**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 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 fried 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 pinciple**

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

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