

“Complex Areas in Subcontracts”

by

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Delay Damages

Should the Delay Damages (i.e. the Liquidated Damages or the Penalties) in the Subcontract be at the same daily rate and the same cap as those in the Main Contract ?

No

Yes



- 4.1 The Contractor shall make the Main Contract (other than the details of the Contractor’s prices thereunder as stated in the bills of quantities or schedules of rates and prices as the case may be) available for inspection to the Subcontractor
.....The Contractor shall, in any event, provide the Subcontractor with a copy of the Appendix to Tender of the Main Contract together with Part II of the Conditions of Main Contract
.....The Subcontractor shall be deemed to have full knowledge of the provisions of the Main Contract (less such details of the Contractor’s prices).

- 4.2 The Subcontractor shall so execute and complete the Subcontract Works that no act or omission of his in relation thereto shall constitute, cause or contribute to any breach by the Contractor of any of his obligations under the Main Contract
- 4.4 If the Subcontractor commits any breaches of the Subcontract, he shall indemnify the Contractor against any damages for which the Contractor becomes liable under the Main Contract as a result of such breaches. In such event, the Contractor may, without prejudice to any other method of recovery, deduct such damages from monies otherwise becoming due to the Subcontractor.

UAE Federal Law No. 5/85 (2/87) – The Civil Code

BOOK ONE

CHAPTER II – The effects of a right

Part 2 – Means of enforcement

Section 2 – Compulsory enforcement

(2) Performance by way of compensation

Article 390 :

- (1) The contracting parties may fix the amount of compensation in advance by making a provision therefor in the contract or in a subsequent agreement, subject to the provisions of the law.
- (2) The judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void.

Should Compensation be Equal to the Loss ?

Federal Supreme Court Case No. 103/24 dated 21 March 2004

The effect of the provisions of Article 390 of the Civil Code is that in order for a penalty for delay - consensual compensation - to be paid, it is not sufficient that just the element of default should have been made out on the part of the obligor under the obligation. It is also necessary that the element of damages sustained by the obligee should be made out. If the obligor negates the element of damage, then the prescribed penalty will lapse. It is open for the judge to reduce the penalty for delay stipulated in private muqawala contracts if it is proved that they are excessive and the amount of damage is less than the amount of the agreed penalty, on the basis that compensation should be awarded in proportion to the damage. The damage is the loss in fact sustained by the aggrieved party, and his missed earnings. The trial court is obliged to include in its judgement a statement of the elements consisting damage taken into account in the penalty.

- Judge Abdul Aziz Muhammad Abdul Aziz.

The effect of the provisions of Article 390 of the UAE Civil Code (Cont'd) :-

Commentary on the Civil Code issued by the UAE Ministry of Justice

If the damages are due and equal to the loss sustained, then the liquidated damages agreement in question shall be upheld. However, if the due damages are not equal to the loss sustained, the judge shall have the discretion upon the request of one of the parties, to increase or decrease the amount of these damages in order to reflect the loss suffered. This is in line with the Shari'ah principles under which compensation shall be equal to actual loss suffered.

UAE Federal Law No. 5/85 (2/87) – The Civil Code

BOOK ONE

CHAPTER II – The effects of a right

Part 2 – Means of enforcement

Section 2 – Compulsory enforcement

(2) Performance by way of compensation

Article 389 :

If the amount of compensation is not fixed by law or by the contract, the judge shall assess it in an amount equivalent to the damage in fact suffered at the time of the occurrence thereof.

UAE Federal Law No. 5/85 (2/87) – The Civil Code

BOOK ONE

CHAPTER I - Personal Obligations and rights

Part 3 – Acts Causing Harm

Section 1 – General Provisions

Article 296 :

Any condition purporting to provide exemption from liability for a harmful act shall be void.

UAE Federal Law No. 5/85 (2/87) – The Civil Code

BOOK TWO - CONTRACTS

CHAPTER I - Contracts of Work

Part 1 - Muqawala (contract to make a thing or to perform a task)

Section 3 - Subcontracting

Article 890 :

(1) A contractor may entrust the performance of the whole or part of the work to another contractor unless he is prevented from so doing by a condition of the contract, or unless the nature of the work requires that he does it in person.

(2) The first contractor shall remain liable as towards the employer.

8.7

Subcontract Damages for Delay

If the Subcontractor fails to comply with Sub-Clause 8.2 [Subcontract Time for Completion] and this failure causes or contributes to a failure by the Contractor to comply with Main Contract Clause 8.2 [Time for Completion] the Contractor shall, subject to Sub-Clause 3.3 [Contractor's Claims in connection with the Subcontract], be entitled to deduct delay damages from the Subcontract Price for this default. The liability of the Subcontractor to the Contractor for delay to the Subcontract Works shall be limited to the amount stated in the Appendix to the Subcontractor's Offer.

If no amount is stated in the Appendix to the Subcontractor's Offer, the liability of the Subcontractor to the Contractor for delay to the Subcontract Works shall be limited to 10% of the Accepted Subcontract Amount.

Types of Subcontracts :-

- Domestic Subcontracts.
- Nominated Subcontracts :- 1. Nominated under PS 2. Nominated in Contract
- Who is responsible for the delays caused by Nominated Subcontractors ?
 - Dubai Court of Cassation Case No. 213/2008 dated 19 January 2009
 - Dubai Court of Cassation Case No. 340/1999 dated 16 January 2000
 - Dubai Court of Cassation Case No. 266/2008 dated 17 March 2009
- Unless the Contract specifies such responsibility, UAE Courts tend to place such responsibility on the Party who appointed them ! (i.e. the Employer !)
- Would the arrangements made by the Employer to employ companies / workers / Specialists to work for him, fall into a category of Subcontracts ?
- No, they should not be called Subcontracts. Other expressions such as Employer's Direct Contracts, Package Contracts or similar should be used.

Forms of Subcontracts :-

- ICE Blue Form of Subcontract (should not be used with FIDIC Main Contracts).
- FIDIC Conditions of Subcontract for Works of Civil Engineering Construction, 1st Edition 1994 – Should be used when FIDIC 1987, 4th Edition is the Main Contract.
- FIDIC Conditions of Subcontract for Construction, 1st Edition 2011 – Should be used when FIDIC 1999, 1st Edition is the Main Contract.

59.1 All specialists, merchants, tradesmen and others executing any work or supplying any goods, materials, Plant or services for which Provisional Sums are included in the Contract, who may have been or be nominated or selected or approved by the Employer or the Engineer, and all persons to whom by virtue of the provisions of the Contract the Contractor is required to subcontract shall, in the execution of such work or the supply of such goods, materials, Plant or services, be deemed to be subcontractors to the Contractor and are referred to in this Contract as “nominated Subcontractors”.

Subcontracting 4.1 The Contractor shall not subcontract the whole of the Works. Except where otherwise provided by the Contract, the Contractor shall not subcontract any part of the Works without the prior consent of the Engineer. Any such consent shall not relieve the Contractor from any liability or obligation under the Contract and he shall be responsible for the acts, defaults and neglects of any Subcontractor, his agents, servants or workmen as fully as if they were the acts, defaults or neglects of the Contractor, his agents, servants or workmen.

Provided that the Contractor shall not be required to obtain such consent for:

- (a) the provision of labour,
- (b) the purchase of materials which are in accordance with the standards specified in the Contract, or
- (c) the subcontracting of any part of the Works for which the Subcontractor is named in the Contract.

5 Nominated Subcontractors

5.1

Definition of “nominated Subcontractor” In the Contract “nominated Subcontractor” means a Subcontractor:

- (a) who is stated in the Contract as being a nominated Subcontractor, or
- (b) whom the Engineer, under Clause 13 [Variations and Adjustments], instructs the Contractor to employ as a Subcontractor.

4.4

Subcontractors

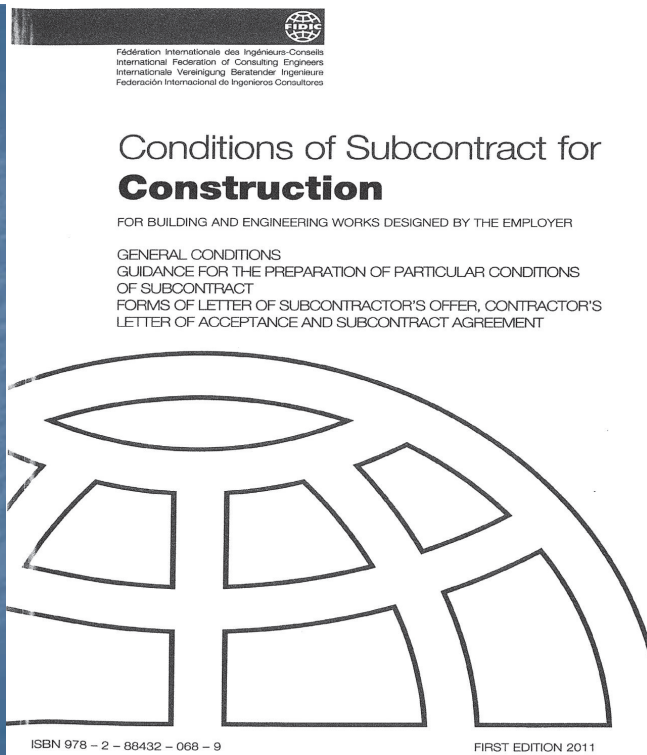
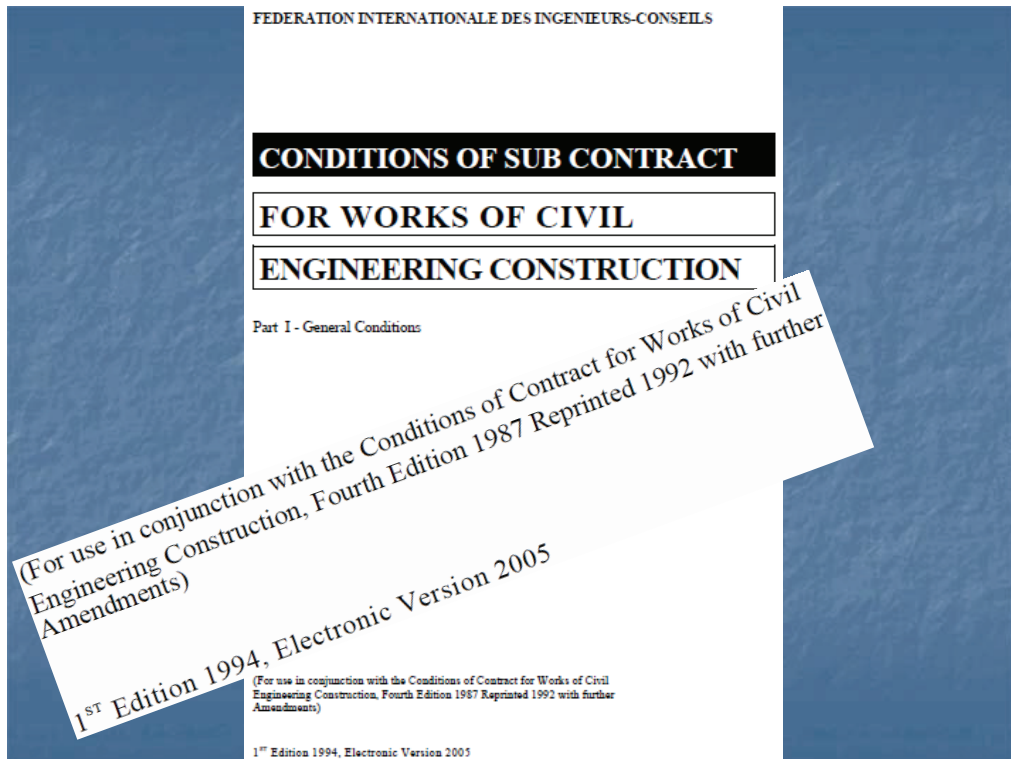
The Contractor shall not subcontract the whole of the Works.

The Contractor shall be responsible for the acts or defaults of any Subcontractor, his agents or employees, as if they were the acts or defaults of the Contractor. Unless otherwise stated in the Particular Conditions:

- (a) 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;
- (b) the prior consent of the Engineer shall be obtained to other proposed Subcontractors;
- (c) the Contractor shall give the Engineer not less than 28 days' notice of the intended date of the commencement of each Subcontractor's work, and of the commencement of such work on the Site; and
- (d) each subcontract shall include provisions which would entitle the Employer to require the subcontract to be assigned to the Employer under Sub-Clause 4.5 [Assignment of Benefit of Subcontract] (if or when applicable) or in the event of termination under Sub-Clause 15.2 [Termination by Employer].

Dubai Cassation Court Case No. 266/2008 dated 17th March 2009

“when the subcontractor is selected by the employer or its consultants, the employer shall be liable for any delay in the performance of the subcontracted part and the main contractor shall not be liable for any delay fines if they can prove that the delay is caused by such subcontractor and the main contractor played no part in the delay”.



Assignment v Novation

Assignment

- Only the rights/benefits can be assigned
- Other Party's consent may be required (if stated in the contract), but that party need not be a party to the assignment

Novation

- Both the rights/benefits and the obligations/liabilities could be novated
- Tripartite agreement

Assignment of Subcontracts :-

- UAE Law permits assignment.
 - To prevent the provisions of a Subcontract from obstructing such assignment, add to FIDIC 4th Edition similar to that of FIDIC 1st Edition 1999, Sub-Clause 4.4
 - Following a termination if the Subcontractors are assigned to the Employer, do they become Package / Direct Contractors to the Employer ? No, only the Main Contractor's rights/benefits get assigned to the Employer (to get the work completed). The obligation to pay the Subcontractor, liability for defects etc. still rests with the Main Contractor. If the Subcontractors want direct payments from the Employer, then the Main Contractor's right under the Main Contract to payments (by the Employer) should in turn be assigned to the Subcontractors.
 - Other Assignments – Rights under long term warranties. - Cont's Equipment ?
 - Following a Novation does the Employer's Direct / Package Contractor become a Subcontractor to the Main Contractor ?
 - No, the relationship is still governed by the terms and conditions in the former Contract between the Employer and the Direct / Package Contractor (with the Employer now replaced by the Main Contractor). If the Novated Contractor is to become a Subcontractor to Main Contractor, then such requirement should be written into the Novation Agreement with all related provisions such as pay-when-paid clauses, back-to-back provisions etc. properly drafted.
-
- Can a Subcontractor claim from Employer when Main Contractor doesn't pay ?

4.4 Subcontractors

- (d) each subcontract shall include provisions which would entitle the Employer to require the subcontract to be assigned to the Employer under Sub-Clause 4.5 [Assignment of Benefit of Subcontract] (if or when applicable) or in the event of termination under Sub-Clause 15.2 [Termination by Employer].

FIDIC 4th Edition, 1987 is silent about any requirement to include provisions in Subcontracts about such entitlement of the Employer !

15.2

Termination by Employer

The Contractor shall then leave the Site and deliver any required Goods, all Contractor's Documents, and other design documents made by or for him, to the Engineer. However, the Contractor shall use his best efforts to comply immediately with any reasonable instructions included in the notice (i) for the assignment of any subcontract, and (ii) for the protection of life or property or for the safety of the Works.

1.1

Definitions

1.1.2.8 "Subcontractor" means any person named in the Contract as a subcontractor, or any person appointed as a subcontractor, for a part of the Works; and the legal successors in title to each of these persons.

63.4

Assignment of Benefit of Agreement

Unless prohibited by law, the Contractor shall, if so instructed by the Engineer within 14 days of such entry and termination referred to in Sub-Clause 63. 1, assign to the Employer the benefit of any agreement for the supply of any goods or materials or services and/or for the execution of any work for the purposes of the Contract, which the Contractor may have entered into.

4.4 Subcontractors

(d) each subcontract shall include provisions which would entitle the Employer to require the subcontract to be assigned to the Employer under Sub-Clause 4.5 [Assignment of Benefit of Subcontract] (if or when applicable) or in the event of termination under Sub-Clause 15.2 [Termination by Employer].

4.5 Assignment of Benefits of Subcontracts

If a Subcontractor's obligations extend beyond the expiry date of the relevant Defects Notification Period and the Engineer, prior to this date, instructs the Contractor to assign the benefit of such obligations to the Employer, then the Contractor shall do so. Unless otherwise stated in the assignment, the Contractor shall have no liability to the Employer for the work carried out by the Subcontractor after the assignment takes effect.

Conditions of Hire of Contractor's Equipment 54.5

With a view to securing, in the event of termination under Clause 63, the continued availability, for the purpose of executing the Works, of any hired Contractor's Equipment, the Contractor shall not bring on to the Site any hired Contractor's Equipment unless there is an agreement for the hire thereof (which agreement shall be deemed not to include an agreement for hire purchase) which contains a provision that the owner thereof will, on request in writing made by the Employer within 7 days after the date on which any termination has become effective, and on the Employer undertaking to pay all hire charges in respect thereof from such date, hire such Contractor's Equipment to the Employer on the same terms in all respects as the same was hired to the Contractor save that the Employer shall be entitled to permit the use thereof by any other contractor employed by him for the purpose of executing and completing the Works and remedying any defects therein, under the terms of the said Clause 63.

Costs for the Purpose of Clause 63 54.6

In the event of the Employer entering into any agreement for the hire of Contractor's Equipment pursuant to Sub-Clause 54.5, all sums properly paid by the Employer under the provisions of any such agreement and all costs incurred by him (including stamp duties) in entering into such agreement shall be deemed, for the purpose of Clause 63, to be part of the cost of executing and completing the Works and the remedying of any defects therein.

Incorporation of Clause in Subcontracts 54.7

The Contractor shall, where entering into any subcontract for the execution of any part of the Works, incorporate in such subcontract (by reference or otherwise) the provisions of this Clause in relation to Contractor's Equipment, Temporary Works or materials brought on to the Site by the Subcontractor.

4.2

Assignment of Subcontractors' Obligations

In the event of a Subcontractor having undertaken towards the Contractor in respect of the work executed, or the goods, materials, Plant or services supplied by such Subcontractor, any continuing obligation extending for a period exceeding that of the Defects Liability Period under the Contract, the Contractor shall at any time, after the expiration of such Period, assign to the Employer, at the Employer's request and cost, the benefit of such obligation for the unexpired duration thereof.

UAE Federal Law No. 5/85 (2/87) – The Civil Code

BOOK TWO - CONTRACTS

CHAPTER III - Contracts of Work

Part 1 - Muqawala (contract to make a thing or to perform a task)

Section 3 - Subcontracting

Article 890:

- (1) A contractor may entrust the performance of the whole or part of the work to another contractor unless he is prevented from so doing by a condition of the contract, or unless the nature of the work requires that he do it in person.
- (2) The first contractor shall remain liable as towards the employer.

Article 891 :

A sub-contractor shall have no claim against the employer for anything due to him from the first contractor unless he has made an assignment to him against the employer.

Assignment and Subcontracting

The Contractor shall not, without the prior consent of the Employer (which consent, notwithstanding the provisions of Sub-Clause 1.5, shall be at the sole discretion of the Employer), assign the Contract or any part thereof, or any benefit or interest therein or thereunder, otherwise than by:

- (a) a charge in favour of the Contractor's bankers of any monies due or to become due under the Contract, or
- (b) assignment to the Contractor's insurers (in cases where the insurers have discharged the Contractor's loss or liability) of the Contractor's right to obtain relief against any other party liable.

Neither Party shall assign the whole or any part of the Contract or any benefit or interest in or under the Contract. However, either Party:

- (a) may assign the whole or any part with the prior agreement of the other Party, at the sole discretion of such other Party, and
- (b) may, as security in favour of a bank or financial institution, assign its right to any moneys due, or to become due, under the Contract.

Issues with Assignment Provisions in FIDIC :-

- Subcontractors may not want to work for the Employer if the Employer would not pay them for the Subcontract Works being carried out.
- Subcontractors may also want the previous payments from the Main Contractor settled before start working for the Employer.
- But the Main Contractor is not getting paid as he is terminated and therefore cannot pay the Subcontractors.
- Even if the Employer wants to pay directly, he cannot do that as the Main Contractor would later demand payment from the Employer for the same work.
- Also the Employer cannot channel the payment through the Main Contractor :-
 - as there is no assurance that he will promptly pay the Subcontractor.
 - also because payments have to be retained until final account stage to recover Employer's additional costs of completing the Works and losses.
- Therefore it is advisable to make provisions in the Contracts :-
 - either, obligating the Main Contractor to assign his payment rights (in respect of the Subcontract Works) to Subcontractors.
 - or, to replace the assignment provisions with novation provisions.

UAE Federal Law No. 5/85 (2/87) – The Civil Code

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A sub-contractor shall have no claim against the employer for anything due to him from the first contractor unless he has made an assignment to him against the employer.

Law No. 19 of 2001 – Bahrain Civil Code

SECTION ONE - PERSONAL RIGHTS OR OBLIGATIONS

BOOK TWO – SPECIFIC CONTRACTS

Part III – CONTRACTS FOR HIRE OF SERVICES

Chapter 1 - Contracts for Work - Section I - General Rules of Contracts for Work:

Fourth: Assignment of Contract and Sub-contracts:

Article 605

(a) A sub-contractor and workmen working for a contractor in the execution of a contract have a direct right of action against the employer but only to the extent of such sums as are due by the employer to the main contractor on the date that action is commenced.

(b) Workmen of a sub-contractor likewise have the same right of action against the main contractor and the employer to the extent of the claims in question.

Article 606

The rights of a sub-contractor and workmen provided for in the preceding Article have priority over those of a person to whom the main contractor has assigned sums due to him by the employer. In case of plurality, they shall recover their rights in proportion to the debt owed to each of them.

Law No. 22 of 2004 – Qatari Civil Code

BOOK TWO - CHAPTER III

Contracts Pertaining to Works - Section 1 - Contracts of Work

Sub-Section 1 - General Principles of a Contract of Works

5. Termination of a Contract of Works

Article 702 :

1 - The subcontractor and labourers who work for the main contractor while the work is being carried out will have the right to claim directly from the employer no more than the amount by which he is indebted to the main contractor from the time the action is brought and the subcontractor's labourers will have the same right in respect of both the main contractor and the employer.

2 - The aforementioned subcontractor and labourers, when they levy an attachment in respect of the employer or main contractor, will have a priority right over the amounts due to the main contractor or the subcontractor at the time such attachment is levied and the priority right of each of them will be in proportion to his right and payment of these amounts may be made directly to them.

3 - Such rights of a subcontractor and labourers as are established under this article will be preferred to the rights of those to whom the contractor assigns his right in respect of the employer.

Questions ?



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Essential knowledge without which Contracts / Subcontracts cannot be administrated correctly, in order to protect the company interests. Next class starts in Dubai on 5th January:

1. Variations and Valuation of “varied work”
2. Contractor’s Entitlement to Extension of Time and Prolongation Costs.
3. Dealing with Concurrent Delays.
4. Notices, Detailed Particulars and Calculation of Prolongation Costs
5. Sub-Clause 52.3 & its Effect on Prolongation Costs.
6. Formulae for the Recovery of Head Office Overheads. (Hudson, Emden, Eichleay, Hank-Laun and Samaratunga)
7. Drafting the Contract Agreement.
8. Methods of Measurement and CESMM3.
9. Dispute resolution, Arbitration and ADR.