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Arbitration of Construction and Infrastructure Disputes in Pakistan:Lessons from FIDIC Contracts and International Practice

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***Abstract*:** The construction and infrastructure industries in Pakistan (specifically in relation to CPEC) are increasingly using FIDIC standard form contracts, which direct disputes to the Dispute Board and international arbitration. There are also shortcomings in the procedures introduced by these mechanisms, as many construction disputes still come before the Pakistani Courts, and local parties are not very knowledgeable about the technical and procedural requirements of FIDIC arbitration. This article highlights the risk allocation and dispute resolution procedures in FIDIC contracts, reviews Pakistan's experience with arbitration in both domestic and international forums, and compares with other jurisdictions such as the United Kingdom, Singapore, and the Gulf countries. At the end, it proposes recommendations and changes to contracts, institutional design, and capacity building to create a more coherent and efficient dispute resolution system between the contracting parties in construction and infrastructure disputes in Pakistan.

Keywords: construction arbitration, infrastructure disputes, FIDIC contracts, Pakistan, CPEC, dispute boards, enforcement, institutional reform.

Introduction

Pakistan's development plans are heavily reliant on big infrastructure and construction projects. The construction of highways, power plants, dams, ports, and urban transport systems is carried out through public procurement, public-private partnerships (P3S), and foreign direct investment (FDI) schemes. These projects are complex, require large capital inputs, and are often politically sensitive. Issues related to delays, cost overruns, variations, defects, and payment claims are thus commonplace. Its resolution, therefore, is of immense consequence not only for the parties involved in these disputes but also for the delivery of projects, fiscal stability, and Pakistan's image as a reliable partner in infrastructure projects.

The FIDIC set of standard form contracts has come to the fore in this scenario, for many major projects, such as those involved in the China-Pakistan Economic Corridor, the FIDIC Red, Yellow, or Silver books are used, sometimes tailored to the specific conditions of each project. These contracts include multi-tier dispute resolution provisions, initially with the engineer's determinations, then with a dispute adjudication or avoidance board, and finally with international arbitration (ICC/LCIA/SIAC). However, the domestic arbitration law in Pakistan, which remains stuck under the Arbitration Act 1940 until the enactment of the Draft Arbitration Bill 2024, has failed to align with these transnational contractual regimes.

This article contends that Pakistan is at a crossroads in resolving construction/infrastructure disputes. It may reduce project risk, attract more sophisticated partners, and handle disputes more efficiently if it adapts its legal framework, institutions, and professional practice to contemporary FIDIC arbitration. However, if it cannot, it risks fragmentation of its own courts and international arbitral proceedings, inefficient enforcement of contractual mechanisms, and unnecessary costs. The analysis below will attempt to identify the key gaps and suggest feasible measures to advance reform, rather than merely couching proposals in grand terms.

Although the academic analysis of the construction dispute resolution experience in Pakistan is limited. Much of the available knowledge is found in the records of government departments, contractors, advisors, and counsel. It has not yet been processed into any published case law or scholarship. This article will also strive to identify a research agenda more firmly rooted in empirical evidence to help advance evidence-based reform in this area.

In this light, it becomes clear that understanding and enhancing the mechanisms for resolving Pakistan's construction disputes is not just a complex technical issue but also a governance issue.

FIDIC Contracts and Dispute Resolution Mechanisms

Standard forms of contract, most of which are published by the International Federation of Consulting Engineers (FIDIC), are used in international construction. The Red, Yellow and Silver Books 2017 and 1999 offer a holistic approach to contract management, risk transfer and dispute resolution. A central key element is the need to notify the claims within clear time limits, assess them according to the rules set by the engineer and then, if disputed, take them up with a dispute adjudication or avoidance board (DAB or DAAB). Any dispute board determination is an interim, final, and binding decision to be obeyed until an amicable resolution or arbitration is reached. Disputes are only taken to arbitration if one of the parties provides notice of dissatisfaction within the time stipulated in the contract (FIDIC, 2017).

Many of these mechanisms are in place to avoid disputes going to formal arbitration, thereby preserving cash flow and relationships at the project level. They do, however, depend on speedy claims management, skilled engineers and effective dispute boards. Disputes also tend to leap straight into arbitration and even into domestic courts if parties are accused of failing to give the required notices, if engineers are not fulfilling their roles in clearly defined ways, and if dispute boards are not formed or don't function. Therefore, it is imperative to understand how the FIDIC is designed to work and how it can go awry in Pakistan.

Some provisions of the local statutes are also mandatory and apply to FIDIC contracts. There is doubt regarding the enforceability of dispute board awards in a domestic Forum, the consequences of non-compliance with the notice requirements, and the compatibility of the FIDIC-based arbitration clause with national arbitration laws. In other jurisdictions, such as England and Singapore, there is a body of case law that generally upholds FIDIC mechanisms, enforces interim binding decisions, upholds the significance of contractual time bars, and provides relief only in very limited cases of unconscionability and public policy. There is not much case law in Pakistan addressing these questions, leaving parties and tribunals uncertain.

FIDIC has also evolved from 1999 to 2017, based on lessons learned from disputes. There has been an increased focus on dispute avoidance in the 2017 forms, including more frequent meetings between the parties and the dispute avoidance and adjudication board and the board being encouraged to support the parties' efforts to reach an informal resolution. This preventive role echoes international 'best practice', where it is recognised that several conflicts can be handled at the preventive level through advanced communication and problem-solving, provided the necessary measures are in place. In Pakistan, the provisions of FIDIC for avoiding disputes are often ignored in the construction industry, either because contracts are awarded under a different edition of FIDIC or because of significant changes to FIDIC, often made by lessors and courts. The use of older editions of FIDIC, or heavily amended versions, sometimes fails to implement their dispute avoidance features in Pakistan to the extent of their potential (FIDIC, 2017).

In summary, FIDIC contracts provide Pakistan with a blueprint – successfully tried and tested internationally – for structuring project governance and dispute resolution. Against the background of ongoing discussion on the appropriateness of FIDIC in general, the question is whether FIDIC's mechanisms are adequately applied and adapted, and whether domestic law and institutions are effective in addressing disputes arising in this context.

The reforms in this article are an attempt to achieve an integrated vision to bring the Pakistani practice closer to it.

Construction and Infrastructure Disputes in Pakistan

While there are virtually no empirical data in Pakistan on the volume and nature of construction disputes, indicators from the Law and Justice Commission's statistics, High Court records, and arbitral institutions suggest that construction claims account for a large share of commercial cases. Common conflicts include differences of opinion on specifications, delays due to area changes, design changes, and rising material costs, and employer withholding/encashment of performance guarantees. In many cases, these conflicts occur in public-sector contracts, where government departments and state-owned companies serve as employers, introducing additional layers of the bureaucratic process and the audits associated with it (Law and Justice Commission of Pakistan, 2021).

The China-Pakistan Economic Corridor has added a dimension. Foreign contractors, complex financing deals and political considerations frequently complicate the CPEC projects. The preference for foreign arbitration in CPEC-related contractual disputes is perhaps the determining factor in selecting the arbitration clause. Perhaps the determining factor in the choice of an arbitration clause is investors' preferences and perceptions of the neutrality and enforceability of foreign arbitration, which is common in CPEC-related contracts. These decisions may make business sense, but they prevent expertise-building efforts by Pakistani institutions and professionals—and may even be helping to export high-value conflict. Meanwhile, smaller domestic projects also create contentiousness that ends up in Pakistani courts, where delays and a lack of technical expertise may undermine the advantages of standard form contracts.

However, when opting for arbitration, they tend to include ad hoc arbitration clauses based on the 1940 Act or the Arbitration Act of the arbitral seat. Pakistani courts may then challenge an award on procedural grounds, such as errors in appointing the arbitrators, non-observance of statutory formalities, or alleged misbehaviour. But these issues can create perceived uncertainty in or delay the enforceability of arbitration unless judicial attitudes are supportive and predictable. Recent case law under the Recognition and Enforcement of Foreign Arbitral Awards Act 2011 indicates a trend toward greater recognition of foreign-seated arbitral awards. However, the pace is uneven from province to province.

Anecdotally, practitioners have reported numerous construction disputes in Pakistan that might have been prevented or reduced through proper, systematic documentation and escalation of site-level disputes. Some projects see contractors delay declaring claims for fear that doing so may aggravate employer relationships, and employers view early claims as an adversarial act rather than as part of the everyday running of the contract. This can result in a state of affairs that detracts from the FIDIC principles of ensuring that claims management functions quickly and transparently. This will necessitate lifestyle (cultural) changes, in addition to legal changes, which will involve educating all stakeholders in the public and private sectors on the importance of early notification and documentation (Zamir, 2020).

There is also variation between provinces of Pakistan. In bigger cities like Lahore, Karachi, and Islamabad, conflicts out of construction projects are likely to be linked to bigger companies, international contractors, and some understanding of the FIDIC concepts, whilst the small scale urban and rural conflicts are likely to be centered around forms drafted by the government and/or out-of-date that are entirely at the mercy of the government and have few provisions for ADR. Thus, any attempt at national reform should be cognizant of these differences and provide enhanced tools and training for large projects, and strengthen the traditional contract and dispute resolution regime for smaller projects (Law and Justice Commission of Pakistan, 2021).

Experience with FIDIC-Based Dispute Boards and Arbitration

The experience with FIDIC-based dispute boards in Pakistan is mixed. In some donor-funded projects (e.g., those of the World Bank or the Asian Development Bank), the use of dispute boards has been incorporated into the FIDIC procedure, and it has worked constructively, promptly resolving claims. In other projects, especially those funded by domestic employers, employers, or contractors have been less willing to pay for the perceived extra expense of a dispute board, or have regarded it as a "rubberstamping" exercise. Boards might be appointed late, fail to meet regularly, or be disregarded if they make decisions that don't meet parents' approval. This compromises the potential of the mechanism as a preventive and problem-solving mechanism (World Bank, 2020).

Affected parties in Pakistan often have to navigate the arbitration landscape steeply when associated with the dispute pursuant to the FIDIC clauses. Requires skills and resources that are not necessarily available within local firms, such as complex procedural timetables, turning of documents, expert evidence, and quantum analysis. This often leads to the hiring of foreign counsel and experts and thus to higher costs. Those Pakistani counsel and experts who do take up the activities serve well, as it gives them much-needed experience. Presently, there is no organised scheme to foster a wider base of construction arbitration specialists. The ability to prepare claims, develop case strategy, and exploit/reject technical arguments regarding the interpretation of FIDIC clauses can be affected.

Sometimes, tribunals handling cases involving Pakistani projects have noted poor project management and inadequate records. Claims may not be reported on time or in full, site records may not be kept up to date, and there may be inadequate reporting of variation orders. These are the flaws that diminish contractors' capacity to establish entitlement and raise the potential for factual disputes. If that isn't done, they also reduce the value of dispute boards, which depend largely on high-quality records. The need to resolve these issues involves not just dispute resolution clauses, but project management practices at large.

Donor-funded projects partially balance these out. The experience of variations and claims has been timely, with lenders such as the World Bank and the Asian Development Bank insisting on the proper establishment of dispute boards and monitoring contract administration. In such projects, however, even in arbitration, the gap between well-equipped international contractors and local subcontractors and/or state entities can persist. The challenge is that the parties to an arbitration proceeding are not fully equipped to meet it, and Pakistan is on the back foot in such proceedings.

There are also challenges, such as language and documentation. Many FIDIC contracts and relevant communications are written in English, whereas site communications and records may also be in Urdu or other local languages. Technical documents arbitration translation is an expensive service and can lead to errors. Encouraging bilingual documentation and − importantly − a comfortable level of working in the language of the contract for key contract administration personnel will limit friction and enhance the evidentiary basis for a dispute board and for a tribunal (Zamir, 2020).

Comparative Lessons from Other Jurisdictions

Given the origins of many common law construction practices, there are lessons to be learned from the United Kingdom. Having a Technology and Construction Court, specialised judges, and a relatively robust body of case law on construction contracts and adjudication has paved the way for a fast and predictable environment in which disputes can be resolved. Under the Housing Grants, Construction and Regeneration Act 1996, payment disputes can be resolved through litigation or arbitration, and there is also a fast-track, interim, binding process called statutory adjudication. It has generally been the case that the courts have upheld the dispute resolution procedures in contracts and included the requirement for parties to adhere to the contractually agreed time bars, such as that contained in FIDIC contracts, under which the parties are required to issue dispute notices.

Singapore has rapidly developed its reputation as a regional centre for construction arbitration and construction dispute boards. Singapore's institutions, such as the Singapore International Arbitration Centre, have developed arbitration protocols specialising in infrastructure, and, with their support, dispute boards and standing neutrals are being appointed early in complex infrastructure projects. Singaporean courts take a pro-enforcement approach to arbitration contracts and to arbitration awards, assuring the parties that contractual objections will be honoured. Capacity building targeted results in practitioners and experts who are not only comfortable in using FIDIC contracts, but are also comfortable in working with technical evidence (Chan, 2018).

FIDIC contracts on mega-infrastructure projects have been extensively used in the Gulf states, such as the United Arab Emirates and Qatar. Their experience shows both strengths and weaknesses behind such an approach of transposing FIDIC forms into civil law and hybrid systems. Proper understanding of how concepts such as dispute boards and interim binding decisions will be enforced has not, in some cases, been clearly articulated by the courts, and there has been some divergence in how such powers will be exercised. With time, however, international arbitration practice has become more influential in supporting contractual dispute resolution mechanisms (Raouf, 2016).

Based on these comparative examples, it is recommended that Pakistan not only consider the textual alignment of the Arbitration Law with the UNCITRAL Model Law but also establish specialised institutions and a professional community for construction disputes. The development of specialised court lists and arbitration panels, and the establishment of protocols for dispute boards, can help create a more coherent system.

Reflectively, based on experience in other countries, it is important to ensure that public procurement regulations are coherent with standard form contracts. Sometimes the rules governing procurement are too strict, and the rules for contracting are too loose, resulting in disagreements when contractors seek variations or time extensions because the contracting officer is concerned about audit findings. The UK and Singapore have resolved this issue by stating that compensating events and extensions of time are compatible with good procurement, provided they are used legitimately. Procurement and audit processes in Pakistan will also benefit from similar clarification to prevent players from resorting to ‘defensive decision-making', which may simply refer cases to tribunals for quick results rather than resolving disputes in the field (Government of Pakistan, 2020).

Australia's experience provides another model for security-of-payment legislation. Under the statutes of New South Wales and other states, there are expedient ways for contractors to get interim payment, which has the effect of converting the money claim into a debt which can be recovered in court and a determination of the detailed final order, if required, is made at a later stage, by arbitration or litigation. The laws governing the Pakistani industry and legal environment may differ, but the essence of "no cash flow = no life" in construction remains the same. Any changes to the adjudication or dispute boards in Pakistan must consider this principle and aim to ensure prompt, timely, and enforceable decisions to ensure that projects roll.

Suggested Reforms and Recommendations

Based on this analysis, a number of recommendations are offered to reform Pakistan's existing construction and infrastructure dispute resolution system. Firstly, the Draft Arbitration Bill 2024 should specifically acknowledge the existence of dispute boards and explain how the award made by dispute boards can be made binding. Provisions could specify that decisions made by properly constituted boards on an “interim” basis have the force of law similar to an arbitral award, which could be challenged only on limited grounds. This would make it abundantly clear that parties cannot ignore a board's decision and litigate or arbitrate a case ad infinitum without repercussions.

Secondly, public sector employers should be required, under procurement rules and standard bidding documents, to include FIDIC-style (properly adapted) clauses for dispute resolution and to establish dispute boards at the time a project is bid, not when a dispute occurs. Engineering, project manager, and government official training programmes should focus on the importance of timely claims notification, unbiased engineer determinations, and positive facilitation with the dispute board. This can be facilitated by donor agencies associated with projects in Pakistan, through technical assistance and an insistence on good practice in contract administration.

Thirdly, Pakistan needs to have a specialised forum for construction disputes. This includes the establishment of construction (arbitration) benches in the High Courts, sufficient judges with technical and contractual skills, and a list of arbitrators and experts by the IMAC or a separate construction arbitration case. Other modifications to speed the process, such as limiting dilatory practice, expert conferencing and case management conferences, would help. Capacity building could be sped up by working with existing centres in Singapore, London and Dubai.

Fourthly, a joint accreditation scheme and continuing professional development requirements for construction adjudicators, members of the dispute board, and arbitration counsel should be developed through the joint efforts of professional organisations such as the Pakistan Engineering Council, several bar associations, and others. An increase in skilled neutrals and advocates will reduce reliance on foreign professionals, and Pakistani parties will save on exorbitant fees paid to foreign neutrals. Universities have a role to play by integrating construction law and dispute resolution aspects into engineering and law courses.Lastly, there will need to be better data. Pakistan should conduct a systematic collection and publication of anonymised data on construction disputes, including time taken for resolution, the forum of resolution, and the resolution. This would help policymakers and industry stakeholders identify which reforms are needed and where the bottlenecks are. This iterative effect between practice and policy can, over time, develop a stronger and more stable framework for addressing disputes that inevitably arise when ambitious projects, such as infrastructure investments, are undertaken.

In addition to legislative and institutional reform, the contract's practice itself should be improved. FIDIC general conditions tend to be extensively modified by Pakistani employers/contractors in ways that upset the balance between risk and dispute resolution provisions, e.g., the removal of dispute boards and the unrealistic shortening of time bars. Changes have been suggested, including the development of government-approved conditions that standardise acceptable deviations in the basic FIDIC constructions, and guidance notes that explain aspects of the key provisions. This would reduce the growth of "don't know; don't care" clauses, which could create uncertainty and litigation.

One of the recommendations is that Pakistan consider establishing a statutory adjudication regime for domestic construction projects along the lines of the United Kingdom's model, adapted to Pakistan's realities. This would be merely a quick, interim remedy for payment and time differences that will work hand in hand with the current arbitration and courts. If there are specific sectors (power, transport, etc.) where a decision has been made to implement a pilot, it could be tested for feasibility. However, adjudication, if successful, could reduce the number of disputes that proceed to full arbitration and improve cash flow in the construction industry (Bayfield & Furst, 2019).

Capacity building should not be restricted to lawyers and Engineers. Exposure of judges to FIDIC concepts, delay analysis, and expert evidence is needed for judges who try construction cases in either type of action or with regard to the enforcement of awards. Judicial training modules – perhaps in cooperation with foreign judiciaries with extensive experience in construction disputes – would lead to higher quality and greater uniformity in judicial decisions. The creation of clear, well-reasoned judgments that will support contractual disputes and resolution regimes will, in the long run, affect the behaviour of parties and limit opportunistic challenges.

Lastly, there is a need for regular forums for communication where a group of stakeholders, such as government agencies, contractors, consultants, lenders, and DR professionals, can learn from each other's experiences with completed projects. These forums could review de-identified examples of conflicts, identify commonalities in their causes, and reach a consensus on how to address them, whether through enhanced drafting, project management, or training. Competitive bidding and this sort of learning are hallmarks of mature building markets. They will be vital for Pakistan to shift from firefighting disputes on an ad hoc basis to more systematic, system-wide responses. As a means to facilitate these changes, Pakistan could establish a national centre for construction law and dispute resolution, either within one of the universities or through a joint venture with a professional body. A Centre like this could provide a specialised diploma, host conferences, create a database of anonymised awards, and challenge the board's decisions, serving as a hub for engagement with international networks. As time passes, this would go some way towards establishing good practice and serve as a forum for continued policy debate.

Sequencing will be important for implementing some of the recommended changes/improvements. Several "quick wins" like providing guidance on how to use standard FIDIC forms in public procurement and setting up specific training programmes can be taken in the short term, and more complex 'quick wins' such as statutory adjudication and creation of a national centre can be taken in the longer term after consultation. Key stakeholders have agreed on a wide range of initiatives. While it is important to maintain the pace and momentum to keep them going, these initiatives also need to be mutually reinforcing.

There is also a need for specific measures on the relationship between domestic courts and international tribunals. But guidance through practice and provisions in legislation can leave very little doubt of the general rule that the courts of Pakistan will usually refuse to interfere with the arbitral process, where there are arbitration clauses based on FIDIC, and that enforceability of awards and rulings made by the dispute board will be in accordance with the New York Convention, with extremely strict public policy exceptions. This will decrease forum-shopping and procedural skirmishing, improve filtering, and concentrate on the substance of the technical issues. All of the aforementioned suggested reforms and recommendations seem to be signs in the direction of a more integrated learning-oriented approach, which can be done by involving the complementary mechanisms of drafting contracts, managing projects, engaging dispute boards, holding arbitrations and courts rather than all functioning separately and in an independent manner in the resolution of construction and infrastructure disputes in Pakistan.

In this context, it would be wise if the Ministry of Law and Justice, PPRA, the Pakistan Engineering Council, and the superior judiciary agreed upon and released a policy statement on the principles of construction dispute resolution. This statement might convey joint commitments to prompt payment, the importance of contractual mechanisms, the right to use ADR, and capacity building at the local level, and serve as a stepping stone for subsequent, detailed reforms.

If Pakistan is to keep pace with its aspirations for infrastructure, sequencing, law reform, monitoring results, and readiness to adapt along the way, it shall be paramount.

There needs to be ongoing political commitment, and for the public and private sectors to work together over the long term to achieve success.

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