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Design/Build contracts in Japan - Key differences between the Nikkenren and FIDIC Yellow Book (1999) - PART ONE: Design Obligations

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1. Introduction

This newsletter series sets out key differences between Japanese standard form of a Design/Build contract ("**D&B Contract**") so called "Nikkenren" and the FIDIC Yellow Book (1999) ("**FIDIC YB (1999)**"), and describes Nikkenren aspects with which non-Japanese parties may be unfamiliar. In this part one of the series, we will discuss design obligations of contractors. This newsletter also elaborates the relevancy of "fitness for purpose" obligations which are present under the FIDIC YB (1999), but not expressly defined in the Nikkenren.

While D&B Contracts are not a recent invention, owners/employers are increasingly seeking to use this procurement method for construction projects. A D&B Contract benefits owners/employers by minimizing contact points and (consequently) risks, is meant to save time and costs, and incentivizes contractors to innovate and achieve the best value in the design and construction of a project.

In Japan, while international standard forms of contract, such as FIDIC YB (1999) may address Design/Build projects, the Japan Federation of Construction Contractors has published their own General Conditions of Design/Build Contracts, otherwise known as the "**Nikkenren**"[1] standard form. The Nikkenren is often the preferred D&B Contract to Japanese contractors in order to comply with the revised Japanese Civil Code and the revised Japanese Construction Business Act.

Similar to the Japanese construction-only contract (i.e. "General Conditions of Construction Contract" (*Minkan (Nanakai) Rengo Kyoutei Kouji Ukeoi Keiyaku Yakkan*), otherwise known as the "**Minkanrengo**" standard form[2]), non-Japanese parties may find the Nikkenren terms vague, ambiguous, and unfamiliar. The Nikkenren terms dealing with building/construction obligations are virtually identical to those in the Minkanrengo, and contracting under the Nikkenren may require parties to add particularly detailed conditions to remove some of its ambiguity. Also, as the Nikkenren was prepared so that such conditions could be harmonized with the aforementioned Japanese laws, analysis of such laws could be helpful to further mitigate uncertainties. For the Nikkenren terms regarding building/construction obligations, we would recommend looking at our firm's previous newsletters, comparing the Minkanrengo conditions with the FIDIC Red Book (1999) ("**FIDIC RB (1999)**") for the items already discussed there.

1 The version of Nikkenren which will be analysed in this newsletter is Nikkenren, Rev Version: April 2020.

2 The version of Minkanrengo referred to in this newsletter is Minkanrengo, Rev Version: April 2020.

2. Key differences between Nikkenren and FIDIC YB (1999) - Design Obligation

Comparing the English version of the Nikkenren to the FIDIC YB (1999), the Nikkenren has 61 articles, while the FIDIC YB (1999) has 20 clauses and over 160 sub-clauses. As such, the FIDIC YB (1999) may be considered more comprehensive and in-depth compared with the Nikkenren; below are some key differences.

The main differentiating factor between a traditional construction contract and a D&B Contract is the design obligations of the contractor. Chapter II of the Nikkenren covers the contractor's obligations for carrying out the Design Works. Article 23 of the Nikkenren contains the consequences for the contractor, where there are non-conformities between the design deliverables and what was agreed upon in the contract. Also, Article 55 of the Nikkenren contains the consequences for the contractor where there are non-conformities in the building construction (i.e., between the plan and the work product). Here, non-conformity remedies are for the Contractor to carry out rectification work, provide a reduction in construction price, or compensation for damages. However, Nikkenren terms do not contain clear language specifying "fitness for purpose" obligations as under the FIDIC YB (1999), explained below.

Under the FIDIC YB (1999), the design obligations contained in Sub-Clause 4.1 were drafted to be "wide" and, recently, critiqued to be quite a formidable clause in favour of the owner/employer. The portion of Sub-Clause 4.1 which is often analysed, is the second sentence of the first paragraph, namely: "*When completed, **the Works shall be fit for the purposes for which the Works are intended** as defined in the Contract*." In the 2010s, the English courts[3] interpreted similar "fitness for purpose" clauses to impose strict obligations on contractors to ensure that the works, and/or materials used therein, were of a certain quality acceptable to the owner/employer and appropriate to achieve the purpose of the construction project. While the "fitness for purpose" clause in the FIDIC YB (1999) is not necessarily identical to those interpreted by the English courts, it may be possible that the obligation to construct a work capable of carrying out the purposes that has been specified could even override the obligation to comply with certain plans and specifications. In the event that the technical requirements of a contract specifies that certain parts of the project are to have a lifetime of a specific number of years, for example, the contractor will be expected to take the risk to ensure that the project complies with that specific criteria, even if the owner/employer approved the design, plans and specifications.

While English law is not used in all construction contracts in other jurisdictions, the English courts' interpretation of "fitness for purpose" clauses similar to Sub-Clause 4.1 of the FIDIC YB (1999) still serves as a powerful persuasive authority which in some circumstance may still be relied upon should a dispute arise in other common law jurisdictions. The situation in Japan, however, may be different owing to Japan's civil law nature and that Japanese courts have yet to definitively interpret "fitness for purpose" obligations; therefore, it is unclear how "fitness for purpose" obligations may be interpreted under Japanese law. The obligation to achieve the purpose of the contract under the recently revised Civil Code of Japan (Articles 559, 562 to 564, 415) also has yet to be clarified, compounding uncertainty surrounding "fitness for purpose" obligation legal effects.

Parties contracting under a governing law that follows a common law jurisdiction also may have to take note of the interpretation of "fitness for purpose" clauses, and consider whether the addition of such a clause into the Nikkenren conditions by way of particular conditions would be in the interests of parties.

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[3] The relevant English cases are *Fluor Limited v. Shanghai Zhenhua Heavy Industries Limited* [2016] EWHC 2062 (TCC) and *MT Højgaard A/S ("MTH") v. E.ON Climate & Renewables UK Robin Rigg East Limited* [2017] UKSC 59.

3. Conclusion

The FIDIC YB (1999) has been one of the most highly used D&B Contracts, and parties have contracted on this basis for many infrastructure projects all over the world. With the increase of non-Japanese parties getting involved in construction projects in Japan, contracting on the basis of the Nikkenren, there likely will be an increase in misunderstanding based on one or more parties being accustomed to the FIDIC standard form contracts.

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