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Research Paper

The civil liability of the consortium members for the individual mistake of one member

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Abstract

Nowadays, the various forms of contractual agreements have spread between the different contracting companies for the purpose of executing the huge international contracts which require the synergy of all efforts. This has led to the appearance of new forms of cooperation between the international contractors, called the "Consortium Agreement", which is a kind of special partnership entered into for the purpose of executing a certain project, and ends at the completion of this project, without the constitution of a separate entity for the parties of this consortium. Nonetheless, many and various legal implications result from this consortium, some of which may be attributed to the subordination relationship between this agreement and the international contract of construction; while other legal implications might be attributed to the Consortium Agreement itself. The main problem in this regard may arise, if the consortium members did not agree on the accurate determination of the civil liability for each party, whether it was during the pre-contractual stage, or during the contract's execution; as well as the specific determination of the consortium members' liability towards the employer for the individual mistake of one member, especially in light of the multiple parties and the unity of purpose. In this regard, the liability may take one of the following two forms: first, to consider all members of the consortium as joint partners before the employer; second, to adopt the personal liability of each member separately, thus, each member shall be liable only for the part assigned to him. Hence, we will try here to answer a major question regarding the liability of the consortium members for the individual error of one member towards each other or towards the employer, taking into consideration the special nature of the Consortium Agreement.

Keywords: *Consortium Agreement; Civil Liability; Individual Mistake; Personal Liability.*

1. Introduction

The complex nature of the international contracts of construction has casted a major burden on the contractor with regard to the execution of such contracts, a task which requires gathering many technical and technological experiences, as well as allocating more financial resources, in order to fulfill the obligations of such contracts. This has led to the appearance of a new form of collaboration between the international contractors interested in these types of contracts, in a new phenomenon known as the "Consortium"; thus, such agreements between the contractors have come to be present at almost every international contract of construction.
Nonetheless, this new type of agreements is still truly neglected on both the national and international legislative levels; thus, most contemporary legislations did not care to set an independent legislative system dealing with these agreements of collaboration, as they do not recognize these agreements under an independent legal concept. In this regard, France was first in attempting to draft Law No.: (2994) of 1976, with regard to organizing the provisions of the construction consortium known as "Groupement Momentané d'Entreprises"; however, it did not achieve any success, and the government withdrew the draft before its discussion in the parliament.
This legislative inadequacy has contributed to enriching the juristic controversy regarding the legal nature of the consortium agreements. Therefore, the correct legal adaptation of the consortium may require examining the terms of each agreement separately. In this context, the major problem may arise, if the consortium members did not agree upon the accurate determination of the civil liability for each party, whether it was during the pre-contractual stage, or during the contract's execution; in addition to the specific determination of the consortium members' liability towards the employer for the individual mistake of one member, especially in light of the involvement of multiple parties and the unity of purpose.
Thus, many legal implications and various liabilities result from this type of agreements, some of which may be attributed to the subordination relationship between this agreement and the international contract of construction; while others might be attributed to the Consortium Agreement itself. Furthermore, these liabilities vary widely, whether it was between the agreement members towards each other or towards the employer.

2. The members' liability towards each other

Most often, all consortium agreements apply the principle of the "Personal Liability" between its members; thus, each member or each project of the members and projects constituting the consortium shall be solely liable for his/its portion in the works, hence assuming the full control over the execution of his/its part; which is normal, as there is no partnership between them with regard to the profits or the loses, not to mention that no separate entity is constituted after entering into the consortium agreement.

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Of course, each member shall execute his part in the works in accordance with the stipulations set forth in the primary contract of building and construction; hence, a question arises about whether the obligations of the members of the consortium agreement are obligations of result or obligations of conduct.
In order to answer this question, we have to differentiate between two types of obligations; first, the members' obligations related to the subordination to the construction contract; and second, the members' obligations unrelated to this original contract and resulting from the consortium agreement itself. As for the first type, in light of the subordination relationship between the construction contract and the consortium agreement, we find that the obligation imposed on the agreement members towards each other is an obligation of result. It is well-known that the construction contract imposes an obligation on the contractor to achieve a result – as is the case in the turnkey contracts – such as establishing a residential city, a hospital, an industrial facility, etc.; thus, in such contracts, the contractor cannot be released from his obligation, unless the desired target has been achieved and the required works have been accomplished. In such case, it is not good enough to make the usual efforts or to exert the greatest possible care; thus, as long as the work is not accomplished, the contractor shall be held liable.
Furthermore, if it is found that there are defects in the contractor's works or in the materials supplied by him, the employer does not assume the burden of proving that these defects have resulted from a delinquency or negligence by the contractor; thus, the contractor's obligation to perform the works as agreed and as per the industrial and workmanship standards, is an obligation of delivering a specific result whose violation is instantly proved as soon as not achieving this result, i.e. to prove that the works are inconsistent with what has been agreed upon, or inconsistent with what is stated by virtue of the standards of this industry; whenever this is proved, the contractor will be held responsible for this violation, thus, he cannot challenge this liability, unless it is through providing decisive evidence for the incidence of a foreign cause beyond his control leading to these defects.
In this regard, the Egyptian Court of Cassation has confirmed the abovementioned principle in its interpretation of the nature of the contractor's obligation; thus, the court has stated the matter as follows: "The contractor's obligation is an obligation of result to the effect that the construction built by the contractor shall remain intact and sound for the period of ten years after its delivery; thus, this obligation shall be considered as violated by proving the non-achievement of that result, without the need to prove any mistake. In this context, the warranty attributed to the execution of the construction works by the contractor, shall be fulfilled in case of the appearance of a defect in the built construction during the period of ten years as of its delivery, even if the impacts of this defect were not revealed or aggravated, or the actual demolition did not occur, till after the passage of this period.
Based on the aforementioned subordination relationship, the consortium members' obligation towards each other is an obligation of result within the limits where these obligations are related to the obligations stated in the primary construction contract. On this basis, if one member has failed to fulfill his obligation subject to the consortium agreement, he shall be liable for compensating any damages resulting from such failure against the rest of the consortium members, without the need to prove his mistake regarding this work, or to prove that he has indeed exercised the due diligence.
On the other hand, the second type of obligations imposed by virtue of the consortium agreement between its members – such as the obligation of coordination or the obligation of cooperation – is an obligation of conduct in nature. Thus, a member would be considered to have fulfilled his obligation, if he exerted all care exercised by the normal person, even if the intended purpose was not achieved, unless otherwise is stipulated by virtue of law or the agreement.

3. The members' liability towards the employer

The liability of the consortium members towards the employer is limited to one of the following two forms: first, to consider all members of the consortium as joint partners against the employer; and second, to adopt the personal liability of each member separately, thus, each member shall be liable only for the part assigned to him.
Whereas the general rule in the Civil Law stipulates that the solidarity shall not be assumed, but stated by virtue of law or mutual consent; hence, the employer – in agreement with the consortium members – shall stipulate the joint liability in the agreement contract; and that is in order to avoid any possible argument with regard to determining the nature of the works performed by the consortium members, and determining the extent to which these works can be considered as commercial works, hence assuming the solidarity.
In this regard, it has always been necessary within the field of the international contracts of construction to explicitly stipulate the joint liability of the agreement members towards the employer in the primary contract, with regard to executing all of the obligations arising from the execution of this contract. Hence, if one member assumed this responsibility against the employer, he could recourse to the rest of the members individually or collectively, according to the contract's mechanisms.
Furthermore, many of the corporations interested in drafting model contracts in the international field of construction has been keen to include a stipulation stating the joint liability, when there are multiple contractors; e.g. what is stipulated in the additional Article (73) of Part Two (Special Terms) in the Fourth Edition of the FIDIC Contract Form (Red Book), and Article (14/1) of the General Terms of the FIDIC Contract Form (Silver Book).
In spite of this common practice, there are still some cases – especially in the developing countries – where the employer misses the inclusion of an article in the contract stating the condition of such joint liability. This happened in Egypt in a contract for the execution of an important Egyptian University Hospital; thus, the agreement contract did not include any provision concerning the joint liability, on the contrary, the contract confirmed the non-joint liability of the consortium members, as each member was liable only for the part assigned to him.
In addition to the fact that the obligation of the consortium members towards the employer is a joint obligation, it is preferred in the field of the international contracts of construction – in order to guarantee the well execution of the contract – that the two parties agree that the obligation shall be indivisible; as this stipulation shall fulfill the same role of the idea of solidarity.
There is no doubt that the joint liability of the consortium members towards the employer emphasizes the effectiveness of this format in completing the large and complex projects, as it enables the employer to evaluate the consortium's joint liability with regard to any mistake or negligence in the execution, without having to bear the trouble of looking for the party behind such mistake, as well as the trouble of proving such matter, whether the defect was due to the design, the execution of the works on site, or the provided supplies, and so on. Accordingly, the consortium members are liable before the employer for the failure of one of them; thus, they are liable for replacing the failed enterprise in order to fulfill its obligations, or to assign its obligations to other enterprises by entering into new contracts with them, replacing the failed one, with the liability for all consequences resulting from such replacement; then, those members may recourse to the failed enterprise with all of these consequences in accordance with the contract concluded between them.

4. Conclusion

On the foregoing, we conclude that the Consortium Agreement is no more than a special consensual warranty, i.e. generated from a

pure contractual agreement, which in turn results in the subordination of this relation to the general laws of contracts, which primarily tend to giving priority to the principle of the Autonomy of Will.

Pursuant to the Autonomy of Will principle, the contractors shall be entitled to agree on the inclusion of what they deem suitable of terms and conditions in the contractual relationship, provided the consistency of the later to the public order. Thus, they shall be entitled to agree on the personal or joint liability of the members towards the employer or towards each other, taking into consideration their benefit and achieving the desired purpose of this agreement.

Therefore, we believe that for the sake of the employer's interest, it is necessary to explicitly stipulate the joint liability of the members of the consortium agreement towards the employer in the primary contract of construction, with regard to the execution of all liabilities and obligations arising from this contract; and that is in order to avoid any implications resulting from the non-inclusion of this joint liability in the Consortium Agreement.

References

[1] Alhamad A.S., "The Legal System for the Industrial Facilities Establishment Contracts between States and the Private Foreign Corporations", a Ph.D., Faculty of Law – Assiut University, 1992.

[2] Borredon J., "Code de la Voirie Routière et Textes Annexes: Explicitations et Commentaries", Montreuil, Editions du Papyrus, 2006.

[3] Glavinis PH., "Le Contrat International de Construction", Paris, GLN Joly Édition, 1993.

[4] Hafez A.H., "Arbitration in the International Contracts of Constructions", Cairo, El-Nahda El-Arabia Publishing House, 2007.

[5] Koslow L.," Business Abroad", Texas, Gulf Professional Publishing, 1996.

[6] Megahed O.A., "The Idea of the Primary Obligation in the Contract, and its Impact on the Liability Agreements", Cairo, El-Nahda El-Arabia Publishing House, 2003.

[7] Rice G. & Mahmoud E., "International Business Hand Book", London, Haworth Press, 1990.

[8] Serieldin H.S., "Consortium Agreements and other Agreements of Collaboration in the International Constructions Industry", Cairo, El-Nahda El-Arabia Publishing House, First Edition, 1999.