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Construction contracts in Japan - Key differences between the Minkanrengo and FIDIC Red Book (1999) - PART ONE: Force Majeure and Extension of Time

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1. Introduction

Projections indicate that the Japanese construction industry will have grown by 3.2% in 2022.[1] With the increase in non-Japanese companies investing in building Japanese infrastructure, there has been a corresponding increase in the use of Japanese standard form construction contracts among parties, including non-Japanese companies. The most common form of construction-only contract used in Japan is the "General Conditions of Construction Contract" (*Minkan (Nanakai) Rengo Kyoutei Kouji Ukeoi Keiyaku Yakkan*), otherwise known as the "**Minkanrengo**" standard form.[2] The Minkanrengo is published by the Committee of Seven Associations of Architects and Contractors and is by far one of the more popular standard form contracts used in Japanese domestic construction works. Japanese parties often prefer using the Minkanrengo over international standard contract forms, such as the FIDIC Red Book (1999) ("**FIDIC RB (1999)**"), as it takes into account applicable Japanese laws (e.g., Construction Business Act, Civil Code). While the Minkanrengo is used frequently among Japanese parties, non-Japanese parties may find its terms vague, ambiguous, and unfamiliar.

Non-Japanese parties contracting under a Minkanrengo may be able to remove some of its ambiguity by adding particularly detailed conditions. Also, as the standard Minkanrengo conditions are designed based on the aforementioned Japanese laws, analysis of such laws could be helpful to further mitigate uncertainties.

This three part newsletter series sets out key differences between the Minkanrengo and FIDIC RB (1999), and describes some mitigatory measures capable of modifying the Minkanrengo to align it with international construction practices.

2. Key differences between Minkanrengo and FIDIC RB (1999)

At first glance, one would notice that the English version of the Minkanrengo (at 35 articles and approximately 22 pages) is considerably shorter than the FIDIC RB **(1999)**, which is approximately 58 pages long (excluding the General Conditions of Dispute Adjudication Agreement). Below are some key differences between Minkanrengo and FIDIC RB.

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1 Analysis of the Japanese Construction Market Size, Trends and Forecasts may be found here.

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

(1) Definition of *Force Majeure*

Article 21(1) of the Minkanrengo contains the definition of *Force Majeure*, namely "an Act of God, or other natural or artificial cause for which neither party is responsible". By international standards, some might view this definition as vague and lacking. In contrast, Sub-Clause 19.1 of the FIDIC RB **(1999)** provides four requirements to be fulfilled for an event to be defined as *Force Majeure*. In particular, a "Force Majeure" means an exceptional event or circumstances: (a) which is beyond a Party's control, (b) which such Party could not reasonably have provided against before entering into the Contract, (c) which, having arisen, such Party could not reasonably have avoided or overcome, and (d) which is not substantially attributable to the other Party.

Often, parties contracting under the Minkanrengo conditions may list many potential events which would constitute a *Force Majeure* event. However, the FIDIC RB **(1999)** definition of a *Force Majeure* event is more conclusive with specific categorisations and better allocation of the risks between the parties.

(2) Claims for Extension of Time and relevant costs

Construction projects almost are invariably accompanied by applications for extensions of time. While the Minkanrengo does allow the contractor to claim for a change of project completion date[3] and relevant costs,[4] there are no express provisions which may oblige the contractor to follow certain procedures or oblige the employer to respond to the contractor's claims within a specific period. Compared with the FIDIC RB **(1999)**, which contains a clear claiming mechanism in the form of Sub-Clause 20.1, one view may be that the Minkanrengo is lacking in this area.

Notably, pursuant to Sub-Clause 20.1 of FIDIC RB **(1999)**, the contractor's claims are also subject to the requirement to give the engineer (acting on the employer's behalf) notice within 28 days after becoming aware of the event or circumstance giving rise to the contractors' claim. If the contractor fails to give the notice within such period, the employer is discharged of liability in respect of the claim.

The Minkanrengo conditions do not include such a time bar clause, and consequently this allows the contractor to claim for extensions of time long after occurrence of the event giving rise to the claim. A further catch-all provision, in the form of Article 28(6) of the Minkanrengo, allows extension of time claims where the contractor has a "legitimate reason", and gives the contractor added flexibility for extension of time claims as compared to the FIDIC RB **(1999)**. This broad language of the Minkanrengo, however, sometimes leads to contractors failing to prepare contemporaneous records to substantiate their claims.

Sub-Clause 20.1 of FIDIC RB **(1999)** also requires the engineer to respond to the claim by the contractor within a specific period after receiving a claim. However, the Minkanrengo does not have a such a requirement.
While Minkanrengo may have more flexibility than FIDIC RB **(1999)** for both parties in respect of the claiming mechanism, from a risk management perspective, the employer may be unable to properly estimate the true time for completion and the costs of the project and/or assess their exposure to claims for extension of time and additional costs. Parties contracting under the Minkanrengo may wish to set out clear and detailed terms and conditions for extensions of time and additional costs, such that the time for completion and the costs of the project may be more accurately estimated, and the risks between the parties be clearly allocated.

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3 See, amongst other articles, Articles 17(4), 19(5), 20(2), 28 and 31(3) of Minkanrengo, Rev Version: April 2020.

4 See, amongst other articles, Articles 23-2(6) and 29 of Minkanrengo, Rev Version: April 2020

(3) Dispute Resolution Mechanism - the FIDIC Dispute Adjudication Board

The concept of a Dispute Adjudication Board is not well known in Japan, and there is no statutory construction adjudication regime in Japan, unlike other jurisdictions such as the United Kingdom, Australia, Malaysia or Singapore. Accordingly, there is no such adjudication mechanism under the Minkanrengo conditions. Disputes arising from construction contracts drafted on a Minkanrengo basis would then be subject to mediation or conciliation by the Japanese Construction Works Dispute Settlement Board under the Japanese Construction Business Act (the "**Board**"), pursuant to Article 34 of the Minkanrengo. Arbitration conducted by the Board, or the filing of a lawsuit to a Japanese Court, may only be commenced subject to the execution of an arbitration agreement between the parties, and the requirements of Article 34 of the Minkanrengo being fulfilled.

Non-Japanese parties when contracting on a Minkanrengo basis ought to be cognizant of the lack of an adjudication mechanism, and the necessary steps for mediation or conciliation before arbitration may be commenced.

3. Conclusion of Part One of Three

The widespread preferred use of the Minkanrengo by Japanese contractors in Japan necessitates detailed analysis in its differences with internationally accepted practices. As described above, non-Japanese parties contracting on a Minkanrengo basis might be able to remove the ambiguity which may exist in the Minkanrengo to an extent by adding detailed conditions. An understanding of the underlying Japanese laws would also be helpful for non-Japanese parties to address their concerns and consequently mitigate uncertainty due to the ambiguity of the relevant terms. Other aspects of the Minkanrengo, such as claims for price fluctuations, variations and issues regarding payment will be analysed in comparison to the FIDIC RB **(1999)** in future parts of this series.

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