**Law and Global Infrastructure Projects**

Cours 1

**Introduction:**

Global infrastructure projects are linked to several fields of law: contract law, public law and public procurement law/administrative law (droit des marchés publics), intellectual property (high tech components, protection of trademarks, environmental law, insurance law…

Objective: the understanding of the practical context as well as the theoritical fundamentals.

The first sessions will be dedicated to the understanding the general background, then 4/5 sessions dedicated to the contract (study of the major contracts and clauses of the field), and by the end of the semester, we will cover « satellite topics », that is to say the subcontracts (consortium agreement, join venture agreement,...) : the underlying infrastructure to develop the project, and, hopefully some litigation.

Bibliography will be sent: a short one, and as we work on the FIDIC, need to order it.

Course evaluation:

* Exam 70%: case study, legal opinion type
* Two short tests during the semester (15/20min): 30%

Class preparation: circulation reading assignments and chapter of the recommended books.

**Session 1 – Global Infrastructure Projects**

**What are Global Infrastructure Projects?**

The project can first be defined by its users and the liability issues: a power plant and a railway, a road won’t be used by the same population. The safety issues won’t be the same as the risks in the power plant for instance are higher but for less people. A good illustration of the safety focus of the energy project is that a lot of safety regulations are implemented: for instance the directive “control of the infrastructures”.

Another difference is that a power plant generates electricity, factories generate products, and, a road provides a service. It defines a difference between civil work infrastructure and private infrastructure. Contractually there is a big difference. What type of element generated is also an important element to distinguish the plants for instance.

It is a difficult field to define.

It is a very broad field: air plants, hospitals, maritime ports, mining fields, oil structures, satellites…

Satellites are a good way to think about warranties for instance.

A distinction is also made between:

* A new construction project: “**green field project**”
* A renovation: “**brown field project**”

The risk element between the two types of project is not obvious: it is a debatable subject. Generally, renovated an existing infrastructure will be cheaper than constructing a new one. However, this is only up to a certain point and only on the short term. The performance elements, the energy consumption might be also more important on the old infrastructure. Renovation/rehabilitation projects can be risker because there might be a disturbance between the expectations of the user and of the producer.

Renovation projects can be very risky.

Also, it happens quite often that lawyers who negotiate new infrastructure projects are lawyers who have gained experience in green field projects, therefore in front of a renovation projects they will be driven by the norms implemented for new projects, which can be quite dangerous. It illustrates the need to personalize each contract depending on the infrastructure and its very particularities.

Construction projects: generally it is called “*contrat pour la realisation d’un ensemble industriel*”.

In an industrial project there will be lots of clauses regarding the expected performance of the infrastructure.

Several aspects are contained in Global Infrastructure Projects:

***Price element***:The price of the contract and the real cost can considerably vary.

The financial damage of the project can also be considerably higher if disputes arise (ex: Areva).

***Strategic dimension***:In terms of the strategic elements of a project, it can have high impact on a national economy.

***Technological dimension***: it can allow to limit energy consumption and costs for instance.

***Participants***: who are the main authors? States, government or private bodies (homologation agencies to obtain certificates regarding the safety aspects for instance), engineers (the employees of the suppliers working on the project and the consulting ones: “*ingénieurs conseils*”), constructors, suppliers and subcontractors (a lot of elements are subcontracted: possible to have up to 300 subcontractors), investors, banks, insurance, lawyers…and the two heroes: “the buyer” and the “seller”.

There is une “*terminologie consacrée*”:

* the buyer can be called the employer (as employing the company executing the project) or the “**owner**” of the project (purchasing the infrastructure) and in French “maître d’oeuvre”,
* and the seller is actually generally called the “**constructor**”

Often the consulting engineers fulfil and important role as they quite often designated as the official representative of the customer.

As a lawyer, an important element is your bargaining power; do you have the flexibility to impose your views or are your expose to such a competition that you cannot bargain.

Are we currently buyers or sellers? The crisis is still on, but we passed the tougher years. The answer highly depends on the field and the demand.

The general economic context is not the only driver: you can have strong environmental/political drivers. For instance on the railway sector, if you look back at the past year, you can notice that cities have kept investing even though the economic environment was not going well, but it can be explained by the congestion of the cities.  
Some economists also believe that during difficult economical period, governments need to invest.

You may have some certain key suppliers who have products that are simply at one point of time the best available on the market and bargain is not possible.

Regardless of your economic power, you should not abuse of it because one day you can loose this bargaining power.

Cours 2

**Risks associated with major infrastructure project**

Identification of the risk and then how to tackle it in the contract

Several risks exist:

* Currency exchange constitutes a risk for major legal infrastructure project
  + Currency of the financing and the currency of the income you get from the operations of the infrastructure
    - Create a gap in the revenues
  + A similar: if reasons in terms of contract price
    - Determinated in a currency, however your costs might not be in the same currency zone
      * Today euro is in a free fall compared to the dollar
      * The main risk is if you are a supplier of a contractor in a project: factories and employees in the US, but, a contract in euro: with the euro you have to cover the costs: you get less dollars today than at the moment of the signature of the contraction: unbalance sheet
      * Because of the magnitude of the amount engaged: huge effects
* Economic instability: related to the currency fluctuation
  + Very often when speaking about economic instability is the inflation risk:
    - At the moment the inflation is very low: 0,5
      * World bank scared of a deflation period
    - A low inflation is not a real problem because it is factor of stability
    - For the contractor: high inflation is problematic: it means that the sourcing costs will go up
      * If the prices stay the same, and that every time you want to buy material the prices will go up, so unbalance sheet
    - Contract price adjustment: align the purchase price with the level of inflation.
      * CPA formula: getting cover from inflation risk
* Political instability:
  + Risk of war, riots, rebellions, kidnapping…
  + Strikes: each party responsible for its own employees strike, but national strikes: shared responsibilities
* Export control and embargo
  + Ex: Russia, Iran…
    - In Iran: attack of the oil and gaz industry, for instance, forbidden to use American products: could imply sanctions and even criminal proceedings…
  + Might imply delays…
* Not sufficiently identify the constraints in local laws and practices:
  + International elements in the project, but as a buyer or operator, the company with whom you contract with might come from another country, and, on the contrary if you are the contractor you might have to work in a country you are not based in: local constraints
    - English company contract to build an infrastructure in Malaysia, English law applies, but what about the employees?
      * To the extent you are workers in Malaysia, even if the contract signed said the contract shall be governed by English law, the workers are under the labour law of Malaysia:
        + the law governing the contract will apply to the contract, but if you have to assess as a company if the workers will be allowed to work in Malaysia, the answer will be in Malaysian law

signed the contract and accepted to work in a time frame: must be respected

duty of verification of the law

* + - Laws of the country where the infrastructure will be operated
  + Impact of international treaties or agreement:
    - International tax treaties: will regulate the taxes,… are there local taxes ? important to verify the local taxes
  + International Investment treaties
  + International Treaties regulating nuclear incident
    - Limit to the liability regarding nuclear power plants
      * For the suppliers of a nuclear power plant installation, if the country is not a signatory to a nuclear liability regime, it can be a whole in the project: in the event of a nuclear incident, would be to important for a supplier
      * Risk can be disproportionate to the revenues: special rules
* Impact of technological law: the local technical laws will apply to setting issues, environmental issues, and consequently to the certification of the equipment
  + Classic element: homologation of a railway equipment: depending on the countries, the rules for homologations are different and therefore need to be carefully studied
* Cultural differences: not only for the project execution but also at the time of the negotiation
  + The difficulty when negotiation where the “words”: “l’importance de la parole donnée”
    - Cultures that put the emphasis on the oral agreement, the verbal commitment
      * Might be complicated to negotiate clarification in the contract
        + For instance a protection for delayed payment: not as a fear but as a general protection “non payment clause”
        + The customer might react as offended
* Local partnership:
  + Local subcontractors
* The local surroundings:
  + The “forces of nature” which could compromise the execution or destruct what has been done
  + Also the transportation of the materials:
    - The port of Cairo is very congested and might imply delays
  + Climate is important for the material:
    - Saudi Arabia: extreme temperature: could affect the solidity of the steal or the resistance of the equipment
    - Siberia for the cold for instance
    - Also can be unforeseen: wind at certain period of the year
      * Could imply delays if the local surroundings have not been taken into account

Therefore, lots of element to think about and reflex to challenge all these elements:

* As a lawyer: not expected to know everything but to raise all these questions that could imply delays

**The lawyers’ role in infrastructure project**

What are the expectations on the lawyer?

* Anticipation skills: understanding the general complexity of the project to develop solutions for the anticipated problems
* Having a curiosity for the technical aspects of the projects and in particular the technical equipment
  + Broad idea of how it works:
    - It can in particular influence your level of acceptance of the risks
  + Risk mitigation plan: try to have a force majeure clause in the contract to cover the issues
  + Reporting duties:
    - If lawyer on the battlefield, might get to critical level: need to know what your clients/employers are reading to accept: need to be able to explain in a simple, clear and concise language
  + Creativity: Quite often the closing of the contract is stuck and need to find creative solution to close the deal
  + Evolution of the lawyer role in a globalized economy: through the international legal practice in this specific field: development of a similar language
    - Tend to negotiate with people with similar backgrounds: facilitates the contract wording, the understanding of the issues….

**Session 2: Scope**

**The public bidding process:**

* The customer as a preliminary phase:
  + limitation of the number of bidders with pre-qualifications requirements:
    - owner of the technology,
    - previous experience,
    - ….
  + When interested in the projects: ordering of the tender documentation
    - Lawyers will be asked to go through it
* Two things must be talked before the submissions:
  + The submission rules inside the tender documentation “boring rules”
  + Legalisation requirement
    - Certification of the translations of the documents
  + The bidding deadlines: disqualification is possible
* An element which has a major impact: sometimes bidding rules provides no allowance to change the contract condition:
  + The price level plays an important part: not always the cheapest winning the project
* The notion of fairness and equitable treatment of the bidders:
  + Need to give a fair chance to all bidders
* Impact of competition law rules:
  + Most countries have antitrust regulations
    - Possible to team up? need to check the legislation to avoid horizontal integration of the companies on the market

Cours 3 - The legal context and contractual schemes for global infrastructure projects

The main contract types/classifications : shift from the macroeconomic view of the field towards to a more contractual and legal analysis.

1. **The main contract types**
2. Distinction between turnkey contract/Equipment Supply Contract:

* ESC: only some elements of a full structure
* Turnkey contract: as its name indicates (even if exaggeration), it means that once you finish the construction, the customer just need to turn the key and the project if working.

With this distinction, if you are the developer of a project, which kind of contract would you like the best?

* Not always turnkey contract and the more the future owner has experience and engineer capacity, the more it is likely that he could do the interface himself and will therefore opt for equipment supply
  + Whether the developers are beginners or familiars is very important
  + But also, depend of the user: if he is more an investor (no knowledge of the technical aspects): Turnkey, but if the buyer is more a utility firm: it will be more of their core knowledge to know what is important and how to do it: more Equipment supply contract
  + Interface risk: if something goes wrong with the performance: of different contracts, might become a ping pong game with no one accepting the liability
    - Advantage with the Turnkey contract: responsibility of the Trunkey contractor, he will take over the interface risk between his own supplies
  + Lenders/banks: as a financing institution, the bank will make sure you select good quality equipment and suppliers: intrusion of the bank into the subject
    - The bank might have a word to say on the type of contract: will prefer to influence the decision towards a turnkey contract: less risk and the banks are generally risk avers and it will increase the performance and reliability of the contract.
  + Litigation: Turnkey contract - Management of efforts
* Fair statement to consider that for major project, the majority will be on turnkey basic.
* However, what is the impact on the price? If the owner has in mind “price optimisation”, what will be his choice?
  + The management price will be included in the turnkey: equilibrated because efforts
  + Common Contract with all the suppliers to avoid the interface risk implementing une “responsabilité solidaire”: but the suppliers might refuse
    - The turnkey is generally more expensive
* If the Owner is a professional: possible to lead the coordination and equipment approach: total price that will be lower than with a turnkey contract
* Different elements though about by the contractors.

1. The structure of the price:

* Lump sum price
* Cost plus fees

In general with Turnkey contract: Lump sum price (“prix ferme et forfaitaire”): it is a price that should not change or only on the basis of very few exceptions: price define as a way for the owner to shift the risk. Therefore, the owner wants to have a peaceful mind: avoid liability and also regarding the price. Convey the notion that the price is not going to change whatever the obstacles the contractor will meet.

Cost plus fees: the ultimate price will be referred to as the actual costs plus a fee: to remunerate the Owner.

The Owner want to know exactly what he is paying for exactly: cost. Then 5 or 10% of fees.

It is a more concrete and transparent approach because the Owner will know exactly what he is paying for, but, also the percentage is complicated to estimate.

Much more Lump sum approaches as for its certainty.

1. The relevance of the technical specifications:

Two ways to describe the specifications:

* Functional specifications
* Detail specifications

The Detail specification gives a list of all the components that need to be supplied for the project. It will cover the very details of all the things that will need to be supplied.

The Functional specifications will be much simpler and could even be a few lines indicating what is expected.

In practice: in general a little bit of both.

They like the comfort of specifications but at the same time they don’t want the suppliers to explain there is something missing preventing him to implement a specific element.

So in general some specifications and outline

1. **The main contract features**

Emerging from major projects’ contracts.

Trend started in Germany:

Germany is the world leader, especially on the export field, explained by the industrial weight of Germany, but also explain why the scholars have dedicated lots of thoughts to major contracts.

From Niklsih literature, we can draw four different features:

1. The long-term feature:

* Definition/negotiation phase: the time required to define all the documents, the particularities of the projects, and the negociation: can last about 2 years
  + Lots of elements that need to be agreed upon
* The execution phase: around four years
  + But if the contract says completion in four years and problems arise: possible to become much longer
  + Even in a turnkey contract, even the owner will have to provide some elements and sometimes if there are delays regarding the contraction: if the Contractor has not been paid he could stop and explain the Owner is responsible as he did not paid on time
  + The definition of defining the tasks: define hat the owner should be doing and allow to introduce delays for instance, but also which party is in charge to obtain the parties and need to make the technical persons to understand how important is the obtention of these elements
* Warranty: one year, but fashionable to have more:
  + Period of test
  + But also “responsabilité des vices cachés”: depending on the jurisdiction

Therefore the long-term element is a very important feature: it will be translated in the contract through all the clauses suppose to foreseen the potential risks.

1. The frame agreement feature

It is a list easy to understand:

* Frame agreement: in French “contract cadre”: so only a few indications
  + Ex regarding sourcing agreements:
* But in reality the contract should be very details
  + For instance when lawyer of Areva for instance: very detailed
* But what Niklish referred to is a different thing:
  + **The elements in the contract will not be able to answer every thing because, the events have not occurred yet.**
    - Change order mechanism in the contract: what is the mechanism to follow in order to change the order
      * The contract has not to be completely detailed taking into account everything
  + The contract should give the framework to change the order for instance
* Niklish meant that the contract should define the steps for change in the agreement
  + Change in order: how to implement the definition
  + Change in applicable law: will serve the purpose to establish the frame of the process if there is a change in the process
    - But it cannot predict which laws will change in the future

1. The cooperation requirement/nature

What Niklish was trying to convey is that in the contract list of duties and obligations to be performed by the owner and the contractor: but at the end: collective interest for the project to be a success: it is the interest of neither to have the project to fail

* Beyond the notions of standards and liability: strict notion of cooperation
  + In the contracts often cooperation requirements
    - For instance regarding the permits
    - But also regarding the custom clearances
      * The clauses formality will detail the cooperation : Owner: “in good faith” to provide the documents to enable the Supplier, to pass the customs for instance
* Cooperation is a very important element
  + Even though if a problem occurs, the friendship might not least long

1. The dispute risk

Long term complex construction projects: meant to embody risks elements?

* The change of people in charge: might create a basis for complications
  + When people who negotiated the contract are not around anymore, possible to become more complicated to determine what was looked for and possible distortion between what was agreed by person A and what is actually done when A left and B is in charge
* The time aspects, the complexity… make some issues more difficult to solve
  + And generally, the dispute: if something goes wrong, the consequential impact can be huge
    - Delay in time: loss of benefits, the loss of opportunities…
    - Consequential impacts can be dramatic: might lead to the failure of a company

1. **Contract classifications**

* If we look at the tasks and services and other aspects that need to be perform to complete the project,
  + Transport, location, teaching elements….
    - Teaching: to teach to the persons how to use the elements you have supplied,
  + It is not only providing equipment, it is also services
* Exemple Malaurie/Enes: variable perimeter of the contract: equipment, but also, studies, advices,..
  + Contrat de vente: will be very narrow definition
  + If not contrat de vente: contract d’entreprise
    - Contrat d’entreprise: “contract for works”: less driven by what you deliver but by the success, the performance regarding what you have to achieve
  + What are the criteria that need to be apply to determine if it is a contrat de vente or contract for works?
    - First: the economic criteria: what is the contractor is to supply and the price: what is the proportion of the price that corresponds to materials and what is the proportion that is services and intangible elements
      * If less than 50% of the price is materials
      * Then more than 50% of the price is dedicated: it means the economic proportion of services is higher and therefore a contract for price
    - Second: “psychological criteria”, it is the “custom made criteria”
      * Is the project reflecting a standard product or is that what you are constructing a tailor-made product to answer the Buyer’s expectations
        + The more tailor-made, the more it is a contract for work
* What is the impact of the classification? Why is it relevant? Two main impacts from the legal side:
  + The impact on the limitation/exclusion of liability: depending on the jurisdiction some restriction can be valid for a contract for works and might not be valid for a contract of sale
    - In France: some limitation of liability can be forbidden: Consumer/Company, or in between two commercial companies
  + The other: status limitation
    - The period of time applicable regarding whether some liabilities have expired will have different regime
* The contract for works is more flexible regarding the limitation of liability or the prescription. If you x-want to reduce the risk: need to determine in the contract what, you as a party, acknowledge the contract as.
* However, in many jurisdiction, the judge is not bound by the qualification, but it remain a good specification and indication, that will bring more certainty in the contract
* Several scholars take the view that even the classification as a contract for works, does not fully reflect what the contract is about and is therefore inadequate.
  + Then if it is not falling in one of these categories: “contract sui generis”
    - And some even went further saying that these contracts are so special that a new category should be created for them and to fill the gap
* The correct classification: “sui generis”: none of the existing category is adequate and none reflects its full complexity
  + Also: to come back to Nikslish as these contracts have their own specificities: need to implement a framework because might not exist or be complex to find it in the laws ruling the contract

**COURSE OUTLINE**

**SESSIONS 2 & 3 : General legal & regulatory frame**

Focus topics (in light of reading assignments):

* Notion of “turnkey” contract
* Main features of complex long-term construction contracts
* Main contract classifications

The Bidding process

Call for tenders

Pre-qualification rounds / Pre-qualification requirements

Tender specifications / Bidder’s guidelines:

* submission rules (forms to be used; deadlines; legalization requirements)
* bid deviation rules (no deviations policy; limited deviations policy; alternative bids possibility; etc.)
* bid evaluation criteria

Tender Conditions

Public Procurement Rules: fairness & equality of treatment between bidders

Competition Law Rules: maintaining a level playing field between competitors bidding for the project

Main contract types

Equipment supply contract versus “turnkey” contract

Pros & cons of turnkey contracting:

* one single contractor for the whole project, hence less project supervision tasks for the owner (lower requirement for engineering and technical capabilities) and **less interface risks** (no need to manage the interface between lots comprising the full plant);
* **easier to finance** since main completion risks are on the contractor (subject however to bargaining power);
* **less claims management for the owner** (no Ping-Pong game of liabilities between various contractors on the origin of defects in case the plant is not working properly);
* **price level** (risk premium & contingencies will normally be built into the price by the contractor to anticipate absorption of unexpected risks);
* even in turnkey contracting, owner will have various obligations and responsibilities (hence “turning the key” will not be the sole duty of the owner) and will likely need to **absorb certain risks** (e.g. risk of unforeseen underground conditions).

Lump-sum contract versus “Cost + Fee” contract: statistically, lump-sum contracting is the most frequent approach and is the logical price structure for turnkey contracting.

The relevance of the technical specification when assessing the contract types: functional specification versus detailed specification (contracts will typically combine functional and detailed specification, but the more we move into turnkey contracting, the more a focus on functional specification is to be expected).

Main contract features

The **“Nicklisch school”** in Germany (University of Heidelberg) and its contribution to the analysis of main contract characteristics:

* The long-term feature: several years from tender phase to end of warranty phase, sometimes decades, hence the need for contract clauses to handle future events (e.g. unexpected inflation);
* The frame agreement aspect: the contract sets a frame of solutions and mechanisms for the parties to approach events occurring during the project life (e.g. change order clause explaining how to handle requests by owner for scope variations; change in laws clause explaining how to handle changes in legislation after contract signing);
* The cooperation requirement: beyond traditional obligations specified in the contract, the parties need in various areas to cooperate with each other to achieve certain tasks in the best collective interest of the project (e.g. cooperation when handling customs clearance formalities or when filing permits and licenses to operate the plant). By extrapolation, Anglo-American literature sometimes refers to the need for the parties to behave as “friends of the project” (how realistic ?);
* The dispute risk: given the sums and financial consequences at stake when something goes wrong in the project, contracts for the construction of large infrastructures tend to have a high exposure to conflicts, claims and litigation.

Main contract classifications:

The contract for the construction of major industrial infrastructures contains a large variety of tasks and obligations (design and engineering studies, sourcing and procurement, manufacturing, assembling, transport and logistics, training of owner’s personnel, site construction, testing, operation and maintenance, etc.). This makes the classification of the contract in the standard recognized statutory categories problematic and courts have to analyze the contents of the contract to assess the right category in which the contract should fall (variable geometry approach!).

The more we move into turnkey contracting, the more the contract will be classified as a “contract for works” (“contrat d’entreprise” in French; “Werkvertrag” in German). The more we move into equipment supply contract, the more the contract will be classified as a “sales contract” (“contrat de vente” in French, “Kaufvertrag” in German).

The classification of the contract has non-negligible consequences:

* It may influence the validity of limitation of liability clauses (e.g. under French law, certain liability exclusions are enforceable in a sales contract only between professionals of same business field);
* It may influence applicable statutes of limitation (e.g. under French law, the statutory liability for hidden defects applies essentially to sales contract).

The parties may try to reduce the risk of uncertainties by specifying themselves in the contract (e.g. preamble) the desired classification, but usually courts are not bound by the parties’ designated classification.

Certain authors (minority doctrine) therefore consider that a classification s*ui generis* is the most appropriate and calls for the adoption of legislation specifically designed to regulate infrastructure construction contracts (similar e.g. to specific legislation adopted for unusual and particular contract types such as leasing contracts).

Cours 4

What are the criteria to assess that an Infrastructure contract is an international or a national contract?

* The nationality of the parties
  + Two French companies : no debate
    - However, if they write the contract in English, and decides to apply French Law
      * Link of connexity
    - They have the right to redact the contract in English
      * Law protecting the French language
    - Fraude à la loi ?
      * If it can be demonstrated that the parties decided with the deliberate intent to use a foreign law to escape the applicable law
        + Ex: law of the place where the property is located

Example of Caron: died in the US, his American wife claimed the shares of the real estate pertained to a company and therefore where not under French Law. The Children of Caron claimed it was a fraude à la loi : abusive skim

* + - When contract between two French companies possible to use foreign law, however, good to think about Fraude à la loi
* The place of execution of the contract, especially if different from the parties’ nationality
* There are no single criteria that is pertinent on its own
* Faisceau d’indice and connexity elements and the more the contract has international aspects, the more it will be considered it is an international contract
* French case law: the French standard : a contract is international when it touches upon international elements
  + Lorsqu’il met en jeu les interest du commerce international
* Impacts of the international qualification
  + **Much more flexibility to select the law governing the contract**: if you choose a governing law, there will be less challenge regarding the applicable law
  + L’ordre public et loi de police
    - Public order : Might apply to the contract or in an attenuated manner
      * L’effet atténué de l’ordre public
    - Mandatory rules/ public policy / lois de polices
      * Certain of them might have a more limited effect
  + Dispute resolution : it will make it easier to select international arbitration as a forum
    - More flexibility to select the dispute resolution forum
  + To the extent the contract is international, the international treaties might be applicable
* **Contract without a governing law**: the practionners negotiating the contract will do all diligent efforts to provide in the contract, clauses and solution : they want the solution to be in the contract
  + Nicklish
  + The more you detail in the contract, the less you need to search what is the applicable law
    - Ex: if you define that strike is a force majeur, no need to find out in the law
  + The governing law clause will exist, but won’t be used as much as if the contract did not provide for for framework
    - Use a governing law, but then put in the contract as much details, as detailed as possible

**The Lex Mercatoria**

No governing law clause is very unsecure choice, therefore, having the lex mercatoria is better than nothing.

Furthermore, if you refer to the UNIDROIT principles, as they are almost a written version of the lex mercatoria, it would be a way of having some written elements as applicable law.

Lex mercatoria: loi des marchands.

However, very complicated to determine what is part of it

German author Stein : Lex mercatoria: Reality or

She makes a very acid remark about lex mercatoria : “there is uncertainty concerning its origin, its scope, its substance, ist validity, ist sources, its development…”

Lex mercatoria “romantics”:

They have answered to the need for clarifications about lex mercatoria trying to evaluate all the customs and tried to identify the lex mercatoria principles.

In France, Bertold Goldman: he was the father of the lex mercatoria concept

Lord Mustil: article through which he identified the 20 principles of the lex mercatoria principle

Berger: has identified 69 principles: “lex mercatoria is not just a mere topic, it is the expression of commercial reality”

International arbitration awards are considered as valid and enforceable.

Furthermore, if you look to the list of contract published by the ICC there are references to the lex mercatoria

Distinction between the lex mercatoria and the global law:

Global law article : Global law is much more extended than the lex mercatoria, which is connected

“there is a fine line between a hero and a fried potatoe”

Cf. Manirusthsaman

Global law is wider than the lex mercatoria, as lex mercatoria is meant to apply to commercial elements

Global law touches any field of law: no limits and therefore “phenomenon”

Cf. Article “The globalization of commerce has determined a process of global law creation”

Lex mercatoria: source of creativity and argument development

Some of these principles are not embodied in the contract; therefore the lex mercatoria comes to supplement the contract.

**The lex mercatoria principles**

1. Pacta sunt servanda: the contract is the law between the parties, French civil code
   * whatever you have agrees in the contract shall be conducted
2. Clausula reibus sic standibus
   * The long term of the contract
   * Cases where the contract terms might be adjusted as with the circumstances
     + However drawback: principe de la sécurité juridique : if you adapt to circumstances, you loose the element of certainty
       - “Hardship clause”: something has occurred and makes the contract much more burdensome to conduct
       - force majeur: impossible, hardship: still possible to execute but will be economically inefficient
     + Clause od hardship in the contract usually not usued in contracts in the field of energy,
       - However, a challenge of the contract based on the hardship provision is actually more often used
     + Idea is to adapt the clause of pacta sunt servanda through the hardship
       - But usually need for the change of circumstances to be abnormally high
   * For the cirucmstances to influence on the contract, they must be very strong
3. Principle of abuse of rights: parties should not use clauses in the contract in an abusive manner
   * If a party is applying a clause that is in the contract, it is a good thing to know that in some instances even the use of your right can become abusive
     + Ex: Hot air Balloon
   * If a project is late: the delay is causing a damage to the owner : cannot generate revenue, and as a result, almost always, “delay damage clause in the contract”: in order to compensate
     + If you are late: possible to know that the owner is not suffering any damage: even if you were on time the owner would not be able to use the plant
       - Is there a delay? and second question : so delay penalties ?
         * In such a case you can use the third principle : abuse of right
4. Culpa in contract and law: you are liable for precontractual events
   * Abusive breakdown of negociations
     + Usually before signing, negotiations phase during which you are not bind by the contract
       - Parties invest a lot of energy and money in negotiation
   * Need a basis for tort action because np contract
     + In between the responsabilité contractuelle and délictuelle
       - Idée de la rupture abusive des pourparlers contractuels
     + If you write a letter of intent : not sure the project will conduct to a contract : possible to add in the letter of intent a clause regarding the possible losses
     + Need for a very bad behaviour of the other party
       - For instance if one of the party has had secret parallel talks with another party
5. The Good faith principle:
   * The parties should behave in a good faith
   * notion that is often use in the wording of the contract
     + for instance in force majeure: “the parties shall renegotiate in good faith”
6. Bribes and corruption: contracts signed under these circumstances are considered illegal
7. When a contract with a state entity : the state entity cannot escape the contract
   * Fight the principle of state immunity
8. The principle : in a group of companies, if the Mother company takes a commitment, then the affiliates are bind by the commitment
9. Force majeur principle: contracts who are affected by unforeseen events : force majeur situation
10. The Gold Clause concept: possibility in the contract to pay by gold, and there had been debate regarding the validity of such a way of payment
    * Nowadays: some countries might by petrol and pay through cereals, but quite rare
    * Payment through gold has disappeared
    * But contract price adjustment: Contract price adjustment to foresee the variation of the currency
      + The modern practice to have a CPA is an inheritance of the principle contained in the lex mercatoria
11. If a party is in breach of contract: the other party can use it as of inexecution:
    * One party is entitled to treat itself as discharged from its obligations if the other has committed a breach, but only if the breach is substantial.
    * “Exception d’inéxecution” : if the other party does not execute, does not perform, then the party can discharge from its obligations
      + Substantive breach: for instance payment
      + Substantial shall serve as a criteria to make sure one party won’t use it
      + Notion of proportionality
    * The problem sometimes is not contained in the contract, therefore, good to be listed among the principle,
      + However, if the applicable law contains the principle of “exception d’inexécution” or a reference to the lex mercatoria, then possible to use it
12. No party can be allowed by its own act to bring about a non-performance of a condition precedent to its own obligation.
    * Precedent condition precedent: certain conditions must be fulfil
      + Often issuance of the contractor parent company to give a guarantee in order for the owner to be sure that if the contractor does not fulfil the contract, then the parent company would do so
        - The owner will not be willing to start payment before having the guarantee
    * Subcontractor
    * Parent company guarantee
      + A party should not use its own default to postpone payment
13. A tribunal is not bound by the characterization of the contract ascribed to it by the parties
    * When writing the contract, should specify the nature, however, judges are not bound by it
14. Damages for breach of contract are limited to the foreseeable consequences of the breach
    * In terms of French national law
    * Droit des obligations avec la “*Vache de Pottier*”
      + Pottier: a farmer bought a cow at a farmer’s market, and, the cow happened to have the disease and the cow died, but before dying the cow had contaminated all the other cows
        - Therefore the farmer had no more source of revenues and went bankrupt
      + Chain of reaction that started with the cow with the disease
      + Question: to what extent the seller of the defective cow should be held responsible for ?
        - At some point you need to cut the chain of damages that need to be compensated
          * “*dommage prévisible*” in French Law
    * have to compensate but only to the extent that damages was foreseeable
      + ex: of the luggage, loss of the luggage vs plane accident
        - not foreseeable that u had gold in your lugage
15. The duty to mitigate losses: A party which has suffered a breach of contract must take reasonable steps to mitigate its loss

* Do you have an obligation to limit your damage?
  + Ex: Pottier - if the farmer notices that the cow is sick, perhaps need to take steps to put the cow in quarantine
    - But should the farmer pay for the fence to separate the sick cow from the others?
      * Quick and practical measure to mitigate the damages: common sense notion
        + Almost the river side of the abuse of right

1. Damages for non-delivery are calculated by reference to the market price of the goods and the price at which the buyer has purchased equivalent goods in replacement

* Almost insurance related principle: the insurance company
  + It is more expensive but better to insurance the replacement value
    - It is more insurance driven
* The price paid at first is secondary compared to the price paid today for replacement

1. A party must act promptly to enforce its rights, on pain of losing them by waiver. This may be an instance of a more general rule, that each party must act in a diligent and practical manner to safeguard its own interests

* Act promptly failing which you are deemed to have waived your rights
  + If you consider you have the right to claim something you should claim promptly and diligently because you need to advise the other party
  + The typical example if the force majeur example
    - Whenever you have a force majeur clause, you have a specific provision that explains how you shall notify the other party : this provision will generally provide for a deadline
  + “Failing which”: you shall be deemed to have waived your right to obtain compensation for the force majeur event
    - duty to act promptly
  + two sides: a bit harsh, but, at the same time, efficiency: put an incentive on the contractor to alert the owner in order to help him to mitigate the damages for instance
    - sympathy for the other party as wel : need to be informed
    - when something gets closer from a force majeur: notify
* safety argument: when everyone was supposed to know? You can argue about that
  + Even of you have doubt it is better to notify
* In the FIDIC: progress report clause to inform the owner of the production
  + Example where in the progress report: the project manager had notified that all harbours were blocked in ice, more time because of this unforeseeable event
    - Argued that even though no specific letter, the unforeseeable event was mentioned
* Always have the reflex to notify the other party

1. A debtor may in certain circumstances set off his own cross-claims to extinguish or diminish his liability to the creditor

* Compensation: principle relatively easy to understand, if you owe money and the customer owes you money: compensation
  + However this principle can become more complex when implementing in real life
    - Requirement for the debts to be liquid and exigible:
      * Element of connexity as well: an example: two construction projects in two separate contracts, and then, the customer stops paying you on the first contract and in the second contract, you owe delay penalties: debatable question
        + Connexity element

Set off: same parties, same contract, for debts that have became due and that are liquid

The main discussion regards the liquidity

* Main recommendation : st off clause in the contract can be a good idea: it is a well known principle so might be interesting to have it within the contract

1. The salvation doctrine:

* Contracts should be construed according to the principle *ut res magis valeat quampereat.*
  + If a clause in a contract becomes invalid because not consider legal, then the invalidity should not contaminate the rest of the contract
  + Salvation doctrine: the parties should replace the problematic clause
    - Just because the compete clause is invalid does not destroy the contract and the parties should have the opportunity to replace the clause: obligation to renegociate
      * You will therefore save tge contract and reach the goal targeted in the second principle
  + Severability clause: usually say that if one clause is considered as invalid, then should not impact the rest of the contract
    - Cut the clause and replace it

1. Le silence vaut acceptation

* Failure by one party to respond to a letter written to it by the other is regarded as evidence of assent to its terms
* In most jurisdiction te silence principle is invalid in consumption contract, and it is only accepted in commercial contracts
* Typical examples :
  + Expiration of the contract but the parties continue to operate, therefore the contract is deemed to have continue
  + And secondly, incentive to have
    - If you are not getting something from teh other party, write to them and silence equals acceptation

**COURSE OUTLINE**

**SESSION 4 : International legal context**

Focus topics (in light of reading assignments):

* The notion of Global Law and its relevance to infrastructure projects in a globalized economy
* The *Lex Mercatoria* and its key principles as a basis for contract drafting in the international practice

Impact of the international legal frame

What makes an infrastructure construction contract international?

Practical issues surrounding the internationality criteria:

* Nationality of the parties;
* Destination of the equipment / Foreign construction site;
* International supply chain;
* Cross-border issues.

Summary (French law position): a contract is international if it affects the interests of international commerce.

Consequences of the international nature of the contract:

1. flexibility in the choice of law (less exposure to “fraud to the law” issues),
2. flexibility in the choice of dispute resolution methods (e.g. choice of International Chamber of Commerce arbitration assumes an international contract)
3. attenuated effect of public order,
4. limited application of mandatory rules,
5. applicability of international treaties.

The trend towards “Self-sufficient Contracts” or “Contracts without a governing law”: i.e. endeavors of legal practitioners and contract negotiators towards achieving an autonomous contract fully independent from any national legal system.

Lex Mercatoria & its influence on the international contract practice

Theory:

The debate around the existence of the Lex Mercatoria

Definition / Concept / Differences with the notion of Global Law

Complications around the boundaries of the Lex Mercatoria

The evolution of the Lex Mercatoria and the efforts of codification (e.g. Unidroit Principles; European Principles of Contract Law)

Conclusion: an academic debate or a practical reality?

Practice

Review of Lord Mustill’s 20 key principles:

1. “Pacta sunt servanda” (promises must be kept): contracts are to be enforced according to their terms. The contract is the law between the parties;
2. “Clausula rebus sic stantibus” (things thus standing): as an exception to pacta sunt servanda, contracts (especially long-term ones) can be adjusted in cases of fundamental changes in the circumstances prevailing at the time of contract signing;
3. Abuse of rights: clauses of a contract should not be applied in an unconscionable (unethical) manner;
4. The doctrine of “culpa in contrahendo” (fault in the conclusion of a contract): duty to negotiate with care, duty to avoid abusive breakdown of negotiations as a basis for pre-contractual liability;
5. Good faith principle: contracts are to be performed in good faith;
6. Contracts or clauses secured through illegal or dishonest means (e.g. bribes) are null and void or unenforceable;
7. A State entity cannot escape obligations by claiming lack of capacity/authority to be a party to a binding agreement;
8. The controlling company of a Group is regarded as contracting on behalf of all affiliated companies of the Group;
9. Force majeure events (unforeseen difficulties) affecting the performance of a contract require a renegotiation of the continuation of the contract between the parties;
10. Gold clause agreements are valid: especially in long-term contracts, payment of the creditor with gold or gold equivalent (instead of the agreed contract currency) is enforceable, leading today to the validity of Contract Price Adjustment (CPA) clauses;
11. Substantial breach by the other party can justify discharge of obligations by the non-breaching party (e.g. suspension of contract execution due to non-payment);
12. A party cannot validly cause the non-fulfillment of a condition precedent to its own obligation by its own act;
13. A tribunal is not bound by the manner through which the parties have characterized/qualified their contract;
14. Damages for breach of contract shall be limited to the foreseeable consequences of the breach;
15. Duty to mitigate losses: a party suffering damages caused by the other party has an obligation to mitigate the extent of its losses;
16. Damages for non-delivery are to be assessed based on market price & replacement value (not based on the initial price);
17. Duty to act promptly and diligently to safeguard one’s own interests, failing which the concerned party shall be deemed to have waived its rights to entitlements;
18. Right of set-off: claims and counterclaims can be set-off against each other;
19. Salvation / Severability doctrine based on the principle “ut res magis valeat quam pereat” (better to function than to perish): duty of the parties to replace an invalid clause by a valid one serving similar purposes in order to “save” the contract;
20. Silence equals consent.

Cours 5

International Model Contract: the FIDIC silver book is our guide for the following sessions

The Relevance of International Model Contract:

* ICC, UNCITRAL
* MF1 Contract conditions: published by the UK association of mechanical engineers
* The World Bank contract models: liability clauses
  + Contains limitation of liability clauses
* In Europe: the Orgalim conditions
  + They produce various model and especially models of consortium agreements
* New Engineering Contract: model that started its implementation in South Africa
* The FIDIC: among the most well-known
  + The FIDIC “rainbow” because each has a colour and different targets

What are the advantages of the FIDIC book?

* you save the cost of having to work from scratch
  + two sides :
    - as the model contracts are made by technicians, knowledgeable among the practitioner, expert document
    - because it is written by experts you get a lot of experience
* Also the contracts are generally up to date: you have something that is quite trendy
* The flexibility of the use
  + If you decide to use the FIDIC Silver book and that you are an owner: possible to adapt the model to your specific needs
* Time and efficiency of the negotiation phase

Is it frequent or not?

* yes, but how do you define the frequency
* it happens from time to time that projects would be governed by this FIDIC Silver model contract
* even if the contract is not a model contract, but the parties make a reference to the model contract to make their point: when arguing about a clause, reference to the contract
* the frequency is there, but more with reference

Cours 6

Matters discussed in the class and related materials: ex: you are advising a company a Russian company, because risk of change of money.

The advice would be to insert a contract price adjustment clause in order to address the risk of fluctuation.

Final exam: more real life access, with access to the materials.

**FIDIC Silver Book**

* General clauses and then we will study more particular clauses.

Need to keep in mind the interpretation rules: need to keep that in mind when analysing a contract.

There are several interpretations rules that are quite extreme over cautiousness: for instance regarding the feminine of the words, however, some are more classical such as the definitions regarding good faith and fair dealings.

Regular references to address matters in a “reasonable” manner.

Notion of best efforts as opposed to reasonable efforts:

* Possible to have clauses that says the contractor shall deploy “best efforts” as opposed to “reasonable efforts”
* Best efforts: you have to spend whatever money that is necessary to achieve your goal
* Reasonable efforts: you don’t need to go the extra mile
  + moneywise: antonov equipment can be linked to “best efforts”
    - best efforts: may be deem to spend a lot of money to transport the material to overcome a force majeur event,
    - however, if the same clause provides for “reasonable efforts”: still need to deploy efforts, however, you can use transportation such as trucks
* if you have accepted the best efforts : need to make the best to overcome a situation

Notion of state of the art:

* State of the art technology, the services provided should be the most modern…
* Depending of the governing law possible to have different sort of standards: how advance the level of diligence should be?

Contract Proferentem Rule:

* A signal that if you are the drafter of the contract you take in a special responsibility: if you take the lead in drafting the contract, you have responsibility, and if a clause is ambiguous: then the interpretation will be against you
* The interpretation will be used against the Party drafting the contract
  + Use extensively in the practice
  + However, the more you have participated in the draft of the contract, the less you can refer to this principle
* This notion however plays an important role when you are in a project where there is a public actor: easier to use that clause

Introduction to the contract:

First you need to **define and describe the parties**: it is quite important for the parties to be well described: registered location, number of registration… it helps you to know who you are dealing with but also if you want to do some researches on the other Party: it is important to know who you are dealing with.

After the description of the parties, you have a **Preamble**: it allows not jumping immediately to the contract clauses. Very often the preamble will be used to describe the level of competence or professionalization of the parties: “the contractor has been chosen because of his competence level” for instance. It can play against you because the owner will use it to assert you cannot pretend you could not achieve something because of the level stated in the Preamble.

Depending of the background of the parties or to the place where the contract is completed, the Preamble has not the same importance or the same content.

The Preamble shall describe the project and the parties in an adequate and honest manner.

Thirdly, the contracts usually have a **long list of definition**. Key words are used regularly in the contract, therefore in order to simplify the lecture and understanding of the contract, they are defined at the beginning.

The definition are not only used to simplify the understanding, it is also used to contain important concept.

For instance the word “day”: calendar day? But in practical terms you have Saturday and Sunday, and the force majeure happens in a day with a holiday: therefore you have actually only 5 or 4 days to complete your obligation.

However, if you define “day” as opening day: you will have indeed 7 days.

Same thing regarding “applicable law”: obligations to comply with laws of the contract, but if the definition of law are any law: you have extended the scope of the possible applicable laws.

The obligations whereby the owner has an obligation to use subcontractors in the project: the obligation can be extended or not: the obligation therefore to go to the owner to have his approval much be much bigger.

Therefore: need to read all the definitions.

The **contractual order precedents**: for instance the general conditions and then the particular conditions.

If you decide to have the initial offer made by the contractor in the contract, you have to lower its priority: you don’t want it to prevail. Since the offer of the contractor was made in response to the initial tender: you might also want to put it in the contract. There are pros and cons to have these documents included or not.

Some professionals believe that, as the parties agreed on a contract, supplementary should not be added.

However, other persons believe it can be of some help when interpreting the contract: for instance if a piece of equipment was omitted in the contract, it can be contained in the initial offer: so is to be delivered as part of the initial offer and the price did not change while the equipment was omitted so should be provided. Therefore the initial offer can be used as a fall back.

Moreover: what about the correspondence exchange during the preparation of the contract? Usually not part of the contract and usually the opposite: the contract is the entire agreement and any exchanges between the parties, prior to the signature, is considered as not being part of the contract.

The General Clauses

Some supplementary parties might serve as representative or adviser to the parties. Usually the contractor or the owner might used these persons as well as executive of the project. Therefore, often a clause regarding the powers of these persons is added to the contract.

FIDIC Article 3.1

Some general clauses are key to the start of the projects;

Firstly, clauses regarding **the condition precedents to the start of the works**: that is to say the provision of the contract that says what is needed for the project to actually start: for the clock to start ticking: when does the project execution really starts. Definition this moment is very important, as often there is a delay for the completion.

The site access element is key as it means that for the contractor to start the work, he needs to be able to access the site where the infrastructure is to be built (evaluation of the ground, diverse studies…). Another very important element is the permits: often a clause is added stating that the clock starts ticking when permits are received.

Capitalistic view of the project: funds are needed. If you are the contractor: to start the work you need to have certain amounts of money: have to employ personal, buy material… You usually try to negotiate a down payment to commence the work. This way you know the work will start only after receiving at least a certain amount of money.

Also, you will need to be sure a financing scheme has been put in place. Therefore, when the owner is going to finance the project through a financing scheme, you will have as a requirement to start the work the put in place if the scheme.

Another important thing to have before starting is insurance policies: it is important because if you are the contractor and you take the insurance: it will be your own power, however, if the owner takes the global insurance policy: you want to be sure he has subscribed to the insurance before starting.

Any types of financing guarantees that are to be issued as the performance of the project: whenever the customer pays a down payment often will be condition to a bank guarantee. The same way: the owner might ask for a caution “parent company guarantee”. Therefore, if you are the owner you want to make sure the project won’t start before you have the parent company guaranty.

This clause is very important because it helps you to put in place basic things before starting the project.

Another example of general clauses is the **progress report clause** to inform the purchaser of the evolution of the project.

Clauses as well regarding to **site access and the site risks**: even in a turnkey contract, the owner still have a few obligations among which there is the access to the site. A key issue regarding that: who bears the liability of the site or regarding problems emerging from the quality of the site.

Example of quicksand discovered on the site impacting the project: delay and a change in the construction.

In an ideal world: as a contractor, you should ask for the quality of the ground to survey before provide the calculations. However, there can be two difficulties: the site surveys are very expensive, and second difficulty: the bidding process can start before the owner has complete possession of the land in order for the owner to gain time.

What is more common is for the owner to do a site survey and to provide it to the contractor for him to provide its offer. However, is the owner liable for mistakes in the site survey? It is often a big debate, as the owner will give to the contractor the data “for his information”: however, should not be used as a basis. Therefore, as a contractor might say if he cannot rely on the site survey, the survey is useless. Therefore often an agreement: condition precedent to have a site survey as a condition precedent to start the work. However, if the survey reveals some difficulties implying supplementary costs and delays, it constitutes a sort of risk for the owner as the contract might be impacted.

The three difficulties of the site:

* Poor quality of the site
* Environmental pollution
* Discovery of archaeological artefacts and relics: who is the owner of the artefacts?
  + In the Fidic books there are references to the artefacts

The clauses around the site will contain the notion that the contractor has made every investigation to become familiar with the context.

Also possible to include the possibility for associations to block the access to the site: who is in charge?

Another question: **how do you allocate between the owner and the contractor the main permits?** Usually two types of permits: construction permits and the operating licence. Classically the contractor drives the construction: so he is in charged with the construction permit, and, the owner operates the facilities so operating licence.

Usually the main recommendation rule: the easiest rule: *the permits, licences and authorizations required should be allocated based on who has the obligation to get the permits according to the applicable law as the applicable law usually refers to whom is competent to apply for a permit.*

However, the list of potential permits to obtain is long, need to be sure who is in charged of getting them.

**The custom clearance obligations**:

The Incoterms booklet organizes the various elements that come with delivery and custom clearance. In the incoterms there are different example and timing when the equipment is considered as delivered.

Custom clearance: need to incorporate the time to clear customs in the time schedule.

Not how much it takes to clear custom, but how many days the all customs local officials have to clear customs: what will prevail in a dispute, is the local law.

Another general clause is **the approval relating to subcontractors**:

The owner wants the contractor to go to him every time. Therefore, if you are a subcontractor approval clause in the contract: need to have a broad definition.

**Is it legitimate for the owner to have approval of technical drawings?** Even if the contractor has a general approach: the owner might want to review the drawings and to proofread it to make sure no mistake is made. However two many issues: if the owner has approval, does he get the liability? The contractor can indeed say the approval of the drawings is an obligation to correct the drawings. Also if you are the contractor, you will make sure only the most important drawings shall be submitted to the owner and a certain time limit to have back the drawings and go on with the construction: eight days after which the owner will be deemed to have approved the drawings for instance.

**EHS: environmental health and safety rules** on the site Article 6.7 of the Fidic

EHS rules such as stating that the employees should wear helmets can be considered as a breach the contract.

Sometimes, if there are EHS issues on the site, the director shall be respected: strict remedial measures are sometimes necessary with regards to EHS obligations.

Finally, it is also possible to have a **recap with the priorities and the obligations.**

**Miscellaneous clauses “boiler plate provisions”: at the end of the contract generally, that have a different level of importance.**

**COURSE OUTLINE**

**SESSION 5 & 6 : Key Contract Clauses I : General Clauses**

Reading assignments:

* The duty of good faith in contractual relations
* The notion of abuse of rights
* The meaning of “best efforts”
* INCOTERMS in international trade
* Contra proferentem rule
* The notion of condition precedent

The relevance of international model contracts

Main model contracts: FIDIC contracts; MF1 contract conditions; ICC model contracts; NEC (*New Engineering Contract*); World Bank conditions; Orgalime

Advantages of model contracts:

1. specialized contractual documentation drafted by experts in the field;
2. reflection of benchmarks and outcome of return of experience;
3. actual and regularly updated;
4. flexibility through adaptations & modifications;
5. Time & Costs reduction for the negotiation phase.

High frequency of the recourse to model contracts in the international practice: can be either as full contract basis or as a punctual clause reference to better assert arguments in the negotiation.

General principles influencing the interpretation of contract clauses

* Principle of good faith and fair dealing;
* Notion of reasonableness
* Notion of abuse of rights
* Best efforts versus reasonable efforts when discharging obligations
* Notion of “state of the art”
* *“Contra Proferentem”* rule

Introductory provisions

Description of the parties (be precise!)

Preamble (can be more dangerous than they look): description of the field of business of the parties, description of the professional level and qualifications of the contractor, references to the requirement to provide “state of the art” technology, etc.

Definitions: fulfill a practical need (clarity; avoiding repetitions) but also contain substantial relevant information, therefore to be read with the greatest care. Examples: “Costs”, “Laws”, “Day” (calendar day or business day?), “Subcontractors”, etc. (see the FIDIC Silver Book definitions for illustration).

Order of precedence of contractual documentation, for example:

* signed contract,
* exhibits,
* letter of award
* Contractor’s bid
* Owner’s call for tender

General clauses

Parties’ representatives / role of Owner’s consulting engineer (FIDIC 3.1)

Contract effectiveness & Commencement of the Works

Typical conditions precedent:

1. payment of down-payment,
2. issuance of financial securities (bank guarantees or parent company guarantees),
3. insurance policies in place,
4. financing in place (for financed projects)
5. access to the site granted by Owner,
6. construction permits in place

Progress reports (4.21)

Site access / Contractor to have knowledge of area & its environment (FIDIC 2.1, 4.12, 4.13, 4.15)

Permits & Consents / Owner’s permits versus Contractor’s permits (rule of allocation should be based on the principle whereby Owner is to obtain those permits to be obtained in Owner’s name pursuant to applicable laws, and Contractor is to obtain those permits to be obtained in Contractor’s name pursuant to applicable laws)

Delivery terms / Responsibility for customs clearance / Incoterms (note: need to assess time aspect of clearance formalities, example of infrastructure project in Bulgaria where applicable customs clearance regulations were giving 60 days official time lapse for customs officer to clear goods)

Approvals relating to subcontractors: approval of main subcontractors (rationale?), rules for changing subcontractors, flexibility in using worldwide manufacturing network

Approvals relating to technical drawings: rules for submission of drawings, definition of drawings concerned, time aspects of approval

Rules relating to EHS & Construction site regulations (FIDIC 4.8, 6.7)

General obligations of the Contractor / General obligations of the Owner

Miscellaneous / boiler plate clauses:

* Entire agreement clause
* Assignment (by Owner or by Contractor), FIDIC 1.7
* Amendment formalities: No oral modification clause (formal written agreement required to modify the contract)
* Confidentiality (e.g. no right to take pictures) & IP rights (FIDIC 1.9, 1.10, 1.11)
* Language of contract (not to be confused with language of proceedings in case of disputes; especially relevant for contracts written in double languages to define which language prevails; should also define language for correspondence & documentation produced during the project, such as progress reports), FIDIC 1.4
* Severability clause (“salvation clause”)
* Notices: key provision for claims submission, FIDIC 1.3
* Interpretation rules, FIDIC 1.2
* Record retention clause
* No waiver clause
* Further assurance clause or cooperation clause
* Headings for convenience only
* Survival of provisions clause

Cours 7

Boilerplate provisions – Miscellaneous provisions

They are considered as secondary clauses but they are useful

**Entire agreement clause**: all the documents that are not expressly mentioned as part of the contract are not

An important clause is the **assignment provision “clause de cession”**: under what conditions a party may be authorize to transfer the contract to another party. Important because as an owner you don’t want the party you have selected as a bidder to be changed without your consent: you want to make sure the contractor you have selected does not simply transfer the contract to someone else. And at the same time if you are the constructor, and, you rely on the financial security of the owner, you don’t want him to change without your consent.

Provision under **Article 1.7 of the FIDIC**.

Another important provision: **Confidentiality** (e.g. no right to take pictures) **& IP rights** (**FIDIC 1.9, 1.10, 1.11**). Level of technology used in the project needs often to be protected. There are therefore confidentiality clauses in the contract: no party is authorized to disclose elements of the contract. If you are the contractor: you don’t want the owner to speak about your competences to your competitors and if you are the owner you don’t want the strategy to be given away.

Another provision quiet specific to infrastructure contract: clause regarding **the language governing the contract**. Quiet often especially if you negotiate the contract in English but that the country requires the contract to be in the local language: often the case in Russia and in China. The main issue is: what is the applicable language if there is a translation mistake or discrepancy. In case of hesitation one language shall prevail.

However, even if the language is determined, it does not mean that every time you have correspondences or exchanges with the other party, it shall be translated: therefore sometimes, it is possible to note in the clause that every exchange won’t be translated. Also the prevailing language of the contract might not be the language of the dispute proceedings (arbitration). It means that in case of a dispute the arbitrators will proceed in English. Reassuring because if you are stuck with a specific version of the contract in a rare language.

**Severability clause**: one of the lex mercatoria’s clause: if a provision is declared invalid, the parties shall replace this provision by a valid one. Salvation clause

**Notice requirement clause**: **Fidic 1.3**, key provision for claims submission the notice must be in writing and follow such and such criteria.

**The record retention clause**: Cf. Niklish. Need to keep correspondences: record retention clause put an obligation to the parties to keep records of the project to keep records and proofs if needed.

**No waiver clause**: the fact that a party fails to exercise a right, shall not be construed as a waiver as being able to claim such entitlement in the future: “no waiver clause”. Just because the customer accepted the first time not to apply delay penalties, does not mean he waived his right to apply delay penalties in the future.

**Cooperation clause**: the parties shall cooperate.

**Headings for convenience only**: rule of interpretation. It is a common feature: the parties should not give too much importance to the headings of the sections as a rule of interpretation. You have a reflexion of this in **Fidic 1.2**: general rules of interpretation. “the marginal words or other headings…”

Negative point: if you give a title, it reflects the substance of the clause: therefore, would be more logical/better to be able rely on it. Example of claims beyond the price of the contract: limitation of liability.

Ex: of the insurance

**Survival clauses**: Even if the execution of the project is completed certain of the clauses will survive and typically clauses that will survive are the confidentiality clauses, another typical one is the survival of provisions linked to dispute resolution: standard because sometimes a arty terminates the contract but you feel it was abusive termination.

Section 7: analysis of key contract clauses

In general, these clauses are dealing with risks and risk allocation.

**The issue of underground risk**: **section 4, with the main one at section 4.12**: underground risks are on the contractor.

The main thing is to remember that the general philosophy of the Fidic silver book is to put the burden on the contractor (Cf. **4.12 and 4.15 especially**).

The employer is expected to share with the contractors all relevant elements with the contractors especially regarding the site conditions. But even if the owner share the site conditions with the owners, it does not mean that the owner takes the liability for that: ***4.10: the employer shall have no responsibility for the information shared, sharing information is just a good faith help***. These provisions are actually some of the more debated of the Fidic book in real life as often contractors believe it put too much liability on them.

Last year exam: archaeological elements: good to approach it through 4.10 and 4.12, but there is **a specific provisions targeting fossils at provision 4.24**.

What is the best way to allocate the risks? No miracle solution, but you need to fight for the party you are representing.

The main message to retain is that because of the potential for delay regarding underground condition is a topic not to put on the side.

**The regulations applicable to the project**: how serious is the risk of the change of applicable after you changed the contract? Keeping in mind that “*nul n’est sensé ignorer la loi*” and the time aspects: therefore the changes of legislation often occur during the completion of the projects.

The two most frequents one: **environmental law as well as the customs and taxes**. At the time you submitted your bid, and, after a bit of time a change of the important duties laws can increase: possible even to finish the project loosing money because need to complete but paying with the margins.

For instance; the construction of a coal power plant and in the contract: clause stating that the emissions levels should not exceed certain cap of production. Therefore the contractor cannot pursue, as he won’t get the licences. Often as you have an obligation to comply with applicable law, the employer will expect the contractor to issue a scope change requiring you to meet the new standards. However, if extra-costs or time for the contractor: who should bear the costs.

The contractor will tell the owner: the law as changed and in order to change the material, extra costs/time: *who should bear the extra costs and the delay penalties.*

Balance allocation of risk: the contractor will accept to do the work and be compensated. However, in this situation change in law clause: if a change in law occurs after signing the contract: extra cost and extra time to complete: addressed quiet often in contract **Fidic 13.7**

What should be the definition of laws when you speak about a change in laws: shall means the laws adopted by the Parliament: what about decrees? If you are the contractor you will want to define laws in the widest possible chance.

Should it include case law? Sometimes a change occurs through jurisprudence: results of courts decisions: change in law? Therefore in defining the change in laws you might want to have an extensive definition.

What about technical norms made by international association? No obligation to comply with these new technical norms: not required to comply with these norms.

One trap to be careful about: easy mistake when you read a change in law clause is when the clause makes reference not only to laws that have been adopted but also laws that are in draft state. The question is: should you have protection or not to cover the impact of a law that was a draft at the time when you signed and was promulgated after signature: no clue to know on what final form it would be decided, the fact that a law in a draft form does not give you certainty as the final content of the law. Too much uncertainty; therefore make sure that “laws being debated” are not under your responsibility.

The laws where you execute the project or where you have your suppliers? Should the change in law protection be a worldwide protection or local only? If the change in law focuses only on the places where you execute: might be too narrow, but at the same time, you can expect that the owner might not be willing to give you a worldwide protection, therefore might be limited to the countries where you have your factories, or where the suppliers … extratorrial application of the change in applicable law.

Extra cost and extra time, therefore besides the geographical limitation you might have **peanut claim**: if a change in law has a changed but less than a certain amount of consequences, then not taken into account

**Force majeure**: embodied in most countries in the world. Force majeure is a French term used in English. Other notions that refer to that: hardship, doctrine of frustration… Act of God: comes from above, human beings have nothing to do with it. Beyond the control of the parties, but religious aspects of it can be used as well for example India and the god(s). [however if reference to the interpretation rules: plural = singular].

***The first point to remember is that the force majeur notion is embodied in the main judicial systems***

Adding it in the contract can help you assert some elements of it as well the governing law might not contain enough details. The typical drafting of the force majeure clause is: general introduction of the clause with the definition: “event beyond the will of the parties, caractère imprévisible, irresistible” 3 critères. And then, a list of events even the list is expressly said not to be exhaustive.

***The main consequence of the force majeure clause is to give more time***.

What happens if a force majeure event lasts for some times? The main protection of Force majeure is time provided to the Party, and as it is considered as coming from above: a party should not have to provide supplementary costs, however, it provides more time. A project disrupted by a war: and if the war event is still on for years? Can the parties be locked up for some times? You have to exit your employees, suppliers…for safety reasons…and they won’t wait for ever; need new suppliers, loss of personnel,… possible to have a long term cost impact for the employer: either party but mostly the contractor can say they will be able to terminate: ***After a certain period of time, either party shall be allowed to terminate the contract***. The period of time is more a negotiation time, but most of the time the principle is accepted by both parties.

**What is the difference between Hardship and Force Majeure?**

*Force majeure: it has become impossible, hardship: possible but much more burdensome economically speaking.*

Hardship: not common, but can happen. With regards to foreseeability, the two clauses might be quite similar.

It is not compulsory to have it as a requirement. “Beyond the control of the parties”

The point of the debate: does it make sense to keep the work on even though it has become economically burdensome. The usual problem regarding hardship is predictability; possible to renegotiate to economic terms and the parties might not be at ease: *in general present in oil and gaz infrastructure projects*.

To circumvent the lack of certainty of the approach: it will very likely contain a dispute resolution mechanism: an expert shall review the economic impacts of change in the situation for instance.

Always at liberty to request a change in the contract.

**The issue of Uninsurable risk: owner’s risk**

[Uninsurable risks: often the contractor is liable until the risk passes to the owner.]

it is link to the rule of who bears the risk of disruption or damage until take over of the works? The general pple: the contractor bears the risks until the infrastructure is beard over the constructor to the owner?

For instance: a nuclear exposure because of an explosion close from the site. The site is declared as not being accessible. Other instance: pressure waves of the planes.

*The reasons why they are referred to an uninsurable risks: insurance companies will refuse to insure this type of risks: war, radiations…*

Very rare instance: terrorist attack in South Africa. It is quiet rare but if it happens the consequences are huge. If a matter address and it is not address on the contract then the constructor might be liable and need to construct a new plant without new payments: obligation to rebuild the infrastructure and pay delay penalties.

*Important to keep in mind that these kind of events are generally not covered by the force majeure:* does not cover the cost of rebuilding: need to address it through the **uninsurable risk notion**.

The owner’s risk notion: by exception to the rule of risk should the infrastructure be damages before as a consequence of some risks listed then the risks shall be taken by the owner. The extra costs are not covered by force majeure and the insurance often refuses to cover these kinds of risks.

Cours 8

**Uninsurable risk in the Red Book**: **Article 17.3** - the list of uninsurable risk is quite long.

**The difference between force majeure and uninsurable risk**:

Force majeure: entitles to extra time, whereas, employer’s risk or uninsurable risk gives right to extra time but also compensation.

**Change orders**:

Change order is a classical terminology to say that the contract is being amend. It is also known as variation.

***Possible to change the governing law***: when moving to the financing of the project, the financing institutions can ask to change the governing law, but generally it is not the classic “variation”.

However, when we speak about change order or variation, **it means that parties want to change the specifications or what the contractor is expected to render**.

**A change in law will often lead to a change order**. The way to reflect the change in law is to change the order.

Usually, contractors are happy if the owner wants a broader scope, however, if the owner wants to reduce the scope: possible to insert a clause limiting the reduction to 20% of the total project for instance, in order not to disturb the contractor plan.

When the contractor wants a change order it is generally because of a change in law or a force majeure.

With regards to the Nicklish’s principles: long term, therefore change orders are actually quiet frequent.

If the owner wants a broader scope, **first things negotiated will be cost and time**. However, sometimes people forget about the time aspect. People, who are familiar with the field, will ask for time increase and extension of the time schedule. In both cases, the negotiations will be tough. Indeed, because of the inflation where the prices are increasing, The conditions might change.

**The performance aspect**: also, need to think about the fact that the change might prevent the contractor to achieve what was initially agreed. For instance change of titanium blades by steal blades: less megawatt production. Therefore in this example, with different types of blades, the performance won’t be the same (less than 300 megawatt per day for instance). Need to think about this aspect, because even you can be held responsible.

Fourth example of possible impact: the ability of the equipment to resist other time. **The warranty obligations of the contractor**: if certain technology change request, therefore the equipment might be less resistant.

Performance impact and warranty impact are less obvious as price and time, but they are very important.

Also: assuming that when you negotiate the contract with the owner, no agreement on the change order, can the owner adds a sentence in the contract stating that “in the event the parties disagree on a change order, the contractor shall proceed with the project anyways”? Proportionality and abuse of right…

Even though, if disagreement on the price, the contract could say that in that case, the owner can demand the execution and the contractor escalate the request to arbitration.

Also: moving ahead and proceed with escalation is not a sufficient answer. Furthermore**, if a change requested by the owner gives raise to potential safety issues, the contractor can be allowed to say that he won’t proceed with the change**. The safety exception is one that could allow putting an exception.

**Article 13.1 of the FIDIC Silver Book**, there are exceptions under which the contractor might be able to challenge a change order request. **Otherwise, the contractor should have a general right to submit the dispute to arbitration is case of a disagreement.** However, the dispute resolution will help you mostly if the disputed point is time or price.

If you represent the contractor, you will want the most exception to make sure you won’t be forced to proceed to a change order if such variation is problematic.

In many of the topics discussed, you either have a time impact or a cost impact or both, and this is what is known as **“extra time entitlement” or “extra cost entitlement”.**

**Wrap up clause**: cross reference to all clauses giving entitlement to extra cost or extra time: **FIDIC Article 8.4.** It is quite practical.

(key contract clauses 2: allocation of risk)

Key contract clauses 3:

This part regards everything that deals with performance and the transfer of the project to the customer.

Delay and technical performance of the project are essentials.

Why would you consider that delay damages or technical problem damages are at the heart of the damage potentialities of the project? **The two main obligations are that you need to deliver a project on time and in accordance with the functional expectations**. Core obligations of the contractor: the mirror effect of this obligation is that if late or if the infrastructure does not function, the owner asking for damages will hammer you.

**Liquidated damages and penalties:**

First the controversy between the civil law and common law tradition:

* ***Code civil***:

“Clause pénale”. In the day-to-day practice, it is referred to as penalties, but the official is “clause pénale”. The main difference between the common law and the civil law tradition:

In the civil law, the judge has the power officially recognised to step into the contract into the clauses and adjust the clauses if he feels the amounts are too high. Can the judge increase? It will depend of the jurisdiction, the Code Civil provides for it if the amount is “too high” or derisoire. However, in case law, it is very rare for a judge to increase a “clause pénale”, most of the time reduction. In Germany, only reference for the judge to diminish the amounts no reference to reduction of the amounts.

However, when we think about the fact that in France “*le contrat est la loi des parties*”, therefore, how come the judge has the power to change the amount? Basically, in the philosophy of the civil law concept, the clause is called “pénale” as it will create a fear to the other party, that if the other party does not respect its commitments it will be punished. Therefore, by definition it is higher than the potential loss: it is there to create an incentive to perform. When you take the view that the parties can almost contractualize a criminal sanction, the question of the possibility to do so arises. Normally, only the state is allowed to give a criminal punishment… Therefore, the reason for the judge being able to change the amount is a trade-off of the fact that the parties have been given the right to insert in the contract a penal clause with dangerous sanction.

* Common law

Other time the English case law evolved as stating that a penalty clause should be declared invalid as only the state can provide for penal sanctions. Famous jurisprudence emerged at the time to erase penal clauses, and implement liquidated damage. The idea was that it should be a concept where the parties have to assess in advance the potential damage and have a damage clause in the contract. Same evolution in the US.

Liquidated damage; the parties acknowledge that the damages are genuinely estimated and therefore shall not be understood as a penalty.

Regardless of the civil or common law tradition, pros and cons on both sides.

The only thing that might be troublesome in the civil law tradition is that when you look at the possibilities in civil code and case law, you will realize that the possibilities are mostly open in a consumer relationship. There is a lot of case law on penalties that are found on the laws. Need to protect consumers that borrow at the bank. However, when in commercial litigation, tendency that the judge should be very careful when intervening in the their contractual relationship. Belgium and Germany have made the choice that this power of the judge should interfere even when big international company, especially when contrat d’adhésion.

If the contract is governed by a common law system: need to be aware that you might have to be careful with the clause to increase its level of acceptability.

Depending in the jurisdiction: refer mainly at three functions. The clause will be used as a damage mechanism. The clause can also serve as a limitation of liability and it works as a limitation of liability.

If adjustment of the clause: what are the factual elements the judge will look? The comparison between the actual damaged suffered and the level of damages asked. You could be tempted in a clause to specify in a clause that “should the actual damages happen to be much less of what is provided, then negotiation”: but in a common law context, not a good idea because almost an assertion of the penal character of the clause.

No harm no fall principle shall apply: principle stating that if the other party has suffered no damage at all, the clause should not apply. Very strong element to demonstrate the other party has not suffered any damages at all.

Article about the traditional difference between liquidated damages and civil law view. The author questions the system and proposes solutions to solve the problem.

Practical aspect of a liquidated damage clause:

It will serve the purpose of providing compensation for delays.

The drafting of these clauses is not only about agreeing on the principle and price. Indeed, there are a few things behind this kind of clauses.

***The first thing: defining an amount***. The first question is: should the amount be defined and fix or a percentage of the contract price? A certain amount per days of delay, or, in case of a delay, the contractor will pay an amount equivalent as a percentage of a contract. ***First kind of pitfall, if there is inflation and a Contract price adjustment clause, and that you expressed the level of damage in percentage, the amount of damage will increase with the contract price***. Same regarding a change order as the variation will impact the final price and therefore the rate of the damages. The potential level of damages will increase with the increase of the contract price, whereas with a fix amount, no change.

If you choose a penalty per day: smallest time frame, however the most frequent is per week, because a day is often to narrow in a long-term project. The way to catch the difficulty is to state in the clause that if the delay is shorter than expected, then pro rata per day.

The delay penalties or liquidated damages will be linked to delivery to the site. If it is a turnkey contract: comparison with the take other date of the infrastructure by the owner because the take over date is the date when the infrastructure starts operating. ***Also in addition possible to have a request from the owner to base the liquidated damages or delay penalties based on the milestone of the schedule***. If you deliver late, you could still be on time.

***The more the project is a turnkey project, the more as a constructor, you will have the power to fight the milestone of the schedule***: therefore the most important is the last date. The more there will be on the site different contractors and that therefore, one contractor will depend on the other one, therefore the owner will have power to bargain as there might be domino effect.

If you are advising the owner, you might have to think about whether if there is a milestone delay then there will be impacts and consequences on other aspects of the project.

If you are advising the constructor: milestone: double sanction?

***The delay penalties can apply per unit or for the entire infrastructures, therefore, if some infrastructure can function on their own, then it might be interesting to apply delay penalties per unit***.

**Another thing that s classical is the cap: if you have a delay LD mechanism: you might want the certainty of a cap to keep the damages reasonable**. It is not an open debate.

The norm is in between 10 and 15% of the contract price for LD Cap. Sometimes you can have less and other times more. Often banks financing the project wants a higher cap.

What happen if you hit the cap?

**COURSE OUTLINE**

**SESSIONS 7 & 8 : Key Contract Clauses II : Risk Allocation Clauses**

Focus topics (in light of reading assignments):

* Change in law clauses
* Force Majeure clauses
* Hardship clauses

Site conditions & Underground risks (FIDIC 4.12)

Site conditions influencing the construction of the infrastructure:

* Site conditions in the broad sense (access routes, meteorological conditions, rights of way, etc.);
* Soil conditions (e.g. sandy soil requiring heavier civil works infrastructure than anticipated: deeper concrete blocks);
* Sub-soil conditions: pollution; caverns; landmines (in former war territories); artifacts & relics (in ancient territories, e.g. Greece)

Who should bear the risk of site conditions?

Relevance of site surveys / Reliability of site surveys: how to use site surveys as a solution mechanism and draft site conditions clauses accordingly.

Change in Laws & Regulations (FIDIC 13.7)

How serious is the risk? Changes in tax laws and changes in safety rules requiring equipment modification are probably among the highest risks.

Narrow & wide definition of “Change in Laws”:

- shall it include decrees and other administrative regulations?

- shall it include technical norms edited by engineering associations?

- shall it include case law?

- shall it refer to draft laws not yet enacted?

- shall it be limited to a specific country, such as the country of construction of the infrastructure?

What impact in case a change in law has materialized: costs compensation & time extension? Need for a threshold to avoid “peanut claims”?

Force Majeure (FIDIC 19)

Legal notion of “force majeure”: act of God, frustration of contract French law criteria: a force majeure event must be i) unexpected, ii) beyond the control of the parties and iii) irresistible.

Contractual notion:

* Why the need to define contractually?
* Typical events covered in a Force Majeure clause
* Typical events giving rise to discussion: employee strikes; insolvency of suppliers

Consequence: time extension, but what about costs compensation?

Quid in case of prolonged force majeure: termination rights?

Hardship

Legal notion of hardship: e.g. “imprévision” under French law, “Wegfall der Geschäftsgrundlage” under German law

General criteria: fundamental change of the economic circumstances rendering performance of contract obligations unbearable for one party

Contractual notion:

* How frequent is hardship covered in a contract? (more relevant in oil & gas industry)
* What threshold of fundamental changes to qualify as hardship
* Problems with lack of certainty and predictability of contract execution

Consequence: contract renegotiation, but quid if the parties cannot agree: termination? Decision by a third party expert or by arbitration?

Care of the Works / Transfer of risks / Uninsurable Risks / Owner’s risks (FIDIC 17.2; 17.3 & 17.4)

General rule: the risk of destruction or damage to the infrastructure shifts to the owner upon Acceptance / Take-over of the works

Exceptions: Uninsurable risks (also called “Owner’s risks” or “Excepted risks”):

* War / riots / terrorist attack;
* Nuclear radiations;
* Pressure waves by aircrafts;
* Damage by Owner prior to Acceptance

Consequence: owner to decide on rectification; time extension & costs compensation for contractor

Typical sources of disagreement in contract drafting: geographical limitation of the events (country of construction site versus country(ies) of manufacturing & transport activities)

Change Orders / Variations (FIDIC 13)

How frequent are change order requests in a project?

Who has the initiative of a change order: contractor or owner?

What must be discussed in a change order negotiation?

* Impact on price;
* Impact on time schedule;
* Impact on performances;
* Impact on warranties.

What if the parties disagree: can there be “forced” or “imposed” change orders?

* If the contract specifies that Contractor is bound by change orders / variations imposed by the Owner, then this should come with certain exceptions (see FIDIC 13.1, 2nd paragraph, listing exceptions linked to safety or impact on guaranteed performances. Another exception could be impact on defects warranties in case a change of materials imposed by the Owner reduces the life expectancy of the equipment or increases risk of defects);
* In case of imposed change orders / variations, Contractor should reserve the right to refer the matter to dispute settlement.

Extension of Time & Extra Costs entitlements

Always useful to have a wrap-up clause (e.g. FIDIC 8.4 on extension of time for completion)

Be watchful of the definition of costs

Cours 9

Penalties and liquidated damages : Article sent to read.

What happens when the cap of delay penalties/LD is reached on a project?

* Delay damages to be paid per week of delay up to a certain cap : in the International market, depending of the country and the risk, whether banks are financing the project, the contractor, the employer : from 10 to 20% of the contract price.
* For instance: 1% per week, after 10 weeks you can reach the cap.
  + When you reach the cap, what happen?
    - Ex: Okiloko delay : 5 years
    - The idea is to lower the rate before hitting the cap
* The cap is also a limitation of liability: but then what will the owner do if the delay continues?
  + Is he without remedies?
  + The owner has a right to terminate the contract, termination right comes to a remedy: possible to ask a third party to come and carries on: better to let the clause alive
    - After you hit the cap: you could technically have a right for the owner to terminate
      * It is not in the owner interest to terminate of the project because by the time you start a bidding process from scratch it can take so much time that it could be even longer
    - It must be a situation where the owner has lost complete confidence in the contractor to finish the work
      * Usually you have a “grace period”
    - It is fair to say that usually intermediate mechanism.
  + Possible to have a second clause: double the rate: way to increase the amount of damages the more there is delay: however possible to reach a penalty clause this way
    - Indeed, if the parties have decided of some delay and damages, therefore if there is an escalation judges can understand it as a disguised penalty
  + Others try to say that if the cap is hit, then the owner would be able to claim the actual damages suffered: not automatic
    - Indeed, the liquidated damages clause advantage is to be automatic: the owner does not need to make the proof of the damages actually suffered
      * But if the owner estimates that after that: damages based on the actual damages suffered.
      * The problem of this approach is to be in contradiction of the LD clause: because LD clause: it should be the sole remedy for the delay situation
        + Contractors don’t like much to be exposed to further damages claimed by the owner: therefore sometimes specific sentence saying that the LD clause shall be in accordance to the damages so that no more damages could be claimed: “penalité libératoire”

When you pay it it frees you up of any damages

* The main advice therefore: rate of delay damage and the cap : you need to calculate how much time it will take to hit the cap and when the cap is hit, you should look for what is planned by the contract:
  + Termination
  + Further delay penalties

**Termination**:

When we speak about termination: résiliation. (resolution being cancelation).

The notion of termination is not retroactive, if it was a cancelation meaning it cancels all the rights of the past it would be very complicated to manage in such project.

The projects are too complex to envisage cancelation rights.

**The Buying down right**:

When speaking about performance liquidated damages: you commit on the on time performance

The question that arises: assuming a power plant where you have a certain amount of megawatts and that you have to demonstrate the performance to stop the delay penalties (as linked to the validation) : take over certificate.

Assuming you do the performance test, but you reach only 99% of the performance agreed: the contract provides for you to pay a performance penalty.

Could the owner insist on remedial measures to achieve 100% of performance achievement?

Can the owner ask the contractor to pursue to get to 100% with the collateral effects of such event : that is to say, the contractor will have to spend time, money and efforts and will at the same time continue to pay delay penalties as not received the certificate?

Or should the contractor have the choice to pay the performance damages or pursue the works?

Owners like to have a large scope of action : therefore, question of negotiation, however buying down right: the fact contractor buy its right to get the take over of the facilities and stop the delay risk exposure.

Another idea is that to the extent that the owner will plan a delay penalty scheme: does it make sense to have a bonus completion if earlier than schedule.

Owners: welcome to give an incentive to finish earlier however, it does not mean operation will be start earlier: so not possible to operate the facilities and finance the “incentive”.

However, if the owner has sufficient financial means: set aside a sort of special reserve which would finance an early completion : peacefulness of mind to know the project is finished early.

“you do not get what you do not ask for”: if you represent the contractor

The last point : sometimes in contracts governed by common law principle: general clause : time is of the essence

It is an English originating concept: and therefore is linked to a termination contract

If you are the contractor: you don’t like it as it implies side effects: as long as you pay for damages, owner should not be able to terminate the contract.

“time is of the essence” : can create complexities with regard to delay penalties

Can a duty to mitigate damages be used as a flag?

If you are the contractor facing this delay claim: possible to ask,

If the owner is aware of the delay: no need to bring and rent things on the side: could be mitigating action of the owner as a way to stop expenses.

To what extent is it reasonable ?

Duty to notify the delay

Cours 10

Bonus for early completion – not only hammered for delay

Delay LD claims

Time is of the essence: need to be careful of this notion in a contract, especially if combined with an express right : as long as you are paying delay penalties: abnormal for the owner to have a right of termination, even though why delay penalties?

Another technical issue: how to deal with common systems when you have an infrastructure with multiple units? In many GIP you have several lines of production: one can produce detergent and the other comestics. The two lines can work independently, however, there are also common system such as the control command. In this chemical plant, you will have a control command to control the electricity and the production for instance. The specificities that occur in delay penalties when you have these multiple units are applied per production line and when you have the take over process, it is common to take over per unit. The owner will want to do the take over and start producing in the first line of production before the end

When doing so, you will need to have a take over of the control systems. When you hand over these elements, the clock will stop for these elements. However, when you do the same with unit 2 and that the take over is delayed because of a problem in the control system? Should delay penalties be applied in such a case?

The warranty period starts: the remedy of the defect shall be warranty repairs of the common system.

For a reason caused by contractor, a defect in the common system which as already been handed to the owner can be considered as of the fault of the contractor?

The contractor say you are not allowed to ask for delay penalties as the command system are under the owner’s control : as there is a warranty period: the contractor must come and repair and that it. Is he right?

If you are the lawyer representing the owner you believe your position is justified: delay of unit 2 caused by the contractor and therefore delay, and even more if the defect lies in the command control

But f you are the lawyer of the contractor it makes sense but at the same time the equipment has been given

The owner’s position makes sense theoretically, however, if the equipment has been taken over then warranty: technically the delay will be caused by an equipment under owner’s control : if liquidated damage - double penalty

Need to address this issue

Performance LDs

They aim at penalizing the lack of efficiency or performance of the facility there are references to performance damages in FIDIC 12.4 and ….

The performance penalties will be set by having a rate expressed in a define amount or percentage: typically you will have a performance LDs per performance lost. Same mechanism as for delay penalties.

In terms of the technical values that are penalized: can all the performances expectations can be exposed to performance LD’s? They penalise either what is generated/created by the facility, but also what comes into the facility : the row material consumption. What you make is what the facilitate creates less the costs such as electricity needed.

Therefore, if you take a coal powerplant, the performance penalties will create less electricity, and, if to produce the electricity you use more coalt than agreed: the owner can say he was expecting less consumption therefore increase coast of running the plant: for the life expectancy of the facility : cause a problem.

On the one hand the production shortfall of the facility and on the other hand the higher consumption of the facility.

Other performance penalties? In some cases, there are levels were you cannot apply level penalties: EHS: if the emissions levels have been put in line with the legislation of the country, then, if the plant exceeds the emissions level the owner wont be able to perform the plant.

Noise levels: the operating permits will specifies noise levels and if beyond possible to have injunction to

Levels of decibels in the control room to ensure proper work conditions to the employees

Therefore in these cases, if you cannot achieve the performance: then the contractor has a “make good obligation”: instead of paying a compensation, the contractor has to come and make what it can to achieve the goal.

For all the items of the technical specification: no alternative other than achieving what has been agreed: until you have not achieved these compulsory levels, if late, then delay penalties

The make good obligation: the owner cannot be satisfactorily compensated and therefore must achieve the performance

To assess the performance level, the only possibility is to do performance test and therefore need to insert the performance test in the contract : often they are done to validate the take over certificates

Some owner wants to take over asap and would rather do the test after: however, if test after the performance: penalties need to be adapt after the take over: delay penalties cannot apply

Limitation of the delay exposure: the main driver for this is the driver. Some are very meticulous and until they want to be able to have the test before signing the take over certificate, while over owner are more obsessed by the performance therefore want to take over asap

Performance penalties are calculated per unit

Also there is a cap and often the cap is the same as for delay penalties

Paying attention to the fact that LD’s should not be completed by other means of compensation

To the extent you have a production short fall, the owner should not be able to ask for more penalties.

Termination? Performance penalties: minimum guaranteed performance: the article 9.4 FIDIC: what happens if the level of performance is such as you are very far apart from what was guaranteed.

If you don’t achieve 290 megawatt for a 300: 10% you will have hit the cap of performance penalties

The owner can say that the facility is not producing enough: 290 as the minimum guaranteed performance: Normally your obligation is 300, if you are in between 300 and 290 : pay performance penalties, if you are under: make good obligation : the owner will say that if the minimum performance is not achieved, then the owner will be able to reject the project

As a lawyer: help with the design of this facility and dialogue with the engineer: ask them if they are comfortable with the minimum: even though risks

**Bidden rights problematics**: the bidden right problematics is around this: if you are in the minimum performance guarantee range, as a contractor you should request to have the possibility to pay the performance penalty as a way to stop paying the delay penalties (for instance if you achieve 299 megawatt) . It is a question of risk and flexibility : as contractor you want to have the possibility to pay the performance penalties instead of the delay penalties when not under the minimum guaranty.

The mirror of bonus completion in the performance: achieve 320 megawatts: will the owner be able to sell the bonus electricity ? depending on the economic context, some situations will be easier to argue.

If booming economic phase: the owner know he will have no problem selling the products: possible to argue

Good reflex to first ask for it and then discussion depending of the context

Similar tricky situation with performance LDs: what is the link between warranties obligations and performance settings: the normal : performance test and if achieved: will be possible to get the take over and therefore the warranty period will start: after 6 months of operation: major breakdown of the production.

Major piece of equipment broke down: once the repair is completed, is the owner entitle to do again performance test? Replacement of a key component: it would usually be discretly address in the contract on the warranty section : in case of defect, contractor should come and “in cases of major repairs, the owner shall be entitled to ask for performance test and verify the guaranteed performances” : renewed performance test: if you have this obligation, the the consequence is that if you don’t achieve the same level then performance penalties

The sentence seems harmless: but actually acceptance that throughout the warranty period, exposure to performance penalties

There is no right or wrong: bargaining matter

Guaranty the performance at take over, but refusal to have a performance obligation throughout the warranty period

Need to define “major repairs”: not every time there is a small defect, so possible to contain the performance test to very specific major effects for instance if on the steam turbine or generator: possible to restraint it to the noble/key components

FIDIC: 11.6

Some performance warranties are well designed and are almost

They measure the availability of the equipment over time: the availability warranties may say along the lines that the contractor warrants over one year time the facibility will be available 92% of the time

If during a particular year, the facility is unable to produce, then the contractor should pay the owner

Avalability guarantee is particularly adapt to the satellites systems, railway infrastructure…

The all purpose of taking time on delay and performance lds: key compensation scheme

Most of the disputes are around the application of these concepts.

The second reason is to realize that structuring a delay penalty in a contract is not just a paragraph clause, there is much more around that and the liquidated damage scheme is a remedy mechanism.

**The take over process:**

It is a process through which, when the facility is completed, the contractor will hand over the facility to the owner: in a turnkey contract: moment when the contractor will hand over the key to the owner.

For a doctrinal stand point, scholars refer to it as the “cornerstone of the project”, the “culmination point of the project”… the reason for that is that there are many important consequences linked to the take over: if successfully competed, the opwner will give you a take over certificate or a provisional acceptance certificate leading to a final acceptance certificate: if the take over as been completed, the owner will give a second certificate to signify the warranty period is finished.

With the take over the warranty starts: as soon as you achieve take over, you can measure when the warranty will starts

Another consequence: almost the final payments

Owner: final payment at the take over but bank warranty ‘guarantee bond’: if you don’t perform the warranty period, the owner can get the amount back from the bank. If the take over milestone payment: give a bank warranty, have it pay the money,…

What it means is that on one hand: take over: milestone payment, but at the same time, obligation to give a bank guarantee to cover the warranty period. Also, when you reach the take over the performance bank warranty then starts the warranty period bank guarantee.

Another consequence: the clock stop ticking: end of the delay penalties

Last but not least consequence: the risk moves to the contractor to the owner.

The punch list items:

If the facility meets the main requirements and you have minor defects, do not prevent the take over of the facility, but should be handled: the main obligation have been fulfilled, but at the take over list of obligation : the punch list items, to tackle during the warranty period.

The defects liability warranty: **FIDIC Section 11**

The period of time during which the warranty will last is subject to the bargaining power of the contractor and the owner. The norm is one to two years, and the, extended warranty period. No yes or no answer, what you need to be careful, is not only to make sure the warranty period is well defined but also that the warranty period starts: if nobody knows when the warranty period starts: the short period is nullified.

Also when the clause says that the contractor shall make sure the plant has no defects or repair defects: what is a defect? In some contracts, the warranty clause is pretty standard, but “defects” are defined as “any compliance with the requirement of the contract”: extremely wide. Should be define in very specific technical definition of what is a defect.

Another debate : if a defect appears in an equipment: two ways to fix the defect : repair or replace. The question is: who has the right to decide whether repair or replace? The cost and time for replacing can be much higher: the easiest way to fix this “at its option”: at the contractor’s option. Most of the time the owner will accept this, because believe they should not have an invasive management. However, if the words are not in the clause, then the contract, will not give you the answer. The warranty section does not explain who has the option, but it would be unfair and unreasonable to impose this. However, if the contract is silent, you have this exposure: therefore analysis of the governing law, in this case “to the extent that the repair measure allow the owner to have a facility working, it would be an abuse of right to push for replacement”

Example of the fact that if the contract is silent, governing law can help and also an example of the fact three words can change the contract

You can see the impact of the drafting skills between the parties

**Another notion : fit for purpose**:

The contractor warrants that the facility or infrastructure is fit for the purpose for which it was intended

Most of the time it will be obvious: the equipment can become older but still fulfil the purpose

Near and tear

Many warranty clause: contractor shall have no obligation for repair the use of the equipement

Example of the gaz plant in a stop and go mode: use in a different manner than the one it was designed for

Question the engineers: qualify the fit for purpose notion

How the owner will use the equipment especially if the contract states “fit for purpose as planned by the owner”

From the contractor’s perspective: exhibit saying that the contractor warrant the equipment shall have been constructed keeping in mind the design life notion in link with the one year warranty?

Design life: some problems appearing during the warranty period can be so important that they put in question the design life

The contractor warrants for a period that the facility will run according to some elements: you need a red flag again : be careful the design life does not conflict with the one year warranty

The key words are “subject to the provisions to article (one year warranty) design life”: not a supplementary warranty

Last point on the warranty guarantee: remedy provision

Should the governing law apply as a supplement to provide additional warranty? For instance “la garantie légale des vices caches”: statutory hidden defect warranty

Can the owner use that statutory warranty?

The way you escape this risk: the warranty provision in this contract are in lieu of and to the exclusion to any additional warranties applicable at law or otherwise”: the warranty section is all the parties wanted to address and therefore they should not look for additional warranties

However, in some jurisdiction, this warranty limitation is not valid or to a certain extent: need to control : parties have accepted this exclusion in full acceptance : black bold majuscule letters so the parties cannot deny being aware

**COURSE OUTLINE**

**SESSIONS 9 & 10 : Key Contract Clauses III : Performance Clauses**

Focus topics (in light of reading assignments):

* Liquidated damages & penalties
* Take Over process

Liquidated damages & Penalties (Delay & technical performance)

LDs at the heart of the project execution since Contractor has two main obligations:

* delivering the infrastructure on time; and
* delivering the guaranteed performances of the infrastructure.

**Theory:**

Notion of Liquidated damages & penalties from a comparative law perspective:

* Civil law tradition: penalty is both a sanction (serves as a deterrent to motivate performance) and a contractually agreed damage compensation;
* Common Law: penalties are invalid since they are considered as abusive and conflict with the monopoly of the State to impose criminal fines & sanctions. Therefore, only liquidated damages are allowed, i.e. genuine pre-estimate of potential damages to be suffered as a result of deficient performance.

Power of the judge to revise penalties in civil law jurisdictions.

What about “no harm no foul”? Should the LDs or penalties still apply if the Owner has not suffered any damage?

Pros & Cons of each system

Function of LDs & penalties: i) deterrent, ii) damage assessment and iii) limitation of liability.

**Practice: Do not underestimate the topics around LDs structuring**

1. Delay LDs (see FIDIC 8.7)
2. Generalities

* defined amount or percentage
* if reference to contract price, quid if change orders add to the price?
* Per day or per week, quid if half week delays?
* Link to take over date: classically, whether delay penalties are due for payment will be measured according to delay beyond the guaranteed take over date;
* Are penalties on multiple milestones of the project schedule reasonable?
* Delay LDs per unit of an infrastructure;
* Delay LD cap: cap level depends, often around 10% or 15% of contract price;
* Does it make sense for LDs cap to be disregarded in case of gross negligence of contractor in causing the delay?

1. Specific points

* Delay LDs and additional delay damages: to what extent are the LDs/penalty “in full and final satisfaction” of liability? Quid acceleration costs for example?
* Delay LDs and termination or cancellation of contract? Issues surrounding prolonged delays.
* Delay LDs and “time is of the essence” clauses: is it reasonable for the Owner to be entitled to terminate for delay when the cap of delay penalties has not be reached?
* Delay LDs and duty to mitigate damages: can the duty to mitigate damages be a defense to an LDs claim?
* Delay LDs and bonus for early completion: an incentive for completion in advance of schedule can make sense;
* Delay LDs and multi-units infrastructure: issues around delays caused by the “common systems”: quid if Unit 1 of an infrastructure is taken over with the “common systems” of the infrastructure (e.g. control room of a 2-unit nuclear power plant) and delays occur to take over unit 2 due to defects in the common systems? In such case, is contractor liable to pay delay LDs on Unit 2 although Unit 1 and the Common Systems have in the meantime shifted to risk and ownership of the Owner?

1. Performance LDs (see FIDIC 9.4 & FIDIC 12.4)
2. Generalities

* defined amount or percentage
* Definition of penalized technical values: e.g. production shortfall, higher consumption rate, etc.
* Quid if certain technical values cannot be penalized since require fulfillment per legislation or operation permits (e.g. noise levels or emissions level)? In such case: make good obligation.
* Link to performance tests in connection with take over process: performance tests can take place before take over, in such case they are a condition to obtaining take over, or can take place after;
* LDs per unit of an infrastructure;
* LD cap: cap level depends, often around 10% or 15% of contract price.

1. Specific points

* Performance LDs and additional damages for performance deficiency: to what extent is the penalty “in full and final satisfaction” of liability?
* Performance LDs and termination or cancellation of contract? Issues surrounding “minimum guaranteed performances” (see FIDIC 9.4 b).
* Performance LDs and “Buy-down” rights: is there a duty to exhaust improvement options: if contractor achieves the “minimum guaranteed performances” but does not reach 100% of the guaranteed performances during the performance tests, can the Owner refuse take over and request the contractor to continue works to achieve 100% at the risk of contractor being exposed to LDs for delayed take over? In other words, is the contractor entitle to “buy down” the takeover by paying the performance LDs and obtaining take over, thereby sparing the exposure to delay LDs?
* Performance LDs and bonus for improved performance: an incentive for better-than-guaranteed performances can make sense;
* Performance LDs and warranty obligations: can the Owner impose an obligation to repeat performance tests after major repairs to ensure that the infrastructure still meets its guaranteed performances? If so, does this lead to a continuing performance LD exposure during the warranty period? (see FIDIC 11.6)
* Performance LDs & availability guarantee: for certain & infrastructures, availability/reliability of the infrastructure can play the key role (e.g. satellite system; railway infrastructures)

Take Over / Provisional Acceptance of the Works (FIDIC 10)

Take over is one of the most critical phases of the infrastructure project: for several authors it constitutes the cornerstone of the project or its culmination point!

Main consequences associated with take over:

* Transfer of risk of loss or damage to the infrastructure;
* Payment of the milestone payment linked to take over;
* Return of the performance bond, possible issuance of a “warranty bond”;
* Start of the warranty period;
* End of the delay LDs exposure: the clock stops ticking: assessment of delay LDS;
* Completion of performance tests: assessment of results of these tests and exposure to possible performance LDs

Defects Liability / Repair & Replacement obligations (FIDIC 11)

Duration / Scope of “defects” (be careful about definition)

Repair & replacement obligations: choice of contractor (or Owner?) to repair or replace?

Fit for purpose notion

Design life issues: e.g. does a 20-year design life expectancy requirement constitute a 20-year defects warranty?

Latent defects or hidden defects warranty (statutory or contractual)

Exclusive remedy clauses: contractual warranty to be in lieu of any warranty remedies at law

Remember that technical specifications may contain warranty-related requirements (e.g. spare parts availability), so all warranty matters are not always exhaustively treated in the general contract conditions.

Cours 11

Financial clauses: the main one are the one relating to the contract price.

We have covered various areas covered on previous discussion.

However: need to have a **Contract Price Adjustment Clause**: way to adjust the price based on the evolution of material costs, inflation...especially on long term project.

The second key point is with respect of cash flow: critical for project execution because it’s about what is the level of revenues you get on contract price. The idea is that the contractor want to avoid to be cash flow negative: that is to say spending money to continue while having not receive the contract price: no revenue to compensate. You wanna be cash flow positive: when you look at the milestone payment of the contract: condition precedent: the down payment will be the first milestone payment of the project. And then throughout of the project, you will receive a portion of the contract price. Usually the allocation is 10/20%: 10% after completion of the training of the personal for operating the facility for instance. You need to make sure those milestone payments cover the expenses you have at the same time.

Therefore if you are the lawyer and see the payment will be done at the end of the warranty period: problematic.

Another point to be careful about: how to cover the situation of **delay payment**?

Three main remedies that should be included in the contract:

* Late payment interest: percentage form
* If the customer still does not pay, you should have the right to suspend the work: it is a way to protect your cash flow.
  + Usually, you will have a reasonable notice period like 30 days before suspension
* If suspension has not produced any effects: termination with again a reasonable notice period

**Financial securities on the project and everything that relate to bonds and guarantees:**

The lawyers are involved in reviewing bonds and guarantees.

The first question is: what are the main types of bonds and guarantees?

Bonds and guarantees are generally used indifferently, in France distinction

* **First demand bank guarantee**

The difference is how is it for the person to access the money that is under bank guarantee. First demand: the owner can contact the bank and demand the money just by sending a fax for instance. “the contractor is in default of the completion of the contract”. It is almost like a formality: purpose for the beneficiary is not to debate with the bank. As soon as the formality is fulfilled the bank must pay without inquiring what is the situation of the project and without discussion. First demand bank guarantee demand: treated as a separate agreement from the main contract. First it is because the bank guarantee is a tripartite agreement while the contract is a two parties agreement. Moreover, since the bank is not supposed to interfere, the commitment of the bank is detached of who is right or wrong in the dispute.

* If the customer does not have access: the customer considers it’s the owner liability: dispute. The owner send a fax to the bank to get the guarantee, you call the bank and say not to pay, but, the bank won’t care: as the formality will have been done by the owner, the bank will pay.

How to explain this mechanism quite shocking? The reason why it is so commonly used is that the financial dimension are huge: the owner will pay directly 200 million as down payment while the contractor might not have started works: paying so much might feel at risk to pay such an amount not having received anything.

Therefore, this bank guarantee gives financial security: if the owner wants to access the money he can without debate or discussion.

There can be some extreme situations of fraud: where the parties are not in a good faith dispute. But there are cases where there is a fraudulent call of the bank guarantee: call of a fraudulent nature. Is there a mechanism to stop the bank guarantee? Principle issue? Should there be an exception of the first demand bank guarantee: a right for the contractor to stop payment on a fraudulent call? Yes: in most jurisdiction, if there is an abusive or fraudulent call, the applicable law might provide for a system : in France, but also in India, or Canada, Spain,…in most countries there is an exception for abusive or fraudulent:; you must be able to demonstrate a crystal clear case of abuse or fraud, even though you won’t be able to convince the judge to issue an order for the bank not to pay.

In most cases: abuse or fraud: juge de l’injonction, as a matter of emergency: if irreparable harm: you can activate a fast track like the référé. Whithin a few days/hours: possible to have an emergency hearing.

You contact the injunction judge: he will issue a temporary order to the bank to stop payment until the injunction hearing will take place in a short period.

What you can do in the contract to increase the chance to stop the bank in abusive or fraudulent activation to the bank guarantee: obligation for the bank to call the contractor first. Sometimes even if you have the possibility to call the judge, you won’t have an advance information mechanism. Most of the time you learn from the bank guarantee call from the bank: always better to know in advance. If you are in a sort of dispute with the owner, you can take preliminary measure such as selecting the outside lawyer.

The competent judge is the judge of the jurisdiction of the Bank. However, sometimes you have to face a procedural and substantive hurdle. Very strict criteria to accept to stop a bank call

The likelihood to stop a bank guarantee is very low. If you succeed to stop a first demand bank guarantee: major achievement.

The major economic argument: il faut preserver la signature des banques: it is to preserve the international reputation of the bank at the international level on the first demand bank guarantee market: it will be known and whenever you propose a bank for this country: the owner will refuse because the bank does not fulfil the commitment.

The red flag is when reference to bank guarantee: not triggered mechanism and rarely stoped.

The down payment bank guarantee: if the customer has not a down payment the customer will call the bank to gt back. But as soon you start working as a contractor, the down payment will be reduced.

Sometimes in the bidding phase, you might have a bid bond: it is a bond you submit when you submit your offer: meaning you cannot take back your offer until final decision. You have exited the project before the deadline.

A general performance bond: bank guarantee saying it is issued as a financial security to ensure the performance of the contract: can be demanded by the owner is late or does not pay delay penalties for instance

The warranty bond: will cover your obligations under the warranty period.

Sometimes you can even have an adjustment mechanism. Small amount because you will have completed the project.

FIDIC

14.2: advance payment bond,

14.9: a retention bond,

4.2: warranty bonds, performance bonds

The ICC has issued the uniform rules for bank guarantees: these rules set out what are standard conditions for bank guarantees. Very often will make a reference : it is important to have an expiry date.

If you issue a performance bond and anticipate the expiration date, you will want to put the expiration date in the bond: therefore you have a certainty the bond will come to an end.

Extend or pay call: if owner is not fully confident everything is in order, the owner wants the bond to survive but no immediate need to activate it: will ask to extend the bond and if you refuse perhaps he will call the bond except if the bond is extended to 6 months.

Suspension and termination rights for delay payment:

**Suspension or termination for convenience**: generally only possible for the owner: in French, résiliation pour convenance personnelle. Termination at your discretion

It s no longer convenient for the owner to go on with the project, so terminate it. Often in US contract: “termination without cause”: no reason to terminate. It conveys the notion you can terminate the contract at your own discretion.

Usually, as a matter of philosophy it is a standard because the owner is the driver of the project, and, sometimes the circumstances can change for the owner: better to kill the project and reduce the cost when still possible. However it is accepted with decent financial compensation: usually specified: since this termination occurred in a circumstance where the contractor is not in default: owner must give financial compensation. You might have equipment in the factory of the contractor: has not been deliver to the owner but can be tailor made equipment for the project and the contractor might not be able to recycle this material: therefore: compensation for the cost engaged with subcontractors, equipment… and often an allowance of profit: the contractor will loose the expectation of a profit.

Not abnormal but need to check there is sufficient compensation.

The main case of suspension and termination is default: you can have either a suspension for owner’s default: for the owner, he will have termination rights, for instance delay liquidated damages: when you have reached the cap possible for the owner to want the termination.

Termination for breach of the contract confidentiality restrictions, refusal by the contractor to issue a bank guarantee that is provided for in the contract,….

These suspension/termination rights are contained in article 15 and 16.

If you have the right to terminate for breach, it is not exceptional to stipulate only material breach can activate termination. Only material breach could lead to termination in this case.

Most of the time the party asking only material breach instead of any breach will be successful, but in that case definition of the material breach : limited list of key issues such as p prolonged delay, inability to issue bank guarantees, violations by the contractor to apply confidentiality…It is a question of assessment: the main recommendation is to qualify material breach to avoid abrupt termination.

The pure period: remedy period which will be specify in the contract: reasonable notice to the contractor.

**Project finance scheme**: it is not unusual for the banks to want to have a say in the suspension and termination rights because the banks are financing the projects: if something serious happens in the project such as the magnitude

Signature of a direct agreement between the bank and the contractor: the contractor generally does not like direct agreement with the bank: but often it is a prerequisite to the financing of the project: if the contractor feels he is allowed to terminate the contract he should give simultaneous information to the owner:

Sometimes: at the bank request possible to extend the period.

Stepping rights of the bank: meaning that the bank might want to be able to take controle of the project: if the problem is that the owner is at default, as part of a stepping right, the bank might be able to substitute itself to the owner.

**Exclusion and limitation of liability**

FIDIC Section 17.4

The first point is to know whether some damages/losses can be excluded from indemnifications:

In our project, classical losses that will be excluded will be:

* indirect and consequential damages: if the contract has been well drafted: exclusion of consequential losses: under no circumstance shall any party be able to recover consequential losses : typically it will be loss of production, loss of contract, loss of use of the facility
  + If we assume defect in an equipment: the factory stops for 10 days for the contractor to intervene: the consequential losses: compensation of the loss production and reparation: can be too heavy because the factory could work for a period of time and it is complicated to control: the contractor is not operation the facility: very standard in this contract to exclude this type of consequential losses: very important consequences
* The overall limitation of liability: 100% of the contract price: the extend damages in the worse case should not be more than the price received

Exceptions: third parties damages

The other standard exception is violation of property rights, wrongful misconduct: grossed negligence (that needs to be defined in the contract)…

* also gross negligence should not be to light: a good way to define it would be to define it as a negligence of severe gravity showing reckless behaviour…add a few adjectives to qualify the behaviour

You will often have in these contract an **exclusive remedy clause**: saying that the remedies provded for in the contract shall be the exclusive remedies of the parties

It will be a limitation of liability and sometimes tailor made exclusive clauses.

Whenever a party is in breach you can only use the remedies that are provided for in the contract and cannot use the ones that are at law.

The remedies not in the contract to apply.

Need to be very careful with this kind of clause; might deprive you of some remedies in the applicable law if the contract is not précised enough.

Ex: late penalties and contractor shall be able to suspend the contract for late payment, if the contract does not contain this clause on termination right: if you have accepted the exclusive remedy clause, what do you do if the contract does not provide for the possibility to suspend and terminate if not paid : therefore you wont be able to seek a remedy outside

The only remedy you might have is if the termination/suspension for non payment: is that the remedy is a public policy superseding the contract

Risk of being trapped by the exclusive remedy clause

If you are forced to accept it: need to be sure you have added remedies for everything under the contract.

**Governing law and dispute resolution clauses**

**FIDIC Art 20: Dispute resolution** : court or arbitration, arbitration is quite common

As an introduction to full dispute, possible to have mediation or adjudication… there are debates as with regards mediation should be a compulsory block: mediation only makes sense if both parties are willing to discuss

With the claim process: it is important to follow the steps contain in the contract: notice and formalities provisions of the contract and the claim process: for instance if claiming force majeure: notice period

Make sure you send it to the representative.

**COURSE OUTLINE**

**SESSION 11 : Key Contract Clauses IV : Financial & Legal Clauses**

Focus topics (in light of reading assignments):

* Bonds & Guarantees
* Exclusions & Limitations of Liability

Contract Price (FIDIC 14)

Remember contract price adjustment issues: currency fluctuations, index formula to adjust evolution of material prices or labor costs

Advance payment / Milestone payments / Cash-flow issues

Delayed payments: late payment interests

Payment defaults: suspension and/or termination rights

Bonds & Guarantees

Bonds & Guarantees aim at providing a financial security to the Owner for the due performance of the Contractor’s obligations.

Can take the form of a Parent Company Guarantee, or can take the form of bank guarantees (bonds) generally issued as unconditional “first demand” guarantees that are independent/autonomous from the main contract. In case of a call, the bank is required to pay the beneficiary (owner) without need to investigate if the contractor was in default.

First demand bank guarantees can be exposed to abusive calls but obtaining an injunction to stop a bank guarantee payment typically requires a “crystal-clear” case of fraud or abuse by the beneficiary (owner). Injunction judges are reluctant to easily grant payment blockage decisions since they want to preserve the international reputation of the issuing banks.

“Extend or pay” issues.

Advice for drafting: refer to the “ICC Uniform Rules for Demand Guarantees”.

Main types of bank guarantees on a major infrastructure project:

* Bid bond;
* Advance payment bond (down payment bond) (see FIDIC 14.2);
* Retention bond (see FIDIC 14.9);
* Performance bond (see FIDIC 4.2);
* Warranty bond (see FIDIC 4.2: the performance bond extends to defects liability).

Suspension / Termination rights (FIDIC 15 & 16)

Suspension or termination for convenience

Suspension or termination for Owner’s default

Termination for Contractor’s default

Notion of “material breach”

Cure period to remedy defaults

Impact of direct agreements with financing banks on suspension & termination rights (in case of project finance scheme)

Exclusions & Limitations of Liability (FIDIC 17.4)

Exclusion of consequential losses

Aggregate cap covering both delay & performance LDs (e.g. 30%)

Overall limitation of liability (e.g. 100%): quid exceptions such as third party damage, gross negligence or Intellectual Property rights violations?

General exclusive remedy clause

Claims & Dispute resolution (FIDIC 20)

Claim submission process: be wary of time bar and formality aspects

Alternative dispute resolution mechanisms: e.g. mediation, adjudication, mini trial, etc.

Arbitration

Court litigation

Exhibit

Explanations on how a first demand bond typically works

1. The bank guarantee is issued by a bank at the request of the contractor to provide financial security to the owner (beneficiary) for the proper performance of the contract.
2. A performance bank guarantee for example will typically be around 10% of the contract price and can be called by the beneficiary if the beneficiary is of the view that the contractor is in default.
3. Upon a call being made, the bank is only required to verify the formality conditions of the call, but is not required to investigate whether the contractor was indeed in default.
4. A standard example of bank guarantee formulation relating to a call would be as follows:

*“A demand under this bank guarantee shall be made in writing to the bank and shall be accompanied by a statement from the owner (beneficiary) of the guarantee i) stating that the contractor is in default and ii) explaining in which respect the contractor is in default.”*

Note: As you can see from the above formulation, the owner is not required to prove to the bank that the contractor is in default; the owner only needs to state to the bank that the contractor is in default and give a short description of the default.

A major difference would be the following formulation:

*“A demand under this bank guarantee shall be made in writing to the bank in case of a default of the contractor under the contract, and this demand shall be accompanied by a statement from the owner (beneficiary) requesting payment under the guarantee.”*

Note: at first sight this may look like a first demand bank guarantee formulation but it is not: by adding “in case of a default”, an external condition has been introduced since the bank will then require a proof from the owner that there is indeed a default and if the contractor challenges, then the bank will likely require a court decision to prove who is right and whether there is indeed a default.

Cours 12

Time management aspect: in the final case study need to be careful

Two main topics today: subcontracts and consortium agreements. They are satellites topics or agreements: very important because, there is no major contract without a supplying base. Consortium agreement as important as well: very important because of the size of the project: need to team up to face the dimension of the project.

Also we might be asked to advise on consortium agreement.

1. **Subcontracts**

In termes of classification: tendency to distinguish sous-traitance de marché et sous-traitance industrielle.

On the one hand global sourcing and project specific sourcing.

When you do purchasing for a GIF: you can do a global purchasing not for a particular element of a project: for instance purchase for cables but not specifically assigned when negociating the frame agreement. Very different from project specific sourcing : contract with a supplier involve in the project: it is project specific.

Here project spedific subcontracting : sous traitance de marché. Indeed generally the general sourcing will be handled in a separate manner and as lawyer of the GIP: specific.

When the contractor is on the bidding process: ask for quote and get budget quote or limited validity offer and as soon the contractor is awarding the project, it goes further in negotiation. Need to be prepared to finish the subcontract quickly not to be late but not going to far as if you don’t get the project: loss of time. Therefore, usually a short agreement securing the availability of the subcontractors in a terms sheet is done during the bidding process.

Also need to arrange back-to-back approach between the main contract: the problematic of back to back subcontracting. Make sure the main contract is echoed/mirrored in the subcontract: what you have in the main contract should be in the subcontracts: also called a flow down from the main contract to the subcontract.

What is the main purpose of doing this?

Make sure if something happen: sandwich aspect: if there is a problem, from then perspective of the owner: no matter who provided the material, the owner will turn to the main contractor. If the equipment was brought from the main contractor to a subcontractor: back-to-back transfer of the claim. The more the subcontract is a mirror of the main contract the more the main contractor will be able to turn to subcontractor.

Mirror effect: how complex/easy it is to workout a back-to-back subcontract? To the extent the aim is to have almost a copy paste, does it require lot of work? One area where you have some flexibility is the definition of the scope between the various subcontractors : need to make sure the subcontrators’ scope is well defined.

If a general chapter specifies the main contract specification: it is quite easy and perhaps could take only the relevant chapter.

Nevertheless, there is a level of adaptation: if we speak about the key contract clauses for instance the warranty clause, imitation of liability, force majeure, penalty… Can you take the same clauses or need to precise them?

One page syndrome concept: one page and then reference to the main contract: but problem: recurrent problem with civil works on how the contract works: need to adapt to the specificities

For instance: force majeure clause: want the subcontractor to have the same force majeure event as the contractor: for instance if one says a strike is a force majeure and then other not : inconsistency. However: if the same delay to notice for the force majeure is the same for the subcontractor : the notice will be valid for the subcontractor, however, if no buffer left, the contractor will not have sufficient time to notify

Need to reduce the notice period: to arrange a buffer of a few days between the notification of the subcontractors and the notification of the owner from the contractor to benefit from force majeure.

Same with limitation of liability: the overall limitation of the contractor is equivalent to 100% of the “Contract Price”: if back to back clause here: what is the limitation liability cap of the subcontractor? What is meant by that? The main contract or the subcontract? Need to adapt on a proportionate basis: when you transfer the clause to the subcontract: you will have this issue with all the definitions.

You have to translate and adapt all the definitions.

An other example is that the owner will have to validate the choice of the main subcontractors : does it imply a chain of reactions or reverse?

An other dangerous example is the take other condition: moment when the entire facility is taken other by the employer and the warranty period starts. Steam turbine: for the subcontractor, if you imagine that after delivery on the site: from the perspective of the subcontractor: when does the warranty period starts? When delivered on the site or when the all infrastructure has been taken over? You don’t want to have a question mark as to when the warranty starts.

Same with regards to governing law: main contract governed by English law, the subcontract also governed by English law? Full harmony between the contracts to avoid conflict of laws or choose French law because more comfortable.

If the main contract s governed by English law – common law system and the subcontract by French law – civil law system: might have some discrepancy because in one penalties might be authorized and on the other liquidated images.

The rule in general: to the maximum extent have the same governing law in the main contract and the main subcontracts because same jurisdiction. To the extent you can harmonize the governing law principle : good thing.

(continue the exercise with other clauses: the official time of the commencement of the works: perhaps before your own, also insurance policy: will you impose the same insurance policy as the one of the main contract ? maybe not: different coverage…)

The point to remember is to have the reflex that back to back is good and practicable as a notion to understand but at the same time need to think and avoid the one page syndrome.

1. **Consortium agreement**

Need to be distinguished from joint venture:

* traditionnaly when people speak about joint venture: set up of a legal entity : register a company, the parties bring assets and in exchange get shares
* a consortium on the contrary is an agreement
  + Readings : “*A far more important distinction between a consortium and a joint venture is that in a consortium there is no right to share in profits. Each party's profit results from its participation in the consortium. Profit calculations are made without reference to the calculations of other members. The only concern is that other members may take, or fail to take, actions which could endanger expected profits*.”

Joint venture: long term goal: the company created is supposed to have several years, whereas a consortium is usually short term and only for a particular project : when the project is completed, the consortium is over. Consortium is project specific and short term: it explains why there is less competition restriction in teaming up, contrary to the restrictions contained for joint venture. Possible that if no consortium, the company would not be able to have sufficient network and meet the requirement of the project : two competitors temporarily work together, which could be far more complicated if joint venture. Short term can helps with regards to the competition aspect.

Consortium agreement: you have two main types of consortium: open type of closed one.

* The open consortium is open because it is known to the owner and the customer, it is disclose in full transparency and the way it is disclosed, sometimes, the consortium members can sign the contract together with the owner:
* Sometimes a company will take the view it will be the main signatory of the contract and the owner won’t know about the consortium: closed consortium

The main advantage: in open consortium: **joint and several responsibility** to the owner: responsabilité jointe et solidaire. However, the simple fact that two companies sign the same contract, almost automatically provides a joint and several responsibility. If the contract has been signed by the technologic company and a civil work company, and a problem occurs, the owner will have the choice as to which one to turn to: generally the one with the largest pockets. Then the one who paid will turn to the other for instance if the defect is a technological one.

Why a consortium?

Generally the main contract will be an exhibit to the consortium agreement.

Another point that generally pops up is the exclusivity of the partnership: it is important to make sure about **the finalization of the consortium before signing the bid**: you will usually team up before the bid: agreed on the price submitted to the consumer, will need to work together beforehand. Therefore you must negotiate the consortium before submitting the bid. Therefore the exclusivity is crucial : you share elements so you want to be on an exclusive basis.

The other aspect is the work scope allocation: in particular if interface issues between the equipment. The consortium member should take the contract and make sure no overlap in what they will do and put the price for what they actually do: importance of pricing once each action. Similarly, if one party does not do it and the other thought it would problematic : gap in the price and complexity.

Also if there is a problematic: importance to know under which scope it falls.

There will be decisions to be taken :

* you can have a leader
* or a board
* or both

one area where you have to be careful is to design the leadership in order not to look as a company because you might have a tax requalification: you could have tax requalification. You could have de facto set up a company and then the revenues of the consortium will be tax as a company : can be disastreous in tax management.

Important not to make it look like a company, but also important to had a sentence: to avoidance of doubt the parties state they have no instance of setting a company and the consortium is short terms.

You should have a consortium leader: a chef de file : will be empowered to represent the consortium : main point of contact to the owner. Does it mean the leader can take decision at full discretion?

For instance payment delay from the owner, the consortium leader organizes a meeting: issue in payment: disagreement between the consortium member as to what attitude should be taken?

Power of attorney: possible to act as the consortium leader, but sometimes, you might have a procedural requirement as to all members agree. If you are the consortium leader you want a power of attorney as an exhibit: officially the empowered person to take decisions on the consortium. The way to limit: the consortium agreement will contain an article : “consortium leader”: duty and powers of the consortium leader: everything the consortium leader might decide on its own or with the other members: and eve, though the consent of other members is required, in case of emergency situations, the consortium leader will be able to launch an action : possible for the consortium members to trigger action if disagreement with the decision. The other consortium leader position: you drive the decisions but at the same time you expose yourself to the claims of the other consortium members who in some situation will try to show you have not acted properly.

How will consortium members share the liquidated damages?

Either the guilty parties pays: no mutualisation of the risks and if there are penalty claims the consortium member at fault must pay: no sharing.

The other approach : as they teamed up, if there is a fault: allocation of the risk based on the shares in the project: if delay claims : regardless of who caused the delay, pay in accordance of the shares: mutualisation – sécurité sociale.

Sometimes also there is a combination : the parties will share up to their proportionate share and up to a point, the guilty one will pay, or on the contrary, the guilty pays and up to a point proportionate sharing : incentive on the guilty party.

Also how will the contract price be paid? The consortium leader opens a bank account, the owner pays and then the leader allocated the shares. Or the owner pays the shares directly.

Pay-when-pay clause in the consortium agreement: the consortium leader will pay the consortium members when paid by the owner: the leader does not take other the risk.

It will be a reasonable request from the consortium leader to obtain a management fee: because can be a loss of time and time and money: possible to have a commission. Very classically: the clause describing the consortium leader’s powers: management fee to compensate the leader for this activity.

The biggest advantage for the consortium leader to manage the bank account and the payment: it gives an enormous levier : if a consortium member does not perform or perform with default : possible to retain the money until the consortium member acted. Gives you enormous power, which you should not abuse of. In terms of discipline in driving the project it is part of the consortium leader power.

Also: usually consortium agreement will provide for the possibility to exclude a member and replace him in order to manage the project well.

Then other classical clauses : governing law, disputes…

First you have to determine if you are advising the consortium leader or members: and then negotiate on this basis

* if consortium leader: maximum leverage of action and powers: to make decisions in front of the owner, management of the payment flow, retaining money,…

A debate you have: often a share of delays, however when performance penalties: usually guilty pays principle because distinction between the scope