

The logo for K&L GATES, featuring the company name in white, uppercase letters on a solid orange rectangular background. The background of the entire slide is a blue bokeh effect with light spots.

# The K&L Gates Construction Law Masterclass: FIDIC in Qatar

The Renaissance Hotel, West Bay, Doha

15 May 2014

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## **The Oryx Village**

Rich Paciaroni, Partner, K&L Gates LLP

## The Oryx Village – an introduction

- Mixed housing & hotel project near Al Khor
- High-end, beachfront development
- Hotel and beach-club integral to appeal
- 60% of the development already sold off-plan
- Promised “Gala opening” on 31 December 2015
  - 85-week schedule from the works as of today
- Works to be procured on a design & build basis



## FIDIC Yellow Book '99 with “Gulf” amendments

- Works to be let on amended FIDIC Yellow Book
- Ground risk to contractor, “Fidelity in Design and Construction WLL” (or... FIDAC, for short)
- FIDAC to obtain all Approvals from Authorities
- Authorities defined as “Government Ministries”
- “Total Fixed Price and Guaranteed Delivery Date”
- LDs set at 5% of contract price per day
- Particulars in clause 20.1 – 3 days after the event
- Roxy Projects (100% owned by Oryx Village) appointed as the Engineer

## K&L Gates – your advisors of choice on FIDIC

- Some of those “Gulf Amendments” could cause problems:
  - If ground conditions are totally unexpected, what then?
  - Whose duty is it to get approvals from Kahramaa?
  - Whose duty to get approval from Al Khor Municipality?
  - Are LDs of 5% of contract price per day enforceable?
  - What happens if claim particulars not given in 3 days?
  - Is it fair that the Engineer is owned by Oryx?
- These are all issues K&L Gates can advise on – and we will discuss some of them in today’s masterclass

## K&L Gates – our experts

- **Matt Smith**, Partner, K&L Gates London, will discuss the pitfalls of entering into a contract with provisions like those in the Oryx Village Yellow Book:
  - How Qatar law addresses LDs provisions & time bars
  - Risks to Employer in trying and failing to shift risk, and how the contractor should deal with that
- **James Anderson**, Director of Contracts at Qatar Rail, will then give the Employer's view on risk allocation on a major Qatari infrastructure project
- **Kirk Durrant**, Of Counsel, K&L Gates Doha, will then discuss the new Ashghal form of contract, and how its risk allocation is influenced by FIDIC standard forms



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# Using FIDIC Contracts in the Gulf States

Matthew Smith, Partner, K&L Gates LLP

## OUTLINE

- Status and popularity of FIDIC contracts in the Gulf States
- How well do the contracts in the FIDIC suite “fit” with a Gulf setting?
- What issues arise in using FIDIC contracts in the Gulf?



## STATUS AND POPULARITY

- FIDIC's "market":
  - in Qatar and Saudi Arabia – major private-sector projects and public sector projects not being procured by the applicable public works authority
  - in UAE – Red Book used as a base for UAE government forms of contract as well
- Other forms of contract/procurement (NEC, partnering/alliancing, management contracting) not popular

## CHOICE OF FIDIC FORM

- Risk allocation under FIDIC contracts depends on the form used, e.g.:
  - Silver Book – as an EPC contract, the majority of risk is allocated to the contractor
  - Yellow Book – risks more evenly allocated
- Yellow Book generally the most popular FIDIC form in the Gulf States for D&B contracts
- Silver Book (EPC) gaining acceptance over time

## SUITABILITY OF FIDIC FOR THE GULF

- FIDIC forms largely based on English common law principles
- FIDIC has its roots in the ICE 4<sup>th</sup> Edition
- However, these common law roots do create certain paradoxes when the contracts are used in civil law jurisdictions like most of the Gulf states
- Other differences relate to the culture and approach to risk allocation

# SUITABILITY OF FIDIC FOR THE GULF

Common issues include:

- scope of damages provisions and enforceability issues
- more onerous/restrictive notification, claim and time-bar procedures
- more restrictive variation and time/cost entitlements
- fixed prices/strict payment terms/long payment periods
- more restrictive suspension and termination provisions
- decennial liability obligations

## SUITABILITY OF FIDIC FOR THE GULF

- Many of these are seen in the Oryx Village conditions of contract
- Care needs to be taken when transferring risk
- To ensure that any amendments are enforceable, it is necessary to have a thorough understanding of the contract and any civil code articles which may override certain FIDIC conditions, even when there is a different choice of governing law

# USING FIDIC IN THE GULF

## Parties – Employer

- Typically government or public-sector related entities with a strong negotiating position and consistent contracting strategy
- Public authorities are often bound by approved budgets which means that a high degree of cost certainty is required
- Contracts are usually fixed price often with no price escalation or fluctuation provisions (although price escalation is becoming much more of an issue)
- Sovereign immunity issues often need to be considered

# USING FIDIC IN THE GULF

## Parties – Contractor

- In Qatar, unless you have an exemption to set up a foreign-registered branch (for works of public benefit), compliance with Law No. 13 of 2000 for the Regulation of Foreign Capital Investment in Economic Activity broadly requires non-Qatari contractors and consultants to form incorporated or unincorporated joint ventures (“JV”)
- Additional issues for engineers / architects caused by Engineering Law (Law No.19 of 2005), so local JVs attractive to consultants
- Drafting changes often needed to accommodate JVs, consortia or other arrangements:
  - joint and several liability of JV members
  - parent company guarantees from each of the JV members
  - disclosure of JV agreement
  - provisions in relation to subcontracts with associated companies

# USING FIDIC IN THE GULF

## Choice of law and language

- Sub-Clause 1.4
- Contracts governed by English law likely to differ significantly to contracts governed by civil law or Islamic law in content and interpretation
- Limited body of case law in civil law jurisdictions
- Culture and local practice can heavily influence the use and interpretation of FIDIC contracts



## USING FIDIC IN THE GULF

### Choice of law and language (cont.)

- Translation issues may arise it is often not possible to have a “word for word” translation of every single provision in a contract
- Process of translation, say from English to Arabic, may introduce areas of ambiguity and differences in interpretation
- Language for communications may be different from the language of the contract

# USING FIDIC IN THE GULF

## Time bars on Contractor's claims

- Sub-Clause 20.1:
  - Contractor must give notice of any claim, whether for time or money, not later than 28 days after he became aware, or ought to have become aware, of the circumstances
  - Contractor loses his entitlement to additional time or money if he fails to notify
  - Contractor must then submit a “fully detailed claim which includes full supporting particulars” within 42 days of becoming aware of the event or circumstance (NB: this is not within 42 days of the notice)

## USING FIDIC IN THE GULF

### Time bars on Contractor's claims (cont.)

- SC 20.1 is often amended to limit the time periods for notification and attach time bars to particulars as well as the initial notice
- Another common amendment is to make it clear that the notice must “describe itself” as a notice under SC 20.1—avoids the contractor relying upon other records, such as meeting minutes, as a notice (this is the approach taken in the Gold Book)

## USING FIDIC IN THE GULF

### Time bars on Contractor's claims (cont.)

- Enforceability of time bar provisions
- Qatar Civil Code
- Art. 172(1): concept of good faith
- Art. 172(2): custom in construction projects
- Art. 418: 'prescription' (i.e., Limitation)

# USING FIDIC IN THE GULF

## Application of local law

- Qatar Civil Code (Law 22 of 2004):
  - Article 172 (1) – The contract must be performed in accordance with its contents and in a manner which consistent with the requirements of good faith.
  - Article 172 (2) – The contract is not limited to obliging a contracting party to comply with its contents, but also includes its requirements in accordance with the law, custom and justice in accordance with the nature of the obligations in the contract.

## USING FIDIC IN THE GULF

### Time bars on Contractor's claims (cont.)

- Are time bars unfair/contrary to the principle of good faith?
- English law approach has been to uphold time bars and to emphasise the commercial value of these provisions
- *Multiplex Construction (UK) Ltd. v. Honeywell* [2007]:
  - “...Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent.”

# USING FIDIC IN THE GULF

## Delay damages

- Sub-Clause 8.7
- Terminology: it is fairly common in the Gulf for delay damages to be described as a “penalty”;
- Highlights the difference with common law jurisdictions where the penal nature of delay damages would be a ground for unenforceability
- Common law requirement that LDs must be a ‘genuine pre-estimate’

## USING FIDIC IN THE GULF

Delay damages

Article 266 of the Qatar Civil Code:

*“The agreed upon compensation shall not be due if the debtor proves that the creditor did not suffer any damage. The court may reduce the compensation from the one agreed upon if the debtor proves that the assessment was exaggerated to a high degree, or that the obligation has been partially performed. Any agreement to the contrary shall be null and void.”*



# USING FIDIC IN THE GULF

## Delay damages

- Burden of proof under Art. 266 rests heavily upon the Contractor
- Difficulty in proving that a loss has not been suffered (unlikely) or has been highly exaggerated
- In practice, the courts may respect the parties' agreement and uphold the delay damages unless there is clear evidence that they exceed the employer's actual loss

# USING FIDIC IN THE GULF

## Delay damages

- Interestingly, converse of Art. 267 may not apply (i.e., if the Employer's loss is greater than the pre-agreed damages)
- Article 267 of the Qatar Civil Code:  
*“If the damage exceeds the amount of compensation agreed upon, the creditor may not claim more than such an amount, unless he proves that the debtor committed deceit or gross mistake.”*
- Contrast with the position under the UAE Civil Code
- Other potentially relevant provisions: Art. 171(2) of the Qatar Civil Code

# USING FIDIC IN THE GULF

## Limitations of liability

- Sub-Clause 17.6
- Parties generally have a fair amount of freedom to agree caps on liability (subject to various provisions in the applicable civil code)
- Qatar Civil Code: Articles 171(2), 259, 711
- SC 17.6 is typically amended to insert additional “carve outs” or exceptions. Examples:
  - Proceeds of insurance under clause 18 (avoids the potential conflict between the aggregate cap on liability and the limits of indemnity required for the insurance policies)
  - IPR
  - Personal injury or property damage

# USING FIDIC IN THE GULF

## Limitation Periods/Decennial Liability

- Decennial liability is one of the most-significant differences between common law and civil law jurisdictions such as Qatar and the UAE
- Article 711 of the Qatar Civil Code provides that contractors and designers provide a joint guarantee for ten years from project completion
- Strict liability
- Covers the “total or partial collapse or fault in the buildings ...even if the collapse or fault has resulted from a defect in the land itself” provided that the defect threatens “sturdiness or safety”
- Cannot be contractually limited or excluded (Art. 715 of the Qatar Civil Code)

# USING FIDIC IN THE GULF

## Limitation Periods/Decennial Liability (cont.)

- A concern for contractors and consultants whose PI cover may not cover such liability
- Check the insuring clause in PI policy as to whether the cover has a “legal liability” or “negligence” trigger
- CAR insurance unlikely to provide cover
- Decennial or latent defects insurance can be taken out by the employer/owner against the liability for latent defects but costly and difficult to obtain

# USING FIDIC IN THE GULF

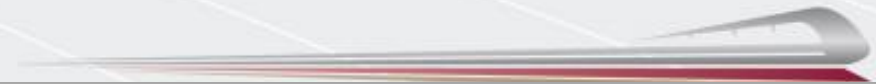
## Limitation Periods/Decennial Liability (ctd.)

- Sub-Clause 11.10 confirms that there is no contractual time limit on the contractor's liability after issue of the performance certificate
- The FIDIC Defects Notification Period (Cl. 11) is an additional contractual remedy and does not replace decennial liability, which is likely to start running from the issue of the performance certificate

# Client Approach to Risk Allocation on Design and Build Projects under FIDIC

James Anderson

Director of Contracts – Qatar Rail



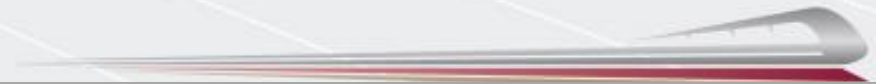
# The Engineer

Who shall perform the role of the Engineer under the Contract?

- The PMC
- Member of Employer's Team
- Independent

What is the role of the PMC?

- Engineer
- Independent Consultant
- Integrated into Employer's Team





# Role of the Engineer – Generally

**FIDIC Fourth Edition 1987:**

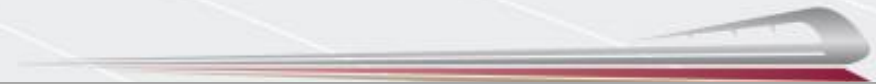
**3.5 – Engineer to act impartially.**

The Engineer shall exercise such discretion impartially within the terms of the Contract and having regard to all the circumstances.

**FIDIC First Edition 1999:**

**3.5 – Determinations.**

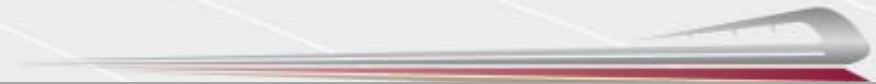
The Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.



# Role of the Engineer – Amended

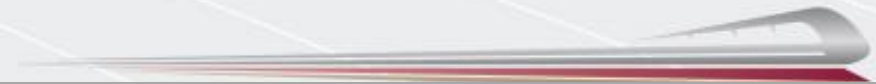
The Engineer shall obtain the Employer's specific written approval before taking action under any of the following Sub-Clauses:

- Delegation by the Engineer
- Instructions of the Engineer
- Determinations
- Subcontractors and Suppliers
- Extension of Time for Completion
- Delay Penalties
- Suspension
- Taking Over
- Performance Certificate
- Right to Vary
- Payment Certificates



# Contract Risk Profile – Employer's View

- Change in Law
- Errors in the Employer's Requirements
- Subcontractor Approval
- Design Approval
- Extension of Time
- Taking Over
- Contractor Termination Rights
- Force Majeure
- Claims, Disputes and Arbitration

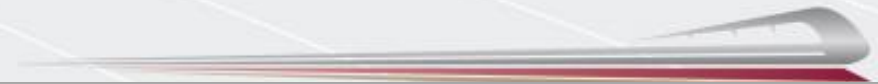


# Change in Law – FIDIC

The Contract Price shall be adjusted for a change in the Laws of the Country (made after the Base Date).

“**Laws**” means all national (or state) legislation, statutes, ordinances and other laws, and regulations and bylaws of any legally constituted public authority.

“**Base Date**” means the date 28 days prior to the latest date for submission of the Tender.

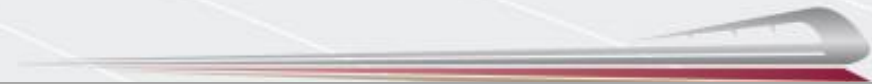


# Change in Law – Amended

A “**Change in Law**” shall occur if, after the date of the Letter of Acceptance, the State of Qatar alters or amends existing Legislation, or creates new Legislation, the occurrence of which was Unforeseeable.

“**Legislation**” means a formal law or decree published in the official Gazette issued by the Qatar Ministry of Justice, but shall not include policies, regulations, procedures or directives published by Authorities.

“**Unforeseeable**” means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender.

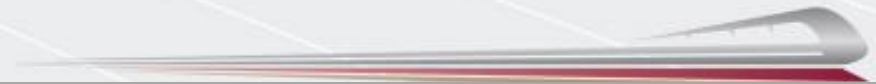


# Errors in the Employer's Requirements – FIDIC

If the Contractor suffers delay and/or incurs Cost as a result of an error in the Employer's Requirements.

An experienced contractor exercising due care would not have discovered the error when scrutinising the Employer's Requirements.

Then the Contractor can claim cost and time.

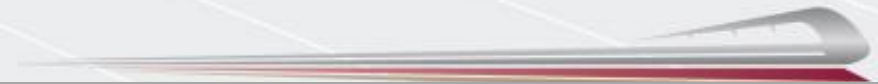


# Errors in the Employer's Requirements – Amended

Regarding any error in the Employer's Requirements identified on or after the date of the Letter of Acceptance.

The Contractor shall have no entitlement and shall not make a claim.

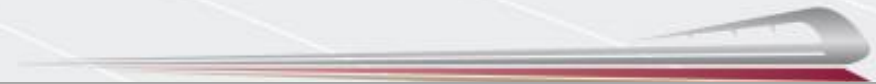
Employer makes no representation or warranty, either express or implied, concerning the accuracy of the information contained in the Employer's Requirements.



# Subcontractor Approval – FIDIC

**"Subcontractor"** means any person named in the Contract as a subcontractor, or any person appointed as a subcontractor, for a part of the Works.

The Contractor shall not be required to obtain consent to suppliers of Materials, or to a subcontract for which the Subcontractor is named in the Contract.



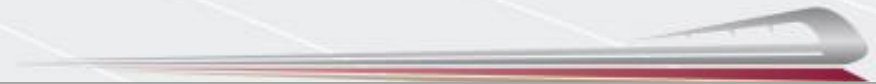


# Subcontractor Approval Amended

“**Subcontractor**” means any person named in the Contract as a subcontractor, sub consultant, or a supplier of Goods.

“**Goods**” means Contractor’s Equipment, Materials, Plant and Temporary Works, or any of them as appropriate.

For all Subcontractors the Engineer’s prior written approval shall be obtained.

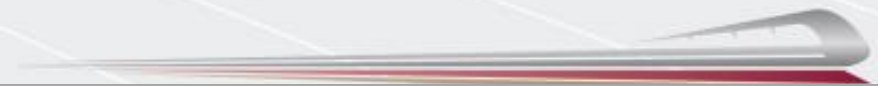


# Design Approval – FIDIC

Each review period shall not exceed 21 days from the date on which the Engineer receives a Contractor's Document.

The Engineer shall give notice to the Contractor that the Contractor's Document is approved, with or without comments, or that it fails to comply with the Contract.

The Engineer shall be deemed to have approved the Contractor's Document upon the expiry of the review periods for all the Contractor's Documents.



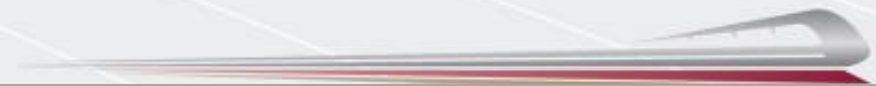
# Design Approval – FIDIC

Each review period where the activity of receiving the Engineer's response is determined by the Engineer to be on the critical path shall be 28 days.

Where not on the critical path, the Engineer shall respond within 56 days.

If the Contractor's Document complies with the Contract, the Engineer shall issue a statement of no objection.

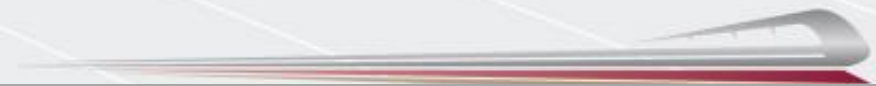
Unless expressly stated in the Contract that the Engineer shall approve or review the Contractor's Document, Employer will look to limit the instances of approval.



# Extension of Time – FIDIC

Grounds for a Contractor to claim an extension of time:

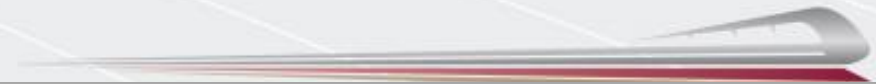
- (a) a Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3),
- (b) a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions,
- (c) exceptionally adverse climatic conditions,
- (d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, or
- (e) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site.



# Extension of Time – Amended

Grounds for a Contractor to claim an extension of time:

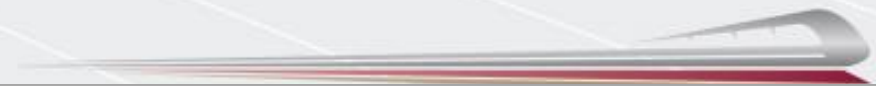
- (a) a Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3);
- (b) a cause of delay expressly stated in these Conditions as giving an Entitlement to an extension of time under the Contract; or
- (c) a material breach of the Contract by the Employer.



# Taking Over – FIDIC

If the Employer uses any part of the Works before the Taking-Over Certificate is issued:

- (a) the part which is used shall be deemed to have been taken over as from the date on which it is used,
- (b) the Contractor shall cease to be liable for the care of such part as from this date, when responsibility shall pass to the Employer, and
- (c) if requested by the Contractor, the Engineer shall issue a Taking-Over Certificate for this part.

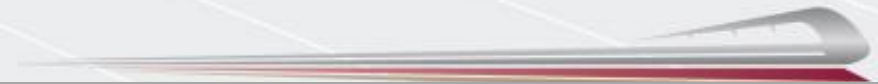


# Taking Over – Amended

The Employer is not obliged to take over the Works or any Sections(s) of the Works before Time for Completion even if he uses that part of the Works.

The Employer may, at its discretion, decide to take over a Section of the Works before the Time for Completion.

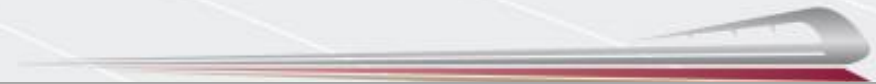
Provided the Engineer determines such Taking Over is in the interest of the Project.



# Contractor Termination Rights - FIDIC

The Contractor shall be entitled to terminate the Contract if:

- (a) Sub-Clause 2.4 (Employer's Financial Arrangements) fails to provide details,
- (b) The Engineer fails to issue the relevant Payment Certificate,
- (c) The Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated,
- (d) The Employer substantially fails to perform his obligations under the Contract,
- (e) The Employer fails to comply with Sub-Clause 1.6 (Contract Agreement) or Sub-Clause 1.7 (Assignment),
- (f) A prolonged suspension affects the whole of the Works, as described in Sub-Clause 8.11 (Prolonged Suspension), or
- (g) The Employer becomes bankrupt or insolvent, goes into liquidation, or has a receiving or administration order made against him.





# Contractor Termination Rights – Amended

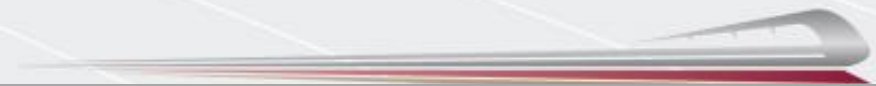
## **Example 1:- (For non-payment or non-issue of a payment certificate)**

To refer such matter to the competent Qatari Court of Justice for the purpose of interim or temporary measures by giving notice in writing to the Employer of his intention to take such action.

## **Example 2:- (For non-payment or non-issue of a payment certificate)**

If the Employer fails to pay the Contractor any amount in accordance with the Contract that is not in Dispute, then the Contractor may give notice requiring the Employer to remedy the default.

If the Employer fails to remedy the default within ninety (90) days of receipt of notice the Contractor may issue a notice terminating the Contract. The Contractor has no other right to terminate the Contract.

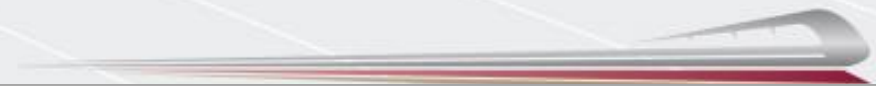


## Force Majeure – Amended

In this Clause, "Force Majeure" means an exceptional event or circumstance occurring only in the Country:

- (a) which is beyond a Party's control;
- (b) which such Party could not reasonably have provided against before entering into the Contract;
- (c) which, having arisen, such Party could not reasonably have avoided or overcome; and
- (d) which is not substantially attributable to the other Party;

but which does not include specifically, ground and subsurface conditions at or under the Site referred to in Sub-Clause 4.12 as "physical conditions."

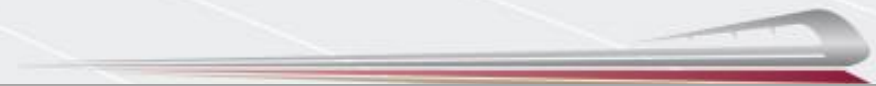


# Claims, Disputes and Arbitration – FIDIC

- Dispute Adjudication Board
- Amicable Settlement
- Arbitration

Arbitration may be commenced prior to or after completion of the Works.

The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

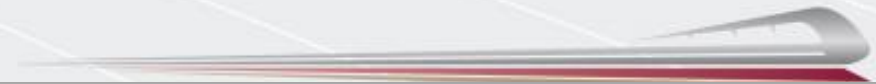


# Claims, Disputes and Arbitration – Amended

- Referral to Senior Executives of Employer and Contractor
- Expert Determination
- Arbitration

Neither party shall refer a dispute to arbitration until after a Taking Over Certificate for the whole of the Works has been issued.

The arbitration agreement is not effective until the issuance of the Taking Over Certificate for the whole of the Works.





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## **The New Ashghal Suite of Contracts**

Kirk Durrant, Of Counsel, K&L Gates LLP

# THE NEW SUITE OF STANDARD FORM CONTRACTS

- BACKGROUND (and the need for a new suite)
- THE APPROACH and PHILOSOPHY
- EXAMPLES OF CHANGES TO LOOK OUT FOR
  - THE CAVEAT: The suite is still largely under production, and we are limited in the amount of details that we can go into, but the idea is to give you a flavor of what to expect.

# BACKGROUND

- Qatar Public Works Authority
  - Adhering to Qatar National Vision 2030, Ashghal contributes to the economic and social development of the State of Qatar with infrastructure projects valued at a cost of, by most estimates, over **QAR100bn** to be delivered within the next **5-7 years**

# THE PORTFOLIO

- The New Doha Zoo





# THE PORTFOLIO

- Sharq Crossing



# THE PORTFOLIO

- Other major road projects:
  - Lusail Highway
  - New Orbital Highway
- Other major infrastructure projects – e.g. Idris

# KEY TO SUCCESS

- **Reformation of Contracting Strategy**
  - Addressing issues of risk to make contracting with Ashghal more attractive
  - Addressing areas of administration to maximize chances of timely and economically completing

# KEY TO SUCCESS

- **Reformation of Contracting Strategy**
  - Corresponding user guides for each form
  - Corresponding training for its internal staff and stakeholders



# The Exercise



# THE DOMINANT THEMES

- (1) More **attractive** contracts
- (2) **Administration** clarity

## MORE ATTRACTIVE

- Place risk with party best able to manage
  - THE CAVEAT
  - Ashghal is still a public entity and still has a duty to the public, so it has to (out of necessity) handle risk differently than the private sector.



## MORE ATTRACTIVE

- Ambiguities and Inconsistencies – GCC Standard
  - *“should there be any conflict, discrepancy, inconsistency or ambiguity between any of the various documents making up the Contract, then, unless otherwise expressly provided, the most stringent shall apply”*

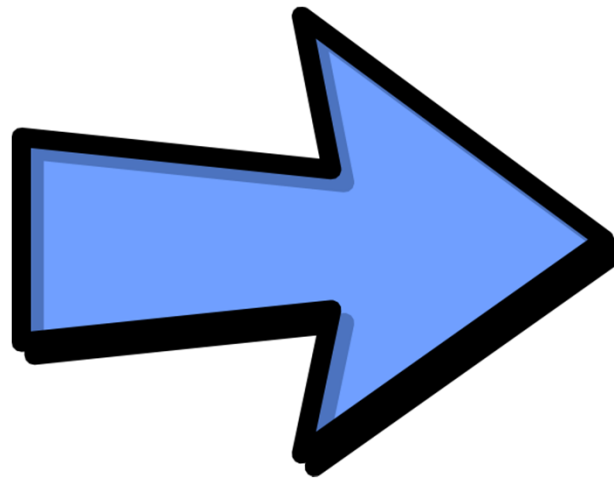


## MORE ATTRACTIVE

- Ambiguities and Inconsistencies – FIDIC Says...
  - *“The Contractor shall be responsible for verifying and interpreting all such data. The Employer shall have no responsibility for the accuracy, sufficiency or completeness of such data, except... the following portions of the Employer’s Requirements...”*
    - 1999 FIDIC Silver Book (Clauses 4.10 and 5.1)

## MORE ATTRACTIVE

- Ambiguities and Inconsistencies – What you should expect from Ashghal's new suite...



## MORE ATTRACTIVE

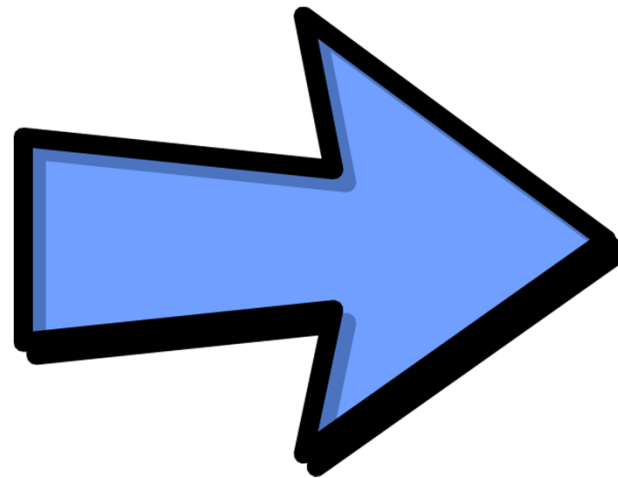
- Consents and Approvals – GCC Standard
  - “Contractor shall be solely responsible for obtaining all permits and approvals and it is understood that the Client shall not be liable for any costs or delays due to failure to timely obtain such permits and approvals for any reason whatsoever”

## MORE ATTRACTIVE

- Consents and Approvals – FIDIC says...
  - “If the following conditions apply...
    - ...Diligently followed the procedures [of the public/issuing authority]
    - ...Public/issuing authority causes delay
    - ...Delay not foreseeable
  - Entitled to make a claim for extension of time”

## MORE ATTRACTIVE

- Approvals and Consents – What you should expect from Ashghal's new suite...



# ADMINISTRATION

- Provisions that give the parties in relation to the administration of post-contract issues
  - Change Procedures
  - Payment Procedures
  - Contract Closeout Procedures



# ADMINISTRATION

- Change Procedures
  - “Should the Contractor believe that an instruction of the Company constitutes a Variation, the Contractor shall be entitled to submit a Variation Request which shall be evaluated and ‘determined’ by the Company”



**Request  
Denied!**

*Please re-submit in 90  
days for further denial.*



**NICE NEW SUITE... THEN WHAT?**

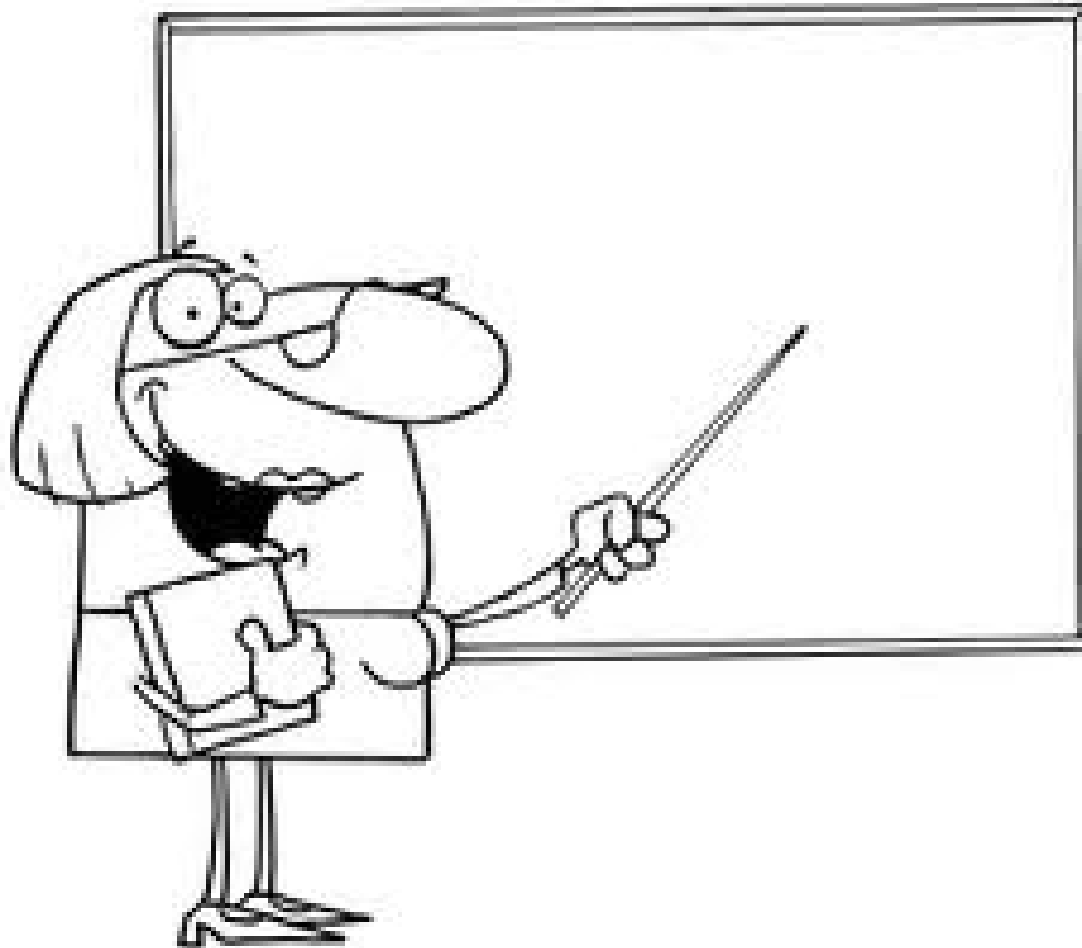




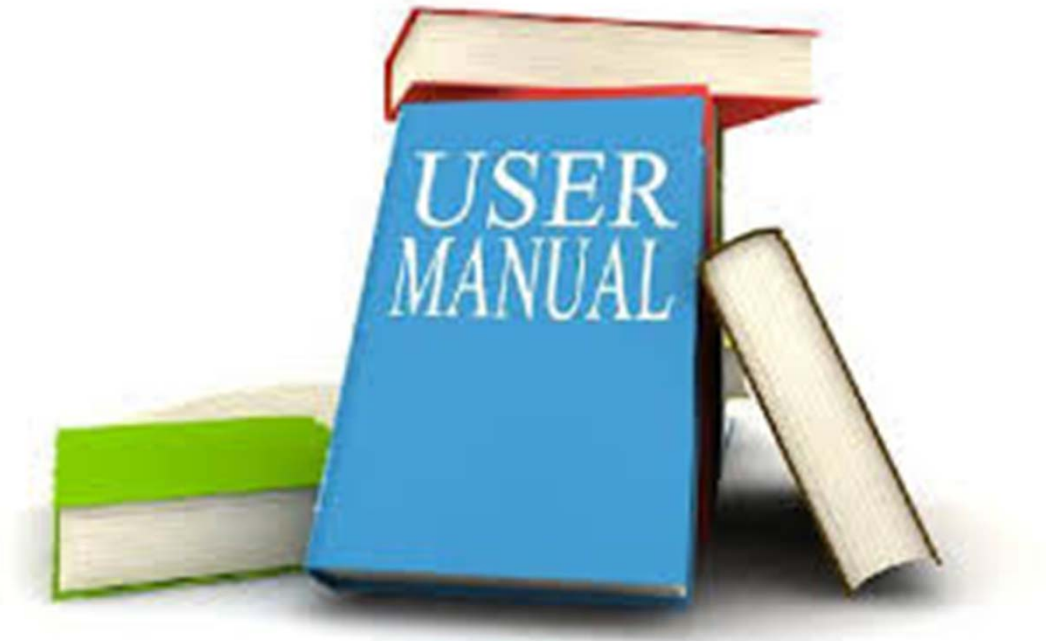
# CHANGING BEHAVIOUR

- The exercise just would not be complete without...
  - **Corresponding User Guides**
  - **Intensive Staff Training**

# CHANGING BEHAVIOUR



# USER GUIDES





***Coffee Break***

## Oryx Village – Issues on Site

- Ground conditions vary considerably from survey
- Ministry of Interior – one month backlog in granting visas for FIDAC’s workers
- At same time, Civil Defence takes one month to issue Oryx its safety certificate to allow start of work
- Oryx Village concept design is structurally un-buildable – major redesign required
- After re-design, FIDAC submits claim, setting out outline impact: price x 2, programme x 3
- Roxy rejects claim – submitted late
- Final cost – x 4, programme x 3

## K&L Gates – our expert

- **Matthew Walker**, Partner, K&L Gates Doha, will discuss various issues that employers and contractors should bear in mind when administering their contracts:
  - Issues around variations / FIDIC Clauses 8.4 and 20.1
  - Document management & e-mails
  - The difference between claims and disputes
  - Q-Construct and DABs / DRBs



K&L GATES

# Working with FIDIC on a project in Qatar

Matthew Walker, Partner, K&L Gates LLP

# OVERVIEW

- Document management – why do I need to keep this?
  - What is document management?
  - What sort of documents should you keep?
  - What about e-mails?
- How will this document help me?
  - How to get paid for Variations
- What does FIDIC say about it?
  - Clauses 8.4 and 20.1
- The Engineer has disallowed – is this a dispute?
  - Differences between claims and disputes
- Two potential means of dispute resolution
  - Q-Construct
  - DABs and DRBs





***Document management:  
Why do I need to keep this?***

# What is document management?



## Document management (cont'd)

- No “one-size-fits-all” approach
- On smaller jobs, a filing clerk may suffice
- What is EDMS?
- For major projects – EDMS now a vital tool
- As BIM becomes a more globally accepted system, BIM will eclipse EDMS



## Document management (cont'd)

- Hierarchy of documents
  - contractual documents (including technical docs)
  - formal amendments (including provisional sums)
  - variations
  - site instructions, CVIs etc.
  - letters, RFIs / TQs, formal written communication
  - minutes of meetings
  - E-mails
  - informal notes / diaries

## Oryx Village – problems with approvals

- We're told that there are delays happening at the same time with Mol and Civil Defence
  - both parties should be keeping their own records of when the delays started and finished
  - what steps did the contractor take to obtain an alternative labour source while permits held up?
  - what steps did each of Employer, Contractor and Engineer take to mitigate delays with CD permit – other works possible?
  - what documents do each of Oryx, Roxy & FIDAC have to show what they did during delay period?

# What sort of documents should you keep?



## Document Retention

- Not every document is important
- Very rare to find “smoking gun”
- But keep your own records – you may not have access to EDMS later on
  - All formal correspondence (i.e., letters)
  - Minutes of meetings
  - Claim / variation / delay / final a/c documents
  - A decent site diary

# What about e-mails?

**BBC NEWS**

You are in: **UK**

Front Page  
World  
**UK**  
England  
Northern  
Ireland  
Scotland  
Wales  
UK Politics  
Business  
Sci/Tech  
Health  
Education  
Entertainment  
Talking Point  
In Depth  
AudioVideo

Saturday, 16 December, 2000, 15:51 GMT

## E-mail woman in hiding



Press coverage of the story continues

The young woman behind a revealing e-mail seen by millions is still in hiding as five top law firm employees accused of circulating the correspondence await their fate.

Reporters have tracked down Claire Swire's family home, where her parents spoke of their embarrassment.

Five workers based at the Norton Rose firm in London, UK, face disciplinary action when they return to work on Monday.



## Seriously, what about e-mails?

- Be careful what you write on e-mail.
- Every e-mail is capable of being found
- Treat e-mail as you would treat any other formal means of communication
- BUT e-mail unlikely to be a **formal** means of communication
- Don't just e-mail EoT claims, dispute letters



*How will this document help me?*

## Variations – the Employer's perspective



## Variations – the Contractor’s perspective



## How to get paid for Variations

- Consider event – is it a change to scope?
- Or, is contractor being prevented from doing what he agreed to do?
- Understand contract variation mechanism:
  - How soon must notice be given?
  - How should the notice be served? On whom?
  - Form of notice – details, updating?

## Oryx Village – have variations arisen?

- Does the fact the ground conditions were significantly at variance with the survey give rise to a variation?
- Who was liable for the concept design? Does FIDAC's scope include structural engineering?
- Check status of Employer's Information – on what basis was it given to FIDAC?
- How has Roxy dealt with these issues – nil cost variations, or no response at all?



***What does FIDIC say about it?***



# FIDIC Red / Yellow Book 1999, Gen. Conditions

## 8.4 *Extension of Time for Completion*

*The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following causes:*

- (a) a Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3 [Variation Procedure]) or other substantial change in the quantity of an item of work included in the Contract,*
- (b) a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions,*
- (c) exceptionally adverse climatic conditions,*



# FIDIC Red / Yellow Book 1999, Gen. Conditions

## 8.4 (cont'd)

- (d) *Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, or*
- (e) *any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site.*

*If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Engineer in accordance with Sub-Clause 20.1 [Contractor's Claims]. When determining each extension of time under Sub-Clause 20.1, the Engineer shall review previous determinations and may increase, but not decrease, the total extension of time.*

# FIDIC Red / Yellow Book 1999, Gen. Conditions

- Key phrases in clause 8.4:
  - “*subject to clause 20.1*”, i.e., making the issuing of proper notices a precondition of entitlement
  - “*completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed*” – i.e., the delay must be on the critical path

# FIDIC Red / Yellow Book 1999, Gen. Conditions

## 20.1 Contractor's Claims

*“If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment ... the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. **The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.**”*

## FIDIC Red / Yellow Book 1999, Gen. Conditions

- Key phrases in clause 20.1:
  - *It's all about time*, “Notice within 28 days...particulars in 42 days... updates with monthly intervals...”
  - *But that's standard FIDIC* – few if any “FIDIC” Contracts in Qatar have a 28 / 42-day provision. Matt Smith has already talked about notice clause and prescription period—we can advise if your notice period is likely to be enforceable
  - *Role of the Engineer is key*—and you may need to update him frequently



***The Engineer has disallowed – is this a dispute?***

## Claims vs. Disputes

Claim  $\neq$  Dispute

# Differences between claims and disputes

- Claim
  - Essentially an internal process
  - A claim is usually a claim under the Contract – i.e., ought to rely mostly on the mechanisms already in the Contract
  - A claim is usually a claim for time and money, but seldom much else
  - Claim is presented internally – i.e., to the Engineer / Contract Administrator and/or the Employer
  - The only formal procedure (if any) governing a claim will be whatever is set out in the Contract
  - Few claims ultimately turn into disputes

# Differences between claims and disputes

- Dispute
  - Essentially an external process
  - Disputes can canvass claims under the contract, or claims for breach of Contract, or any other remedies available at law (i.e., unjust act, unilateral will, unjust enrichment, or the law)
  - The dispute can seek any remedy available under the law – not just time and money, but injunction, specific performance etc.
  - The dispute is handled externally – e.g., by a court, an arbitrator, an expert, or the parties themselves with a mediator
  - Likely to be a considerable body of external rules governing the conduct of the dispute: e.g., procedural rules and law, evidential rules, rights of audience
  - NB – may be difficult for parties to have some informal means of dispute protected by cloak of “without prejudice”



The image features a blue bokeh background with a central orange banner. The bokeh consists of numerous out-of-focus light spots in various shades of blue and white, creating a shimmering, ethereal effect. The orange banner is a solid, vibrant color that spans the width of the image, providing a high-contrast background for the text.

***Two potential means of dispute resolution***

## Q - Construct

- What is Q-Construct?
  - Intended to be a Qatari version of adjudication but with a slightly longer timetable (up to 60 days)
  - Headed up by ex-TCC Judge HH Frances Kirkham
  - Likely to feature both DABs for parties to opt into and a panel of adjudicators (strictly controlled by QIC-DRC)
  - Decisions to be enforced within QFC jurisdiction by a national Qatar court judge (as if a decision of a local court)



## Q - Construct

- Pros
  - You generally get a decision on a construction contract very quickly (28 – 48 days)
  - Immediately enforceable in some jurisdictions so as to guarantee cash-flow
- Cons
  - Without a mandatory statutory basis underpinning the adjudication, there is little or no incentive for parties to sign up for scheme
  - No Qatari equivalent of “Housing Grants Act”
  - Q-Construct not in use on any projects in Qatar yet

# Informal dispute resolution

## DAB/DRB

- What is the difference?
  - **DAB** (Dispute Adjudication Board) – DAB gives a decision that is enforceable in some jurisdictions, but generally capable of being overturned in a court or arbitration
  - **DRB** (Dispute Review Board) – DRB undertakes a review and provides recommendation that is highly persuasive but nonbinding
- FIDIC – generally uses DABs
- DAB / DRB usually “standing” throughout contract period, although some examples of “ad hoc” DABs being set up to help diffuse disputes

# Informal dispute resolution

## DAB/DRB

### ■ Pros

- Experts involved from the outset so will have a good understanding of the Contract
- May reduce costs and risks of disputes the in longterm
- Process can be quick (84 days)

### ■ Cons

- High standing cost of having DAB/DRB present throughout the Contract
- No track record as clause is routinely removed from contracts in region (only 2 or 3 DABs ever recorded)
- No history of enforceability of decisions in Qatar

## Oryx Village – The DR Clause

- Parties “*shall refer dispute to CEOs before commencing arbitration.*” and “*CEOs shall meet within 30 days and reach agreement*”
- On day 29, Oryx Village CEO asks for two-month extension. He then goes to Germany for medical treatment, and FIDAC CEO can’t reach him.
- 6 weeks pass. FIDAC issue request for arbitration
- Oryx Village refuses to participate or nominate an arbitrator, saying tribunal has no jurisdiction
- At first preliminary hearing, Oryx Village claims no dispute has crystallised, so tribunal should resign

## K&L Gates – our experts

- **Mike Stewart**, Partner, K&L Gates London, will discuss common issues arising out of dispute resolution clauses in FIDIC Contracts:
  - Premature request for arbitration, dispute crystallisation
  - How do tribunals rule on their jurisdiction?
  - How do the dispute provisions in FIDIC clause 20 work in practice?
- **Ana Muñoz**, Senior Associate, K&L Gates Doha, will focus on arbitration in the Gulf, looking at various issues arising out of different procedural rules in Doha and Dubai, as well as recent Qatar judgements on the Civil & Commercial Procedural Code (Law 13 of 1990)

# **FIDIC Dispute Resolution – getting it right (or not getting it wrong)**

Mike Stewart, Partner, K&L Gates LLP



## IS THERE A “DISPUTE”?

- Whether a “dispute” has crystallised will largely depend upon:
  - Compliance with Clause 20.1
  - A determination by the Engineer in accordance with Clause 3.5
  - Subsequent challenge of that determination
  - Referral to the next tier of the dispute resolution provisions:
    - DAB in standard FIDIC
    - CEOs in our example

# CLAUSE 20.1 – THE FIRST STEP IN THE DANCE

- Standard FIDIC – 28 days:

*“If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment ... the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. **The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.**”*

- Our example – 3 days

## CLAUSE 20.1 – A MANDATORY STEP IN THE DANCE

*“If the Contractor fails to give notice of a claim within such period of 28 days, **the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.** Otherwise, the following provisions of this Sub-Clause shall apply.”*

## CLAUSE 3.5 - DETERMINATION

- Has the issue been referred to the Engineer for his determination under Clause 3.5?

*“Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.”*

## CLAUSE 3.5 - DETERMINATION

- Has the Engineer made a determination under Clause 3.5?

*“The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration].”*

- Has that determination been challenged?
- Is there a timescale for challenge

## THE NEXT STEP IN THE DANCE

- Standard FIDIC – Clause 20.4:

*“If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, then after a DAB has been appointed ... either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer.”*

## THE NEXT STEP IN THE DANCE

- Our example – CEOs:

*“Parties shall refer dispute to CEOs before commencing arbitration”*

- Has FIDAC:
  - Complied with Clause 20.1?
  - Referred the matter to the Engineer?
  - Referred the matter to the CEOs?

## WHAT CAN A TRIBUNAL DO?

- Tribunals can rule on their own jurisdiction
- See, amongst other things:
  - Doctrine of *Kompetenz – Kompetenz*
  - Article 6(3) of the ICC Rules
  - Article 21, QFC Arbitration Regulations 2005
- Fundamental principle of arbitration



## WHAT WOULD A TRIBUNAL DO?

- Do we send flowers to the Oryx Village CEO?
- Or do we sent him a Request for Arbitration?
- Is the 3-day condition precedent enforceable?
- Might depend upon whether delay caused by:
  - Neutral event which entitles Contractor to an EoT, such as weather; or
  - Employer event, such as late access.

# ANOTHER TYPE OF JURISDICTIONAL CHALLENGE

- Clause 20.6:

*“Neither party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision”*

- Question relationship between:

- Claim submitted to DAB
- Claim submitted to Arbitral Tribunal

- What about alternative claims:

- Clause 13.1 – Variation
- Clause 4.12 – Unforeseeable Physical Conditions

# THE PRACTICAL POINTS

- Should the Contractor think of all possible legal and contractual arguments when the dispute is referred to the DAB?
- Would this not defeat the commercial purpose of the tiered dispute resolution provisions?
- Is it open to the Contractor to refine its entitlements as the dispute progresses through the tiers within Clause 20 through:
  - Consolidating claims
  - “Re-badging” claims
  - Changing quantum

## **Navigating Arbitration in the GCC –**

*Know the Terrain Before You Set Off*

Ana Munoz, Senior Associate, K&L Gates LLP

# THE ROADMAP

- **Where are we going?**
  - *Ad hoc vs. institutional arbitration*
  - *Overview of arbitration institutions in GCC*
- **If things go wrong, is local assistance available?**
  - *Involving the local courts in the dispute*
- **Will I be asked to show my documents?**
  - *Disclosure in arbitration*
- **How much will this trip cost?**
  - *Institutional fees and other costs of arbitration*
- **ARE WE THERE YET?**
  - *Arbitration is Over; Now What? – Issues with Enforcement*



Where are we going?

# I'M IN ARBITRATION, BUT WHERE AM I HEADED?



## AD HOC VS. INSTITUTIONAL ARBITRATION

- Under FIDIC, ICC arbitration is the default arbitration protocol. But, this is not the only option.
- ICC arbitration is an example of institutional arbitration.
  - Other institutions include LCIA, SIAC, and various GCC-based institutions to be discussed later.
- Ad hoc arbitration
  - Independent of any institution
  - Parties can designate rules – e.g., UNCITRAL rules



# AD HOC VS. INSTITUTIONAL ARBITRATION

- Possible/perceived advantages to *ad hoc* arbitration
  - Expectation of lower cost
  - Independence from institution might appeal to some state entities
- Possible/perceived advantages to institutional arbitration
  - “Brand name” award – help in enforceability
  - Comfort in the stability of a proven institution
  - Procedural assistance from the institution

# INSTITUTIONAL ARBITRATION - CHOICES

- International Institutions
  - International Court of Arbitration at the International Chamber of Commerce (ICC) - Paris
  - International Centre for Dispute Resolution (ICDR) – New York
  - London Court of International Arbitration (LCIA)
- Regional Institutions
  - Cairo Regional Center for International Arbitration (CRCICA)
    - Pioneering institution in the region – Operating since 1979
  - GCC Commercial Arbitration Centre (GCAC)
    - GCC Institution – Headquartered in Bahrain
    - Representative Office announced for Kuwait (2013)
- Country-Specific Institutions

# COUNTRY-SPECIFIC ARBITRAL INSTITUTIONS

## ■ Qatar

- Qatar International Centre for Conciliation and Arbitration (QICCA)
- Qatar International Court and Dispute Resolution Center (QICDRC)

## ■ UAE

- Dubai International Arbitration Center (DIAC)
- Dubai International Financial Center and the London Court of Int'l Arbitration (DIFC – LCIA)
- Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC)

## ■ Bahrain

- Bahrain Chamber for Dispute Resolution (BCDR-AAA)

## ■ Kuwait

- KCCI Commercial Arbitration Centre (KCAC)

## WHY THE CHOICE OF INSTITUTION MATTERS

- Each arbitral institution has its own set of rules
- The rules for each institution are frequently amended and updated
- A trusted legal advisor will know the rules and can help you understand the process



## Qatar International Centre for Conciliation and Arbitration (QICCA)



- Amended as of May 2012 to bring QICCA procedure in line with international arbitration norms
- New rules modeled on 2010 UNCITRAL rules
- First center in the region to use UNCITRAL model

## Qatar International Court and Dispute Resolution Center (QICDRC)

- QFC-based institution, but QIC is a court of the State of Qatar
- Arbitral awards can be enforced through QIC
- Mandatory jurisdiction for QFC matters; consensual jurisdiction for non-QFC parties
- Positioning itself as a construction DR body of choice with Q-Construct



## Disputes in Dubai – DIAC vs. DIFC/LCIA



مركز دبي للتحكيم الدولي  
Dubai International Arbitration Centre  
An Initiative by Dubai Chamber of Commerce & Industry

**DIFC | LCIA**  
Arbitration Centre

- DIAC established in 1994 and amended its rules in 2007
- Pending passage of proposed UAE federal arbitration law, DIAC awards are enforceable in UAE courts under civil code
- In 2008, competitor DIFC/LCIA was created as joint venture between the DIFC and LCIA
- Rules based on UNCITRAL
- Unlike QICDRC, two-tier enforcement procedure for awards to be enforced “onshore” in Dubai

The image features a blue bokeh background with a central orange banner. The bokeh consists of numerous out-of-focus light spots in various shades of blue and white, creating a shimmering effect. The orange banner is a solid, horizontal band that spans the width of the image, positioned in the middle. The text "Can I get assistance locally?" is written in white, sans-serif font, centered within the orange banner.

Can I get assistance locally?



# IF I'M IN ARBITRATION, CAN LOCAL COURTS HELP?



## WHEN MIGHT A PARTY TO ARBITRATION NEED LOCAL COURT HELP?

- Threat of unlawful demand on bonds
- Need to remove or prevent removal of party or equipment from premises
- Or for help with the arbitration itself...
  - Witness will not cooperate
  - Documents not being turned over
  - False documents being presented

## QATAR CIVIL AND COMMERCIAL PROCEDURE LAW ALLOWS INTERIM RELIEF

### ■ **Article 192**

- “...litigants waive their rights to have recourse to the court having initially the competent jurisdiction to examine the dispute.”
- “If a dispute arises ... and one of its parties brings an action before the competent court ... the other party may hold to the arbitration clause as an objection to the non-acceptance of the action.”

### ■ **But, under Article 199:**

- “If, during the course of the arbitration, a preliminary matter which is outside the powers of the arbitrator arises ... the arbitrator shall suspend the proceedings until a final judgment on the same has been issued.”

## UAE CIVIL PROCEDURE CODE IS SIMILAR

- **Under Article 203 (5):**
  - If parties agree to refer a dispute to arbitration, no suit may be filed before the courts.
  - **But**, if arbitration agreement is not raised as a defense to the suit in first hearing, jurisdictional defense may be waived
- Like in Qatari CCCP, an exception re interim relief, Article 209(2), provides that court has jurisdiction to address preliminary issues outside the powers of the arbitrator – particularly as to compellability of witnesses.
- But...new rules for ADCCAC, effective as of October 2013, may limit availability/usefulness of recourse to courts in cases of alleged crime/fraud – **SO KNOWING THE RULES IS KEY!**

## WHAT ABOUT ANTI-SUIT INJUNCTIONS?

- NOT SO FAST! – Can a foreign court in the jurisdiction where arbitration is seated block a local court from granting injunctive relief because of the pending arbitration?
- MAYBE – Anti-suit injunctions
- BUT – Attempt to block local court action may not work if the local court is better suited to grant relief and party has not turned to local court just to get around arbitration agreement.
  - See e.g., [U&M Mining Zambia Ltd v. Konkola Copper Mines Plc \[2013\] EWHC 260 \(Comm\)](#)
  - If this situation arises, experienced litigation/arbitration counsel will be needed to advance the right arguments in the proper forum.



# Document Requirements



# MAY WE SEE YOUR PAPERS?



## DISCLOSURE REQUIREMENTS VARY WIDELY

- In institutional arbitration, rules of institution vary about documents.
  - ICC Rules - permissive language regarding exchange of documents – voluntary
  - IBA Rules on Taking of Evidence in International Arbitration – popular with parties
  - LCIA rules require submission of documents relied upon
  - QICCA rules (Article 28) authorize tribunal to “require the parties to produce documents, exhibits or other evidence.”
- Seat of arbitration relevant: procedural law of state may apply.
  - Jurisdictions vary widely as to attitudes/laws on disclosure/discovery of documents – especially electronic documents.



The image features a blue bokeh background with a central orange band. The bokeh consists of numerous out-of-focus light spots in various shades of blue and white, creating a shimmering effect. The orange band is a solid, horizontal strip that spans the width of the image, providing a high-contrast background for the text.

What will this cost?

# I'M IN ARBITRATION; AM I GOING TO LOSE MY SHIRT?



## ARBITRATION COSTS VARY WIDELY

- Many factors affect arbitration costs
  - Ad hoc vs. institutional
  - Which institution?
  - Complexity of dispute and quantum of damages
  - Number of arbitrators
  - Seat of arbitration and location of arbitrators
  - Use of experts

## ARBITRATION COSTS VARY WIDELY

- *Ad Hoc* perceived as cheaper because of no costs to institution, but this may not always be true.
- In institutional arbitration, local tribunals like QICCA will have much lower administrative entry costs than international bodies like the ICC.
- Costs also will depend on quantum at issue and complexity of dispute, which will affect estimated fees to arbitrators as well as need for experts or for larger legal teams.

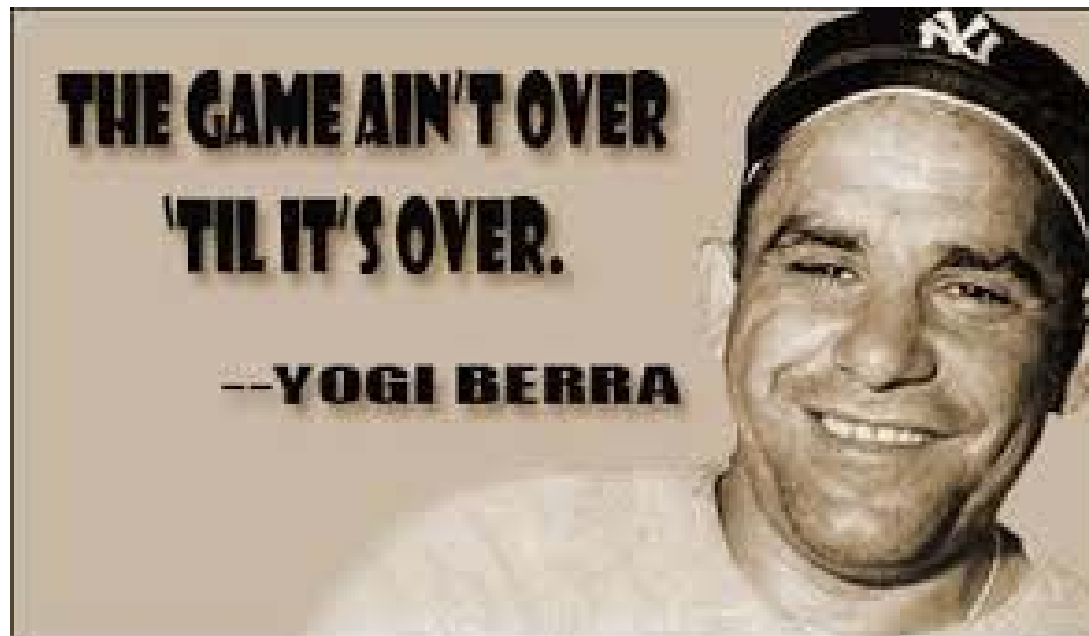
## THE TAKEAWAYS

- Arbitration done right can still be an efficient, and relatively cost-effective means of resolving disputes.
- Experienced arbitration counsel can assist in preparing a case plan which will minimize expense while maximizing chance of successful outcome.
- Prevailing party cost/fee awards do happen!



Will arbitration get me all the way to results?

I'M IN ARBITRATION; WILL I GET PAID WHEN THIS IS OVER?



## ANSWER: ENFORCEMENT CAN BE TRICKY

- Qatari Court Decision *2216/2013* as case study
  - ICC arbitration between two contractors
  - Contractors – Qatari companies
  - Construction contract subject to Qatar law
  - Place of the arbitration – Paris, France
  - Parties expressly agreed that arbitration would be governed by French procedural code
  - Claimant in case was party who lost the arbitration
  - Claimant applied to the Qatar Court of First Instance to annul the award in Qatar



## CASE STUDY: ENFORCEMENT ISSUES (CONT'D)

- Decision 2216/2013 – summary
  - The claimant's application based on previous judgment of the Qatar Court of Cassation.
  - Appeal 64 of 2012 – set aside a domestic arbitral award on the grounds that “*Judgments shall be delivered in the name of His Royal Highness, Emir of the State of Qatar.*”
  - Article 69 of the Civil and Commercial Procedural Code (Law 13 of 1990) (CCPC)).
  - Article 207(1) of CCPC – arbitral award may be annulled if it “*contravenes a rule of public order or good conduct.*”

## CASE STUDY: ENFORCEMENT ISSUES (CONT'D)

- Decision *2216/2013* – summary
  - Partly a language problem – a lot of arbitration jurisprudence in European languages.
  - They all have different words for “judgment” and “award”. Courts give the former, arbitrators give the latter. They are not the same.
  - In Qatar, all laws (other than the QFC Law) are only published in Arabic. CCPC no exception.
  - All relevant Articles in the CCPC – whether for court judgments or arbitration awards – use the same word in Arabic: *hukum*.
  - Court of first instance may have been constrained by this fact when it ruled in favor of claimant.

## CASE STUDY: ENFORCEMENT ISSUES (CONT'D)

- Decision *2216/2013* – postscript
  - As a post-script... Court of Appeal has upheld Court of First Instance decision, so this case is on its way to the Qatar Court of Cassation.
  - Reasoning of Court of Appeal was extremely limited.
  - Essentially, the Court of Appeal repeated the judgment of the Court of Cassation from June 2012 – awards are intended to have the force of judgments so must be issued in the name of the Emir.
  - This reasoning does not sit comfortably with international arbitration jurisprudence.

## CASE STUDY: ENFORCEMENT ISSUES (CONT'D)

- Decision *2216/2013* - points to note
  - Until judgment becomes a binding precedent, still arguable whether issuing an award in the name of His Highness the Emir is a matter of public policy.
  - Or does it merely concern interpretation of CCPC?
  - Judgment binding if Court of Cassation rules on substantially same point three times – not done so yet
  - In the meantime, to ensure your award is enforced in Qatar... seek legal advice!

## Oryx Village – Conclusions

- Care needed over Contract drafting
- Multi-disciplinary approach often best—and that includes consulting with a lawyer on legal issues
- Take care over risk transfer—it adds to price and political / reputational risk impossible to transfer
- Invest time and effort in setting up robust processes for managing documents and capturing change
- Construction law experts like K&L Gates can help you avoid disputes before they arise
- ...and have us on speed-dial from day one!

# Thank you!

# شكرا



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