrative of this article given all amendments are conceptually identical in all three Books, excluding the amendment mentioned in relation to the Guide in the last page of this article, which is specific to Yellow Book and Red Book.

WHAT IS A "CLAIM" AND A "MATTER"?

Definition of "Claim" as amended with 2022 Amendments is as follows:

> *"**Claim**" means a request or assertion by one Party to the other Party (excluding a matter to be agreed or determined under sub-paragraph (a) of Sub-Clause 3.5 [Agreement or Determination]) for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works.*

The wording within the parentheses is newly incorporated into the definition to exclude matters subjected to agreement or determination under Sub-Clause 3.5 [*Agreement or Determination*]. To understand and elaborate on this exclusion of a "matter" from scope of a Claim, one needs to take a look at the recently amended Sub-Clause 3.5 as well.

Reference: FIDIC Conditions of Contract for EPC /Turnkey Projects (2017, Reprinted 2022 with Amendments).

Accordingly, below paragraph is added with 2022 Amendments to Sub-Clause 3.5 [*Agreement or Determination*] as the second paragraph:

> *"Whenever these Conditions provide that the Employer's Representative shall proceed under this Sub-Clause 3.5 to agree or determine either:*
>
> *(a) Any matter, as provided in Sub-Clauses 11.2, 13.3.1, 13.5, 14.4, 14.5, 14.6.3, 15.3, 15.6, and 18.5, identifying in the same Sub-Clause the date of commencement of the corresponding time limit for agreement under Sub-Clause 3.5.3 [Time limits]; or*
> *(b) any Claim,*
>
> *The following procedure shall apply:"*

Previously, this provision was simply referring to "any matter or Claim", which rendered the difference between the scopes of "Claim" and "matter" vague. Currently, the amended paragraph lists matters within the scope of this clause by reference to specific sub-clauses. This list is helpful in clarifying the scope of what is deemed as a matter, especially in the presence of the amended wording of the definition of a Claim. The referred sub-clauses are relevant to agreement or determination of (i) causes of a remedial work (SC 11.2), (ii) EOT (*extension of time*) and/or Contract Price adjustments due to a Variation (SC 13.3.1), (iii) incorrect or not agreed daywork statements (SC 13.5), (iv) revised schedule of payments (SC 14.4), etc. When the referred provisions are reviewed, it is clear that the list does not include any claim between the Parties at the time the matter is submitted to the Employer's Representative and the Employer's Representative encouraged the Parties to reach an agreement or made a determination on the matter. The inference to derive from this analysis is that the concept of "matter" is envisaged to identify the issues which do not officially amount to a "Claim" but bear the potential to turn into a "Claim".

Prior to 2022 Amendments, the word "matter" was in need of an explanation and now the concept is much clearer with specific references to related sub-clauses in a limited nature. Consequently, by reading the definition of "Claim" and the added paragraph to Sub-Clause 3.5, it can be said that in means of the General Conditions, a Claim is a request or an assertion for an entitlement or relief under the Contract between the Parties, but not relevant to any other third party, and does not include "matters" submitted to the Employer's Representative as listed under second paragraph of Sub-Clause 3.5. Emphasis of the concept of "matter" and carving it out of the scope of a "Claim", is one of the changes bearing substantial importance brought with 2022 Amendments.

WHAT IS A "DISPUTE"?

Definition of "Dispute" is also amended with 2022 Amendments and the latest version is as follows:

> *"**Dispute**" means any situation where:*
> *(a) one Party has made a Claim, or there has been a matter to be agreed or determined under sub-paragraph*
> *(a) of Sub-Clause 3.5 [Agreement or Determination];*
>
> *(b) the Employer's Representative's determination under Sub-Clause 3.5.2 [Employer's Representative's Determination] was a rejection (in whole or in part) of:*
>
> *(i) the Claim (or there was a deemed rejection under sub-paragraph (i) of Sub-Clause 3.5.3 [Time limits]); or*
> *(ii) a Party's assertion(s) in respect of the matter as the case may be; and*
>
> *(c) either Party has given a NOD under Sub-Clause 3.5.5 [Dissatisfaction with Employer's Representative's determination].*

Exclusion of "claim" from the definition of Dispute

Pursuant to the definition, a Dispute may arise from a "Claim" or a "matter" (without reference to specific incidents for "matter") and the Employer's Representative's rejection of such Claim or a Party's assertion. It is worth to underline that in the earlier drafting of this definition, the claim was just written as "claim" without specifically referring to the defined Claim, but now it is written with a capital letter to refer to the defined terminology for "Claim". Therefore, not any claim, but only the issues that qualify as a Claim in line with the defined terminology may qualify as a Dispute.

The exclusion of "claim" from the definition is further explained under the Second Edition Guide comments in a manner to emphasize that a "Dispute" as defined and used in the 2017 Books is confined to disputes only in between the Parties:

> *"It should be noted that this definition of 'Dispute' refers to a Claim but not to a claim. As explained in the guidance above for the definition of "Claim", claim under the 2017 Books has a different meaning to that of Claim. Therefore, 'Dispute' as defined and used in the 2017 Books is confined to disputes between the Parties. It excludes any dispute arising from a claim made by a Party against a third party under the Performance Security, under a guarantee, under an insurance policy, or in connection with intellectual/industrial property rights."*

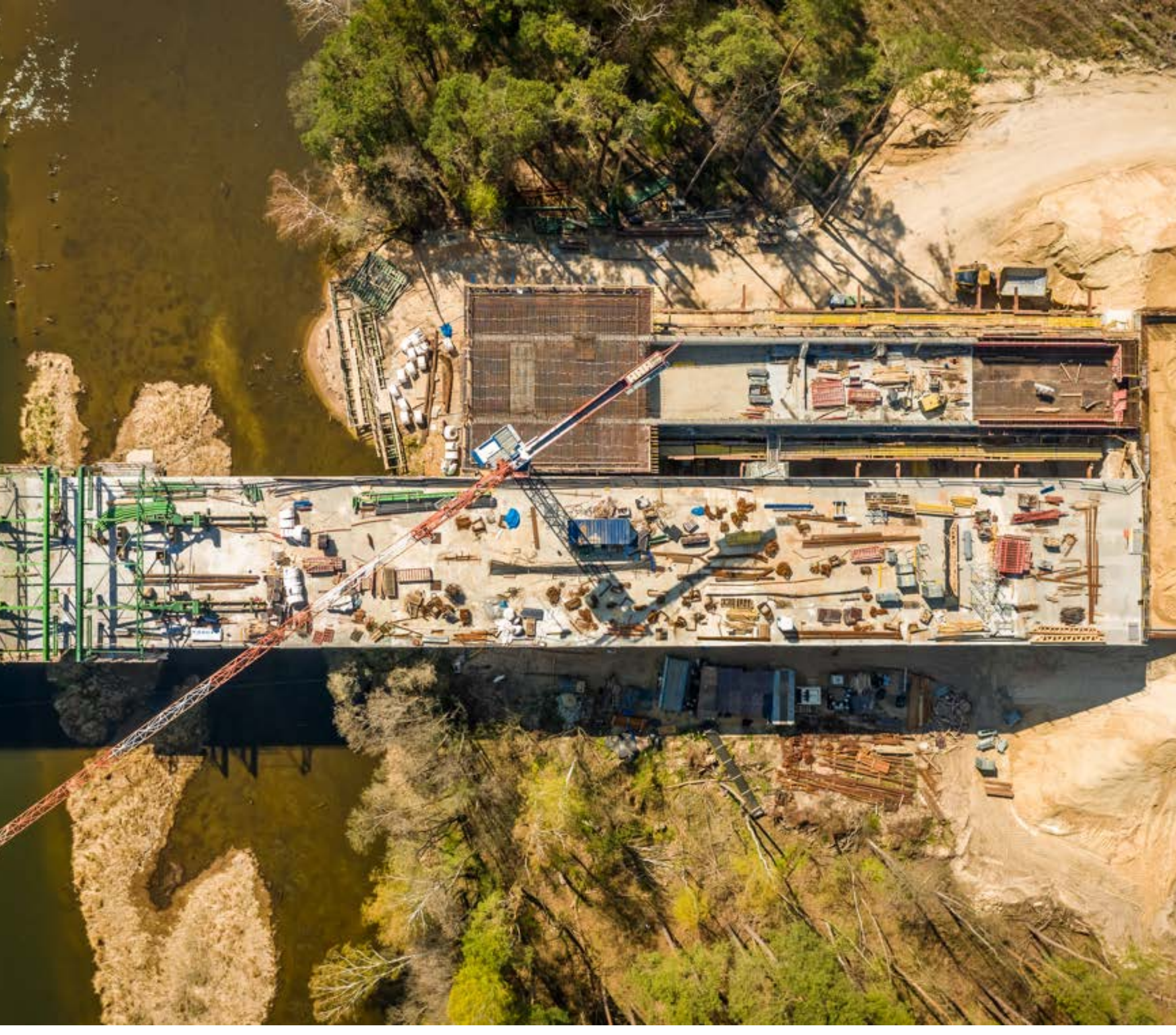
The commentary makes it clear that the purpose to exclude other claims from the definition was so that only the Claims between the Parties would be subjected to Dispute resolution procedures under the Contract.

Conditions for a Claim or a matter to qualify as a "Dispute"

Previously, emergence of a Dispute was conditional to (i) making of a Claim by one Party to the other Party or determination of a matter by the Employer's Representative and (ii) rejection of the claim by the other Party or by the Employer's Representative. Prior to 2022 Amendments, the definition of Dispute also included a statement that "*a failure by the other Party to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAAB or the arbitrator(s), as the case may be, deem it reasonable for it to do so.*"

Considering this wording is now removed from the definition of "Dispute", it can be said that by deviating from the former structure, FIDIC now deems it a condition that a Claim or a matter should first be submitted to and rejected by the Employer's Representative, for a contractual Dispute to exist. Hence, making of a Claim and rejection of the same by the other Party is not sufficient to conclude on the existence of a Dispute, and Employer's Representative's rejection is a must for the Parties to initiate Dispute settlement procedures.

These conditions on existence of a "Dispute" seem to be in line with the detailed claim procedure laid out under FIDIC 2017 Revision, and accordingly, a matter or a Claim may be qualified as a Dispute, only after being rejected by the Employer's Representative.



<u>Exceptions to conditions required for a matter or a Claim to qualify as a "Dispute"</u>

There are further amendments introduced by FIDIC 2022 Amendments with regard to emerging of a Dispute. By incorporating a whole new paragraph into Sub-Clause 21.4 [*Obtaining DAAB's Decision*], certain exceptions are listed to above mentioned conditions in order to enable the Parties to directly apply Dispute settlement provisions, without having the need for the Employer's Representative's rejection of the matter or the Claim. The newly introduced wording under Sub-Clause 21.4 [*Obtaining DAAB's Decision*], is as follows:

"In addition to the situation described in the definition of Dispute under Sub-Clause 1.1.29 above, a Dispute shall be deemed to have arisen if:

(a) there is a failure as referred to under sub-paragraph (b), or a non-payment as referred to under sub-paragraph (c), of Sub-Clause 16.2.1 [Notice];

(b) the Contractor is entitled to receive financing charges under Sub-Clause 14.8 [Delayed Payment] but does not receive payment thereof from the Employer within 28 days after his request for such payment; or

(c) a Party has given:

(i) a Notice of intention to terminate the Contract under Sub-Clause 15.2.1 [Notice] or Sub-Clause 16.2.1 [Notice] (as the case may be); or

(ii) a Notice of termination under Sub-Clause 15.2.2 [Termination], Sub-Clause 16.2.2 [Termination], Sub-Clause 18.5 [Optional Termination] or Sub-Clause 18.6 [Release from Performance under the Law] (as the case may be);

and the other Party has disagreed with the first Party's entitlement to give such Notice;

which Dispute may be referred by either Party under this Sub-Clause 21.4 without the need for a NOD (and Sub-Clause 3.5 [Agreement or Determination] and sub-paragraph (a) of Sub-Clause 21.4.1 [Reference of a Dispute to the DAAB] shall not apply)."

From review of the added text, if the issue is related to termination or non-payment, the claiming Party may directly apply to the Dispute Avoidance and Adjudication Board ("**DAAB**") under Sub-Clause 21.4 without first submitting the matter or the Claim to the Employer's Representative for agreement or determination. In fact, this is logical, as in the case of a non-payment, there is no issue to be determined by the Employer's Representative or there is nothing to be agreed about by the Parties. Simply, a payment entitled by the Contractor is not paid by the Employer or the contract is terminated for the counterparty's default, but the counterparty denies the terminating Party's entitlement to terminate. Therefore, it is convenient for the Parties in terms of time efficiency in such circumstances that the matter or Claim can directly be submitted to the DAAB, and to arbitration thereafter.

AMENDMENTS REGARDING THE DISPUTE AVOIDANCE AND ADJUDICATION BOARD

Sub-Clause 21.2 [*Failure to Appoint DAAB Member(s)*] of General Conditions of Contract is amended in a manner to reflect that unless otherwise is set forth under the Contract, FIDIC shall be the appointing authority, if the Parties fail to appoint the member(s) of the DAAB. Accordingly, in such a situation, any of the Parties may apply to Presidency of FIDIC or a person appointed by the President of FIDIC by requesting appointment of DAAB members. While making the appointment, FIDIC may consider but is not limited to making the selection among the persons named in the Contract Data. The fees of so appointed members will also be stated in the terms of appointment by FIDIC. Pursuant to the 2022 Amendments, such appointment shall be final and conclusive, and the DAAB Agreement shall be deemed to have been signed by the Parties and the DAAB members.

There are many amendments made also in the General Conditions of the DAAB Agreement, which are mostly for clarification purposes. However, it is useful to highlight the amendment made in Sub-Clause 4.1 (c), which changes one of the conditions for being appointed as a DAAB member. In the former drafting, it was set forth that the DAAB Member should in the ten years before signing the DAAB Agreement, not have been employed as a consultant or otherwise by any of the Parties and/or their personnel, except in such circumstances as were disclosed in writing to both Parties before signing of the DAAB Agreement. Currently, the ten years independency term is decreased to five years. This is interesting given the debate over measures of impartiality and independence of adjudicators and arbitrators.

AMENDMENTS MADE IN THE GUIDE

With 2022 Amendments, FIDIC also released amendments to the Guidance for the preparation of Particular Conditions. Most of amendments are for clarification purposes and avoidance of some errors. Nonetheless, one amendment that is worth mentioning herein relates to Sub-Clause 18.1 [Exceptional Events] of Yellow Book and Red Book, which actually represents a significant change in FIDIC's approach.

With regard to an amendment made in Guide for Yellow Book and Red Book Sub-Clause 18.1 [Exceptional Events] is amended in its entirety as follows:

> *"In respect of sub-paragraph (f) of this Sub-Clause, it should be noted that any event of "exceptionally adverse climatic conditions" (as referred to in sub-paragraph (c) of Sub-Clause 8.5 [Extension of Time for Completion] will not constitute an Exceptional Event unless it is of such severity or magnitude that the conditions stated in subparagraphs (ii) and (iii) of this Sub-Clause 18.1 [Exceptional Events] are fulfilled. Therefore, unless both such conditions are fulfilled, there is no right for either Party to suspend the Works in the case of an event of "exceptionally adverse climatic conditions", although if this type of event has the effect of delaying completion and taking-over of the Works or Section the Contractor shall be entitled to EOT under sub-paragraph (c) of Sub-Clause 8.5 [Extension of Time]."*

Through the amended paragraph, the Guide emphasizes that although in principle, exceptionally adverse climatic conditions do not constitute an Exceptional Event, if such conditions were so severe and in the magnitude that could not reasonably have been provided against before entering into the Contract and could not reasonably have been avoided or overcome by the affected Party, these conditions may represent an Exceptional Event. Otherwise, as set forth under Sub-Clause 8.5, such climate conditions will only represent a reasoning for EOT *(extension of time)*.

This is a major change of approach, as previously the Guide was mentioning that any event of exceptionally adverse climatic conditions is excluded from the definition of what constitutes an Exceptional Event, and there was no right for either Party to suspend the Works for such conditions. In other words, it was not possible to claim that any such events were in fact preventing the affected Party's performance in a manner to entitle the affected Party to consequences of Exceptional Events. The Guide continued by stating that such conditions may still have a delaying effect on the performance of the Works (although not representing an Exceptional Event and entitling the affected Party to suspend the Works), so such conditions may entitle the affected Party to EOT *(extension of time)* only.

Currently, the amended Guide provides a more logical approach to exceptionally adverse climatic conditions, since the criteria is determined as how severe and how preventive such conditions are. This is due to the fact that if it is impossible to perform under such conditions, then it would not be correct or fair to insist that there is no Exceptional Event and no entitlement to consequences of Exceptional Events regardless of the severity of the climate conditions.

Reference: FIDIC Guide (2017, Reprinted 2022 with Amendments)

NEWS FROM FIDIC

In November 2023, FIDIC has published a reprint of the Emerald Book form of contract for underground works and launched a new guide for its use.

The Emerald Book, which is a joint initiative with the International Tunnelling and Underground Space Association (ITA-AITES) is reprinted in 2023 together with a new guide by FIDIC by evaluating certain comments and queries raised by users, leading to amendments to improve the
use of the contract in practice and to ensure the contract relevant and easy to use in a changing industry landscape. The new guide provides an overview with a perspective to key differences from the Yellow Book, on which it is based.

On 27 November 2023, FIDIC published a new practice note on the topical and important issue of dispute avoidance.

The new practice note aims to raise awareness on the dispute avoidance function of dispute boards for FIDIC contract users and adjudicators and to ensure that best practice is adopted. In line with this, FIDIC emphasized that "*the dispute avoidance is critical when it comes to successful project delivery and the note should be of enormous assistance to the industry in that regard*."

The note was prepared by the working group by taking into account the views of the members of the FIDIC President's List to whom their ideas were asked in the form of five questions.

These key questions seeking to obtain information on how dispute avoidance works in practice were:

1. *How/when does the dispute board make the parties aware of its dispute avoidance role?*
2. *When should dispute avoidance ideally take place?*
3. *Where should dispute avoidance take place?*
4. *What matters most lend themselves to dispute avoidance?*
5. *What are the most effective techniques for dispute avoidance?*

The note that is detailing with the answers obtained from members of FIDIC President's List, can be reached through FIDIC website.

On 30 October 2023, World Bank renewed its agreement to use FIDIC standard contracts for a further term of five years.

It is announced by FIDIC that the agreement with the World Bank is renewed and expanded in a manner to ensure the World Bank adopts the use of nine FIDIC standard contracts for a further erm of five years. The World Bank is granted a non-exclusive license referring to the nine major FIDIC contracts for projects they finance, and the documents will be used as part of the bank's standard bidding documents. The license includes the 2017 Second Edition FIDIC contracts, as reprinted in 2022 in a manner to indicate increasing use of 2017 Second Edition FIDIC Contracts with 2022 Amendments.

Among its remarks on the renewal of World Bank's agreement, FIDIC rightfully notes that "*The World Bank's move represents a key endorsement for the contracts from a major international funding organization*".

Without a doubt, the World Bank's adaptation of FIDIC 'rainbow' suite of contracts and using them as a key part of standard bidding documents will have an undeniably strong influence on investors of major international construction projects, not only for the projects funded by the World Bank, since such approach is a sign of the World Bank's confidence to fair and balanced structure of FIDIC suit of contracts. Indeed, these two conditions -fair and well-balanced- are indispensable for a successful construction project, which contributes to the high profile of FIDIC suite of contracts.

As announced by FIDIC, the nine FIDIC contract documents covered by the renewed FIDIC-World Bank agreement are as follows:

1. Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer ("Red Book"), Second edition 2017, Reprinted 2022 with amendments.
2. Conditions of Contract for Plant & Design-Build for Electrical & Mechanical Plant & for Building & Engineering Works Designed by the Contractor ("Yellow Book"), Second edition 2017, Reprinted 2022 with amendments.
3. Conditions of Contract for EPC Turnkey Projects (Silver Book), Second Edition, 2017, Reprinted 2022 with amendments.
4. Client/Consultant Model Services Agreement ("White Book"), Fifth Edition 2017.
5. Conditions of Contract for Design, Build and Operate Projects ("Gold Book") First Edition 2008.
6. The Short Form of Contract ("Green Book"), First Edition 1999.
7. The Short Form of Contract ("Green Book"), Second Edition, 2021.
8. Conditions of Contract for Underground Works (Emerald Book), First Edition, 2019, including its Reprint 2023 with amendments when published.
9. Form of Contract for Dredging and Reclamation Works, Second Edition, 2016.

SAUDI CIVIL TRANSACTIONS LAW

INTRODUCTION

The Civil Transactions Law ("the **CTL**") of Kingdom of Saudi Arabia has been issued on 18 June 2023 with the Royal Decree M/191 and published on 19 June 2023 in the Official Gazette. In accordance with the Article 721 of the CTL, the CTL will come into effect 180 days after its publication in the Official Gazette, which corresponds to 16 December 2023

Considering the Vision 2030 of the Kingdom as well as the ongoing legal reforms therein, issuance of the CTL represents one of the most significant transformations in the legislative system of the Kingdom of Saudi Arabia.

With its 721 articles, the CTL comprehensively sets rules and regulations on a wide variety of topics concerning civil transactions. These include, the law of persons, law of property, types of rights, and usage of them, liabilities, guarantees, general provisions for contracts, such as formation, termination, nullity, obligations, execution thereof, tortious acts, losses and damages, compensations, as well as specific provisions for different types of contracts including construction contracts.

SIGNIFICANCE AND APPLICATION

The CTL represents a milestone in Saudi Arabia, since prior to adoption of the CTL, the civil law was not codified and issues relevant thereto were regulated based on the Basic Law of the Government among which the Islamic Law, i.e. Holy Quran and Sunnah, was considered as the basis in accordance with the various doctrines of different Islamic scholars. With issuance of the CTL, contemporary global standards and terms are now set forth under a codified law and legal clarity for business affairs and transactions is provided.

It is also worth mentioning that a legislative hierarchy is set forth under Article 1 of the CTL. According to this Article 1 (2), application of provisions of the CTL does not prejudice the special provisions. Therefore, it is interpreted that the special provisions shall a priori apply. Moreover, according to Article 1(1), the provisions of the CTL shall be applied to all matters that are addressed in the CTL by specific wording or as to the content. In the absence of such context, provisions of the general rules set forth among the final provisions under the conclusion section of the CTL shall apply. In the case there is no rule that can be applied in the CTL, the provisions derived from Islamic Law that are most convenient in light of the CTL shall apply.

Another important matter regarding the CTL concerns its temporal application being envisaged as retrospective. While the CTL came into effect on 16 December 2023, according to the Royal Decree, it will be applicable also to contracts that have been executed before this date. There are two exceptions to this retrospective application. Either (i) one of the parties needs to demonstrate a contradicting "statutory provision" or "judicial principle" with respect to the situation at stake, or (ii) a limitation period needs to have already begun to run before 16 December 2023.

CONSTRUCTION CONTRACTS

As mentioned, the CTL sets forth rules and regulations for several different contract types among one being the contracts concluded for construction. Provisions specific to construction contracts are regulated between Articles 461 and 478. On the other hand, it is envisaged that other relevant principles shall also apply to construction contracts where applicable. For the purposes of this paper, main general principles and specific provisions that concern construction contracts are evaluated below.

GENERAL PROVISIONS

Principle of Good Faith

While the necessity to exercise the principle of good faith for contracting parties was already a part of Islamic Law, this rule is now explicitly included in the CTL under Article 95 as "*[T]he contract must be executed in accordance with its content and in a way consistent with good faith*". Additionally, in Article 41, the liability for damages is attributed to a party acting in bad faith during the contract negotiation phase as "*[I]f a contract is being negotiated, the negotiating parties shall not be liable to conclude the contract, nonetheless, the party who negotiates or ends the negotiation with bad faith shall be liable from the damages suffered by the other party. Such liability shall not include a compensation for loss of profit expected under the negotiated contract*". Accordingly, it is clear that the CTL requires not only the execution, but also the negotiation of contracts to be conducted in good faith.

Limitation of Liability

Even though previously the Saudi Courts did not implement a liability cap, limitation of of liability now becomes applicable under the CTL. Accordingly, Article 173 is as follows:

> *"The parties are allowed to agree the debtor to be exempted from the compensation for the damages stemming from non-performance of contractual obligations or delay therein, exception of which are fraud or*
> *serious fault.*
> *It is not allowed to agree on an exemption from a liability stemming from the harmful act."*

In many countries allowing for the limitation of liability of contracting parties, this freedom is restricted for the cases where the party for whom liability is excluded and/or limited somehow acts in wilful misconduct or gross negligence. Similar to this general approach, it is worth noting that in application of this limitation of liability provision, the CTL sets forth that the debtor cannot be exempted from liability for damages resulting from serious fault. It is reasonable to interpret "serious fault" in a manner to correspond to wilful misconduct and gross negligence, as used under civil law terminology. Fraud is the other exception, which prevents application of exemption from liability to compensate damages. The provision also mentions that the contacting parties cannot agree on a limitation of liability clause for damages stemming from "*the harmful act*". Although, what is envisaged by a harmful act is not clear, it would not be wrong to interpret that such an act includes actions constituting fraud, tort, wilful misconduct and/or gross negligence. Whether inclusion of some other actions in the framework referred to with "harmful act" is possible will become clear in time with application of the CTL.

Non-performance

(i) Impossibility

According to Article 110 (1), it is set forth that the synallagmatic contracts shall be automatically terminated in case one of the corresponding obligations becomes impossible to perform due to a reason beyond the control of the party failing to perform as a result of such impossibility. The article reads as: "*The contracts which are binding on both sides, if the performance of the obligations becomes impossible with a reason that is not under the control of the debtor, debtor's obligation and the counter obligation shall come to an end and the contract shall be rescinded automatically".* In such case, the parties are no longer required to apply to court by requesting rescission of the contract, and the contract will automatically come to an end. Second paragraph of the same article envisages that in case of partial impossibility, then only such part of the obligation that has become impossible to perform and the corresponding obligation in that proportion shall end automatically, without a need for a court decision. Additionally, it is possible for the counter party to request from the court termination of the contract in its entirety. Nonetheless, the court may reject the termination request if it deems such partial impossibility is not significant with respect to the whole of the obligations.

Finally, apart from termination, Article 294 of the CTL also sets forth that the debtor shall be discharged of its obligation to perform, if it can be proven that it is impossible for the debtor to perform due to reasons beyond control.

(ii) Unexpected exceptional circumstances

Article 97 of the CTL reveals itself as a mandatory general provision against which no party agreement can be made. In that vein, this provision provides the legal ground for adaptation of a contract to unexpected exceptional circumstances which negatively affect one of the parties and impose a heavy burdensome on that party in performing its contractual obligations. In such a case, the affected party may invite the counterparty to negotiate necessary adjustments on the contract to avoid such negative effects. However, if no agreement is reached between the parties within a reasonable period of time, then the court may reasonably amend the burdensome obligation by adapting the contract to such exceptional circumstances, which were not possible to be anticipated at the time of entry into the contract, provided that the affected party proves the extent of hardship caused by such circumstances on its performance. Turkish law also has this concept, although there are some differences in implementation.

On the topic of impossibility, Article 471 (3) of the CTL is a special provision specific to construction contracts, and further describes in addition to the general provision under Article 97 above the court's authority to restore the contractual balance. This provision is explained in detail below under Section B/(c) that is relevant to special provisions pertaining to construction contracts.

(iii) Defence of non-payment

Pursuant to Article 114 of the CTL, if a contracting party fails to perform its obligation, then the counter party may suspend the corresponding obligation, until the failing party performs its obligation. In order to be entitled to such a right of suspension, both corresponding obligations should be due for performance. The same concept also applies under Turkish law.

Termination of contracts

The primary general provision concerning the term of the contracts are Article 94 of the CTL, which provides that a valid contract cannot be revoked or amended except by agreement or by virtue of a statutory provision. Other general provisions for termination of contracts are regulated under Articles 105 to 114.

Further, there are special provisions specific to termination of construction contracts. Among general provisions, it is set forth that a contract can be terminated under various circumstances such as parties' mutual agreement to end contract in whole or in part (Article 105), breach of the contract (Articles 107 and 108), or impossibility of the performance (Article 110).

Differing from the Turkish law approach, under the Saudi laws, it is not possible for a party to terminate the contract upon material breach of the other party by providing a reasonable remedy period if the breach is not remedied within such term. The Saudi approach in case a contracting party fails to fulfil an obligation under a valid contract allows the other party to apply to the court by asking for an order for the contract to be performed (Article 94) or rescinded (Article 107). Under Article 108, the parties may also agree that the contract is rescinded, if one of them fails to perform an obligation, without having need for a court order. Therefore, in case of a breach by a party, the parties may agree to terminate the contract or in the absence of any such party agreement, the contract may only be terminated by way of a court award.

Consequences of termination, in the sense whether it affects the contractual relationship by returning the parties to pre-contract state or prospectively by preserving the obligations performed so far, are regulated under Article 111 of the CTL, which foresees differing terms for different circumstances. Under Turkish law, similar to CTL, different consequences apply to ending of contracts, while ending of a contract with a retroactive effect is called "rescission", and ending of a contract with no retroactive affect is called "termination".

Accordingly, after the rescission, as per Article 111(1), the contracting parties shall be returned to their status prior to entry into the contract; however, if it is not convenient given the nature of the contractual relationship, the court may decide for payment of a compensation. Further, Article 111(2), sets forth that if the contract is a time-based contract, which envisages continuous obligations for the parties (i.e. lease contracts, service contracts), the rescission shall not have a retroactive effect, and the court may order for compensation, if necessary.

Therefore, it is interpreted that pursuant to Article 111, the party breaching its contractual obligations shall be required to indemnify the harmed party by compensating reliance damages to ensure that the harmed party attains its financial position prior to entry into the contract. However, if this is impossible (i.e. in a construction project, where a certain part of obligations is already performed, or time-based contracts such as lease contracts), then the breaching party shall compensate the actual damages suffered by the harmed party due to early termination of the contract. Hence, while the term "rescission" is mentioned in the CTL that actually refers to compensation of damages with a retroactive view, in ending of time-based contracts due to a party's breach or in the event of impossibility of the harmed party being returned to its pre-contractual financial status, rescission shall not apply retroactively, and the harmed party shall be compensated for its actual damages due to early termination.

Another noteworthy article under CTL concerns the survival of certain contract clauses even after the recission. Pursuant to Article 113, dispute settlement and confidentiality provisions under a rescinded contract shall remain in force after rescission, without prejudice to the statutory provisions. This being the default regime under the Saudi law, the parties are at liberty to agree otherwise.

In addition to the general provisions above, Articles 476 and 477 provide special provisions concerning termination of construction contracts due to an emergency excuse and consequences thereof, which are explained in further detail under Section B/(b) below.

Liquidated damages

CTL provides provisions on liquidated damages under Articles 178 and 179. Accordingly, Article 178 sets forth that:

"*The contracting parties may determine in advance the amount of compensation by stating it in the contract or in a subsequent agreement, unless the object of the obligation is a monetary amount, and no notice is required for the entitlement to compensation*."

Article 178 provides the legal basis for parties agreeing on a pre-determined damages amount, whereas Article 179 regulates the details of implementation, and modification of the agreed liquidated damages amount by the courts as well as the burden of proof in application of this article under its first three paragraphs, which read as follows:

"No compensation shall be payable if the debtor can prove that the creditor did not incur any damages.

The court, upon the debtor's request, may decrease the amount of compensation if the debtor proves that the compensation amount is exaggerated or that the obligation has been fulfilled partially.

The court, upon the creditor's request, may increase the compensation to an amount equivalent to the damages if the creditor proves that the damages exceeded the amount of the contractual compensation as a result of fraud or serious fault of the debtor."

Therefore, the contracting parties are allowed to determine the amount of liquidated damages at the time of entry into the contract. The parties are not required to evidence the amount of the damages that they have suffered or to serve notification in order to be entitled to such liquidated damages if the conditions are realised. The parties are also entitled to claim the damages exceeding the pre-determined liquidated damages to the extent that they can prove fraudulent behaviour or serious fault of the counter party. Finally, the fourth paragraph of Article 179 highlights the mandatory nature of the abovementioned provisions and considers any agreements by the parties to the contrary as void.

Compensation

Pursuant to Article 161 of the CTL, the court may award for the specific performance of an obligation, which a contracting party failed to perform. However, if such performance will be too burdensome for the party against whom the court has awarded, then instead of specific performance, Article 164 sets forth that payment of an indemnification may also be considered by the court. It is worth to note that besides material damages, moral damages are also addressed under the CTL through Article 138 as "*[T]he compensation for the injurious act includes the compensation for moral damages".*

General provisions of the CTL required any harm to be covered in full by way of a compensation to revert the party suffering damages to the situation in which such party was, or could have been, had the harm did not occur. Reasonably, CTL requires a link of causality between the loss and the loss of profit suffered by a party and the subject breach. Pursuant to Article 180, the indemnifying party who is not acting fraudulently or at serious fault is only obliged to compensate the counterpart for the damage that could have been foreseen at the time the contract was entered into. However, in case of fraud or serious fault, such limitation does not apply in line with the concept of limitation of liability as noted under Section A/(b).

Determination of compensation amount also requires consideration of whether the party suffered damages had the opportunity to avoid the damages with reasonable efforts that an ordinary person would be expected to exercise. Pursuant to the CTL, if the breaching party, contributes to increase of the damage as a result of its own fault, such party's entitlement to compensation shall be reduced in proportion with the fault. This regulation is also very much in line with the "contributory negligence" concept under Turkish law.

Statute of Limitation

Previously, there was no provision for statute of limitation under Saudi law. Now, differing from the old structure, Article 295 of the CTL now sets forth that no legal action will be heard after 10 years (except where the law provides otherwise) for contractual disputes; and it is further set forth under Article 305(1) that the contracting parties are not allowed to agree on increasing or decreasing the mentioned time bar.

SPECIAL PROVISIONS

Alongside with the general provisions reviewed above that are applicable to all types of contracts unless otherwise is specifically regulated- including the construction contracts, there are specific provisions regulated under the CTL as well. As such, the uncodified legal principles that were applied to the construction contracts became codified and gained clarity with the issuance of the CTL.

The construction contract ("muqawala") is descripted under Article 461 as a contract where the contractor is under the obligation to manufacture things or perform a work in return for a price. The provision further emphasizes that while doing so, the contractor shall not be subject to the authority of the employer or shall not be deemed as the employer's representative. The specific legal provisions relevant to construction contracts such as time for completion, termination, exceptional circumstances, and price are touched upon below.

Time for completion

The contractor is required to complete the works in accordance with the contract provisions and within the agreed time period as per Article 465. In case there is no time period agreed by the parties for the completion of the works, then the works shall be completed according to the generally accepted principles and within a reasonable time period required by the nature of the work.

Ending of a Construction Contract

Regarding the ending of a construction contract via termination, there are also specific provisions with respect to termination of construction contracts, apart from the above-mentioned general provisions for termination. As such, according to Article 475 of the CTL, "*[C]onstruction contract will expire with the completion of the agreed works".* Article 476, on the other hand, is related to right for termination in case there is an emergency excuse that impedes performance of the contract whereby the party requesting termination is required to compensate the counter party's damages caused by such termination. Moreover, Article 477 regulates a right for the contractor to be released from its contractual obligations where the contractor starts to execute to contract but then becomes unable to complete performance for reasons beyond its control. Accordingly, in such a case the contractor is entitled to the value of the works that are completed and costs spent for the works that are not yet completed. However, a cap is foreseen for application of Article 477 as the entitlement of the contractor cannot exceed the benefit derived by the employer. Such cap implies the aim to protect the balance of interests between the contractor and the employer.

Contract price and payments

There are several articles under the CTL dealing with payments, such as the articles between 470 and 472. According to Article 472, if the contract price is not determined by the parties, the contractor shall be entitled to a payment equal to the value of the works and materials utilised for performance of the works. Although it is not mentioned how the value of the works will be determined, whether by way of considering the then current market prices, it is deemed such reference may be considered as applied under Turkish law.

According to Article 470 (1), a contractor in order to be entitled to claim an additional payment in a unit price-based contract, is required to immediately notify the employer in case of an occurrence of a significant increase in the estimated total contract amount, by indicating the expected increase in payment. If the contractor fails to give proper notice, the contractor will lose his right to demand the costs exceeding the agreed unit price. Moreover, according to Article 470 (2), if the contract amount substantially increases, the employer may discharge of its obligations under the contract and suspend its performance without any delay, provided that the employer reimburses the contractor for the amount of the completed works in accordance with the contract. It is not clear whether the employer's right to be discharged from its contractual obligations or to withdraw from the contract should be interpreted in a manner that the employer is entitled to terminate the contract. It is deemed that the employer shall have the right to terminate the contract in such case, by compensating the contractor for the value of the works that have been performed.

The lump-sum based contracts, on the other hand, are dealt with under Article 471 and as per Article 471(1), in the contracts where the design is agreed between the parties, the contractor cannot claim any increase in the payments even if there is an increase in any of the cost items. Nonetheless, as per Article 471(2), the contractor may request additional payment for the changes and/or additions to the design if the change or addition is caused due to the employer's fault or the employer allows the contractor to do so, or the parties agree thereon. As explained above in Section A/III. (ii), Article 471(3) further regulates the situations in which the contractual balance is collapsed due to an unexpected exceptional circumstance and the authority of the court for restoration of such balance considering the circumstances at stake. The court's tools in restoring the contractual balance includes extending the completion date, increasing or decreasing the contract value, or ordering the contract to be terminated.

CONCLUSION

Considering the previous position of Saudi law with respect to construction contracts and in light of all the concepts and provisions reviewed above, it can be said that the CTL provides clarity and legal certainty for both the contractor's and the employer's side. Besides, the CTL serves as a guidance to the parties while signing, executing, and ending a contract. Through a brief review of the CTL both common law and civil law approaches are observed, such as liquidated damages, recission of contracts, adaptation of contracts to unexpected exceptional circumstances, contributory negligence, defence of non-payment and many others.

GREEN ENTHUSIASM: SUSTAINABILITY

INTRODUCTION

Climate change and increasing amount of greenhouse gas emissions became a global imperative urging societies to combat and take significant actions. As the sustainable development goals ("**SDGs**") adopted by UN provide comprehensive structure to attain a sustainable future, it is incumbent upon relevant actors in various sectors to utilize and actualize those goals by practicing them in their specific areas. While the construction and infrastructure projects are two of the major contributors to the increase of greenhouse gas emissions, the causation can be changed with the actions taken by the sector decision makers and stakeholders. Net zero emissions targets ("**net-zero targets**") is a critical concept in addressing climate change and environmental sustainability. Net zero is the ideal state where the amount of greenhouse gas emissions released into atmosphere is balanced by the amount of the green house emissions removed. Accordingly, the aim of the markets transitioned to a position of enabling lower carbon footprint in the pursuit offulfilling the international goals especially the SDGs as well as achievement of global net zero targets. While net zero concept is a broader term dealing with all greenhouse gas emissions, "carbon neutrality" aims to balance the carbon emissions. "Carbon offsetting", on the other hand, is a strategy supporting investments that aim to decrease such emissions, within the framework of achieving net zero target. An entity engaging in activities resulting carbon emissions may purchase carbon offset projects to reduce carbon emissions to balance the emissions released into the atmosphere and the emissions removed from the atmosphere. Consequently, carbon emissions that cannot be eliminated would be cancelled through carbon offsetting. Energy markets, are enthusiastic about providing greener energy in order to achieve these goals.

Further in this article, intricate relationship between SDGs and net-zero targets and construction, infrastructure projects and energy systems will be evaluated by reference with two of the FIDIC's significant reports.

FIDIC REPORTS

FIDIC, emphasizing the importance of the goals, launched two reports of "Decarbonisation of the Infrastructure Sector" in July 2023 and "Developing Tomorrow's Sustainable Energy Systems" in October 2023.

DECARBONISATION OF THE INFRASTRUCTURE SECTOR

i Overview

Decarbonisation has a critical importance in achieving SDGs. The report focuses on the aim of the reduction of the carbon emissions and impacts thereof while indicating the best practices and experiences of selective companies. The report highlights the lifecycle phases of an infrastructure project and evaluates the steps taken in order to decrease the emission and impacts thereof on each lifecycle phase and ultimately approaches the issue in a holistic way.

The lifecycle phases are listed as:

1. Land use planning phase
2. Feasibility phase
3. Design phase
4. Construction phase
5. Operation & maintenance phase
6. End of life phase

While the importance of the consideration of sustainability and carbon emissions in each phase is highlighted, the report indicates the prominence of the impact of the design phase.

Land use planning phase

In the project, the standards were set forth by Colorado Transportation Commission to reduce greenhouse gas emissions from transportation sector by providing options to reduce vehicle miles travelled (VMT), such as pedestrian/bicycle projects, transit options, transportation demand management programs, traffic operation improvements, and parking management.

Feasibility Phase and Design Phase

In one of the best practice example projects, the twin-tunnel underground railway project called The City Rail Link project aiming significant reduction in carbon emissions. The sustainability requirements are included in each design bundle targeting lifetime emission reduction.

Early Design Phase

With reference to a road project in Australia, it is explained that adopting a holistic approach with an alignment of civil and stainability design outcomes enables the stakeholders to comprehend the positive impact of the earlier consideration. At the beginning of the project, the design optimisation is related to the replacement of the primary materials to the secondaries while the sustainability in whole is not achievable. After the evaluation of a FIDIC member company, a different pavement design was developed reducing the emissions in remarkable amounts consequence of which is the visibility of the sustainability in a very early phase of the process.

Design Phase and Construction Phase

"Carbon footprint" is a fundamental concept in assessing the impact of carbon emissions and identifying of various actions necessary for reduction of emissions. The project, aiming to reduce carbon footprint during design and construction phases, is the first carbon pilot project in Sweden. As the FIDIC member company evaluates the carbon emissions from phases of early design to construction, the fuel consumption with respect to the alignment of the road and pavement design is considered. Consequently, the model is formed as applicable to different infrastructure projects.

Construction Phase and Operation & Maintenance Phase

The road and railway project in Norway visioned to reduce CO2 emissions and energy consumption by at least 40 %. According to comparative assessments, carbon emissions were reduced by around 29% from 2018 to 2021.

ii Challenges

FIDIC identified the challenges in the realm of carbon emissions reduction that there is a continued need for taking a step earlier and carbon management implementation and accounting should have been adopted in planning and concept phases.

iii Accelerating Decarbonisation

According to report, the best practices in every phase should have been aimed to transferred, customized and applied. The report also lists the elements that positively influences the struggle for reduction of carbon emissions as (i) strong communication and exchange of ideas and practices between the actors (ii) fostering proactive collaboration with the contactors, architects, engineers and material suppliers as well as the financial sector while focusing on net-zero targets and SDGs (iii) creating streamlined carbon management procedure such as utilising standard delivery methods to support the goals (iv) training stakeholders and sector peers to raise awareness and develop FIDIC academy for the exchange of best practices.

DEVELOPING TOMORROW'S SUSTAINABLE ENERGY SYSTEMS

The necessity of struggling against the climate change pressingly manifest itself in various areas two of which are infrastructure and energy. The need for reducing energy loss, developing green energy systems and creating sustainable environment continued increasingly and discussions occur especially within the realm of SDGs and net-zero targets, the goals of which are serving as pioneer in the pursuit of the attainment of greener energy systems.

FIDIC highlights that while facilitating the seamless integration of energy harnessed from renewable energy sources, the importance of power grids demonstrates itself as being enablers of sustainable energy transition. FIDIC evaluates decisions regarding energy systems that lie back to years and whether they are still accurate recently, reaching to a conclusion that while serving to SDGs and net-zero targets, various conditions have to be fulfilled as the energy systems should have serve to sustainable environment, efficiency and system resilience.

FIDIC provides four recommendations in this report with respect to policy making, innovation, urban sustainability, collaboration with society while referring to the SDGs, to serve as a contributor therein.

Clients should procure solutions with specific links to the SDGs outlined

The first recommendation indicates to the necessity of the clear and direct intention of different bodies such as governments, private sector peers, communities to achieve SDGs and that their solutions should be in alignment with these goals. Delivery of new grid systems, features and challenges of which are detailed in the report, and their successful integration to the field is essential for the growth of the sustainability and requires the collaboration of the abovementioned bodies.

Modern power systems involve a complex delivery of multiple types of projects

Secondly, the report recommends the engagement of the engineers in the conception of the project and feasibility phase as soon as possible.

With that, renewable energy integration can be promoted, industrial efficiency standards can be developed, solutions for the matters related to energy storage as well as grid system resilience can be enhanced, an assessment in a lifecycle approach can be provided.

Society and communities matter

According to third recommendation, achieving SDGs requires the community engagement and collaboration, the sector should be more costumer and society centric rather than primarily serving to the clients, whether rooted from public or private sector. Accordingly, the importance has to be attached to public awareness and understanding of the significance of SDGs.

Policy frameworks need to be in place and fit for purpose

Lastly, the report indicates to the pivotal role of policy and regulatory frameworks in the energy and grid sectors. While developing them, it is necessary to highlight the essential aspects as grid reliability, standards of safety, reduction of carbon emissions, sustainability goals, resilience and financing thereof. The report mentions several examples from various countries clarifying the role of different policies for the development of grids while prioritizing efficiency, renewable energy integration and modernisation. Also, the harmonisation of policies and regulations in that realm between different countries is standardized guidelines on operational norms, equipment, technical specifications and technologies is of utmost importance along with their relation with interoperability. Consequently, it is recommended with the report that there should be a stability between the policies of different countries, while the practises and experiences should be exchanged. Also, the importance is attached to the establishment of collaboration for research between scholars, stakeholders and government agencies and to the trainings for professionals in infrastructure area.

ENERGY UNION REPORT

Within the realm of the global vision thriving for transition to a more sustainably structured system, mentioning the European Commission's State of the Energy Union 2023 Report is also noteworthy. As European Commission launched its strategy report for the reformation and reorganisation of the Europe's energy policy having five mutually reinforcing and closely interrelated dimensions, including decarbonising the economy, the Commission monitors the progress annually and issued State of the Energy Union 2023 Report on 24 October 2023. The report evaluates the EU's crisis response strategy basing it to climate and environmental concerns under European Green Deal. According to the report, an acceleration with respect to installation of renewable energy capacities and rise of production of renewable electricity is observed and generating 39% of electricity by renewable sources is achieved. Additionally, greenhouse gas emissions are decreased by 32.5% in comparison to 1990 and the generation of electricity from wind and solar resources exceed the electricity generated from fossil resources.

STANDARDS OF THE TURKISH SUSTAINABILITY REPORTING

With the Official Gazette dated 29 December 2023, the decision of Public Oversight Accounting and Auditing Standards Authority was published as "Determination of the Standards of the Turkish Sustainability Reporting". The Standards shall be applied to the reporting periods on and after 1 January 2024. The standards of International Financial Reporting Standards (IFRS) S1, with respect to general requirementsfor disclosure of sustainability, and S2, with respect to climate-related disclosures are determined as sustainability reporting standards.

These standards are applicable to the construction companies fulfilling the criteria in the decision "Determination of the Application Scope of the Standards of the Turkish Sustainability Reporting" published in the same Official Gazette.

CONCLUSION

FIDIC, being a pioneer in the construction, infrastructure and energy sectors, draws attention to two remarkable topics in the realm of sustainability on energy systems and infrastructure. The reports serve as an informative guideline with respect to the application of SDGs and net zero targets in the modern power systems and infrastructure projects while providing the so-far best practice examples and recommendations for the way forward.

Reference: Decarbonisation of the Infrastructure Sector. FIDIC. (2023, July).
Reference: Developing Tomorrow's Sustainable Energy Systems. FIDIC. (2023, October).
Reference: State of the Energy Union 2023 Report.
Reference: Determination of the Standards of the Turkish Sustainability Reporting.
Reference: Determination of the Application Scope of the Standards of the Turkish Sustainability Reporting.

REGULATION AMENDING THE REGULATION ON ZONING FOR THE PLANNED AREAS

The Regulation on Zoning for the Planned Areas ("**Regulation**") published on 3 July 2017 in the Official Gazette no 30113. The Regulation substitutes the previous regulation dated 2 November 1985 of whose provisions were revised for more than fifteen times until the issuance of the Regulation. One of the main ambitions of the Regulation is to eliminate the legislative diversity that may hamper the zone integrity.

Although the goal was to keep the legislation on the matter simple and uniform, with the Official Gazette dated 12 May 2023 with the number 32188, another regulation named the Regulation Amending the Regulation on Zoning for The Planned Areas amending the provisions of the Regulation was issued and came into force on 1 July 2023 (the "**First Amending Regulation**"). Considering the massive earthquake disaster took place on 6 February 2023 affecting thirteen cities in Türkiye, the First Amending Regulation aimed to increase the preventive measures against natural disasters and the durableness of the buildings as well as to ensure safety of life and property against such kind of disasters. The First Amending Regulation was further amended with the Regulation Amending the Regulation on Zoning for The Planned Areas published in the Official Gazette on 12 August 2023 with the number 32277 ("**Second Amending Regulation**").

According to the First Amending Regulation and the Second Amending Regulation, following provisions are added to Article 5, concerning the General Principles of the Regulation:

(i) For the buildings utilized for residential purposes, the height of the commercial ground floor shall not exceed 4.5 meters, and conveyor systems specified in Turkish Building Earthquake Regulation ("**TBE Regulation**") which was published in the Official Gazette on 18 March 2018 with the number 30364 shall be used.

(ii) Short columns, mezzanine floors and closed outer spaces in buildings having more than seven floors in addition to ground floor, shall not be allowed. However, certain rights are also provided for among the provisions to be exercised in cases where the precedent rights become unusable. The number of floors, which was four pursuant to the First Amending Regulation, was increased to seven with the Second Amending Regulation.

(iii) In order to prevent clashes between adjacent buildings to be constructed, a distance amounting to the expansion joint space shall be left between the buildings starting from the parcel borders, in compliance with the requirements of the TBE Regulation.

Frames shall be formed by connecting the columns in the buildings that are built with closed outer spaces, through joists.

Additionally, the First Amending Regulation sets forth that several provisions shall be added to Article 57(2), (6), (7) of the Regulation, with the heading of Building Projects, content of which concerns certain requirements imposed on the engineers and architects with respect to their qualifications and experiences. The mentioned requirements differentiate depending on the height of the building floor.

To sum up, the Regulation was amended for several times and twice only in 2023 as an effort to address the gaps in the construction legislation. Although these technical and legal adjustments are necessary, and their prompt realization after the earthquake with the intention to avoid similar incidents in the country is valuable; it is quite interesting that the number of floors is increased from four to seven in only one month. There is no explanation as to which technical and/or legal reasoning such an increase was enacted with the Second Amending Regulation. Finally, we deem it essential to emphasize that as much as adopting relevant legislation in line with technological developments matters, inspection and supervision of such legislation also bears utmost importance to ensure that the legal framework is reflected into practical life in a manner to realize the preventive intention against natural catastrophes.

Reference: The Regulation on Zoning for the Planned Areas
References: Regulation Amending the Regulation on Zoning for The Planned Areas (2023 July and August)

TURKISH SUPREME COURT APPROACH TO CONSTRUCTION DISPUTES

Every year, a considerable number of Turkish construction companies are listed among toptiered international construction companies as construction is one of the fields in which Turkish companies have extensive experience and knowledge. As a result of disputes being an inherent consequence of complex construction projects, Turkish construction companies frequently confront a variety of them, and Turkish Supreme Court has established a common approach to certain types of repeatedly faced construction disputes. In this paper, four Supreme Court decisions rendered recently in 2023 with respect to the construction projects and the disputes arising out of or in relation to these projects are briefly evaluated.

In a case filed by a contractor with the claim of additional payment under a construction contract, it was alleged that the size and stiffness of the rock under the ground was different than the technical specifications. The court of first instance accepted that there is a substantial difference between the actual underground structure and the features specified in the technical specifications. The court decided that it was not possible for the contractor to foresee this difference at the tendering and contract signing stage and ordered for making of an additional payment in favour of the contractor. The 15th Civil Chamber of Supreme Court reversed this decision stating that the court should have received a reasoned and accountable expert report regarding the differences between the excavation costs stated in the contract and actual costs occurred during performance of excavation works and whether this difference, in comparison to total lump sum contract price, represents an extraordinary circumstance, which couldn't have been foreseen by the parties, requiring the modification of the contract with respect to the circumstances changed. After the reversal, the court of first instance received an expert report complying with aforementioned standards and partially accepted the contractor's claims. Accordingly, the 6 th Civil Chamber of Supreme Court decided to uphold the decision, given the 15th Civil Chamber of Supreme Court was closed.

In another case, 15th Civil Chamber of Supreme Court reversed the court of first instance'sdecision regarding the rejection of contractor's claims for remaining payments including the payments for additional works. The Chamber decided that contractual works and additional works outside of the contract' scope should have been differentiated. Accordingly, the entitlement of the contractor with respect to the contractual works should have been determined by considering the ratio of the works that are physically completed and applying such ratio to total amount of the works to be performed under the contract, by also taking into account the deficient and/or defective works. The Chamber also indicated that with respect to additional works outside of the contract's scope, the market price of the work should have been calculated while considering the current free market value.

Upon the reversal, the court of first instance partially accepted the contractor's claims. Accordingly, the 6th Civil Chamber of Supreme Court upheld the decision.

Similar to that decision, 6th Civil Chamber of Supreme Court decided in a different case that, if the employer initiates a second tender process after termination of the contract and claims from the contractor the difference between the two proposals, the completed portion of the works within the scope of first contract/ tender should have been determined by considering the ratio of the physically completed works and such ratio should have been applied to total amount of the works. Accordingly, the difference between the two proposals should have been deducted from the amounts payable to the contractor and the contractor's entitlement should have been calculated accordingly.

In a recent decision issued by 6th Civil Chamber of Supreme Court, it was determined that in the lump sum contracts awarded in accordance with the public tender legislation, if the contractor performs a work outside of the contract' scope, the value of such additional works should have been determined in accordance with the Articles 21 and 22 of the General Specifications for the Construction Works ("**General Specifications" / "Yapım İşleri Genel Şartnamesi**"). According to Article 193 of the Code of Civil Procedure, the General Specifications are considered as evidentiary agreement, therefore the court should have taken the General Specifications into consideration ex officio. According to Article 21 of the referred piece of legislation, if the value of the additional works is less than 10% of the contract value, then the value of the additional works will be determined in line with the value of the contractual works specified under the contract.

If the value of the additional works is more than 10% of the contract value, then the value of the additional works will be calculated in accordance with the market price of such works. Accordingly, the 6th Civil Chamber of Supreme Court reversed the decision of the court of first instance in which the court relied upon the expert report that determined the value of the additional works in accordance with the market price without considering the percentage of the amount of the additional works.

In view of the decisions cited above, it can be said that the Supreme Court has an approach tending towards specifying the determination of both the scope and the value of the additional works. In terms of the value of the additional works, in line with the General Specifications, the Supreme Court has established a plane where rather than the contractually agreed prices, the current market value of the cost items under the breakdown of the additional works may also be adopted depending on circumstances of the case. In reaching such conclusion, the ratios of the works performed or the additional works over the total contractual works in calculation of the value of the additional works performed by the contractors were some parameters taken into consideration by the Supreme Court.

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INTRODUCTORY BROCHURE

Müftüoğlu Law Office is established with the vision of generating quality-oriented solutions to its clients by acclimatizing itself to the ever-changing global order and the accelerating dynamism of the modern era. Müftüoğlu Law Office is established in 2021 with the aim of assisting its clients by procuring its services in the fields of energy, superstructure and infrastructure construction projects, financing and project finance, mergers and acquisitions and dispute settlement, litigation and arbitration related thereto.

We provide legal advice to our clients on project finance and construction, supply and installation and O&M contracts relevant to construction, infrastructure and energy projects, and advise on the resolution of disputes and assist in either amicably or by way of adjudication before dispute adjudication boards or arbitral institutions, represent clients before national and international arbitration authorities.

Our partner, FIDIC Certified Adjudicator Bilge Müftüoğlu also delivers training programs to companies active in the construction and energy sectors with regards to construction contracts including FIDIC suite of contracts.

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