COMMON CONTRACTUAL ISSUES FACED BY MALAYSIAN CONTRACTORS OPERATING IN MIDDLE EAST USING FIDIC FORM OF CONTRACTS

AHMED ABUBAKER A. SALEH

UNIVERSITY TECHNOLOGY MALAYSIA
COMMON CONTRACTUAL ISSUES FACED BY MALAYSIAN CONTRACTORS OPERATING IN MIDDLE EAST USING FIDIC FORM OF CONTRACTS

AHMED ABUBAKER A. SALEH

A project report submitted in partial fulfilment of the requirements for the award of the degree of Master of Science (Construction Contract Management)

FACULTY OF BUILT ENVIRONMENT
UNIVERSITY TECHNOLOGY MALAYSIA

June 2014
To Fatima my mother, Shadiya my aunt, Merima my wife, Amani my sister, Sumaya my aunt, and my little sisters Marwa and Isra.

Thank you, ladies for the help, support, guidance, patience and good deeds.

To Abubaker my late father, Anas, Osama, Hussam, Jihad, Majed, Abadi, Khalid my brothers.

Thank you, Gentlemen for the inspirations and moral support
ACKNOWLEDGEMENT

First of all, I would like to express my deepest gratitude to Almighty God, Alhamdulillah, for granting me with extreme patience, tolerance and intellectual capacity throughout my life and this study. Thank God for everything.

Then comes, my family including my parents, wife, who taught me a new meaning of sharing and unconditional love, my aunts, brothers and sisters, for the support and encouragements.

Not forgetting, my Supervisor Assoc. Prof. Dr. Rosli AbdulRashid for his timeless effort, understanding, knowledge, mentoring, guidance, inspirations, and never ending friendship. Much respect and deep appreciation to him and to Dr. Shadiya Mohammed S. Baquatayan who guided me on the use of SPSS and statistical analysis methods appropriate for my study.

I would also like to thank my lecturers, Dr. Maizon and Mr. Jamal, for the great knowledge I acquired from them as well as other lecturers and staff of the honorable University Technology Malaysia who made my study pleasant and beneficial.

Lastly, I wish to thank and acknowledge those who have given me a helping hand and provide assistance throughout the project, especially to those correspondents of this research.
ABSTRACT

Construction projects are called international when parties from different countries enter into an agreement to carry out the work. Usually, parties use FIDIC standard forms of contracts, as they are widely used globally for complex international projects. During construction, generally, issues occur between parties of the contract when a party contends that, although, the words of the contract, taken literally, seems to apply to the events or the circumstances encountered but within the contemplation of the other party, these events and circumstances seems to be applied differently according to the wording of the same contract and/or the provisions of the governing law of the contract. That would misdirect the parties as to what should happen, who should do what, and often who should bear the cost. Therefore, this study has been taken to identify and categorize the issues of the international construction contract i.e. FIDIC, and, also, to determine the effect of the factors (legal system, language, and application of FIDIC) that are causing the issues, from the experience and the point of view of the Malaysian contractors who worked in the Middle East, specifically, Saudi Arabia and United Arab Emirates. and point out the key issues for the unwary to consider. The methodology of the study includes extensive research and a survey, designed accordingly, with participation of Malaysian professionals who have a vast knowledge and direct involvement in construction project in UAE and Saudi Arabia. The result of this study identified and categorized the issues; focused on key issues; and determined the effects of the factors (the legal system/governing law, language, and application of FIDIC) and how influential each factor is on those issues.
ABSTRAK

Projek pembinaan dipanggil antarabangsa apabila pihak-pihak dari pelbagai negara membuat suatu perjanjian untuk menjalankan kerja. Biasanya, pihak perjanjian menggunakan FIDIC sebagai borang kontrak, kerana ia digunakan secara meluas di peringkat global bagi projek-projek antarabangsa yang kompleks. Semasa pembinaan, secara amnya, masalah berbangkit di antara pihak-pihak kontrak apabila salah satu daripada pihak kontrak berpendapat bahawa walaupun kebiasaannya bahasa kontrak ditafsir secara harfiah, dan digunakan di dalam keadaan seperti yang tertera didalam kontrak, ada juga kes-kes dan keadaan dimana bahasa kontrak ini ditafsir secara berbeza oleh pihak kontrak yang lain. Berikut demikian, keadaan ini akan mengelirukan pihak-pihak kontrak berkenaan apa yang sepatutnya berlaku, seperti kekeliruan tugas dan kekeliruan yang paling kerap berlaku adalah kekeliruan berkaitan kos. Oleh itu, kajian ini telah diambil untuk mengkaji semula isu-isu kontrak pembinaan antarabangsa seperti FIDIC, dari pengalaman dan sudut pandangan kontraktor Malaysia yang bekerja di Timur Tengah, khususnya, Arab Saudi dan Emiriah Arab Bersatu. Metodologi kajian termasuk penyelidikan meluas dan kajian, yang direka dengan sewajarnya, termasuk dengan penyertaan ahli profesional Malaysia yang mempunyai pengetahuan yang luas dan terlibat secara langsung dalam projek pembinaan di UAE dan Arab Saudi. Hasil kajian ini dikenal pasti dan dikategorikan kepada isu, memberi tumpuan kepada isu-isu utama; dan menentukan bahawa sistem undang-undang/undang-undang yang mengawal, bahasa, dan aplikasi FIDIC.
# TABLE OF CONTENTS

- DECLARATION ii
- DEDICATION iii
- ACKNOWLEDGEMENT iv
- ABSTRACT v
- ABSTRAK vi
- Table of Contents vii
- LIST OF TABLES x
- LIST OF FIGURES xi

## 1 INTRODUCTION

1.1 Background 1
1.2 Problem Statement 4
1.3 Aim 5
1.4 Objectives 6
1.5 Scope 6
1.6 Research methodology 7
  1.6.1 Literature review 7
  1.6.2 Data collection 7
  1.6.3 Data analysis 8
  1.6.4 Conclusion and recommendations 8

## 2 LITERATURE REVIEW

2.1 Introduction 10
2.2 Fédération Internationale des Ingénieurs-Conseils (FIDIC) 11
  2.2.1 The Red Book: 12
  2.2.2 The Yellow Book: 12
  2.2.3 The Silver Book: 13
  2.2.4 The Green Book: 14
2.3 Issues 15
  2.3.1 Interpretation, ambiguity and Language related Issues 15
  2.3.2 Choice of Law related Issues 18
2.3.2.1 Common law 21
2.3.2.2 Civil law 23
2.3.2.3 Differences between common law and civil law 24
2.3.2.4 Shariah law 27
2.3.3 Contractual Claims and Disputes 30
2.3.4 Variation 36
2.3.5 Delayed Payment 38
2.3.6 Risk Allocation and liabilities 39
2.3.7 Delay Damages (Liquidated Damages v. Penalty) 44
2.4 Construction Industries of Saudi Arabia and United Arab Emirates 46
2.4.1 Saudi Arabia 47
   2.4.1.1 Introduction 47
   2.4.1.2 Contracts, Procurement and Finance 48
   2.4.1.3 Restrictions on International Contractors and Labors 49
2.4.2 United Arab Emirates 50
   2.4.2.1 Introduction 50
   2.4.2.2 Procurement 51

3 DATA COLLECTION 53
3.1 Introduction 53
3.2 Questionnaire survey 54
3.3 Respondents 55

4 DATA ANALYSIS 56
4.1 Introduction 56
4.2 Overall results of questionnaire distribution 57
   4.2.1 Part 1: Background of the project: 57
   4.2.2 Part 2: Issues and causing factors 60
   4.2.3 Part 3: Extras (optional) 63
4.3 Causes of issues 67
   4.3.1 FIDIC 67
   4.3.2 Language 68
   4.3.3 Governing law / legal system 69
4.4 Level of Significance 70
   4.4.1 High significance issues 70
   4.4.2 Medium significance issues 70
   4.4.3 Low significance issues 71
4.5 Important key issues to the unwary 72
   4.5.1 Amendment of FIDIC clauses 72
   4.5.2 Disputes resolution 73
LIST OF TABLES

Table 2. 1: Some of the terminologies' differences between common law and civil law .................................................................................................................................................................25
Table 2. 2: Contractors claims ..........................................................................................................................................................................................32
Table 2. 3: Employers Claims ..........................................................................................................................................................................................33
Table 4. 4: Result of part 2 of the questionnaire describing the relationship between issues and causing factor .................................................................................62
Table 4. 5: Causes of Issues ..........................................................................................................................................................................................67
Table 4. 6: High significance issues ..............................................................................................................................................................................70
Table 4. 7: Medium significance issues .................................................................................................................................................................71
Table 4. 8: Low significance issues ..............................................................................................................................................................................71
LIST OF FIGURES

Figure 1: Research Methodology................................................................................. 9
Figure 2: Location of projects ......................................................................................... 58
Figure 3: The governing law of the contract ................................................................. 58
Figure 4: Procedural law ................................................................................................. 58
Figure 5: Language of the contract ................................................................................ 59
Figure 6: procurement (FIDIC book)............................................................................... 59
Figure 7: Amendment of FIDIC provisions .................................................................. 63
Figure 8: Disputes avoidance ......................................................................................... 64
Figure 9: Notice of claim in UAE .................................................................................. 64
Figure 10: Disputes resolution in KSA ......................................................................... 64
Figure 11: Interest entitlement ....................................................................................... 65
Figure 12: Additional Risk ............................................................................................ 65
Figure 13: liability for death and or injury of construction worker(s) ......................... 65
Figure 14: Decennial liability ......................................................................................... 66
Figure 15: Delay Damages ............................................................................................. 66
CHAPTER 1

INTRODUCTION

1.1 Background

The trend of internationalization of construction companies has been rising throughout the world. Going international has accelerated the flow of information and resource allocation, bringing people, organizations and countries closer.\(^1\)

However, in international construction business, it is essential for construction companies to know when to enter a newly opened country market. Entering a foreign market is a critical strategic decision that requires, extensive environmental scanning to determine how well the company can succeed in the international market; and appropriate matching of the strengths of the company with the international market opportunities.\(^2\)


Construction projects became more complex and multi-dimensional, demanding more disciplines and skills. Therefore, construction projects, nowadays, in developing countries are often carried out in joint ventures with construction companies from developed countries. International collaboration can be of particular benefit to all parties of projects. Trans-global economic developments offer an opportunity to develop products using the most up-to-date expertise and knowledge in a cost-effective manner.\(^3\)

FIDIC Fédération Internationale Des Ingénieurs – Conseils (from French, the International Federation of Consulting Engineers) was initiated in 1913 as a global representative for the consulting engineering industry, to ensure successful international collaboration. Thus, FIDIC, today, is well known for the standard form Conditions of Contract for the worldwide construction industry, particularly in the context of higher value international construction projects, and is endorsed by many multilateral development banks (“MDBs”).

Malaysian construction contractors have been progressively involved and continuously encouraged to undertake construction projects along side with multinational participants from diverse political, legal, economic, and cultural backgrounds. To search new geographical presence; To seize the opportunities brought by the global economy’s needs for higher standard of efficiency and quality; To increase global Market Share; To gain political power.

Excellent performance of Malaysian contractors in the construction of many mega projects within the local industry has nurtured the competencies and capabilities of their expertise. However, the very competitive and saturated of local market has driven many Malaysian contractors to make significant appearance in the global market as a mean to effectively capitalize on special expertise.

Malaysian construction companies has reported successful completion of international projects to Construction Industry Development Board’s CIDB

From 1987 to 31 Dec 2012, 115 Malaysian contractors have participated in a total of 691 construction projects worth about US$30 billion (RM102.2 billion) in 50 countries abroad. Out of these projects have completed 617 projects worth USD 19 billion (RM65.5 billion) worldwide, while another 74 projects worth USD 10.8 billion (RM36.7 billion) are still ongoing. The most number of international construction projects have been secured in the Middle East – 41 %, followed by South Asia at 21 %, ASEAN 14%, Africa 12% and other regions 21 %. There are 115 Malaysian contractors currently doing construction work in 50 countries around the globe.

Recently, Middle East has proven to be one of the most attractive construction markets in the world as it continues to present significant opportunities for international contractors including Malaysian ones. According to CIDB newsletter, issued 01 & 02 June 2013. The biggest projects received by Malaysian contractors in terms of value are from the Middle East. Malaysian contractors’ contribution is obvious in countries such as the UAE, Saudi Arabia, and other Middle Eastern countries where Malaysian companies participated in iconic construction projects such as the Burj Khalifa in Dubai and Capital Gate in Abu Dhabi. Construction groups like Muhibbah Engineering, Setia Group, Gamuda Bhd, Road Builder Holdings (M) Bhd, UEM Construction Sdn Bhd, IJM Corporation and Bina Puri Holdings Bhd had exported their expertise to the Middle East.

However, in today’s complex world of construction, it is almost impossible to complete a project without issues arising during the process. In order to understand how and why these issues arise, they must be placed into proper perspective.

---

What is the scenario of international construction process? What are the issues arising from working in different country? Under different legal system than the one practiced in home country, Malaysia? How did they (Malaysian contractors) overcome the language differences? How to implement FIDIC? Are the terms and conditions of FIDIC compatible with the legal system of that country? How was FIDIC interpreted by the parties of different backgrounds? How well is the FIDIC contract amended and drafted using words (apart from the drawings) to express in the light of events and circumstances in prospects? In general, what are the issues faced by other contractors working in the same host country? In case of disputes, how were they avoided/resolved? And many other questions triggered this research.

1.2 Problem Statement

According to the CIDB Malaysian Construction Industry Master Plan, 2007, it is stated that some of the main challenges and difficulties facing Malaysian contractor in international project ventures are as follows:

- Opportunities – availability of projects.
- Chances of securing projects.
- Business environment–Legal system, language and others.
- Funding – whether the projects are government funded, multilateral agency funded or privately funded.
- Level of risk ranging from security risk to infrastructure risk.
- Ease of entry/exit – existence of trade and non-trade barriers and ease of repatriating profits.

This research tends to focus on the third point of the list above and study in depth the common contractual issues that are creating obstacles for the Malaysian contractors performing in the Middle Eastern countries, Specifically, Saudi Arabia and United Arab Emirates (UAE), which occurs while using FIDIC forms of contract. Being located in Malaysia would make it a proper and beneficial site for my
study to analyze different legal system’s (Common Law in Malaysia, Civil law in UAE and Shari’ah Law in Saudi) interpretations, and examine the effect of different languages used for communication, in relation with the issues arising from the application of international construction contract (FIDIC).

1.3 Aim

As the major issues affecting the management of international construction projects, legal contractual issues deserve wide research because it controls the financial and technical aspects of the construction project. This Master Project Thesis is not complete coverage of building contract (FIDIC) problems. The author’s consciousness of the gaps in the selected issues is based on the previous authors and practitioners emphasis on them. This study aims to identify and address the main contractual issues of different countries where Malaysian contractors undertaking projects. In order to, establish the guidelines to enhance more contract management efficiency of the FIDIC’s Conditions of Contract; to determine and mitigate the conflict causation by implementing an appropriate dispute avoidance mechanisms for international construction projects, especially for those carried out in the Middle East.
1.4 Objectives

1) To identify and categorise the issues arising from the use of FIDIC in the Middle East.
2) To determine the effect of the factors (legal systems, language and application of FIDIC) on the issues.
3) To determine the key issues arising from working in UAE and Saudi Arabia.

1.5 Scope

This study focuses on the responses and data’s obtained from the Malaysian contractors performed construction projects in the Middle East using FIDIC conditions of the contract. There are many bespoke or standard forms of contracts in use internationally and it is not the purpose of this research to refer to them but rather use FIDIC as it is the most commonly used, therefore, avoid confusions that the reader may get by making quotations and illustrations from various forms of contracts. As discussed earlier, the main countries in the Middle East with numerous development projects are Saudi Arabia and United Arab Emirates. Therefore, limiting the study to these two countries is the scope of my research.
1.6 Research methodology

The methodology adopted in this research is subdivided into several stages, viz.; identifying the research issues, literature review, data collection, data analysis, conclusion and recommendation. Refer to Error! Reference source not found. below.

1.6.1 Literature review

Extensive literature review is carried out, using books, articles web sites and e-journals to produce and evaluate models.

1.6.2 Data collection

Questionnaires sent to Malaysian contractor companies and personnel. Names and addresses of these companies are extracted from the Construction Industry Development Board (CIDB) web-based database list of contractors’ companies to enquire about their opinions, issues they overcame and strategies they followed to ensure success of their projects in the Middle Eastern countries by responding to the questionnaire.

Face-to-face discussions about the issues mentioned in the questionnaire took place to determine other issues that are not mentioned in the questionnaire which would enhance the quality of the data and the research overall.
1.6.3 Data analysis

The collected data will be studied, and analyzed using SPSS based on the issues. Data will be analyze and performed in tables and graphs for easy reference.

1.6.4 conclusion and recommendations

Shows the findings and conclusion for this study. Recommendations are, also, suggested for contractors working or willing to work in Saudi Arabia or United Arab Emirates, to enhance the level of understanding of the construction/contractual issues faced by Malaysian contractor using FIDIC in the Middle East generally and Saudi Arabia or United Arab Emirates specifically.
Common Contractual Issues faced by Malaysian contractors operating in Middle East using FIDIC form of contracts

Literature Review
Extensive literature review is carried out, using books, articles, web sites and e-journals to:
1) Identify the problem
2) determine aims and objectives

Objectives
1) To identify and categorise the issues arising from the use of FIDIC according to the frequency of occurrence.
2) To analyze the causes of issues in relation to legal systems, language and application of FIDIC.
3) To determine key legal issues arising from working in UAE and Saudi Arabia.

Data Collection
Collection of data
Research Design

Data Analysis
The collected data will be studied, and analysed using SPSS based on the issues. Data will be analyse and performed in tables and graphs for easy reference.

Conclusion and Recommendations
- Achieve the objectives
- Limitations
- Recommendations

FIGURE 1: RESEARCH METHODOLOGY
REFERENCES


