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Sunway Resort Hotel & Spa, Kuala Lumpur

## **CASE STUDIES OF USING FIDIC IN SOUTHEAST ASIA “Cultural Sensitivities”**

*Presented by Salvador P. Castro, Jr. during the FIDIC Asia-Pacific Contract Users' Conference on 11 and 12 June 2013, Sunway Resort Hotel & Spa, Kuala Lumpur, Malaysia*

Good Morning!!! Selamat Pagi!!!

My colleagues in the panel will be discussing with you case studies on contractual and legal issues in Southeast Asia. Considering that for the first time since the start of these conferences on Asia-Pacific, the subject focuses mainly on Southeast Asia, so as an Asian, I have decided to zero-in my paper on our cultural sensitivities in Southeast Asia and what's being done to address the concerns and issues on the cultural differences between our region and the Western world.

- As they say, "One of the distinct features of Southeast Asia is its diversity of cultures".

### **GENERAL**

This coming September, FIDIC will be celebrating its 100th year anniversary. Since the first contract was published 56 years ago, FIDIC has published a series of contracts addressing the allocation of risks between the parties, with broad applicability from the traditionally unit rate contract to the design-and-build and turnkey contracts, and lately, the design-build-operate contracts.

FIDIC Contracts are globally- accepted as recognized international construction contracts. However, it appears that there are constraints or barriers in the use of the FIDIC Contracts in Southeast Asia.

- These barriers are from employers, both government and private sectors, local contractors, and even local consulting engineers despite of the fact that FIDIC Contracts were developed by consulting engineers and local lawyers, and in spite of the recognition that the conditions are widely applicable to the civil law and common law jurisdictions.

It was only in the last 10 years, more so in the last 5 years, that we observed a rise in the use of FIDIC contracts probably as a result of the introduction of the MDB Harmonised Editions by the multilateral banks, such as the World Bank, the Asian Development Bank, and lately by JICA, on their foreign-funded projects and also the local and foreign joint-venture infrastructure projects in the region.

- However, a number of the construction contracts used in the region are what we call the “modified FIDIC” or “patterned after FIDIC”, some of which we believe are not based on FIDIC at all.

## **SURVEY**

We conducted an informal survey among participants who attended the AIM-JICA Practical Project Management Program, a JICA-grant project conducted in Manila since 2009. One of the questions we asked was:

### **“Why is FIDIC not widely used in the infrastructure projects in your country?”**

- These participants, about 1,000 nos., were contract users (government and a few contractors and local engineers) coming from Bangladesh, Bhutan, Cambodia, Laos, Myanmar, Indonesia, Philippines, Thailand, Sri Lanka, Vietnam, and as far as Mongolia, and Jordan. These are countries where JICA has presence.

Another survey was informally conducted among the participants of an in-house FIDIC contract training of a Philippine construction firm with local and international operations.

The few key answers which were commonly shared by the majority of the participants were :

- "FIDIC contracts in government projects are not used because they contradict with our laws and government standard contracts."
- "Cultural differences in our country. We are too sensitive in so many aspects."
- "DAB is expensive and deleted in our contracts. There is no accredited DAB in the region."
- "FIDIC is strict and our government and other disciplines have an impression that FIDIC is a straightjacket contract and disallows owner's flexibility."
- "Due to lack of knowledge on FIDIC, it is seen as an adversarial contract due to a lot of notices and time limits." (more education to the engineers and lawyers is needed)

## **SOUTHEAST ASIA**

Now where is Southeast Asia?

SOUTHEAST ASIA is a sub-region of Asia consisting of countries that are members of the Association of Southeast Asian Nations (ASEAN) and East Timor. Members of the ASEAN are:

- |                      |                |
|----------------------|----------------|
| 1. Brunei Darussalam | 6. Myanmar     |
| 2. Cambodia          | 7. Philippines |
| 3. Indonesia         | 8. Singapore   |
| 4. Laos              | 9. Thailand    |
| 5. Malaysia          | 10. Vietnam    |

Southeast Asia is a diverse mix of countries, people, cultures, religions, laws and politics. A mix of countries that offer stable political, legal and business environment to a much less-developed and much less certain legal, political and business environment. There are also members in the ASEAN that are currently in the process of transitioning to a more democratic form of government and instituting positive changes in their legal, banking, and business environments.

## CULTURAL SENSITIVITIES

The culture in the ASEAN is diverse : a mixture of Chinese, Indian, Spanish, Arabic and the indigenous Malay cultures, including a number of other nationalities and ethnic groups.

- The Philippines, as an example, is influenced by Spanish and Western cultures derived from the period the country was under the Spanish and American rule.

Although English is the common language in the ASEAN, the level of speaking and understanding the English language varies among the members of the ASEAN.

According to the Department of Languages and Cultures of Southeast Asia, ASEAN is a region of enormous linguistic diversity where hundreds, or perhaps thousands of languages are spoken.

English is not the ASEAN mother tongue, but rather considered as the language for business. While a number view English as a their second language, there are a number of countries in the ASEAN that are still in the process of learning and understanding English, including learning the FIDIC contracts.

Singapore	<b>Malay, Mandarin, Tamil, English</b> (national language is Malay with English as the language for business)
Brunei Darussalam	<b>Malay</b> (Bahasa Melayu)
Cambodia	<b>Khmer</b>
Indonesia	<b>Indonesian</b> (Bahasa Indonesia)
Laos	<b>Lao</b>
Malaysia	<b>Malay</b>
Myanmar	<b>Burmese</b>
Philippines	<b>Filipino</b> (English as language for business)
Thailand	<b>Thai</b>
Vietnam	<b>Vietnamese</b>

While the legal, technical and commercial aspects of the contract can be resolved "across-the-table", understanding the cultural sensitivities in the ASEAN is very crucial even in the drafting and managing the FIDIC Contracts, which may affect relationships between parties during the life of the contracts.

Example :

***“A Notice is sometimes considered as a sign of aggression or “declaration of war on notices”.***

***“A Claim is sometimes considered as a dispute.”***

***“Notice provisions and time-bar provisions” are considered as a straightjacket contract.***

***“Dispute Adjudication Board” is another layer of expenses, specially with the DABs coming from the western culture.***

The combination of the above would, at times, strain the relationships and sometimes lead to arbitration.

This reminds me of Robert Knutson in his book "FIDIC: An Analysis of International Contracts," wherein he said, "People look at the same contract language and actually understand different things. This could be, and often is, because we all looked at the world through our specific culture and historical perspectives."

### **CULTURAL DIFFERENCES**

One of the main considerations is that countries in Southeast Asia are traditionally "high-context cultures", while Australia, Germany, England, Canada, Switzerland and the United States are typically low-context culture countries. (*Managing Cultural Differences by Philip R. Harris & Robert T. Moran*)

High-context culture uses high-context communications.

- Communications are indirect and the message is delivered implicitly rather than explicitly and directly.

Within the ASEAN :

- Relationships are always more important in business than the contract.
- "Face Saving" is regarded as one of the most important dimensions of contexting in the business within the ASEAN in order to preserve one's prestige, dignity or reputation.
- There is high priority on keeping harmony, preventing anyone from losing face and nurturing relationships during the life of the contract.

Examples :

- Filipinos are somewhat emotional people and very sensitive.
  - "HIYA" in Filipino or shame is an important social force for Filipinos that in business people, at times, will "save face" at all cost.
  - This culture of "lose face" is similar also with the Thai and other members of the ASEAN.
- Indonesians are extremely indirect in business contexts. Therefore, it is very important to circumvent the subject before the critical issues are mentioned.
  - Indonesians and other Malay countries in the ASEAN, in its business context avoid for someone to feel "MALU" in Indonesia, or ashamed, insulted or embarrassed.

### **ADDRESSING THE CULTURAL SENSITIVITIES**

Global investments and growth of development are now focused on ASIA, which includes the ASEAN. Addressing the above barriers, including the use of the DAB, the following are being pursued by FIDIC, JICA and ADB in the ASEAN :

#### **1. AIM-JICA-FIDIC PRACTICAL PROJECT MANAGEMENT PROGRAM (2009 to present)**

- This refers to the JICA-funded project for the training of the mostly ASEAN contract users focusing on the practical use and management of claims and disputes of the FIDIC Contracts and MDB Harmonised Editions - the "ASEAN Way".
- Today, over 1,000 have completed the program with participants from the ASEAN and Bangladesh, Sri Lanka, Mongolia, Japan, Jordan.

## 2. FIDIC TRAINING AND ACCREDITATION AS FIDIC CONTRACT LECTURERS

- FIDIC has trained and accredited 2 from ASEAN as FIDIC International Contracts Lecturers, with the aim of providing FIDIC trainings in the ASEAN using its ASEAN experience and an understanding of its legal systems and its cultural sensitivities.
  - One from Indonesia and another from the Philippines.

## 3. FIDIC IN-HOUSE TRAININGS ON CONTRACTS

- The last 2 years have shown a demand for in-house FIDIC trainings from employers, specially the ASEAN private sectors and contractors.
  - Example : In the Philippines for the last 2 years, there has been a demand for in-house FIDIC trainings on contracts and management of claims, the ASEAN way.
- The demand could probably be due to the various Public-Private Partnership (PPP) Projects and major investments in the ASEAN.
  - In January 2013, the IMF World Economic Outlook Update on the Gradual Upturn in Global Growth during 2013 has identified Indonesia, Malaysia, Philippines, Thailand and Vietnam as among the emerging markets and developing economies.

## 4. FIDIC-JICA WORKSHOP AND ASSESSMENT OF ADJUDICATORS

- FIDIC-JICA has announced that 13 out of 40 trainees passed the FIDIC-JICA Workshop and Assessment and qualified to be in the national list of FIDIC's Member Associations. Ten out of the thirteen are from the ASEAN.
- The ten (10) who passed can qualify for appointment as members of DAB and will be able to address the concerns that DAB is expensive since the accredited DAB under the FIDIC President's List have come mostly from Europe.

## SUMMARY

The use and interpretation of every clause of the FIDIC Contracts are the same, regardless of whether you are in the Asia-Pacific, Europe, Americas, or Africa.

FIDIC Contracts are flexible and it is in the understanding and manner in how the contract is:

- [a] formalized, taking into consideration the applicable law and its procurement policies, and
- [b] the manner in which the contract is managed, taking into consideration the cultural sensitivities of the country.

## CLOSING

Allow me to close by quoting Hon. Rodolfo Severino, Secretary General of ASEAN, in his address during the International Law Conference in Kuala Lumpur on 03 September 2011:

*"It is not a matter of history, it is a matter of culture. Southeast Asians' way of dealing with one another has been through manifestations of goodwill and slow winning and giving of trust. And the way to arrive at agreements has been through consultation and consensus, ...mushawara and mufakat... rather than across-the-table negotiations involving bargaining and give-and-take that result in deals enforceable in a court of law".*

Ladies and Gentlemen,

**“LET US USE THE FIDIC CONTRACT THE FIDIC WAY BUT IT MANAGE THE ASEAN WAY.”**

**TERIMAH KASI**

**SALVADOR P. CASTRO, JR.**

*Mediator, Arbitrator, Adjudicator*

**Salvador P. Castro, Jr.**, is Chairman and President of SPCastro, Inc. (SPCI), a project management firm with operations in the Philippines, Brunei Darussalam and now the UAE. With over 40 years of work experience in project and construction management, including 20 years in alternative dispute resolution, Mr. Castro is a Fellow, Association for Project Management, Incorporate, Chartered Institute of Building, and Member, Society of Construction Law, all of the UK. He is a registered Civil Engineer, APEC Engineer and ASEAN Engineer. He recently passed the FIDIC-JICA Workshop and Assessment for Adjudicators.

Mr. Castro is a FIDIC Contracts International Accredited Trainer. He is also an Affiliate Member of FIDIC. From 2009 to present, Mr. Castro is a member of the Panel of Experts in the FIDIC Asia-Pacific Contract Users' Conferences. At present, Mr. Castro is an Adjunct Professor of the Asian Institute of Management (AIM) under its collaboration with JICA and FIDIC in the Practical Project Management Program where he lectures on Contract Management on the FIDIC Conditions of Contracts, and Claims, Disputes and Resolution of Disputes.

Mr. Castro is 2-term Past President of the Council of Engineering Consultants of the Philippines (CECOPHIL), Member Association in the Philippines of FIDIC, and Past President of the Philippine Institute of Construction Arbitrators and Mediators (PICAM).

He is the Philippines' Country Representative to the Dispute Resolution Board Foundation (USA), an accredited Mediator and Arbitrator with the Construction Industry Arbitration Commission (CIAC-Philippines), the Hong Kong International Arbitration Centre, Inc., Philippine Dispute Resolution Center, Inc., and Mediator of Court-Annexed Cases and Professor I of the Supreme Court- Philippine Judicial Academy. In 2010, Mr. Castro was appointed as Member of the ExeCom of the PHILJA Training Academy by the Supreme Court of the Philippines.

Mr. Castro is known in the construction industry as the Project Director of the Guinness Book of Record's biggest palace in the world, the Istana Nurul Iman of the Sultan of Negara Brunei Darussalam. His landmark achievements in the field of project and construction management, as represented in his various internationally-acclaimed projects in Brunei Darussalam, earned him the Presidential Citation (Pamana ng Pilipino Award) for overseas Filipino Individuals and Organizations.

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