

The Case of FIDIC Contracts and their Silent Resistance in Latin America: Effects on the Prevention and Effective Resolution of Disputes

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✉ FIDIC forms of contract; South America

Abstract

The article analyzes the recent implementation of FIDIC contracts in Latin America and their impacts. In recent years, there has been a significant increase in the use of these contracts, especially in projects financed by the Inter-American Development Bank (IDB). FIDIC contracts offer multiple benefits, such as a standardized regulatory framework, clear procedures for change management and dispute resolution, and the promotion of transparency and fairness between the parties. Key figures such as the FIDIC Engineer and the Dispute Avoidance and Dispute Adjudication Board (DAAB) play crucial roles in dispute management and dispute avoidance. However, the implementation of these contracts has faced resistance in Latin American practice due to factors such as reluctance to change and lack of understanding of the new roles introduced by FIDIC contracts. Training and the development of specific skills are essential to manage these contracts, but are not always available or accessible to all parties involved. In summary, although FIDIC contracts offer multiple benefits and have proven to be effective in project management and execution, their adoption in Latin America has faced significant challenges. Resistance to change, the need for training and additional costs are factors that have influenced the reception of these contracts, generating more controversy than they are intended to avoid.

I. Recent Implementation of FIDIC Contracts in Latin America: An Analysis of Impact and Challenges

In recent years, Latin America has seen a significant increase in the implementation of FIDIC contracts, especially in projects financed by the Inter-American Development Bank (IDB).

These contracts have been promoted because of their proven benefits and their ability to establish a balanced framework between the parties involved.

The benefits of FIDIC contracts are multiple and have been key to their promotion in Latin America.

First, these contracts provide a standardized regulatory framework that is widely recognized internationally, which facilitates the participation of foreign companies and fosters competition. This, in turn, can result in improved quality of execution and optimization of resources.

In addition, FIDIC contracts provide a clear procedure for change management and dispute resolution, which helps reduce the risk of protracted and costly disputes. This structured approach allows projects to move forward more efficiently, while respecting established deadlines and budgets.

It is also important to note that FIDIC contracts promote transparency and fairness between the parties. By establishing a balance of responsibilities and rights, they foster an environment of collaboration and trust, which can significantly improve relationships between employers and contractors.

Among the most outstanding benefits of FIDIC contracts are the FIDIC Engineer and the Dispute Avoidance and Dispute Adjudication Board (DAAB). Both play crucial roles in the management and prevention / resolution of disputes within the projects.

The FIDIC Engineer, as a professional technician, not only guarantees a more effective control and supervision that ensures compliance with quality standards, but also acts as a neutral entity in case of claims, allowing a professional management. This dual role of the FIDIC Engineer allows speeding up problem solving and minimizing interruptions in the project, promoting a smoother and more efficient execution.

On the other hand, the Dispute Avoidance and Dispute Adjudication Board (DAAB) is a panel composed of independent experts that remains active throughout the project. Its main function is to prevent disputes and, should they arise, to issue quick and binding decisions. The presence of the DAAB encourages early resolution of conflicts, preventing them from becoming major and costly problems. In addition, its early and constant intervention allows the project flow to be maintained, respecting deadlines and budgets.

These figures not only raise the level of transparency and fairness in the administration of contracts, but also improve trust and collaboration between the parties, guaranteeing the effectiveness and success of the project from start to finish.

Notwithstanding the above, the implementation of FIDIC contracts has not had the expected reception due to aspects that have arisen in Latin American practice. Several factors have contributed to this situation, one of the most significant being resistance to change. Public entities and contractors have been reluctant to adopt a system that substantially modifies the traditional dynamics of administrative contracts. The new roles introduced by FIDIC contracts, such as the FIDIC Engineer and the Dispute Avoidance and Dispute Adjudication Board (DAAB), have generated uncertainty and distrust, especially with regard to neutrality and impartiality in dispute resolution.

II. Administrative Contracts vs. FIDIC Contracts

Traditionally, administrative contracts in Latin America have given public entities a position of clear predominance over contractors.

This imbalance has been a common practice, where the contractor exercises significant control over the contractor with generally disastrous consequences.

In contrast, FIDIC contracts seek to establish a better balance between the parties, ensuring that both the contractor and the contractor work under more equitable conditions. Adapting to an international regulatory framework requires a cultural and organizational change that is not always easy to implement.

However, its adoption has not been without its challenges and has generated considerable resistance from the user areas.

Training and development of specific skills to manage FIDIC contracts are essential, but are not always available or accessible to all parties involved.

This has led to a significant learning curve and, in some cases, errors in the interpretation and application of contractual terms.

Likewise, the costs associated with the implementation of FIDIC contracts have also been a point of controversy. The hiring of FIDIC Engineers and the formation of DAAB panels imply additional expenses that not all public entities are willing or able to assume. This has generated debates about the economic viability of the system and its impact on project budgets.

This change in contractual dynamics has been a source of resistance and debate.

III. The Role of the FIDIC Engineer

One of the most discussed aspects of FIDIC contracts is the figure of the FIDIC Engineer. This figure introduces a new role that differs from the regular supervision and oversight functions applied in many countries in the region.

While in the regular development of the Contract, the FIDIC Engineer acts as the Employer's representative, when one of the parties submits a claim, the Engineer must resolve it without favoring any of them, even if it is paid by the Employer. This situation poses a serious conceptual conflict for public contractors who cannot conceive how an entity that is paid for a service can decide something against it.

Likewise, this neutrality has been perceived as an interference in the established roles of supervision and oversight, generating uncertainty and resistance in contracting entities.

Many contracting areas seek to eliminate these functions of the FIDIC engineer, in order to maintain control over contractors and processes, which literally breaks the possibility of benefiting from the FIDIC contract and its best practices. This resistance to adopting the role of the FIDIC engineer can result in less transparent and equitable management, negatively affecting the execution and success of projects and leading to more disputes than expected from the FIDIC Contract.

IV. Dispute Avoidance and Adjudication Boards (DAAB)

Another recurring topic of discussion is the lack of understanding and appreciation of Dispute Avoidance and Adjudication Boards (DAAB).

These dispute prevention and resolution committees play a crucial role in the prevention and resolution of contemporary disputes, offering a more agile and effective alternative to arbitration.

However, their usefulness has been underestimated or mishandled by some users, who tend to eliminate them or not understand their true purpose, erroneously equating them with arbitration, so their improper use is not seldom seen.

This lack of understanding of DAABs is of great concern from its conceptualization to its implementation and practical use. Although this tool is highly valued and used in many projects due to its effectiveness, its misuse generates great discomfort among users. This discomfort not only affects the perception of the DAABs figure, but can also lead to a natural discredit caused by external factors.

V. Need for Education and Adaptation

That said, it is clear that the lack of understanding and adaptation to these new concepts has sown important seeds of confusion in the region.

The negative consequences of a lack of understanding of the FIDIC contracts, the Engineer and the DAAB are multiple and directly affect the success of infrastructure projects. First, resistance to adopting the neutral role of the FIDIC Engineer in the determination of claims can lead to biased and less transparent management, increasing the likelihood of conflicts and project delays. Without a professional figure to effectively resolve claims, disputes tend to escalate, affecting the dynamics and collaboration between the parties involved.

Second, the underestimation and inadequate management of Dispute Avoidance and Adjudication Boards (DAABs) deprives projects of a crucial tool for the prevention and early resolution of disputes.

The misuse or elimination of DAABs means that disputes are not addressed effectively, which can result in longer and more costly arbitration proceedings, seriously affecting the interests of the parties.

Finally, the lack of education and adaptation to these concepts leads to less efficient execution and a less balanced contractual environment. The general lack of understanding of FIDIC mechanisms prevents projects from benefiting from international best practices, which may result in lower quality of works and failure to meet infrastructure objectives.

Joint efforts by both the public and private sectors are needed to maintain the FIDIC philosophy in all contracts and promote a better understanding of its benefits and mechanisms.

In summary, although FIDIC contracts offer multiple benefits and have proven to be effective in project management and execution, their adoption in Latin America has faced significant challenges. Resistance to change, the need for training and additional costs are factors that have influenced the uptake of these contracts. However, with time and experience, it is possible that these barriers will be overcome and that FIDIC contracts will become a more widely accepted and used tool in the region.

VI. Arbitration is not untouched

The impact on arbitration proceedings due to the lack of clarity in FIDIC contracts, the absence of the Engineer in his expected role, and the non-implementation of Dispute Avoidance and Adjudication Boards (DAABs) is considerable. When a

DAAB is not appointed, the ability to address disputes early and effectively is severely impaired. This can lead to unnecessarily protracted disputes, as the arbitration process is forced to deal with issues that could have been resolved earlier.

For example, in cases where the DAAB is expected to act as a preventive mechanism, its absence may lead to a backlog of unresolved disputes that ultimately overburden the arbitration proceedings. The parties involved face increased costs and extended time due to the need to resolve preliminary issues before reaching the merits of the cases. In addition, the lack of an DAAB may mean that decisions are not as clear or precise, further complicating the resolution of the issues in dispute.

In situations where the FIDIC Engineer is not recognized or his role is underestimated, transparency and impartiality in claims management are also compromised. Without a figure who acts as a neutral and professional practitioner, projects are more susceptible to conflicts and disagreements that can escalate quickly, affecting the collaborative dynamics between the parties and resulting in more complex and less efficient arbitration proceedings.

An interesting case study on all these issues can be seen in *Serviam v. MOPC Serviam S.A. Sucursal Paraguay v. Ministerio de Obras Públicas y Comunicaciones*, ICC Case No. 25027/JPA/AJP, in which one of the issues to be addressed, before going into the merits of the case, was the competence of the arbitral tribunal, in the absence of a functioning DAB.

VII. Conclusions

All of the above demonstrates a systematic problem between the lack of acceptance of the FIDIC contracting culture by the contracting entities, the lack of understanding of the figures that FIDIC offers to benefit the contract, and its effects on the prevention and resolution of disputes in this type of contract, in which fewer disputes are expected. It is important to point out that it is not enough to praise FIDIC contracts, but to understand them, implement them and, above all, respect the figures they offer and that can really allow benefits.

At a complex time, it is necessary to have balanced contracts that allow the greatest use of resources for the development of infrastructure projects in the region, with the support of efficient dispute prevention and resolution mechanisms, as FIDIC offers.

It is imperative to insist on the importance of well-balanced and well-drafted contracts that include effective dispute management and dispute prevention tools. This approach is not only beneficial for meeting infrastructure objectives, but is also an obligation to users and taxpayers. The implementation of these contracts should be seen as a new way of contracting and executing projects, aligned with international standards and best practices.

In conclusion, the incorporation of FIDIC contracts in Latin America represents a significant advance towards a fairer and more balanced contractual environment. However, the transition requires an educational and cultural effort for contracting entities to fully understand and adopt this new philosophy, thus ensuring the successful execution of infrastructure projects in the region.