

LEGAL UPDATE



Sustainable Construction in FIDIC Contracts: Legal Enforceability in Arbitration in the UAE

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INTRODUCTION

After the 2015 Paris Agreement, there has been a growing emphasis on Environmental, Social and Governance standards (“ESG”) globally. Owing to the global advent of ESG, there has been a notable and sudden shift from voluntary governance to mandatory and compulsory governance structures with regard to ESG. While countries have globally developed sector specific ESG standards and regulations, the infrastructure sector is responsible for nearly 79% of global carbon emissions,^[1] which puts increasing pressure on the industry to integrate ESG into its governance structures and operations.





ESG Considerations in FIDIC Contracts

FIDIC contracts are standardized construction contracts aimed at providing a harmonized and uniform framework for construction agreements in international projects.^[2]

In November 2021, following the 2021 United Nations Climate Change Conference (COP21), FIDIC introduced its “climate change charter” (Charter).^[3] This Charter seeks to align the construction industry UN Sustainable Development Goals (SDG), the ambitions of the Paris Agreement, 2021 and the Intergovernmental Panel on Climate Change (IPCC) 2018 report.^[4] The charter specifically provides guidance on the commitments of the FIDIC member nations, project teams, companies, and engineers. The Charter sets out the following three core objectives:

This transition becomes even more evident and significant in the UAE, where the construction sector has been experiencing rapid growth and transformation. ESG considerations are no longer peripheral and are becoming central to project planning, execution, and also an integral part of contractual obligations.

In this regard, the International Federation of Consulting Engineers (FIDIC) which provides standard forms of construction contracts and are widely adopted in the Middle East and North Africa (MENA) region, has now begun to incorporate ESG related obligations to be adhered to the trifecta of contractors, suppliers as well as employers alike.

1. Reduce overall carbon emissions by all operations across the infrastructure industry;^[5]
2. Reduce embedded and operational carbon emissions in building and infrastructure projects on which FIDIC members consult, design and deliver;^[6] and
3. Embrace climate change adaptation by mitigating and designing infrastructure which is disaster or event resilient.^[7]

The Charter provides that these objectives are to be achieved through the collaborative and continued multi-stakeholder effort involving:

4. Influence and advocacy for continuous efforts towards United Nations Sustainable Development Goals and climate change mitigation and encouraging and supporting consulting engineers to adopt best practices.^[8]

1. Addressing buildings, infrastructure and industrial facilities and tasking FIDIC's Sustainable Development Committee with providing appropriate guidance on dedicated climate actions and carbon reduction steps.^[9]

2. Through operations, facilities and activities, including:

a) adoption of a science-based approach which is in consonance with the Greenhouse Gas Protocol, working towards a net zero/1.5 degrees centigrade of warming trajectory;^[10]

b) developing a climate action plan at the earliest which includes, amongst other things, clean energy and decarbonization across all operations, facilities and activities;^[11] and

c) annual reporting on the implementation of the climate action plan.^[12]

Additionally, with the inclusion of ESG considerations in the construction sector, FIDIC updated its Red^[13], Yellow^[14] and Silver^[15] books, 1999 and amended sub-clause 4.18 which requires contractors to take *"all reasonable steps to protect the environment (both on and off-site)"* and to *"limit damage and nuisance to people and property resulting from pollution, noise and other results of [the contractor's] operations."* This clause was amended to insert and substitute the word *"reasonable"* with the word *"necessary"*^[16] in its 2017 books which now requires contractors to take all *"necessary steps"* in accordance with local ESG laws and regulations, both on-site and off-site.^[17] It also provides that if the contractor fails to undertake *"necessary steps which are mandatory in nature"*, the contractor shall be in breach of their obligations. Moreover, these obligations and the consequences of failure to ensure that emissions from the project do not cross the limits provided by law, continue to bind the contractor even if the contract is silent on any specific emission limits.

Further, sub-clause 2.3 of the 1999 edition of the FIDIC books places a parallel obligation on the employer to ensure that the employer, his personnel, his sub-contractors and other stakeholders, cooperate with the contractor in fulfilling its ESG obligations under sub-clause 4.18.^[18] This clause has the effect of ensuring that ESG obligations under the contract are a collaborative effort of all stakeholders across the project.

While it is now mandatory for Employers to observe and practice ESG practices during the entirety of the project, it is also essential for parties to be aware of the kind of disputes which may arise when going into arbitration. The disputes may arise either directly from the contract itself which contain of climate- change related obligations^[19] or may be based on the very nature of the dispute arising from transition to green energy and cleaner and green construction methods.^[20] While the former is preferred over the latter, it is also preferred that parties mandate adherence to ESG regulations.

The Enforceability Of ESG Clauses in UAE

In order to be able to raise ESG related claims in arbitration it is essential that contracting parties carefully draft the dispute resolution clause. This can be done in two primary ways, either by a specific mention of reference of ESG related disputes to arbitration in the dispute resolution/arbitration clause itself, or by generally mentioning in the dispute resolution clause for all disputes arising out of the Contract to be referred to arbitration.

For Parties who adopt the ICC Arbitration Rules, they are to follow the recommendations of the ICC task action force of Resolving Climate Change Related Disputes through Arbitration and ADR. The task action force simply defines climate change related disputes to “include any dispute arising out of or in relation to the effect of climate change and climate change policy, the United Nations Framework Convention on Climate Change (“UNFCCC”) and the Paris Agreement”.^[21]

The relevance of these recommendations are particularly high in the UAE, which has actively implemented various ESG aligned initiatives. UAE was one of the first countries to adopt the Paris Agreement, 2016 and had implemented various regulations and policies in line with the same. Some of the most prominent ones being the UAE Vision 2021, National Green Agenda 2015–2030, National Climate Change Plan 2017–2050, Net Zero by 2050 Initiative aligned with the Paris Agreement’s focus on limiting the rise in global temperatures to 1.5 c and Sustainable Finance Working Group (SFWG) providing regulations for sustainable finance.



The Enforceability of ESG Clauses in UAE: Key Challenges in enforcing ESG Clauses

While parties are mandated to implement climate change policies, it has been observed that lack of precision and ambiguity of such ESG clauses, leads to them becoming unenforceable, and ultimately null and void. Some of the problems are:

1. Ambiguity in Drafting of the ESG Clause: Since the inclusion of ESG Clauses into the matrix contract is a relatively new concept, it is likely for disputes to arise over how to correctly interpret and implement the clauses. This issue finds seat in broadly drafted clauses such as the one provided by the FIDIC books which only mandates the parties *“to undertake all necessary steps”*. However, the clause fails to prima-facie mention which steps are to be taken and to what extent can the steps be taken.
2. Measurability: In broadly drafted ESG Clauses, a persistent issue remains of how to measure the ESG Impacts and whether there shall be a provision of ESG benchmarking or third-party verification from certified sources. Without third-party verification or ESG auditing mechanisms, compliance becomes difficult to assess and prove in arbitration. Therefore it is likely that ESG auditing will soon become a significant area for compliance and compliance is likely to become a matter of expert evidence in arbitral proceedings.

3. Supply Chain Complexity: Ensuring ESG compliance across global supply chains is an obligations which falls upon several entities engaged in international construction contracts. However, with an expansive supply chain spread across countries, ESG compliance can become resource-heavy leading to several complications, and as a result, disputes. This also introduces jurisdictional challenges, evidentiary challenges, risk of parallel proceedings and also the difficulty and complexity of holding non-signatory accountable under arbitration claims.



Conclusion

The inclusion of ESG clauses into FIDIC contracts signals a pivotal shift in the construction and infrastructure sectors, especially in the UAE which has widely adopted the FIDIC suite in various national and international projects towards attaining SDGs in the said sector. While the recent amendments brought about in the FIDIC books and the introduction of the FIDIC Climate Change Charter aim to align industry practices with ESG considerations and global climate change objectives, enforcement in arbitral forums remains doubtful due to ambiguity in the nature of such clauses, lack of measurability, lack of metrics and complex implementation mechanisms.

However, it is anticipated that ESG obligations are likely to become more precise and legally enforceable in the coming times enabling these clauses to hold more firm ground in the UAE. Ultimately, robust and well-defined ESG clauses with clear obligations, reliable verification and reporting tools, and strong institutional frameworks will lead to increased enforceability of ESG frameworks, ultimately ensuring that sustainability commitments translate into real-world outcomes and legally binding responsibilities.

Footnotes

[1] United Nations Office for Project Services, *Infrastructure for climate action*, UNOPS

(2021), https://content.unops.org/publications/Infrastructure-for-climate-action_EN.pdf, Pg. 12.

[2] FIDIC.ORG, https://fidic.org/sites/default/files/FIDIC_Suite_of_Contracts_0.pdf (last visited June 30, 2025).

[3] FIDIC.ORG, <https://www.cace.cz/wp-content/uploads/2021/11/Climate-Charter-with-Foreword.pdf> (last visited June 30, 2025).

[4] FIDIC.ORG, <https://www.cace.cz/wp-content/uploads/2021/11/Climate-Charter-with-Foreword.pdf> (last visited June 30, 2025), at Pg. 4.

[5] *Id* at Pg. 7.

[6] *Id* at Pg. 7.

[7] *Id* at Pg. 7.

[8] *Id* at Pg. 11.

[9] *Id* at Pg. 12.

[10] *Id* at Pg. 13.

[11] *Id* at Pg. 13.

[12] *Id* at Pg. 13.

[13] FIDIC, *Conditions of Contract for Construction for Building and Engineering works, Designed by the Employer* 34 (1st ed. 1999), Cl. 4.18.

[14] FIDIC, *Conditions of Contract for Plant and Design- Build for Electrical and Mechanical Plant, and for Building and Engineering works, Designed by the Contractor* 33 (1st ed. 1999), Cl. 4.18.

[15] FIDIC, *Conditions of Contract for EPC/ Turnkey Projects* 22 (1st ed. 1999), Cl. 4.18.

[16] FIDIC, *Conditions of Contract for Construction for Building and Engineering works, Designed by the Employer* 35 (2nd ed. 2017), Cl. 4.18.; see also: FIDIC, *Conditions of Contract for Plant and Design- Build for Electrical and Mechanical Plant, and for Building and Engineering works, Designed by the Contractor* 35 (2nd ed. 2017), Cl. 4.18.; FIDIC, *Conditions of Contract for EPC/ Turnkey Projects* 49 (2nd ed. 2017), Cl. 4.18.

[17] Richard Dupay, *FIDIC Climate Change Charter: what does it all mean?*, PRACTICAL LAW CONSTRUCTION BLOG (last visited June 30, 2025), <http://constructionblog.practicallaw.com/fidic-climate-change-charter-what-does-it-all-mean/>.

[18] FIDIC, *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer* 25 (1st ed. 1999) Sub-cl. 2.3, ; see also: FIDIC, *Conditions of Contract for Plant and Design- Build for Electrical and Mechanical Plant, and for Building and Engineering works, Designed by the Contractor* 25 (1st ed. 1999), Cl. 4.18.; FIDIC, *Conditions of Contract for EPC/ Turnkey Projects* 15 (1st ed. 1999), Cl. 4.18.

[19] UN, *Reports of International Arbitral Awards, Trail Smelter Case (US, Canada)* 16 Apr. 1938 and 11 Mar. 1941, Volume III 1905–198.

[20] Lucia Bízíková, *On Route to Climate Justice: The Greta Effect on International Commercial Arbitration*, 39(1) *J. Int'l. Arb.* 79–116, at 85 et seq. (2022)

[21] International Chamber of Commerce (ICC), *Resolving Climate-Change-Related Disputes Through Arbitration and ADR* (Nov. 26, 2019), <https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>.



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