

CAUSES AND EFFECTS OF THE INTERNATIONAL CONDITIONS FOR CONTRACT AND THE EFFECTS OF THOSE IN A DEVELOPING ECONOMY

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Abstract – Construction sector is a backbone for any growing economy in the globe. Construction of building, infrastructure is a symbol of attaining development. Physical infrastructures are also the symbol of hope many downtrodden countries. Construction of infrastructures can be classified into three broader classifications, Transport and communication, water and energy, buildings for other physical infrastructure. Every construction activity has four phases, planning, estimation, contract and execution. Contract of parties is an essential activity for any construction and developmental activity. Contract of parties is an agreement between one or more entities or parties for a specific activity. Usually the contract of parties will have clauses and mandate for the signing parties by the contract owners. These mandates and clauses define the work nature and qualities of the work that has to be taken. Every successful construction and development has one thing in common a solid work plan. A solid work plan is in another work a powerful contract of parties with better clauses and mandates.

Index Terms— Contract, development, construction, mandate, clauses

1 INTRODUCTION

1.1 INTRODUCTION

Construction in developing countries is a lot different than the developed countries. Construction of developing countries will be a reviving process for the people's hope and aiding the economy. So, these developmental construction activities have to be more economically viable to both parties especially the developing country. And these works are extremely time sensitive. There are two things with more scarcity for both parties, they are money and time. Loss of these both can be a very big problem for the nation's economy. To uphold the basic needs of the country in the developmental construction process contract of parties were signed. This is inevitable because of the nature of the complex problems.

Taking India as an example, India is a growing economy in the world arena. So, the above stated all

conditions is a perfect fit for the Indian scenario. The Contract Conditions formulated by different parties share a common feature in that they all tend to be found largely on the self-interest of the association or institution that devised them. This has, in general, led to a distrustful relationship between different Contract Conditions manifested in squabbles on representation and afforded rights. The atmosphere created because of this fact has not been conducive for cooperation or harmony in proceeding to the next levels of Contract formulation nor administration. This research work concentrates on the following objectives,

- To determine the causes and effects of the international conditions and rules for contracts.
- To find the hurdles for applying rule and regulation on the conditions of contract.

- Assessing the impacts of the international conditions with the developing countries point of view
- Analysis with the context of literature reviews
- Recommendations relevant to the context
- Offer and Acceptance
- Consideration
- Capacity to contract
- The object of the contract
- Formalities

2. LITERATURE

Essentials of a valid contract:

A contract is a commitment. It is an agreement between two parties which gives rise to obligations that are enforceable by law. The basic purpose of a written contract is to define exactly and explicitly the rights and obligations of each party thereof [1]. These obligations moreover, should be distinct from those required by law.

No valid contract shall exist unless:

- (a) The parties are capable of contracting and give their consent sustainable at law;
- (b) The object of the contract is sufficiently defined and is possible and lawful;
- (c) The contract is made in the form prescribed by law, if any.

It is an accepted rule of law that a person has a duty to read and understand a contract before accepting it and his/her failure to do so will not excuse her/his ignorance of the contents [2]. With this in mind, let us look at the basic contents of contracts and their major characteristics especially from the perspective of Ethiopian law.

2.1 Formation of Contract

There are essential requirements with respect to the nature and circumstances of the commitment that must be fulfilled for a contract to be valid. The following are some of the essential features:

2.2 Contract terms

The terms of contract are provisions or stipulations in a valid contract describing some aspects of the agreement between the parties to contract [3]. The terms define the rights and obligations of the parties in accordance with their agreement. The terms can either be express, implied or statutory. Their definition of these terms is as below: Exclusion terms: are words expressly agreed by the parties to contract and by which they intend to be bound. The words must be expressed orally or recorded in handwriting, typing or printing by the parties.

Implied terms: Implied terms are contract terms which are not written down in a contract or openly expressed at the time the contract is made, but which the law implies.

Statutory terms: Statutory terms are terms, which are imparted into contracts by legislation. The Civil Code of Ethiopia, Procurement law and other pertinent legislation are examples of these. Contract terms can also be either:

Conditions – fundamental to the contract. Failure to adhere to a condition may result in a breach and/or damages.

Warranties– are subsidiary to the main contract. A breach of a warranty will only result in the injured party suing for damages.

2.3 Variations of contracts

Contracts are protected by Ethiopian law in that no court may vary a contract or alter its terms on the ground of equity except in such cases are expressly provided by law.(Article 1763) Article 1764 further states that a contract shall remain in force notwithstanding that the conditions of its performance have changed and the obligations assumed by a party have become more onerous than they foresaw.

2.4 Privity of Contracts

Contract liability flows from the existence of a contract. Without a contractual relationship there can be no sustainable legal cause of action for breach of contract or to seek redress under contract liability. The existence of this contractual relationship is called Privity of Contract [4].

2.5 Discharge of Contracts

Events that may result in the discharge of contracts can be categorized into four groups:

2.5.1 Performance

In order to be fully discharged from a contract the parties must have completed all the obligations set in terms of contract. Other causes of extinction are where

- (1) The contract in which it is provided is invalidated or cancelled; or
- (2) The parties or one of them enforce a provision made in the contract for the termination of the contract; or
- (3) The parties agree to substitute a new obligation for the original obligation; or
- (4) The debtor's obligation is set off by an obligation owing from the creditor; or
- (5) The positions of creditor and debtor are merged in the same person; or
- (6) Performance of the contract has not been demanded within a fixed Period.

2.5.2 Breach

Breach of contract occurs when a party fails to carry out its fundamental contractual obligations under the contract. Breach of contract by one party may result in forced performance, an entitlement to damages or in a right to cancellation. Where a party does not carry out his obligations under the contract, the other party may, according to the circumstances of the case, require the

enforcement of the contract or the cancellation of the contract or in certain cases may himself cancel the contract.

2.5.3 Frustration

Occurs when the contract was executable at time of agreement but subsequent events, over which the contracting parties have no control, make it impossible to fulfill the contract obligations.

2.5.4 Construction Contracts

Construction contracts are the written agreements signed by the contracting parties (mainly an owner and a contractor), which bind them, defining relationships and obligations. (O'Reilly 1996). The design of the project contract has a major impact on the economic success of both parties and on the behavior of the parties in their attempt to maximize their upside or protect themselves from a downside [5].

The complex nature of major projects together with their risks require detailed and carefully written contracts that define (as precisely as possible) the legal, financial and technical aspects of the results and behavior desired by the contracting parties [6]. With one or two relatively limited exceptions, the law relating to construction contracts worldwide in the common law world is free of direct statutory intervention [7].

The law of Contract governs these construction contracts, while they cut across the law of extra-contractual liability (tort) and the law of property with respect to their legal provenance. According to FIDIC 1987 and MoWUD 1994, "contract" means the Contract Agreement, the Letter of Acceptance, the Letter of Tender, these Conditions, the Specification, the Drawings, the Schedules, and the further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance. In construction contracts, express terms take the following forms:

1. The agreement: This is the written details of the project and the agreed sum payable for its completion.
2. The conditions of contract: These are the detailed

provisions governing the execution and administration of the project. These we deal with in the form of FIDIC (red book)...

3. Drawings: This is a document delineating the plan shape of the project as well as its design details.

4. Specification or bill of quantities: A document describing the quality of the materials/workmanship as well the quantity of works required. In the absence of express terms, the following term will be implied in a construction contract. That the building contractor will execute the works in a workmanlike manner and complete within a reasonable period of time. Most construction contracts are supplemented by general conditions. The general conditions, sometimes called the General Provisions, specify the manner and procedures for implementing provisions of the construction contract within the context of the construction industry. These conditions are intended to govern and regulate the requirements of the formal contract or agreement. They do not serve as a waiver of any legal rights that either party to the contract may otherwise, possess.

The purpose of the general condition is to establish the legal responsibilities, obligation, authority and rights of all parties involved in the project. As the name implies this conditions are general in nature and apply to any construction project (Gould-Joyce, 2000). Nevertheless, most projects have special requirements which will necessitate some specific changes. These specific changes, additions and amendments are included in the particular conditions of the contract. Thus the general conditions are linked with the conditions of particular Applications, referred to as part II, by the corresponding numbering of the clauses, so that part I and II together comprises the conditions governing the right and obligations of the parties.

These general conditions can be incorporated in the project specifications of the particular construction project. Alternatively, these may also be contained in a separate document attached to the construction contract. Specific conditions of contract, in this instant are set off from the general conditions. The general conditions of construction contracts vary from one set to another.

This is largely due to the different requirements of the agency that originated them. However, most address similar issues, although they may not do so in the same manner. The importance of the general conditions of contract is paramount because of the legal consequences they entail.

3. RESEARCH METHODOLOGY

Research methodology is a way to systematically solve the research problem and research methodology shall identify the research basis, research hypothesis or questions, research design and research analysis [8]. Accordingly this chapter provides a general description of the research strategy adopted for this study, as well as justification of the methodology.

This chapter will describe the research methods applied for this study. It will dissect our every approach and justify adoption of particular methods. As stated earlier, the main aim of this paper is to bring constructive change to the standard conditions of contract adopted in the country by harmonizing them into a single all-rounded document that is able to address thoroughly every possible event in the construction process. Our study thus identified differences in the desk study and assessed impacts via the field survey. Our approach to achieve that has been as follows.

We employed various parameters in identifying and reviewing the differences in the General Conditions. Difference in placement of clauses was not treated as a difference with much impact. We thus went through with our own categories and regrouped such articles together to see if their contents entailed any differences. Our comparative study did not incorporate such clauses whose apparent difference was only of structure. Other laws which have primacy over our standard conditions abridge the seemingly different connotations. An example is in the Variations clause where FIDIC, 1987 elaborates that omission of works is interpreted as excluding those to be carried out by the Employer or by another contractor. The MoWUD conditions are lacking in exhaustive or enumerative

listings of what omission consists of. However, the Civil Code, which is on a higher hierarchy of laws has already provided for what such omissions exclude.

We have not also covered differences that resulted from lack of clarity and where implied terms can be deduced and inherently agreed upon by all parties of the contract. An instance of such lack of clarity is in the Right to vary clause where FIDIC, 1987 summarizes its terms as additional work of any kind necessary for the completion of works'. The MDB Harmonized Edition, on the other hand, clarifies what is implied by this as any additional work, Plant, Materials or services necessary for the Permanent Works, including many associated Tests on Completion, boreholes and other testing and explanatory work etc.

Next, with our preliminary conversations and encounters with practicing professionals and our advisor, we were able to select our area of concentration. We chose to meticulously address a limited number of clauses (in accordance with our initial classification) thereby simplifying our questionnaire, instead of broadening our horizon to incorporate every clause. The clauses we devoted more attention to were:

- Engineer and Engineer's Representative
- Alterations: Additions and Omissions
- Procedures for claims
- Settlement of Disputes
- Time related clauses

A questionnaire (to be covered in more detail in the next section) was prepared based on our findings of the comparative study of the topics stated above. During its distribution, however, we found out that we had to retune our targets because of a technical glitch. The World Bank, like other Multilateral Development Banks (MDB) uses the FIDIC, 1992 Conditions and introduces additional amendment clauses (mandatory, optional and recommended annotations) in the Particular Conditions.

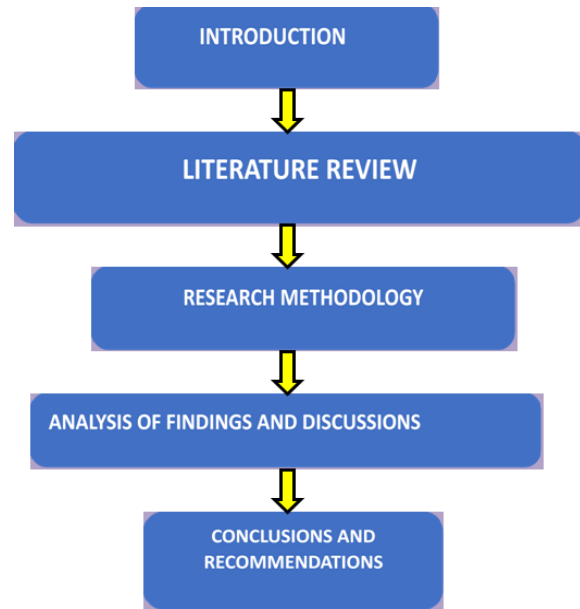


Fig 1. Research process

3.2 Data Collection

3.2.1 Source of Data

Primary data's were collected through questionnaire and interview, while secondary data's were collected through archival documents/literatures (journals, reports, researches, text books and case studies).

3.2.2 Population and participants

This is the method by which the researcher purposefully selects the topic, place and respondents. The population of our research is Building construction project in Nekemte town and the near by district and also the selected respondents from an other area through communication media are those professional Major project stakeholders such as Owners, contractors, consultants and other participants such as project manager.

3.2.3 Data Collection Tools/Instruments

The types of data collecting methods we used in this research namely: Questionnaire Survey Questionnaire As stated by [8], a questionnaire consists of a number of questions printed or typed definite order on a form or set of forms. It will be distributed to respondents who are expected and willingly to read and understand the questions and write down replay in the spacemen for the purpose of our research questions.

3.2.4 Data Analysis

The procedure used in analyzing of data was aimed at establishing the relative importance of the various factors that causing the comparison of Ethiopian and international condition of contract for the construction project

The “Relative Importance Index” method: - were adopted to rank the owners, consultants and contractors perceptions of factors causing the comparison of Ethiopian and international condition of contract for construction project. In order to determine the “Relative Importance Index” for each variable, a Scale of five ordinal measures of agreement (0, 1, 2, 3 and 4) was used to determine the relative ranking.

The Relative Importance Index computed as [9]:

Relative Importance Index

$$(RII) = (\sum W)/(A \times N) \dots\dots\dots (3.1)$$

Where:

W is the weight assigned to each factor by the respondents (ranging from 0 to 4)

A – The highest Weight (i.e. 4 in this case)

N – Total number of respondents

4. DIFFERENCES IN THE STANDARD CONDITIONS AND DISCUSSION

As stated in the chapter on methodology the comparative study of the different conditions was made to incorporate the FIDIC MDB Harmonized Construction Contracts. This was in recognition of the potential of the harmonized edition which articulated in the General Conditions, the mandatory, optional and recommended clauses that had previously been provided to amend the FIDIC, 1992 conditions. Our review was thus based on the Ethiopian General Conditions (MoWUD), FIDIC, 1992 amended by World Bank Particular Conditions (2004), FIDIC (Redbook, fourth edition reprinted, 1992) and MDB Harmonized Construction Contracts. The new Ethiopian General Conditions issued by Public Procurement.

Agencies (PPA) in January 2006 have been incorporated in our discussion. We employed an all rounded method of analyzing every provision in all the above stated documents. The parameters employed in

assessing the differences are stated in PPA 32 under A chronological description of methodology section. Because of our choice to specialize on a sample of the provisions, the following discussion is an abridged version of our original comparison better suited for our purpose. It revolves around the following provisions:

- Engineer and Engineer's Representative
- Alterations: Additions and Omissions
- Procedures for claims
- Settlement of Disputes
- Time related clauses
- Change in cost and Legislation

Although we have compiled and carefully investigated other clauses these have not been included in this study. Other differences included in this section have not been discussed because they were deemed hierarchically lower (in importance) than those clauses that were incorporated in the questionnaire. Discussing their differences, without assessing their impacts was thus rejected. Our study recognizes that the problems that arise from the differences in the Standard Conditions are significant. The way out suggested after much deliberation is a harmonization of the contracts. Harmonization on an international level could be the best remedy but may not be practicable because of the high cost it entails.

Radical change in the standard conditions is an arduous task and difficult to recommend since practitioners are already accustomed to these documents. Years of application have tried and tested undisputed applicability and importance of the Standard Condition. However, harmonization of the existing documents is necessitated to avoid adversarial relationships, ambiguity and conflict that have been observed in practice. This paper will explore such modification in both the general and standard conditions of contract from the perspective of the MoWUD Conditions of Contract. Our recommendation in this section and in the conclusion aim for the MoWUD Conditions to benefit from the experiences gained in applying clauses that are absent in them but are present in FIDIC and MDB Harmonized Conditions. This is because Harmonization is an opportunity to make other amendments that are improvements on earlier clauses applied in General and Particular Conditions

One document can share from the experience of application of its other contemporaries. We believe that taking the best advantages of the other provisions will not only strengthen the MoWUD documents but also increase their acceptance in the Construction Industry. Fusing different provisions in various contract documents into a single policy or provision (in this case from the perspective of MoWUD) will also avoid gaps and other misunderstandings including possible duplication of effort. Use of the harmonized conditions is likely to reduce the number of additions and amendments to be included in the Particular Conditions. Nevertheless, most projects will have special requirements which will necessitate some specific changes. The need for Particular conditions can thus not be compromised because of harmonization of General Conditions.

Consulting engineers, architects, contractors, construction managers and contract specialists are among the beneficiaries of such harmonization. The beneficiaries thus need to be included in any such effort via a participatory approach, no matter how much cost is to be accrued in the process. Their adept technical skills and observations that span over years of application are needed to guarantee the eventual success of harmonization. The harmony of contracts is insignificant if not backed by a procurement system that ensures their proper application. The application of the General Conditions should be in compliance with the criteria of transparency, economy and efficiency necessary for an optimal use of scarce public funds. Close at heart to this paper is the need for a structured legal framework that can serve as the proper platform for the application of the work in harmonizing the varying contract documents.

The World Bank (2004) in its particular conditions provides most of these MDB Harmonized provisions as an optional clause. Explanations are given in the notes and additional clause part for the provisions of these optional clauses as, the FIDIC Part II example is not sufficiently explicit for the purposes of this provision. FIDIC Engineer's Duties and Authority (Sub-Clause 2.1) MoWUD Duties and power of the Engineers (Sub- Clause 2.1) MDB Harmonized Conditions Engineer's Duties and Authority (Sub-Clause 3.1) Proponents of the MoWUD provisions appreciated its orientation toward protecting

government and public interest. They recommended it as best for government financed projects to control the budget. They recognized the ministry's monitoring role was instituted to make sure that the public funds are not siphoned off by 'unholy alliance' of the Contractor and the Engineer. Some recognized the ministry's limitations and especially its lack of manpower to regulate and coordinate consultants and contractors.

The same orientation toward government/public interests has allegedly created impartiality on its part. The government system was also criticized for its stringency and infeasibility. MoWUD's involvement also questions the Engineer's confidence since the Engineer has to go through the ministry for approval on many of his authorities. This is a time-taking process in light of the long approval process. With respect to the timeframe stated in the standard condition, this could cause claims for extension of time by contractors. The MoWUD provision was in addition condemned since it decreases the employer's involvement even if the employer is the financier. The marginalization of the employer is likely to create a gap of information between the parties. FIDIC was recommended for its ability to cater to all parties of the contractor and many types of contracts. More authority is afforded to the Engineer for the determination and the Employer is kept notified of his decisions. This was said to facilitate the work since prompt decisions can be made. For further restrictions FIDIC's Particular Conditions come in handy in delimiting which authorities need to be checked by the Employer. The problem noted in the FIDIC provision lies in Engineers' likelihood to decide on their own interests which may compete with that of the employer. Some argued that giving full rights to the Engineer may lead to the abuse of rights. The World Bank, 2004 document adds optional clauses which further clarify the FIDIC provisions. This outlines the authorities that optionally need to be approved by the employer/financier in a set of environments. This ensures that those decisions with financial impact will not be made without the employer's knowledge. The MDB Harmonized Edition goes one step ahead by including these provisions in the General Conditions further empowering the employer who possesses the money to decide on major issues instead of the agent-

the Engineer. The absence of an external authority saves time and avoids unnecessary delays. The client agreement on the project activity will also make it easier to settle disputes. We are of the belief that powers and authorities of the Engineer are crucial to keeping the work in compliance with some quality standard. Except where otherwise specifically stated and subject to any restrictions in the Special.

Conditions of Contract, the Engineer will decide contractual matters between the Employer and the Contractor in the role representing the Employer. Technical adeptness qualifies the Engineer's to be authoritative on everyday decisions of technical nature. But this authority has to be restricted with time and financial impacts in mind in order to keep the project expenditure within a budget/economy. The approval requirement may vary from project to project depending on the size and complexity of the project. The limits and issues needing approval need to be project specific. The capacity and experience of the engineer should also be a requirement for the limitation of approval.

Thus, although the employer is relieved of minute details, the Employer must be able to have the final say on decisions above a certain financial and time limits. The General conditions, accordingly, should list which authorities need to be passed by the Employer while the financial and time limits can be stated in the Particular Conditions. The new Contract Conditions issued by the Public Procurement Agency (PPA,2006), which has eliminated MoWUD's monitoring role with no public agency substitution. PPA, 2006 has improved the MoWUD provisions in being more lenient toward the Engineer's authorities while providing limitations such as sub clauses 38.2(change in the Bill of Quantities and activity schedule): The Engineer shall not adjust rates from changes in quantities if there by the Initial Contract Price is exceeded by more than 15 percent, except with the prior approval of the Employer.

5. CONCLUSION AND FUTURE WORK

Our objective of the research work was to determine the causes and effects of the international conditions for contract and the effects of those in a developing

economy. In this research work, the literatures for the contract of the parties were discussed and several methods of practice were elaborately discussed. Their individual advantage and disadvantages were listed and they were analyzed with proper care and examples. And also we tried to see on some clauses of the condition of contract and tried to pick out which is important and the very thing to create safe environment in the construction industry, but it may not be only this variations and this is seen by our observation and investigation, so we prepared questionnaire based on the selected title and distributed for construction stakeholders we got responses through face to face interview and through mobile phone. Then based on the responses we prepared this paper.

Condition of contract is the very essential thing to the construction industry since it is the guidance of each and every action. In our investigation we face some problems regarding the awareness of the condition of contract, but some of them doesn't now its benefits there is knowledge gap among the parties. There are many future scopes for this research work. Development is a continuous process around the globe. New set of regulation coupled with environment and regulation coupled with new set of employee condition will be a future work or updation for this work.

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