

Understanding Foreseeability in Construction Contracts 1999 FIDIC Red Book as an Example

دراسة حول إمكانية التوقع في عقود المقاولات

Aymen K. Masadeh

Faculty of Law, Yarmouk University, Jordan

aymenmasadeh@hotmail.com

Remon Farag

MSc Construction Law & Dispute Resolution

remonakram@gmail.com

Abstract

This article deals with the duty of the building contractors to foresee and mitigate risks that are likely to occur in the course of construction of a project. To what extent should a contractor "foresee" risks? What is meant by an experienced contractor? How does FIDIC standard forms of contract deal with foreseeability and how is that different/similar to the legal view of such in UK and UAE?

Keywords: fidic red book, foreseeability, UAE, Construction law

ملخص:

يتناول هذا المقال واجب مقاولي البناء في التنبؤ والتخفيف من المخاطر التي يحتمل حدوثها في سياق بناء المشروع. إلى أي مدى يجب على المقاول "التنبؤ" بالمخاطر؟ ما هو المقصود بالمقاول ذي الخبرة؟ كيف تتعامل الأشكال النموذجية للعقد من FIDIC مع إمكانية التوقع، وكيف تختلف أو تشبه وجهة النظر القانونية نظيرتها في كل من المملكة المتحدة والإمارات العربية المتحدة؟
الكلمات المفتاحية: مقاول، إمكانية التوقع، الإمارات العربية المتحدة، قانون البناء.

1 Introduction

One of the many advantages of the standard forms of contract is that they somehow distribute the various risks in construction so that each party undertakes the risk it can best control.¹ It is, however, a matter of fact that although the presence of these standard forms mitigates the volume of construction disputes, disputes continue to arise for many other reasons. A matter that a body like the International Federation of Consulting Engineers “FIDIC” has monitored for many years, and accordingly developed its forms of contract several times, and issued a spectrum of different versions to cope with the diverse market needs.

FIDIC has taken regard to risks arising out of sites’ physical conditions in both of its editions; the fourth of 1987 and the 1999’s evidently to cope with the developing cases and opinions on the matter.

The first question that may arise when examining a contractor’s claim due to unexpected site’s physical conditions is “why hasn’t this contractor considered it at the tender stage?” We should note that we are not speaking about force majeure here; we are speaking about physical conditions in all aspects that may affect the works. This question may have one of two answers; the first is “the contractor is inexperienced or negligent”, and the second is “no contractor could have expected it”.

It is evident that we are discussing foreseeability here. This explains why FIDIC forms of contract imposed an obligation on the contractor to satisfy itself with a range of physical – and even non-physical – conditions that may affect the works in its sub-clause 4.10 (of the 1999 version) and sub-clause 11.1 (in the fourth edition reprinted in 1992), and at the same time entitle the contractor to claim for those physical conditions that adversely affect the works should the same are proved to be unforeseeable in its sub-clause 4.12 (of the 1999 version) and sub-clause 12.2 (in the fourth edition reprinted in 1992).

In this article, we will discuss the risks of unforeseeable physical conditions as considered by the 1999 FIDIC red book, the relevant English case law, as well as the UAE law.

2 The Development of Clause 4.12

It is useful to first trace the development of this FIDIC clause prior to going deeper into analyzing the subject risk.

In the third and fourth editions of the FIDIC form of contract, this sub-clause was numbered 12.2 before being displaced – among other major changes made – to 4.12 in the 1999 edition. However, the third and fourth editions’ versions of sub-clause 12.2 were somehow different from each other.

The title of sub-clause 12.2 in the third edition was “Adverse Physical Obstructions or Conditions”, while in the fourth edition, it became “Not Foreseeable Physical Obstructions or

Conditions". One could first consider this change as broadening the spectrum of physical conditions a contractor can claim for under sub-clause 12.2 of the fourth edition rather than that of the third considering that the term "not foreseeable" can mean "adverse" or "non-adverse". In order to understand the reason of such change, it should be noted that drafting this clause originally was for the purpose of creating an entitlement entry to the contractor for extension of time and additional cost due to the risk in question. Therefore, the physical condition claimed, should be adverse.² No reasonable contractor would claim for an unforeseeable physical condition that turns to be advantageous to its progress. The added value in this drafting in the fourth edition is that the claimed adverse physical conditions should also be unforeseeable in order to trigger the contractor's entitlements for time and cost.

One could argue; why this clause hasn't been titled "Adverse Not Foreseeable Physical Obstructions or Conditions"? In our opinion, the term "adverse" could be controversial and uncertain sometimes.

Having allowed unforeseeable physical conditions to be claimed for, the risks of foreseeable conditions have been – for the avoidance of doubt – placed under the contractor in sub-clause 11.1 that generally lists what these include.

In the 1999 red book, major changes took place for the whole of the contract form. Among which, sub-clause 12.2 became 4.12 and 11.1 became 4.10. Moreover, other changes took place in the wording of these sub-clauses. In sub-clause 4.12, the title has slightly changed from "Not Foreseeable Physical Obstructions or Conditions" to "Unforeseeable Physical Conditions" perhaps for the sake of using simpler language,³ which was an important motive in the overall changes made on FIDIC red book from its latest version in 1992.

Sub-clause 4.10 introduced the awareness of the local laws to be within the site data that the contractor should be aware of.

A significant alteration was made in the 1999 version of sub-clause 4.12 where the engineer – prior to determining any time extension or additional cost to the contractor due to any unforeseeable physical condition – is given the option to review whether other favorable physical conditions happened to similar parts of the works and consider the same in its determination. In other words, the engineer became entitled to decrease the contractor's entitlement for any time extension or additional cost being reviewed if any advantageous physical condition took place and caused the contractor to save some time from the work program, and / or save some cost it should have expended should that favorable physical condition didn't occur. The European International Contractors (EIC) argue that this provision has the potential to be extremely prejudicial to the contractor and that furthermore, the expressions 'similar parts of the Works' and 'more favourable' may be open to a different and wide-ranging

version of interpretations.⁴ EIC has suggested balancing this sub-clause – in their opinion – by agreeing the foreseeable conditions beforehand. We don't think this suggestion is useful as sub-clause 4.10 [Site Data] (previously 11.1 [Inspection of Site]) has already (more or less) done that by categorizing the site data that the contractor should be aware of and satisfied with, and yet has not limited contractors' claims hereto. Moreover, we do not think it is practically possible to list out what exactly should be the foreseeable physical conditions.

Not only has the EIC commented on this new provision introduced in sub-clause 4.12, other writers as Brian Totterdill noted that it is "controversial".⁵ He wrote a very interesting comment on this particular alteration of sub-clause 4.12 that "it may seem reasonable that better than foreseeable should balance worse than foreseeable, in practice the situation is rarely straightforward".⁶

Other writers from western civil law jurisdictions like Germany consider that both sub-clauses 4.10 and 4.12 hereto are not in conformity with the German law as the law there permits the contractor to rely on the specifications [provided by the employer] to the extent of considering them actual site conditions.⁷

3 Who Can Best Manage the Risk

The above comments made on the penultimate paragraph of sub-clause 4.12 bring us to questions like "who should manage this risk?", "why balancing risk management is labeled as controversial, prejudicial, or even illegal?" Still with Totterdill who gives an important view on this specific risk allocation saying that "It was the employer who decided to construct the project on this particular site and designed the project to suit the site; in principle, the employer should take the responsibility for the consequences of any problems present on his site ... the difficult question is whether the situation could not have been foreseen by an experienced contractor".

The employer is actually the person who has chosen that particular land (s) to build its project on, that choice should come with its associated risks as well. The contractor's risk should be limited – in this regard – to what it could reasonably foresee; within the provisions of sub-clause 4.10, and the tender information at large. Following this rationale, not only that we lean towards the opinions of the EIC and Brian Totterdill hereto, we also doubt that the general application of this alteration made in sub-clause 4.12 is in line with the laws of the UAE in which the use of this FIDIC form of contract is quite common.

Dubai Court of Cassation's decision⁸ quoting article 249 of the UAE Civil Code stated that in occurrence of an event that could not have been foreseeable at the time of concluding the contract that makes performance oppressive to the obligor, it is open to the judge – after weighing up the interests of the parties – to reduce the oppressive obligation to a reasonable level either by; restricting its extent or increasing its consideration. The interesting ending of

article 249 that “any agreement to the contrary shall be void”; opens doubts on how legal the application of the penultimate paragraph of sub-clause 4.12 is.

In this context, it is important to note that article 7 of the UAE constitution states that the Islamic Sharia is a principal source of its legislation. The principles of the UAE law are influenced by the Jordanian law which in turn, was derived from the *Mejallat Ahkam Adliah* (the civil code of the Ottoman Empire).

The interpretation of the court of cassation hereto opens two actions if an unforeseeable physical condition – in line with the definition of the court – occurs: either decreasing the extent of performance, or increasing the consideration. It is evident that decreasing the consideration is not an option here.

The wording of the second last paragraph of sub-clause 4.12 does not prevent the engineer from determining a reduced entitlement to the contractor if a favorable physical condition (whatever that is) has occurred and adjusted the compensation for the adverse physical condition (claimed by the contractor and determined by the engineer to be adverse) downwards. If an engineer so determines, we believe that the court will have the competence to review such a determination under article 249 of the Civil Code.

However, and notwithstanding that penultimate paragraph of sub-clause 4.12, foreseeability appears to be the borderline for risk allocation of physical conditions between the contractor (sub-clause 4.10) and the employer (sub-clause 4.12).

4 Foreseeability

Sub-clause 1.1.6.8 of the FIDIC 1999 red book actually provides a definition for the term “unforeseeable” that is “not reasonably foreseeable by any experienced contractor by the date for submission of the tender”. Except for specifying a base date, this definition may lead to uncertainty and controversy due to the usage of the term “experienced contractor”.

Foreseeability – for the purpose of sub-clause 4.12 – simply means knowing the likelihood of a risk to occur. If foreseeability is proven, the obligation to mitigate automatically triggers. Foreseeability is assumed to be determined at the time of submitting the tender. This necessarily requires obtaining statistical data⁹ to prove how likely any risk would occur at the proximity of the subject site. If any risk occurred, was proven – by the statistics provided by a third party preferably an independent authority – to be unlikely, then its occurrence should be classified as unforeseeable and can trigger sub-clause 4.12.

*Hadley v Baxendale*¹⁰ case gives a direct guidance on the definition and extent of foreseeability where the loss of profit Hadely claimed for has not been granted for the reason that Bexandale & Ors could not have foreseen the same. Only the direct damages that were evidently foreseeable by Bexandale – in the late delivery of Hadley’s crankshaft – were granted to Hadely. If this case

was between an employer (Hadely), and a contractor (Bexandale) on a FIDIC 1999 red book contract, we can say that Hadely has partially breached its obligations under sub-clause 4.10 [site data] in not informing Bexandale with the likelihood of the loss of profit, so Bexandale was able to delay the delivery without being accountable for that specific loss that it could not have reasonably foreseen.

Considering the definition in clause 1.1.6.8, a question arises which is “what about risks that were unforeseeable at the time of tender, but became foreseeable after that date?” For example if a risk that was so unlikely to be considered at the time of tender, then, during construction, that risk became likely to happen, yet has not actually happened. What would be the case if that risk actually happens? We believe, that relates to the provision made in sub-clause 4.10 that “the employer shall similarly make available to the contractor all such data which come into the employer’s possession after the base date”.

In one of the FIDIC’s Q & A online releases, this question was brought, and FIDIC answered as follows. “If additional data (on sub-surface or hydrological conditions at the Site) becomes available on or after the Tender submission date, it might well be possible thereafter to foresee (based upon such additional data) something which was unforeseeable before the Tender submission date (based upon the data available at the Base Date). Therefore, it is essential to define the time at which the question of foreseeability is to be judged”.¹¹

Although FIDIC has not commented on the effect of its answer hereto on the contractor’s entitlement under sub-clause 4.12, I think what FIDIC calls for here is the contractor’s obligation to mitigate. The contractor should not benefit from a risk; that might be classified under unjust enrichment. Therefore, if a risk that was so unlikely to occur as assessed at the time of tender, became likely to happen after the contract is signed, then, it would still be dealt with as unforeseeable should it actually occur, to the extent that the contractor reasonably mitigates its effect on the works.

5 Experienced Contractor

As mentioned above, FIDIC 1999 red book provided a definition for the term “unforeseeable” referring to the competence of an “experienced contractor” to reasonably foresee risks. The term “experienced” hereto is undoubtedly controversial.¹² One could say that he is a seven years’ experienced doctor and a patient may prefer a twenty years’ experienced doctor over a seven years’ experienced one. It is always required to provide a time extent to this term in order to deliver – more or less – a proper meaning. In fact, incorporating the term “experienced contractor” for validating the foreseeability of a physical condition in FIDIC contracts has been recorded to be a contractual disaster¹³ and disputes so related often goes to arbitration.

There is enough English case law that provides guidance on the term in question evidently

touching on tort and negligence. UAE has, so far, limited cassation cases on the relevant article of law¹⁴ as previously referred to above. It is noted that the mentioned decision of Dubai Court of Cassation has not considered at all the test of the “experienced contractor” but has tested the claimed risk from the angle of being “of a public nature that could not have been foreseen when the contract was concluded”. According to this interpretation, any risk that has a public nature that could not have been foreseen – seemingly from the trial court’s view – before the contract has been concluded, can trigger article 249 of the civil code.

Whether a contractor – in not foreseeing a physical condition – is experienced or not may be merely applying the Bolam test.¹⁵ The decision in this case provided that; a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. This requires that the contractor should provide as much as possible of statistical data – preferably from independent authorities – to prove that he was reasonable/non-negligent in not foreseeing a physical condition to occur.

As stated, if foreseeability is possible, an obligation to mitigate automatically triggers. In this sense, a contractor may be liable for failing to foresee in *Donoghue v Stevenson*¹⁶ which introduced the proximity test between the alleged tortfeasor (contractor in this case) and the harmed party (employer in this case). A contractor – in the essence of this case – may be liable for not foreseeing the effect of the risk on the works and consequently on the interests of the employer.

6 Employer to Inform

The interpretation of sub-clause 4.12 cannot be isolated from sub-clause 4.10. The most interesting part in sub-clause 4.10 is the tentative obligation on the contractor to “obtain all necessary information as to risks, contingencies and other circumstances which may influence or affect the tender or works”, however “to the extent which was practicable (taking account of cost and time)”. The past tense here refers to the pre-tender stage where the contractor was just a tenderer among others before being the successful tenderer. FIDIC here refers to this period which is sometimes tight and consequently insufficient for the contractor to properly satisfy itself with all the data included in sub-clause 4.10. The reference FIDIC made here regarding practicability in sense of time and cost may cause the employer to be exposed under *Hedley Byrne v Heller*¹⁷ in case the level of data it provided the contractor with was not sufficient, and/or the tender period was proven very short for the contractor to properly interpret the employer’s provided data or visit the site. Such exposure is in sense of assumption of responsibility founded by this case. Although sub-clause 4.10 obliges the contractor to properly interpret the site data provided by the employer, the employer is under an obligation to provide the contractor with site data before and after the submittal of tender.

7 Conclusion

From the above, it appears that the development of sub-clause 4.12 from the fourth edition to the 1999 edition was quite revolutionary and controversial. The applicability of the penultimate paragraph of sub-clause 4.12 may face some difficulties under the UAE law.

Terms included in or related to sub-clause 4.12 like “foreseeable” and “experienced contractor” are subject to much debate in the English case law as to the extent of such terms and the time on which their existence is to be tested. However, it appears that the UAE law approaches the issue from another angle as to the risk being “public and unforeseeable” rather than “unforeseeable by an experienced contractor”. This may lead to issues in case the FIDIC term “experienced contractor” is disputed and brought to a UAE court. It would be very interesting to see the Cassation courts' view for the same.

8 Bibliography

346 (Dubai Court of Cassation February 7, 2009).

Bolam v Friern Hospital Management Committee, 1 W.L.R. 582 (High Court 1957).

Bunni, N. G. (2005). *The FIDIC forms of Contract*. Dublin: Blackwell Publishing.

Contractors, E. I. (2002). *Contractor's Guide to the FIDIC Conditions of Contract for Construction*.

Donoghue v Stevenson, A.C. 562 (House of Lords 1932).

Engineers, I. F. (n.d.). *Contracts: Basic Questions*. Retrieved August 1, 2016, from Question / Answer: <http://fidic.prg/node/911>

FIDIC - History. (n.d.). Retrieved June 13, 2016, from FIDIC: <http://fidic.org/about-fidic/federation/fidic-history>

Hadley v Baxendale, EWHC J70 (Exchequer Court 1854).

Hedley Byrne & Co Ltd v Heller & Partners Ltd, A.C. 465 (House of Lords 1964).

Nassar, J. A.-D. (2009). Claims, disputes and arbitration under the Red Book and the New Red Book (Part 1). *Construction Law Journal*.

Totterdill, B. (2006). *FIDIC users's guide A practical guide to the 1999 red and yellow books*. London: Thomas Telford.

UAE Federal Law No. 5 of 1985, Civil Tran. (1985). UAE.

Uff, J. (1989). Clause 12 Nightmare. *New Civil Engineer*.

Volkmar, A., & Hok, G. S. (2010). *FIDIC - A Guide for Practitioners*. Berlin: Springer.

End notes :

¹Nael Bunni, *The FIDIC Forms of Contract*, 3rd ed., Dublin: Blackwell Publishing, 2005, p. 100.

²Bunni, *Supra* note1, p. 139

³*libid*, p. 503

⁴ *EIC Contractor's Guide to the FIDIC Conditions of Contract for Construction*, March 2002, reprint March 2003 with editorial amendments, p. 12

⁵ Brian Totterdill, *FIDIC Users' Guide: A Practical Guide to the 1999 Red and Yellow Books*, London, 2006 p. 136

⁶ *Ibid.*

⁷ Axel Volkmar Jaeger & Gotz Sebastian Hok, *FIDIC – A Guide for Practitioners*, Berlin, Springer, 2010, p. 107

⁸ Dubai Court of Cassation, 346/2009, 7th February 2010.

⁹ Jaeger & Hok, *Supra* Note 7, p. 189

¹⁰ *Hadley & Anor v. Baxendale & Ors* [1854] EWHC Exch J70 (23 February 1854)

¹¹ International Federation of Consulting Engineers, *Contracts: Advanced Questions General Question / Answer*, <http://fidic.org/node/915>, accessed on 23rd October 2015

¹² John Uff, *The Clause 12 Nightmare*, *New Civil Engineer*, 6 July 1989, p. 19, and Jaeger & Hok, *Supra* Note 7, p. 189

¹³ *Bunni*, *Supra* Note 1, p. 313

¹⁴ Article 249 of the UAE Civil Code

¹⁵ *Bolam v. Friern Hospital Management Committee* [1957]1 W.L.R. 582

¹⁶ *Donoghue v. Stevenson* [1932] UKHL 100 (26 May 1932)

¹⁷ *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1963] UKHL 4 (28 May 1963)