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'Perspective'

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The Use of Modified FIDIC Forms in the UAE

By Catherine Joshi

First Published October 2015

Introduction

The UAE, in particular Dubai and Abu Dhabi, has seen an extraordinary growth in construction over the last two decades. The FIDIC Conditions of Contract are still predominantly used on construction projects in the region however these are regularly modified by Employers to create bespoke conditions. The UAE is a civil law jurisdiction and has a codified law with particular Articles that apply to construction projects. The use of modified forms of contract in conjunction with the application of civil law can easily lead to a “perfect storm” of contradictions and conflicting obligations.

Background

The construction industry is predicted to contribute 11% to the UAE’s total GDP in 2015 [1] with extraordinary growth over the last decade. The mix of cultures, which is a feature of the UAE, has both benefited and hindered the construction industry. Adverse factors such as language barriers, safety education and quality awareness have added to the inherent construction risks, making a properly drafted contract for the construction industry even more important.

The UAE legal system is founded on principles of Egyptian civil law incorporating Islamic law in certain areas. Its Civil Code [2] is the primary source of law applicable to construction contracts with a specific section called “Muqwala”, meaning the making of things or the carrying out of work. Bargaining power has traditionally been weighed in favour of the Employer, and Contractors, particularly those with limited knowledge of the local law, have often accepted contract terms without fully understanding the implications.

Modifications

The Conditions of Contract for Construction based on the FIDIC 4th Edition [3] or the Red Book [4] are still predominantly used. The format of these conditions is in two parts with Part II Particular Conditions intended to contain project specific amendments which take precedence over the Part I General Conditions, intended to be standard for all projects. Employers in the UAE frequently depart from FIDIC’s contract strategy and modify Part I for their own use. It should be noted that FIDIC will grant licenses for users to prepare such amended conditions, [5] however licensed bespoke contracts are uncommon in the UAE.

The modifications to clauses range from minor edits to substantial redrafting. FIDIC contracts have been drafted by experts who understand the interdependency of the clauses and redrafting of clauses has the potential to compromise this complex interwoven structure. The principle of fairness in the FIDIC contracts which ensures that the parties share a reasonable allocation of risks and liabilities, with accrual of commensurate benefits, is also often compromised.

The modifications fall into two main categories:

- transferring the risk from the Employer to the Contractor
- allowing the Employer to retain control over the contract administration

An experienced Contractor would price the additional risks it has been asked to assume; therefore the Employer ultimately bears the cost. However the competitive tendering process can often leave a Contractor exposed to excess risks; which also equates to an additional risk to the Employer of:

- non-performance
- claims culture

Traditionally FIDIC has promoted good contract administration and the role of the Engineer is key to this. The intended role of the Engineer as the independent decision maker who administers the contract is impaired by the Employer’s requirements to review, approve or even determine issues themselves. The Employer’s desire to retain control over the Engineer’s decision typically results in delayed decisions and ultimately delayed completion and / or increased costs.

In the 4th Edition, FIDIC requires the Engineer to be impartial [6] and in the Red Book to be competent, [7] professional [8] and fair in making determinations. [9] It has been evident in practice in the UAE that the Engineer is not always able to uphold these requirements due to the Employer’s reluctance to give full authority for him/her to perform his duties. Bespoke contracts based on the 4th Edition often amend the term “Engineer” to “Employer’s Representative” thus impacting on the Engineer’s quasi-arbitral role in addition to the contract administration under that edition.

The Contractor’s obligations under the FIDIC forms are based on English common law principles;

typically that the works are executed in accordance with the Contract with skill and care. Under Design-Build or Turnkey Projects, the obligation is for the Contractor to complete works that are fit for purpose. Modifications in bespoke contracts often extend this obligation by, for example, adding express requirements to warrant the works. In addition, the Contractor has a joint and strict liability imposed on it by the Civil Code in relation to structural defects over a 10 year period which cannot be contracted out of. [10] The Muqawala Articles relating to construction, although subject to interpretation in court or by arbitration tribunals, set out clear contractual provisions. Contractors should consider UAE law when accepting a bespoke form of FIDIC, particularly the limitation of liability, liquidated damages, contractual time barring clauses, suspension and termination provisions.

FIDIC's English common law roots are also evident in some legal concepts and terminology. Concepts such as delay damages and time bars are treated quite differently under civil law jurisdictions, such as the UAE, and this may explain why Employers have attempted to modify certain terms and clauses. What is certain is that the modifications the Employers typically make to standard FIDIC forms are in their favour and they create an imbalanced risk share which can reduce the likelihood for both parties of a successful project outcome. The modified FIDIC contract does not reflect the prevalent international contracting culture of collaboration for mutual advantage. This is perhaps why FIDIC is still predominantly used in the UAE and forms such as the NEC, which are based on a collaborative approach, are considered unsuitable for the UAE construction industry.

Consequences

The rapid growth of the UAE construction industry has not given the legal environment time to develop alongside the complexity of the industry itself. Common Law jurisdictions such as England have had the benefit of developing legal expertise over a long period in parallel to the development of the construction industry. It is likely that the legal framework relating to construction will develop further in the UAE as expertise is gained and the law is updated to reflect the industry requirements.

However, the expertise of FIDIC and the long experience of practitioners should not be lost. A collaborative effort to produce a "FIDIC Middle East Contract" should be considered comprising an industry standard set of particular conditions which reflect local law, and a risk-share balance acceptable to both Employers and Contractors. In parallel a change in attitude by Employers towards Engineer and Contractors to promote trust and collaboration would ultimately benefit all parties in allowing the focus to be on completing a project on time, to the required quality and within budget.

[1] Deloitte GCC Powers of Construction 2014 Construction sector accessed via Overview

http://www2.deloitte.com/content/dam/Deloitte/xs/Documents/realstate/construction/gccpowersofconstruction/me_construction_gccpoc2014_sectoroverview.pdf on 20 March 2015

[2] Federal Law No 5: 1985 (The Civil Code) Civil Transactions Law No. 5 of 1985

[3] FIDIC Conditions of Contracts for Works of Civil Engineering Construction, 4th Edition, 1987 (4th Edition)

[4] FIDIC Conditions of Contracts for Construction for Building and Engineering Works Designed by the Employer – The Construction Contract, 1st Edition, published in 1999 (the Red Book)

[5] Licence Agreements for modifying FIDIC Publications <http://fidic.org/bookshop/about-bookshop/licence-agreement-fidic-contracts>

[6] Clause 2.6

[7] Clause 3.1 Engineers Duties and Authority

[8] The FIDIC Contracts Guide with Detailed Guidance on Using the First Editions of FIDIC's 1999 Conditions for Construction, Plant & DB and EPC/T, Clause 3.1

[9] Clause 3.5 Determinations

[10] UAE Civil Code Article 880 and 882

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Building Control in Dubai – A Variety: How approval processes can differ across one city

By Nick Hutsteiner

First Published January 2015

Dubai as a city has grown rapidly since just before the turn of the Millennium, almost quadrupling in size and population in the span of barely twenty years. The city's appearance and character have changed drastically, and fast. So how did the city administration cope with this astonishing rate of development, particularly in the real estate sector?

The answer is it didn't, or more to the point, it did not have to. Rather than expand the capacity of the centralistic municipality and its departments, the leadership of the emirate followed the old Roman maxim of 'divide et impera': It simply created new authorities to manage urban development of the large swathes of virgin land intended for development as free zones and freehold areas.

As a result, and depending on where a building project is located in Dubai, consultants would have to apply for building permits to different authorities. In Dubai proper (that is everything outside the free zones and freehold areas) to Dubai Municipality, and in those new freehold areas to separate building authorities, some of which were and are effectively private entities.

This is less surprising than it may seem at first. After all, a whole lot of Dubai is owned by essentially private investment vehicles, many of which are majority owned by the ruler of Dubai. Largely unconstrained by checks and balances or public consultation mechanisms which – sometimes frustratingly – slow down urban development in democratic countries, Dubai's leadership was able to kick start the extensive expansion of the city by creating self-managed mini cities whilst retaining control of the land itself. Freehold is actually a misnomer for these new areas; Land and property are usually held only on long leases.

Although these new building authorities adhere to standards and building regulations based on international models (e.g. North American NFPA regulations or ASHRAE guidelines) and give the appearance of a 'public' authority status, they were and are nonetheless instituted and controlled by the private master developers that own the land. Development in the new freehold areas would then often be spearheaded by the master developer by providing basic infrastructure such as road and utility networks, or the construction of a well-publicized landmark project, which proved very effective in attracting private investment to the new districts.

It has been clear that this formula works ever since 1979, when a decree by the then ruler of Dubai established Jebel Ali Free Zone around the man-made port of Jebel Ali, thirty kilometers south of the city of Dubai. Since its inception, Jebel Ali Free Zone Authority (JAFZA) has managed and administered licensing, excise duty collection and building permitting in this zone. JAFZA is owned by 'Dubai World', a behemoth of a government-owned investment company, which in turn is majority owned by the ruler himself.

One of the first new districts being created in the early 2000s was the twin business hub of Media City and Internet City (et.al.), owned by TECOM investments, part of Dubai Holding, also majority owned by the ruler of Dubai. Similarly, the development of the new CBDs of Business Bay and DIFC was managed by Dubai Properties Group, also part of Dubai Holding. In these freehold areas, licensing and building permitting was governed by TECOM's own 'Dubai Technology and Media Free Zone Authority'.

Effectively, most of these freehold areas were initially, or still are owned by the ruler of Dubai and governed by authorities that are separate from, and independent of Dubai Municipality. But rather than blurring the (already blurred) lines between state and ruling family, such arrangements plainly demonstrate the ruler to be the custodian of the emirate and its lands – excluding those specifically allocated to public uses or leased or owned by individuals. Capable of owning almost everything, he can equally bestow land by decree to public and semi-governmental entities, or his own private investment companies, and so single-handedly drive exceptionally swift development.

Meanwhile back in the old town across the Creek, Dubai Municipality had continued doing what it had been doing in the past – governing and administering Dubai proper, including land allocation and registration, planning and building control, waste management, undertaking less glamorous projects such as the extension of a public sewer network (not yet completed all over Dubai), and of course tending to the thousands of flowerbeds lining the motorway hard shoulders.

The crash of the real estate sector in 2009 changed this. As projects in freehold areas first stopped altogether, and then underwent slow transmogrification and eventually, resuscitation years later, the regulatory framework changed surreptitiously. Responsibilities shifted between the new building authorities and some were either split up or consolidated in renamed bodies, or dissolved altogether. JAFZA now only regulates activities within Jebel Ali Free Zone; responsibilities for licensing and building control in other 'Dubai World' owned developments such as Nakheel, Dubai Ports and Drydocks, Dubai Maritime City have been devolved onto a new authority, 'Trakhees'. Other semi-governmental master developers and their building authorities, such as 'Mizin' only live on as web cache cadavers and their regulatory responsibilities were subsumed by Dubai Municipality.

Even TECOM's 'Dubai Technology and Media Free Zone Authority' had to relinquish building control in the Business Bay development to Dubai Municipality.

This poses challenges to consultants working on projects that were resuscitated after the hiatus of economic downturn. Dubai Municipality, which was much less affected by the downturn than the private authorities, had continued to develop new regulations and work on its accessibility. For example, 'Green Building Regulations' came into force by Emiri decree in 2008 which the private sector freehold areas and their subordinate authorities had had the liberty to circumnavigate. A new UAE fire code was released in 2011, and the entire approval process at the DM 'Department of Buildings and Housing' moved to an online web portal in May 2012. Today, DM requires BIM models

(for large projects) to be submitted as part of building permit applications. Consultants working on recently re-started projects in Business Bay find themselves now in the situation of having to produce BIM models retrospectively and at great expense to satisfy Dubai Municipality submission requirements which differ greatly from TECOM's earlier requisites.

This highlights the ups and downs of the still very young Dubai private property sector. Whilst the delivery of freehold area developments has taken a big knock, the experiment clearly works for Dubai and private investors. In the background, however, Dubai Municipality has been restored to an important role in managing the development of the city.

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Expo 2020 Dubai: Adopting the Rio de Janeiro 2016 Olympic model

By Christopher Miers

First Published June 2015

What can the Rio 2016 Olympic and Paralympic Games bring to the Expo 2020 Dubai delivery programme? Well, Rio 2016 and the Dispute Resolution Board Foundation are implementing dispute avoidance and resolution provisions in a unique way across 35 contracts for the Rio 2016 procurement, which equally could be applied for Expo 2020. Successful delivery for these high profile projects is critical, since there is no possibility of delay to completion of the contracts, and everything is in the public eye. Dispute Boards have built up a track record of facilitating successful delivery of major construction projects and have been used by many governments and public bodies.

Dispute Boards and the Dispute Resolution Board Foundation (DRBF)

Dispute Boards (DBs) provide a contractual mechanism for real-time dispute avoidance and rapid dispute resolution during the course of a project. They have been developed primarily on major construction projects, with their background commencing in the 1970s in the USA, and thereafter from the 1980s developing worldwide.

In essence, a DB is a panel of three (and occasionally only one) experienced, impartial and independent members who have a dual role under the contract: to visit site regularly and meet with the parties, to facilitate resolution of issues as they arise and before they escalate into formal disputes; and to be available to provide a recommendation or a decision on a dispute if formally referred to the DB.

The DB concept used in the USA is that of a 'DRB', a Dispute Review Board which, in addition to the dispute avoidance role, will provide a recommendation for the resolution of a dispute which is referred to it.

In contrast to this, the concept used most widely internationally is the 'DAB', a Dispute Adjudication Board, which has both the dispute avoidance role, and the role of dispute adjudication providing an interim-binding decision on a dispute when required, which dispute can still be referred on to international commercial arbitration if either party decides to do so.

The Dispute Resolution Board Foundation (DRBF) is a not-for-profit Foundation dedicated to promoting the use and understanding of DBs, and providing training, worldwide. The DRBF is recognised as the leading international organisation in the field of DBs. Accordingly it was approached by the Rio 2016 Olympic and Paralympic Games organisation to assist them in providing an appropriate dispute avoidance and rapid dispute resolution procedure for use on the Rio 2016 contracts.

Rio 2016 Olympic and Paralympic Games

The Rio 2016 Games are to be run in August and September 2016. The Brazil Government (Federal, State and Municipalities) is responsible for the delivery of city bid commitments, being the main venues and infrastructure; and Rio 2016 is responsible for delivery of the Games, including what are described as the 'overlay contracts' which are mostly temporary constructions such as the media building, pools, an arena, ramps and decking, barriers, lighting and signage, bridges, cranes, water and waste treatment, stands and seating.

Under the leadership of Augusto Barros de Figueiredo e Silva Neto, Legal Manager – Dispute Prevention and Resolution of the Rio 2016 Organising Committee for the Olympic and Paralympic Games, Rio 2016 has introduced DBs ('Comitê de Resolução de Disputas') for the delivery of 35 of these overlay contracts for the Games. DRBF, led by Christopher Miers, along with Peckar & Abramson and MVA Abogados, have created the DB Panels and Rules for DB implementation for Rio 2016.

Panels of DB Members

We have created two panels of DB members for these Rio 2016 games: a panel of DB Chairs, who will chair the three-person DBs; and a panel of DB Members, from which each party can select one member.

Each panel member has passed through a two-part process of assessment and training prior to listing:

- A pre-selection process which required applicants to demonstrate an extensive background of relevant experience and qualification, as well as the required language skills (fluent Portuguese for DB Members, and fluent Portuguese or Spanish with some English for DB Chairs).
- Successful completion of a DB training course run by the DRBF.

For Rio 2016 the panel make up therefore brings together Brazilian, Latin American and other international lawyers, engineers and other construction professionals. Expo 2020 can adopt a similar combination of local and international expertise. On each three-person DB, therefore, it can be expected that the combination of experience and skills, and ability to work with the contracting parties in the rapid resolution of differences and avoidance of disputes, will be highly effective. For the one-person ad hoc DBs, the selection of the one-person member will be important for the type of project and individual DB member's background.

Dispute Board Rules

The established international DB rules are those of the FIDIC suite of contracts and the ICC DB Rules. In the USA ConsensusDocs also provides standard DB rules. The FIDIC rules are the most widely known in Dubai.

Special DB Rules had to be drafted for the exceptional circumstances for which the Rio 2016 DBs are required in Brazil. In putting the rules together, we considered the provisions and concepts in Consensus Docs 200.4 and 200.5, as well as rules and DB agreements from other sources. The Rio 2016 rules also are drafted to work alongside local law. The DB Rules form part of the contract between Rio 2016 and each contractor.

Key features of the Rio 2016 DB Rules are:

- Each party selects a DB Member from the DRBF Rio 2016 panel, to be approved or rejected by the other party; grounds for rejection are limited in scope.
- The two DB Members in turn select the DB Chair from the panel.
- Each DB Member and Chair must sign a statement of independence and disclosure.
- In the event of a failure to appoint or agree on the DB selection, the President of the DRBF will make the appointment from the DRBF Rio 2016 panel.
- Short timetables are in place to accord with the short programs for the procurement of these Rio 2016 projects.
- The DB has the power to provide written advisory opinions when jointly requested.
- A formal referral of a dispute may be made to the DB, to obtain a binding decision.
- Later, further referral of the DB decision and the dispute to judicial or arbitral proceedings remains possible.
- Operational assistance is provided by a 'DB Program Manager'. The Program Manager assists the parties in the initial establishment of the DBs, and thereafter assists in the procedural operation of the DBs. This is necessary due to the very short timetables, and to provide consistency of operation across the 35 DBs.
- Remuneration rates for the DB are fixed as a daily rate and monthly retainer.

Special tri-partite agreements have also been drafted, for the employer-contractor-DB member agreements.

Rio 2016 contracts are now in place incorporating these DB provisions. Of course there remains much work to be done by all parties to bring the Olympic and Paralympic Games to a successful conclusion. Equally, Expo 2020 Dubai can take note of the challenges for delivery of such a high profile, public programme and, I believe, take advantage of the experience in Rio de Janeiro to assist in the successful delivery of the Expo 2020 Dubai construction programme.

Adapted from an article by Christopher Miers for Kluwer Arbitration Blog, published on 25th May 2015.

Christopher Miers is the founder and CEO of Probyn Miers and the immediate Past President of the Dispute Resolution Board Foundation, international region (DRBF). He is a leader in the development and introduction of Dispute Boards for the Rio 2016 Olympic and Paralympic Games overlay contracts. He is a Chartered Architect, a Chartered Arbitrator, an Adjudicator, a Mediator and a leading international Expert Witness. He serves on UK and international Dispute Resolution Panels including those under the FIDIC forms of contract. Christopher is on FIDIC's President's List of Approved Dispute Adjudicators and is regarded as a leading negotiator and advisor in worldwide construction conflicts. He is a Visiting Professor at Peking University, School of Transnational Law and he collaborates in various International Forums and lectures worldwide on 'How to Avoid Disagreements Escalating into Disputes'.
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