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Pros and Cons of Construction Contract Templates – Our Experience

In this article we discuss our experience with construction contract templates, such as LOGIC and FIDIC. Contract templates are good, but overall they seem to create some issues with customization and for that reason is it not our preferred contract types. Having said that, we are confident they can be useful in certain circumstances, especially when not a lot of customization is required.

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Standard Contracts

Contract templates, especially when it comes to complex contracts, such as construction contracts (and complex contract templates), may be seem a great way of reducing legal costs. I have not been a fan of those and I am sure I am not the only one. For few reasons. One, because they make a drafter's life difficult when particulars of a transaction dictates a lot of customization. Two, because it is possible to miss out important things if they happen not to be in a standard contract.

Let me spell out few issues...

Over the past several years, I have found myself (not quite intentionally) drafting and negotiating complex construction contracts, most of which have been oil and gas industry related. Over these years, I have experimented with different types of construction contracts and three of them are most notable: a type of construction contracts large law firms would typically use (they are certainly different, but they have a certain typology), LOGIC contracts and some FIDIC contracts.

I am guessing most lawyers representing owners in construction contracts prefer the template large law firms would typically. I suspect these could be the reasons: (i) familiarity with the ins and outs of those types of contracts, (ii) good protection of a client's interest (typically in favor of an owner) and (iii) easier to modify (perhaps partly due the reason (i)). Templates, such as those prepared by LOGIC are designed to make companies life easier. They are actually intended to reduce costs of drafting and negotiating – a very good intention in itself.

Standard is not quite standard

In the market we operate many oil and gas companies prefer LOGIC templates. LOGIC stands for Leading Oil & Gas Competitiveness, which "was incorporated in 1999 by the UK Oil & Gas Industry Task Force (OGITF, now PILOT) to lead a competitiveness initiative for the UK offshore oil and gas industry"¹. FIDIC is the Swiss organization specialized in preparing standard construction and

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¹ From the introduction to the latest version of LOGIC contracts

construction related contracts, among other things. There are number of other organizations in different countries that prepare standard contracts.

The issue we were facing is that each party to a contract claimed to have and preferred to use a LOGIC contract, but each had its own version of LOGIC contract. It so happens that unlike FIDIC, which protects its general conditions from being edited (requiring that any editions be made in the form of special terms), it is easier to get LOGIC contracts in Word® format. Consequently, it is easier to edit LOGIC contracts. For that reason everyone ends up having its own LOGIC contract.

And, God, they look so similar...

It is easy to get every kind of cognitive biases to work (in A. Twersky and D. Kahneman's terms, to get *System 1* to work²) to neglect the differences, which may have quite a significant effect in practice.

FIDIC protects its general conditions from changes. It is hard to say for us (someone not that specialized in FIDIC contracts) if that's good or bad. Our opinion is it is good if (a) parties know details of those contracts, (ii) are OK with the kind balance of interests between the owner and contractor in FIDIC templates, (iii) do not envision many changes to general terms, and (iv) have all the documents and information, which are intended to be part of the contract (other than general conditions and particular conditions). All of these suggest to us some difficulty in customization, although we understand some people may have better experience with FIDIC contracts. Plus, for some transactions it may be beneficial to exactly have that – not making too many changes to standard terms.

The devil is in attachment

Each deal has its own specifics – hardly ever two transaction are the same. It is clear that some customization is necessary. Contract template have the tendency to shift the negotiations from terms and conditions to schedules (attachments, exhibits). Sometimes this can become a quite an exhausting experience.

Other than strictly legal schedules, schedules tend to deal with technical issues and in most cases engineers are heavily involved in putting together these documents. Pushing some of the commercial terms into schedules means some mixing of technical and legal issues in one document. As with general conditions, this may be good or not so good depending on circumstances, but that's not something we often prefer. We think it makes a drafter's work a bit more difficult.

To be sure, technical details are always important and we have seen number of disputes arising from them. Our practice is we look through almost all schedules (apart from the ones that do not contain any text) just in case.

Two sentences

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² Reference is to the concepts discussed in Mr. Daniel Kahneman's book entitled *Thinking, Fast and Slow*