

The Nature of Civil Liability of the Consulting Engineer in International Construction Contracts

Dr. Shames Eldeen Qasim Al-Khazaleh
Doctor of Civil Law .
Taibah university , almadinat almunawara , KSA.

Abstract

Civil liability legislations have agreed on considering the contractual fault as a basis of the contractual liability. While Tort liability is based on a breach of a general obligation “not to cause harm to another.” FIDIC contracts specify the liability of the consulting engineer in accordance to the fault, if his fault is related to contractual liability. Whereas he holds responsibility for the damage if it is associated to tort liability. This research aims to determine the nature of the civil liability of the consulting engineer, whether it is of contractual liability or tort liability in its relationship with the parties of FIDIC contract: the employer and the contractor.

Keywords: Tort Liability, Contractual Liability, damage, harmful acts, Tort.

DOI: 10.7176/JLPG/92-20

Publication date: December 31st 2019

Introduction

The construction industry has recently become the hub of the economic growth both nationally and internationally. This fast-growing industry has encouraged the largest companies to manage and invest in this sector which led to the emergence of some problems such as the overlap between large projects that need huge capital. In addition to the investment nature of these projects, sometimes megaprojects need great financial funding, which require the involvement of foreign investors to construct and manage these projects. On the other hand, some foreign investors wish to establish their investment in another country.

This urban revolution demonstrated the need for laws to govern joint investments, which prompted international bodies and committees to adopt models that govern contracts in this sector in a compatible way of the nature of the execution of such projects. As a result, the International Federation of Consulting Engineers (FIDIC) contracts was issued aiming to achieve a balance between the parties of the contractual relationship.

Jordan has adopted the FIDIC contracts in issuing the clauses of its contractual contracts. The first construction contract was issued in 1978 and was derived from FIDIC contracts. Several amendments were made until 1999 ,the last amendments were conducted to be consistent with the latest copies of the FIDIC contract for The Red Book. It should be noted that the construction contract has become binding to all governmental constructions and must be resorted to if it is related to a governmental facility.¹

FIDIC contract specified the parties to the contract, who are the employer and the contractor, while it has defined the engineer as one of the Employer’s Personnel and who is associated with the employer with an independent contract known as an engineering construction contract.

FIDIC has granted apparent authority to the engineer, who is almost the focus of the contractual relationship, as he is considered a representative of the business owner in the performance of his powers, he may interfere in overseeing the execution of the project or preparing the necessary designs for its execution. He can also do the necessary amendments in addition to his arbitral role.

The problem of the study: Although the engineer²is not a party to the contract, but he is considered the primary element in its implementation. Which exposes him to commit errors or negligence when exercising his duties and accordingly vulnerable to accountability.

As a result of the damage he caused, he may hold the legal liability and a suit may be filed against him. This fact requires determining the nature of his legal responsibility, whether it is contractual or tortious liability, and when it is contractual or tortious liability.

Research Methodology: The researcher used the comparative method, whereby the provisions of the FIDIC contract will be compared with the provisions of the Jordanian civil law based on the Latin system, even though the FIDIC contracts are based on the Anglo-Saxon system.

Research plan: This research is divided into two topics, the first topic defines the parties of the FIDIC contract, as well as the authority of the consulting engineer through three sections; the employer, the contractor and the authority of the engineers respectively.

¹ Shehadeh, M, N. Privacy Arbitration in International Construction Contracts, research published on the website. East law. Com . Karaki, YS (2006) Jordanian contract for construction projects in Jordan, Master Thesis - Mutah University – Jordan. P12 . Nassar, G (2009) Execution of buildings and engineering works designed by the employer, translated into Arabic by the terms of the construction contract, Arab Center for Arbitration Egypt,p12

² FIDIC contract (1999),article (7.2)

The second topic discusses the responsibility of the consultant engineer through two sections. The first section is allocated to the contractual liability of the engineer. While the second section explains the engineer's tortious liability. The conclusion of this research includes the most important results in addition to the recommendations.

The First Topic: The parties to the construction Contracts and the most prominent powers of the consultant engineer

This section discusses the parties to the construction contract including ; FIDIC contract, the employer, the contractor and the powers of the consulting engineer.

Section one: The employer

Article (1-1-2-2) FIDIC (1999) defines the contracting parties¹ including the definition of an employer. Accordingly, the employer is considered a party of the FIDIC contract. The employer could be a natural person or a legal person.² He is also defined as the first party in the contract from whom the offer is issued to conclude the contract. This offer is made through a (Tender)³

Tender is issued to accomplish the work by inviting bids for large projects that must be submitted within a finite deadline. Then a competition is conducted between several contractors to select the most appropriate one that will construct the project with the assistance of an engineer. The last process of tendering is the creating of the contract to the party who wins the bid by the issuance the letter of acceptance.⁴

After that, both parties to the contract, the employer and the contractor shall enter into a contract agreement within "28" days after the contractor receives the letter of acceptance, unless they agree otherwise. Resorting to a tender method for selecting the most suitable contractor from a group of contractors is better than the direct selection by the employer because he will be responsible for any contracting errors.

Based on the foregoing, the employer is the first party in the contract who issues the contract and he can be a natural or legal person who owns the engineering project or who is entitled to construct it. Thus, he is the owner of the idea, the financier and the stakeholder for completion of the project and who attains the desired interest of the project. The project could be an investment of the employer's capital, which requires studying the economic feasibility of the project.⁵ In addition to the employer's personnel who is specified in Article (1-1-2-6) as the engineer, the assistants and all other staff of the employer⁶. On other words, they are the personnel assisting the employer in the execution of the works as he couldn't execute the work alone.⁷ For having assistance, the employer shall notify the contractor, or he will expose himself to legal liability.⁸

Section 2: the contractor

The contractor is the second party in the FIDIC contract. Article (1-1-2-3) defined the contractor as " the person(s) named as contractor in the letter of Tender accepted by the employer and the legal successors in the title to this person(s)."⁹

It should be noted that, the contractor's role comes at the final stage of the contracting process, which is the execution stage of the project and in accordance to the nature of the contract and its goals. The contractor is responsible for what he agrees on when contracting, whether in terms of the construction conditions or the issuances of drawings as agreed upon in the conditions of the construction contract.¹⁰

The contractor is considered the one who accepts to the employer's offer at the time of the tendering process. And who applied for the bid and was selected among the other competitors. When the contractor wins the bid, he shall provide the employer with these documents, performance security and bank guarantees. Then the documents of the contract shall be prepared for signature by both parties.¹¹

The Jordanian Contractors Association Law 1987 states that "the contractor is Any person, natural or legal, who practices the profession on contracting, licensed and registered in accordance with the provisions of this Law."¹²

A contractor is also defined as the natural person who is obliged to provide the necessary materials,

¹ FIDIC (1999) , Article (1-1-2-2)

² Far, A (2016) Introduction to studying general theoretical legal sciences, Dar Al-Thaqafa Publishing, Jordan. 152

³ Mansour, A, M (2015) The General Theory of Commitment, Sources of Commitment, A Comparative Study, Dar Al-Thaqafa, Amman, p. 85. Khulusi, M., M. (2008) Domestic engineering and international contracts, without publishing house.p12

⁴ FIDIC 1999 , Article 1-1-3

⁵ Hiyari, M., A. (2012). Effects resulting from the conclusion of the construction contract for FIDIC 1999 and the methods for settling disputes arising therefrom, Yafa Publishing House.p43

⁶ FIDIC 1999 Article (1-1-2-3)

⁷ Rashid, Kh, A (2004) Contractual Aspects in Construction Projects, Kuwait University, Scientific Publishing Council

⁸ FIDIC 1999 . Article (1-1-2-6)

⁹ FIDIC.1999. Article (1-1-2-3)

¹⁰ Abdel-Alim, Z working paper (2008) presented at the sixth conference of the International Arbitration Federation, Amman 2008, entitled: Modern Trends of Means of Settlement of Investment Disputes in the Arab Countries

¹¹ Mansour, op . cit, p. 63

¹² The Jordanian Construction Contractors Law, 1987. Article (2) f

achievements, services and execution of the work of any project to the contracting parties.¹

This definition has been criticized because it limits the definition of a contractor to a natural person, ignoring the legal person even though most of the contract is conducted through contracting companies and not through individuals.² And by reviewing the text of Article (1-1-2-3) of FIDIC contract, a contractor is defined as a person or persons, which indicates “the natural and legal person” for the execution of the project contract.

When reviewing the text of Article (1-1-2-3) we realize that the definition of the contractor was a person or persons which FIDIC indicates to be the natural or the legal person who is entitled to carry out the contracting project as agreed on with the employer.

Whereas the nature of the contractor is not limited to the one who contracted with the employer, but it extends to his representative, the person named by the contractor and who acts on behalf of him. Those personnel should be implied in the contract, otherwise, the contractor shall be liable.³

The contractor shall appoint the contractor’s representative and specifies him in the contract. If contractor’s representative wasn’t named in the contract, the contractor shall, prior to the commencement date, submit to the engineer the name and particulars of the person he proposes to be appointed as his representative. If consent is withheld, subsequently revoked or if the appointed person fails to act as contractor’s representative, the contractor shall similarly submit the name and particulars of another suitable person for such appointment. The contractor shall not, without the prior consent of the engineer, revoke the appointment of the contractor’s representative or appoints a replacement.⁴

Notably, FIDIC contracts allowed the contractor’s representative to delegate any power, function or authority to any competent person and may at any time revoke the delegation. Any delegation or revocation shall not take effect until the engineer has received prior notice, naming the person and specifying the power, function and authority being delegated or revoked.⁵ Article (4.3) of FIDIC stated that “if the contractor’s representative is to be absent from the site during the execution of the works, a suitable replacement person shall be appointed, subject to the engineer’s prior consent, and the engineer shall be notified accordingly.

Finally, the contractor’s representative must be qualified and experienced in their profession, as the engineer has the right to exclude any person from the contractor’s personnel, including the contractor’s representative for any negligence occurred during the execution of the required works.

Section 3: The most prominent authority of the consultant engineer in FIDIC contracts

First, we should point out the parties to the contract as specified in FIDIC contracts: the employer and the contractor. The engineer is not considered a party to the contract even if the owner of the FIDIC contract considers him his representative for carrying out the duties assigned to him in the contract.

According to FIDIC contract, the authority of the engineer is specified as follows; preparing the design, supervising the execution of the project and his primary role is settling disputes, especially if the matter is related to claims by the contractor.⁶

Generally speaking, what is meant by the word “engineer” is any architect, civil or an electrical engineer. Whereas there is a real difference between the consultant engineer and the general word “engineer” in the FIDIC contract (1999). For this reason, we must distinguish between them.

Article (1.1.2.4) of FIDIC defines “an engineer” as “the person appointed by the employer to act as the engineer for the purposes of the contract and named in the Appendix to Tender, or other person appointed from time to time by the employer and notified to the contractor under Sub-Clause 3.4.” Whereas the consultant engineer is the natural or ordinary person appointed by the employer to exercise the tasks assigned to him under the contract and with full impartiality without prejudice to either party to the contract in accordance with the provisions of the contract.⁷

Accordingly, the consulting engineering services cover all engineering disciplines. The consultant engineer can perform any engineering work, economic feasibility study; drawing designs for rural and urban areas, administrating and supervising the execution of the project, when appointed by the employer.

Thus, the extent of the engineer’s role is specified according to the desire of the employer. The engineer may be assigned to prepare the design only or supervise the construction of the project. He can also hold the two positions. In this sense, he will be an arbitrator and discount, at the same time, specially if there is a defect in the design.⁸

Therefore, there is a difference in specifying the role of the consulting engineer in FIDIC 1999 contracts,

¹Nassar, op. cit p. 3

²Hiyari, op. cit, p. 49

³FIDIC (1999) Article (1-1-2-5)

⁴FIDIC (1999) Article (4-3)

⁵FIDIC (1999) Article (4-3)

⁶FIDIC (1999) Article (1-1-2-2)

⁷Khulusi, op. cit, p.10

⁸Matar, E, A, and Matar, B, A (2008) FIDIC Contract for Civil Engineering Contracting and Means of Decoupling Hours Arising from it, Dar al jamia al Jadeeda, Egypt, Alexandria p. 155

where his role is to provide engineering advice and designs to the employer. The consulting engineer is not responsible for the execution of these designs on the site unless the employer asked him to do so. The role of the consulting engineer in the construction contract is explained as follows, if a person wants to construct; renew a building, adding floors or adjusting his building, he goes to an architect who in turn draws designs and sets necessary measures for the required adjustment. The architect is also responsible for supervising construction of the building.⁽¹⁾ Therefore, it is not necessarily in the construction contract that the engineer who draws designs is responsible for its execution.

The employer may resort to assigning another engineer to supervise the execution of the project, therefore the name of the engineer must be mentioned only without adding the word consultant to prevent mixing as stated in the 1999 FIDIC contract, as the engineer concerned in the construction contract is responsible for carrying out the designs provided by the consultant engineer in the site.

The engineer is the person who approves or revokes what the contractor provides such as the executive drawings. He is also authorized to exercise various tasks such as monitoring the construction of the project in its site, evaluates the obligations of the contractor in accordance with the agreed specifications and terms of the contract, and also he is the one who issues certificates related to the contractor's dues for the current payments against the volume of the accomplished works. This indicates the significant role of the engineer as he is the person who the success or the failure of the project relied on.

It is worth noting that the engineer may sometimes be an opponent and arbitrator when the matter is pertinent to the contractor, as he is the representative of the employer and must monitor the progress of the contractor in achieving the required obligations. Since, it is one of his duties to protect the interests of the employer, provided he does not use his authority to change the contractor.²

Additionally, if the employer intends to replace the engineer, the engineer shall, not less than 42 days before the intended date of replacement, give notice "in writing" to the contractor of the detailed information of the intended replacement engineer.³

The engineer may assign duties and delegate authority to another qualified engineer and he may also revoke such assignment or delegation. The assignment, delegation or revocation shall be in writing.⁴ The engineer has that authority of delegation without an approval from the employer or the contractor, as stated in the explicit text of Article (3-1-4) which stipulates "Whenever the engineer exercises a specified authority for which the employer's approval is required, then (for the purpose of the contract) the employer shall be deemed to have give approval." The engineer who has the delegated authority must comply with the limits of this authority in terms of issuing instructions to the contractor.

Based on the above, the engineer can be defined as that person; whether natural, legal or appointed by the employer named in the Appendix of the tender offer, who is responsible for overseeing the execution of the project and preparing the design if assigned by the employer.

The Second Topic: Civil liability for the consultant engineer in FIDIC contracts (1999)

In the context of the implementation of FIDIC contracts as a construction contract, it is expected that the engineer may cause damage during exercising his duties and authorities to either party, the contractor or the employer. Which requires the person who suffered the damage as a result of the actions of the engineer, whether as a result of a contractual error or breach of a general obligation to file a case against the engineer. Accordingly, civil liability may be contractual and tort liability. The following section will discuss this issue in more details.

Section 1. Contractual Liability

To consider contractual liability, its element should be available. That is a contractual error committed by the engineer against the employer and leads to cause him damage. This damage must be a natural result of the engineer's fault.⁵

It should be noted that, the relationship between the employer and the engineer is based on the engineering consultancy contract signed by the two parties, so the engineer holds contractual liability, unlike the relationship between the engineer and the contractor which is not based on a contractual basis for the absence of the contractual bond between them.⁶

Based on above, the following section will discuss the validity of the contract, the engineer's fault, the damage and finally the causal relationship between harmful acts and damage.

1. *The existence of a valid contract:* The existence of a valid contract between the employer and the engineer is a prerequisite for the establishment of contractual liability. It is not acceptable for anyone to hold

¹ Shabib, M., L (2004) Explanation of the contract of contract, Al-Maaref Establishment, Alexandria, Egypt, 2nd edition .p. 40

² Abdel-Alim., Hiyari, op cit, p 47

³ Article 3-4 FIDIC 1999

⁴ Article 2-3 FIDIC 1999

⁵ Mansour, op. cit, p. 180

⁶ Sanhoury, A. (1989) The Mediator in Explaining the Civil Law, 3rd Edition, Volume 2, Cairo, Dar al Nahda p. 1052

liable for a contract without the existence of a valid contract between the two parties, in addition to a breach of a contractual obligation, whether it is in terms of uncompletion of the work, delay or for a defective execution.¹ To clarify this issue, the relationship between (the engineer - the employer) and (the engineer - the contractor) must be discussed.

A. The nature of the relationship between the engineer and the employer

The relationship between the engineer and the employer is governed by the engineering consultancy contract concluded by the two parties, the nature of this contract is adapted according to the construction contract, because the engineer performs the assigned work independently for pay. His work includes preparing the design for the construction and supervising the execution of the project.²

Accordingly, the engineer's responsibility is determined whether his work is to prepare the design only without supervising the execution of the project or both then he will be liable for any fault in the design, if it is discovered during the execution of the project.³

B- The nature of the relationship between the engineer and the contractor.

Firstly, we point out that the engineer does not have a contractual relationship with the contractor, and as a result, the contractor can't file a contractual liability lawsuit against the engineer. Sometimes while the engineer is supervising the execution of the project, he may cause damage towards the work of the contractor, in this case. The contractor could file a suit against the employer because the engineer is one of his personnel, or he may file a lawsuit against the engineer based on the harmful acts he caused.

2. *Contractual fault*

The contractual fault must be occurred to hold contractual liability⁴ for example if the debtor fails to fulfill his obligation fully or partially or there is a delay or defect in the execution of his obligation. Then he is considered liable. Breach of a contractual obligation is attributable to the person's actions or the actions of his representative.⁵ Accordingly, the consultant engineer holds contractual responsibility if he does not carry out what agreed upon.⁶

The engineer has no authority to relieve either party of any duties, obligations or responsibility under the contract. He has also no authority to delay the delivery of plans to the contractor to start the work. If the engineer delayed submitting the plans related to a project which led to the contractor delaying the work, then he is liable under Article (8.1) of FIDIC contract which stated that "the engineer shall give the contractor not less than 7 days' notice of the commencement date. Unless otherwise stated in the particular conditions, the commencement date shall be within 42 days after the contractor receives the Letter of Acceptance."⁷ Where the delay resulting from the engineer leads to an extension of the completion period by the contractor.⁸ It is noted that we can't consider the civil liability of the engineer unless the legal nature of his duties is specified in the contract.⁹

When discussing the civil liability for the engineer, we should specify the legal nature of the engineer's obligations whether it is of purpose or duty of care. If the engineer's obligation is for achieving a purpose (result), the responsibility remains unavoidable unless the intended result is achieved. The obligation of the engineer to notify the contractor of a specific date to commence work and the contractor's execution of the building is considered an example of obligation to achieve a result. On the other hand, the obligation due care is when an engineer makes all effort and care to fulfill his obligations as the same as any competent engineer in the same circumstances.¹⁰

When reviewing the text of Article (79) of the Jordanian Civil Law that indicates the invalidity of any condition that exempts the engineer or contractor from the decennial liability. The engineer obligation is, in this case, an obligation to achieve a result of the construction in 10 years period¹¹ as explained in the text of Article (79) of the above Law that "the architect/engineer who designed a structure and the contractor who built it, are jointly liable to the employer for any complete or partial collapse and for every defect which threatens the strength and safety of the structure, for a period of ten years from the date of taking over the works "Decennial Liability". Which is mandatory and cannot be excluded from the contract, but the 10-year period can be longer if agreed.

The FIDIC contract considered the engineer's obligation is due care, as it does not limit the employer's

¹ Mansour, op. cit, p. 53

² Hiyari, op. cit, p. 53

³ Sharaf al-Din (2005) Settlement of international construction disputes in Arab countries, FIDIC contract models . 2nd floor, Golden Publishing House, Egypt

⁴ Mansour, op. cit p. 37

⁵ Mansour, op. cit, P.9

⁶ FIDIC(3.1.3)

⁷ FIDIC(8.1)

⁸ FIDIC(8.4)

⁹ Mansour, op. cit, p.34

¹⁰ Mansour, op. cit, p.38

¹¹ Jordanian Civil Law. Article (788)

responsibility in the event of fraud, serious error or reckless behavior.¹ So that the engineer still liable until he carries out the duty of care as what another as any competent engineer with the same circumstances will do, by the contractor's act or force majeure.² It is worth noting that the obligation for achieving a result (purpose) is only attained when the required purpose (result) is carried out completely. In the case of the engineer's obligation to coordinating between several contracts, until the work develops according to the objective plan. He is accountable by the employer if he fails to do so and this acts results in the delay of one or more contractors from carrying out their executive programs.³

There is a difference between the FIDIC contracts of 1999 and the constructing contract in the civil law. Where the civil law requires that the obligations of the engineer shall be an obligation to achieve a result, but what we recognize from the provisions of the FIDIC contracts that it sometimes requires an obligation to achieve a result in other cases that require more care. That is, it is sufficient for the engineer to carry out his duties with proper skill and care and in a workmanlike manner to avoid liability for damages resulting from engineering negligence, unless it proves his cheating or serious mistake.

As a result, by decennial liability the engineer carries out his duties with proper skill and care and in a workmanlike manner; in other words, to the standard of the typical skilled and competent engineer and he shall not bear more than this.⁴

3. Torts

It is not sufficient for the contractual error to exist until the contractual liability arises against the engineer, because it must lead to this mistake, whether it is represented by the failure of the engineer to fulfill his obligations in whole, in part or for defective work, during the exercise of his authority in supervising the execution of the project. As in the case of the engineer's delay in submitting the required plans to the contractor, which leads to an extension of the time for completion and incurring the employer with additional amounts.⁵ Article 363 of the Jordanian Civil Law stated that if the guarantee is not assessed by law or in the contract, the court will value it equal to the damage actually done when it occurs.⁶

Regarding proof, the employer is the creditor, so he is the one who bears the burden of proof if he claims that it occurred. It should be noted that the presence of the damage is not assumed simply because the engineer breached his contractual obligation. Despite the engineer may not carry his work properly, the employer may not be harmed.⁷ For example, if the engineer delayed submitting the designs to the contractor without leading to delay in completing the work, it is not considered a damage that deserves compensation. It must only result in an extension of the time for the completion and adding additional costs to the contractor.

4. Causation

Contractual liability requires a causal link between the contractual fault made by the consultant engineer and the damage that befell the employer so that the damage is a natural result of the engineer's contractual fault. But if the occurred fault wasn't of the engineer's fault, he will not be responsible.⁸

Corresponding to FEDIC contract, the engineer shall have no authority to amend the contract.⁽⁹⁾ Therefore, if he modifies the contract and this result in harm to the employer, he will be responsible for compensation for the damage that the employer has suffered as a result of that damage.¹⁰ The engineer has the authority to delegate his competences to other engineers provided that they are in writing and he shall informs both parties of this (the parties to the contract), and if he does not do so, and the employer suffered damages, he will be responsible for that.¹¹

The assumption of a causal relationship is assumed by the legislator and whoever claims otherwise to deny it. Therefore, the employer burdens the proof of the fault and the damage. He must prove that the damage is caused by the fault of the engineer. On the other hand, the engineer can't deny that responsibility unless by proven the causes of that damage such as a force majeure or the contractor's act.

Section 2: The tort liability of the consultant engineer

The contractual liability of the consulting engineer in the FIDIC contracts implies breaching a contractual obligation. This relationship is limited to the engineer and the employer because of the signed contract (Engineering Consulting Contract) between the two parties. The tort liability may exist between the engineer and the contractor, but there isn't a contractual relationship between them. On this basis, the next section will

¹ FEDIC contract .Article(17.6)

² Jordanian Civil Law . Article (480)

³ Hajri, M. (1980) Civil liability of a consulting engineer as regulated by Kuwaiti Civil Code No. 67

⁴ Hiyari, op. cit. pp.57-58

⁵ Mansour, op.cit, p 182.& FEDIC contract ,article (8.2)

⁶ Jordanian civil law. Article 363

⁷ Hajri, M. (1980) op. cit, p 6 .& Jordanian civil law. Article 363

⁸ Mansour, op. cit ,p 182

⁹ Hajri, op. cit p.6

¹⁰ Jordanian civil law. Article 361

¹¹ Jordanian civil law. Article 361

discuss the pillars of tort liability through explaining the concepts: harmful acts, damages and the causal relationship.

I. Harmful acts.

Article 256 of the Jordanian Civil Code provides that "every injurious act shall render the person who commits it liable for damages even if he is a non-discerning person."¹

Thus, the Jordanian legislator evaluates the tort liability on the basis of the damage and not the fault, that is, the responsibility is based on the existence of the damage², it also indicates that the damage of an objective nature based on material causation, so that the responsibility rests without looking at the level of the person's awareness.³

Accordingly, if the engineer causes a harmful act while supervising the execution of the project, and it leads to cause damage to the contractor, he will be subject to tort liability with the availability of other elements of responsibility. The nature of the relationship between the contractor and consultant engineer, while exercising his duties, is related to any legal breach of his duties. Therefore, the engineer is obliged to take greater care of his behavior and actions towards the contractor. If there is any breach of his duties results in injury, he will be subject to tort liability.⁴

The engineer's delay in responding to the contractor's requests, for example, if the contractor asked the engineer for some advice for a specific problem he encountered during the implementation period. The engineer has an implied obligation to respond during in a reasonable period. But if he does not do so and results in a delay in the execution period, the contractor may hold the engineer accountable for the damages caused due to the engineer causing disruption to the executive schedule.⁵

Proof of tort liability rests on the contractor as the plaintiff, the engineer only must defend his responsibility by proving the force majeure or he denies the causal relationship between his action and the liquidated damages.⁶

II. Damages.

The damage is the basis for the tort liability. If a structural damage resulting from the negligence and a fault conducted by the consultant engineer that caused harm to the contractor, consultant engineer shall be subject to tort liability in the availability of other elements. It should be noted that the importance of the damage lies in estimating the necessary compensation for the contractor.⁷

Structural damage is the damage that a person suffers from conducting construction work in its various forms and leads to harm his material and moral interests.

1. **Material damages:** It is the damage that affects a person's material interests⁸, provided that:

- a. actually occurred: it means the damage has certainly occurred.

That the applicant for compensation suffered from the damage which was in a better condition before it occurred.⁹ It also indicates that the damage was occurred or is going to occur in the future. As the expected damage is not compensated, the engineer's delay in submitting the plans in a timely manner to the contractor will result in real damage.

- b. To be direct damage: It must be a natural result of the harmful act as a result of the structural activity that certainly occurred¹⁰, because a person is only responsible for the direct damage caused by his behavior.

- c. The damage is personal: the person who seeks compensation shall be the person who has suffered the damage personally, he shall not claim on behalf of others unless he is his representative or an heir.

- d. The harm rests on an acquired right or legitimate interest, this indicates that if the claimant of compensation is not the actual injured then, there must be a legal link between him and the injured person so that he has the right to claim compensation.¹¹

2. **Moral damages:** it affects the legitimate non-financial interest of the person¹² and is represented by the psychological pain that is harmed to the injured as a result of prejudice to the moral considerations he is keen on. Provided it is really occurred as the potential damage is not compensated for.¹³

¹ Article 256 of the Jordanian Civil Code

² Hakim, A (1996). Sources of commitment / 2

³ Hakim, op. cit

⁴ Abu al Layl, J, D (2010) Al-Nahda Al-Arabiya Al-Layl, tort liability between default and the parties, Cairo, Dar al Nahda, p115

⁵ Hajri, op. cit .p 19

⁶ Abu al Layl, op. cit , p115

⁷ Sirhan, A. , Khater, N, H (2019) Explaining the Civil Law, Sources of Personal Rights and Obligations) Dar Al-Thaqafa for Publishing and Distribution, Amman

⁸ Hyari, op.cit p 227

⁹ Thanoon, H (2006), simplified in explaining civil law, Wael Publishing House, Amman, p. 723

¹⁰ Hiyari, M., A. (2012). p.96

¹¹ Amiri, S. (1981) Compensation for damage in tort, The Legal Research Center, Ministry of Justice, Baghdad p 40

¹² Thanoon, op. cit, p 723

¹³ Sanhoury, op. cit .p 367

III. The causal relationship between the harmful acts and the damages

The causal relationship between the harmful action (the injurious act) and the damage is an essential pillar in the tort liability arising from the construction work, i.e. resulting from the engineer's act during his supervision of the project execution. The engineer shall be liable if the damage occurred as a natural result of his harmful act. If the connection between the engineer's act and the damage caused to the contractor is not realized, the contractor has no right to file a liability claim against the engineer.

Conclusion

This study addresses a significant issue in the international construction contracts (FIDIC), which is the responsibility of the consultant engineer who is considered the important person in the process of executing the construction contract. Where his role includes various duties such as preparing the designs, supervising the executing of the project and the arbitration of disputes between the two parties to the contract. This study identified the parties to the FIDIC contract, finding that the parties to the contractual relationship are the contractor and the employer. The engineer is not considered a party to the contract despite his actual role in executing the contract. It should be noted that, although the engineer exercises a wide authority, he may cause harmful acts to either party to the contract, so a civil liability action (contractual and tortious liability) may be filed against him. Which may result from the nature of the contractual relationship between him and the employer, that may be a general obligation, not to commit something will harm others through the contractor.

Results

- 1 -That the nature of the relationship between the employer and the engineer is a contractual relationship based on the engineering construction contract. Accordingly, a contractual liability claim can be filed against him based on his breach of a contractual obligation.
- 2- The nature of the relationship between the engineer and the contractor is non-contractual based on that, a contractual liability claim can be filed against him if he caused damage to the contractor.

Recommendations:

- A- Based on the significance role of the engineer, he should be considered a party of the FEDIC contract.
- B- Based on the seriousness of the engineer's role and the damages that may befall the parties to the contract, the engineer should issue an insurance contract before starting his job to cover the expected damages.

References

- Abdel-Alim, G, M (2008) Modern Trends of Means of Settlement of Investment Disputes in the Arab Countries. presented at the sixth conference of the International Arbitration Federation, Amman
- Abu al Layl, J, D (2010) Al-Nahda Al-Arabiya Al-Layl, tort liability between default and the parties, Cairo, Dar al Nahda.
- Arousi, A, A (2004) Civil and tort liability in civil law, Dar Al-Farr
- Awawi, S. (1981) Compensation for damage in tort, The Legal Research Center, Ministry of Justice, Baghdad
- Far, A (2016) Introduction to studying general theoretical legal sciences, Dar Al-Thaqafa Publishing, Jordan.
- Hajri, M. (1980) Civil liability of a consulting engineer as regulated by Kuwaiti Civil Code No. 67,
- Hakim, A (1996). Sources of commitment / 2
- Hiyari, M., A. (2012). Effects resulting from the conclusion of the construction contract for FIDIC 1999 and the methods for settling disputes arising therefrom, Yafa Publishing House.
- Hyari, A, H (2005) Civil Liability of the Physician in the Private Sector, Dar Al-Thaqafa for Publishing and Distribution, Amman
- Karaki, YS (2006) Jordanian contract for construction projects in Jordan, Master Thesis - Mutah University - Jordan
- Khulusi, M., M. (2008) Domestic engineering and international contracts, without publishing house.
- Mansour, A, M (2015) The General Theory of Commitment, Sources of Commitment, A Comparative Study, Dar Al-Thaqafa, Amman
- Matar, E, A, and Matar, B, A (2008) FIDIC Contract for Civil Engineering Contracting and Means of Decoupling Hours Arising from it, Dar al jamia al Jadeeda, Egypt, Alexandria
- Nassar, c (2009) Execution of buildings and engineering works designed by the employer, translated into Arabic by the terms of the construction contract, Arab Center for Arbitration Egypt
- Nassar, C, A (2004) International Federation of Engineers (FIDIC) Contract Legislation Law (no publish house)
- Rashid, Kh, A (2004) Contractual Aspects in Construction Projects, Kuwait University, Scientific Publishing Council

- Sanhoury, A. (1989) The Mediator in Explaining the Civil Law, 3rd Edition, Volume 2, Cairo, Dar al Nahda
- Shabib, M., L (2004) Explanation of the contract of contract, Al-Maaref Establishment, Alexandria, Egypt, 2nd edition.
- Sharaf al-Din (2005) Settlement of international construction disputes in Arab countries, FIDIC contract models . 2nd floor, Golden Publishing House, EgyptAl-
- Shehadeh, M., N. Privacy Arbitration in International Construction Contracts, research published on the website:www. East law. com 2-
- Sirhan, A. ., Khater, N, H (2019) Explaining the Civil Law, Sources of Personal Rights and Obligations) Dar Al-Thaqafa for Publishing and Distribution, Amman
- Thanoon, H (2006), simplified in explaining civil law, Wael Publishing House, Amman

Laws:

- FIDIC Contract Form, Red Book 1999
- Jordanian Civil Law No. 16, 1976