**Reading Assignments – Préparation**

Cours 2 - Préparation

**1° The top 10 things you need to know about FIDIC**

1. What does FIDIC stand for ?

* Fédération internationale des Ingénieurs Conseils

1. History of FIDIC

* Founded in 1913 by :
  + Belgium
  + France
  + Switzerland

1. What does FIDIC do ?

* FIDIC is a global representative for the consulting engineering industry, promoting the business interests of firms supplying technology-based intellectual services for built and natural environments alike

1. What does the FIDIC Suite of contracts cover ?
   1. The Red Book
   2. The Pink book
   3. The Yellow book
   4. The Silver book : Conditions of Contract for EPC/Turnkey Projects
   5. The Orange book
   6. The Gold book
   7. The Green book
   8. Subconsultancy agreement
   9. The White book
   10. The Blue-Green book
   11. Conditions of subcontract
2. What are the most popular forms & the FIDIC approach to risk allocation ?

* The contract structure is generally the same:

General provisions (Clause 1)

The Employer, Employer’s Administration OR Engineer, Contractor, Nominated

Subcontractors OR Design (Clauses 2-5)

Staff and labour, Plant, materials and workmanship (Clauses 6-7)

Commencement, delays and suspension, Tests on completion, Employer’s taking

over, Defects Liability, Tests after completion (Clauses 8-11/12)

Measurement and Evaluation OR Variations and Adjustments, Contract Price and

Payment (Clauses 12-14)

Termination by Employer, Suspension and Termination by Contractor (Clauses 15- 16)

Risk and Responsibility (Clause 17)

Insurance (Clause 18)

Force Majeure (Clause 19)

Claims, Disputes and Arbitration (Clause 20)

1. Traps for the unwary : No.1 Commencement date

* Clause 8
  + In practice many contracts are negotiated with no tendering or with significant post tender negociations
    - FIDIC has introduced the requirement to reach agreement and then create a letter of tender and letter of acceptance priori to sgning the contract (somewhat naive) and it would be preferable to included these as agreed terms in the contract

1. Traps for the unwary : No.2 Notices : conditions precedent

* the most controversial innovation of the FIDIC 1999 Red book is not amplification or amendment to the extension of Time provisions but the requirement under clause 20.1 which is a condition precedent to any extension of time or cost
  + reference elsewhere in the contrat demonstrates that if the contractor is not compliant, he forfeits any entitlement to an extension of time or cost irrespective of relevant circumstances
  + contractors must ne alter to notices under 20.1

1. Traps for the unwary : No.3 Aplication of laws

* When using a FIDIC contract, parties must consider how (i) the chosen law of the contract and (ii) the local laws will affect the interpretation of the terms of the contract
  + Will there be a conflict between the contractual terms and the applicable law ?
    - Where necessary amendment should be made
  + Additionnally, the parties should consider the FIDIC clause relating to adjustments for changes in legislation

1. How do dispute resolution procedures work under FIDIC contracts ?

* Disputes can be adjudicated by referral to a Dispute adjudication board DAB.
* The DAB will comprise of one ot three members, the default position being three (Clause 20.2)
  + Each member nominated one DAB member for approval by the other party, parties and members agree on the appointement of the third member who will be chairman
  + The form of the DAB appointment is the General Conditions of Dispute Adjudication Agreement:
    - a tri partite agreement
  + DAB members can be replaced in some circumstances
  + What is the effet of a DAB decision: DAB decision is binding and must be compled with immediately until revised by amicable settlement or arbitration
    - Parties must give effect to it
    - If no notice of dissatisfaction is served it is final and binding
      * Unless settled amicably, any dispute in respect of which the DAB decision (if any) has not become final and binding shall be finally settled by international arbitration. The Rules of Arbitration of the International Chamber of Commerce (ICC Arbitration) applies, with the appointment of three arbitrators (clause 20.6).

**2° Turnkey contracts: concept, liabilities, claims**

1. **The concept and its practical applications**
2. Origin of the term and definitions

* According to the most widely accepted definition: a turnkey contract is one “under which the contractor is responsible for both design and construction of a facility” (AID Handbook)
  + However: sometimes one finds the term used for other types of arrangements
    - for instance designs prior to the contract

1. Components of a turnkey contract

* a turnkey contract requires the design of the facility by the contractor
  + possible to have some designs in a preliminary separate contract
  + normally: contractor deals with
    - the technology component
    - supplies, construction and erection :
      * even in the most restrictive definition of a turnkey contract, the contractors owes the construction of the complete facility ready to be operated
        + subcontractors possible

“nominated subcontractors”

* + purchasers of turnkey facilities normally require from the contractor at least some help in financing the project
  + also sometimes the contractor’s obligations include complete training programs
  + it has became increasingly frequent for purchasers of industrial facilities or even eployers to require from the contractor some involvement beyond completion of the work:
    - maintenance and repair services

1. Contractual arrangements

* a turnkey contract: generally accepted in the sense of the term provides for design and construction under the single responsibility of the contractor, or occasionally complete construction alone
  + Also idea of the “later date”: control or purchaser ask contractors to take a share in the equity
    - Hope that such a participation reinforce the commitment of the contractors

1. Contracts forms

* The only international model form for turnkey contracts known to me is UNIDO
* Domestic ones: JCT
* All other forms currently in international use are not made specifically for turnkey contracts
  + Ex: FIDIC
  + But these forms are occasionally used for turnkey contracts
    - Complications

1. **Applicable law**

* turnkey contracts often seek to regulare in great detail all issues which possibly might arise between the parties
  + therefore applicable law could appear of secondary importance
    - this issue is important for two reasons:
      * because of rules of public policy which remain unaffected by contractual provisions
      * and in all the other situations where the contract is incomplete or contradictory
  + When considering applicable law in the context of turnkey contracts, four different types of legal rules have to be distinguished

1. The law governing the contract

* determines the contractual rights and obligations of the parties, the interpretation of the contract and, subject to some reservations, its formation and validity
* Parties are free to choose the law governing their contractual obligations, subject to certain restriction resulting from rules of public policy
* Where the parties have failed to agree on the law applicable to the contract, this law has to be determined by reference to conflict rules
  + The criteria for determining the law applicable to a contract differ considerably from one system of conflicts to another
    - Some systems apply the law of the seat or residence of the party which owes the characteristic obligation
    - Others refer to the place where this obligation is performed
    - Proper law f the contract as a bundle of criteria, reference to the place where the contract has been entered into or direct application of the place of performance
  + Conflict rules may provide that one legal system is applied to all aspects of the contract or they may distinguish according to the type of obligation
* Also where the conflict rules designate only one legal system for the entire contract, it may be necessary to characterize the turnkey contract
  + Therefore, court of arbitral tribunal to which the dispute is submitted will automatically apply to the contract law applicable in the purchaser’s country
* In view of this uncertainty, some negotiators for contractors prefer to leave the issue unresolved in the contract rather than provoking at the time of the contract negotiations an argument on this issue which is likely to raise susceptibilities

1. Laws regulations and standards defining the works

* Reference to these laws is often found in the specifications
  + International Standard Organization
* These laws and regulations just as the standards required In the specifications define the quality of the works and thereby the contractors obligations
  + If a change of law and regulation occurs: sometimes the contracts require that the contractor takes steps which can reasonably be expected to make the works conform to modified regulatory requirements
  + If not: constructor may have an implied duty to this effect
    - Implying obviously payment for the modifications

1. Laws and regulations affecting the contractors’ activity

* Laws and regulations directly applicable to the contractor
  + working hours, employment conditions, labor relations,… custom duties, traffic regulations, taxation…
* Sometimes the constructor has to observe these laws where the works are performed, but such a provision is superfluous since the constructor has to observe these laws and regulations by the very fact of his activity in the country and irrespective of a contract provision to this effect
  + Change in these laws : not a contractual matter
    - However if change of laws in the country where the works are performed especially if the work is for that state
      * Often need to have a provision in the contract to this effect

1. Law applicable to the dispute settlement procedures

* Normally the law of the court or arbitration procedures at the place where the procedure takes place
  + Determined independently

1. **The parties respective obligations and liabilities**

* Since the contractor owes the supply of the complete installation
  + The allocation of responsibilities between the parties might appear simple and one might think the purchaser’s only obligation is to pay the price
  + In practice the limits between the parties’ respective obligations are less clearly drawn and on a number of occasions, responsibilities and liabilities may shift from one party to the other

1. Design

* In pple contractor’s responsibility: design is complete, sufficient and adequate, and assures that the facility meets the contractually required performance guarantees.
  + The contractor’s design obligation foms part of his general obligation to supply an installation which meets the required performance guarantees
* The situation is different where the purchaser required changes in design
  + Generally use of the employer’s design : normally exonerate the contractor from liability for resulting defects except if the applicable law stipulates a duty to warn

1. Suppliers and subcontractors

* in pple the contractor is fully liable to the purchaser for the proper performance also of those of hhis obligations for which he retains subcontractors and suppliers
* Contracts occasionally provide that guarantees and warrantees of subcontractors and suppliers have to be passed on to the purchaser
* A shift in liability may occur in case of nominated suppliers and subcontractors: ie those chosen by the purchaser and imposed upon the contractor
  + It can be admitted that the contractor still has a duty to warn
    - But beyond a certain point the contractor should have no liability for the choice of subcontractors and suppliers thus nominated but should be responsible only for the proper supervision of the execution by them
      * Not infrequent that contracts provide for a complete liability by the contractor even for nominated subcontractor, or that the contracts do not regulate the matter at all

1. Time for completion

* Meeting of the completion date (or the successive completion dates) : contractor’s principal obligation
  + However, where the construction program has become part of the contract, the purchaser may require the contractor adheres to this program:
    - Assures the purchaser that progress of the works is sufficient in order to meet the completion date
    - The purchaser’s own production program and the coordination of the contract works with other work may require a strict adherence by the contracto to his programme
  + Where for reasons outside his responsibility, the contractor is delayed, the contract normally entitles him to an extension of time

1. Performance guarantees

* Contractor’s obligation to meet these guarantees:
  + Where his failure to do so is due to defects in approved design or variations ordered by the purchaser, the contractor is not relieved of his obligation unless a exoneration has been agreed expressly or by implication
* A failure to meet contractual performance guarantees is often sanctioned by liquidated damages reflecting the degree by which the guarantees have been missed
  + Generally a function of the contract price
    - Upper limit is generally provided
* The performance guarantees undertaken by the contractor are based on certain assumptions with respect tp the qualify of raw materials used and the operating conditions such as climate, supply of utilities…
  + Quite difficult to determine whether and to what extent shortfall in the performances guarantees are due to such variations in raw materials and operating conditions and not to defects in the contractor’s design or construction

1. The site

* the choice of the site, access to it and frequently also availability of utilities during the construction period, normally are an obligation of the employer
  + Contractor has to specify the corresponding requirements
    - If not appropriate: difficult problems
      * Who is responsible for unforeseen ground conditions?
        + Since the site is provided by the purchaser, it would be fair and reasonable to hold the contractor only for those ground conditions: on the basis of a site inspection and the information provided to him: ground conditions could have been foreseen by an experienced contractor
      * Limitation of the contractor’s obligation all the more justified in case of contracts where the contractor is generally not a civil engineering specialist and can hardly be expected to take risks in this domain

1. Price and payments

* The price for turnkey works normally is a lump sum:
  + While it is conceivable to express prices in a turnkey contract in the form of unit prices or by cost reimbursement, such arrangements seem to be rare
* Nevertheless: not infrequent that turnkey lump sum contracts contain a list of unit prices or prices for certain parts or coponents of the works
  + Serve for the valuation of variations and possibly also for progress payments
* In case of lump sum turnkey contract, it is hardly possibly to fix progress payments by reference to measurement of quantities
  + Partial payments in these contracts normally are made on the basis of milestone such as dates of placing orders to suppliers, achievement of certain stages in the process of manufacturing, packing of equipment, shipment, arrival at site…
    - Partial payment do not necessarily express the exact value of the works executed at the time of payment
      * So partial payments cannot serve as a basis for valuation

1. Unforeseen or exterior events

* in traditional law of contract, the question of unforeseen events is considered as a cause to exempt the party affected by the event from liability for non performance
  + most force majeure clauses still are drafted accordingly
    - this approach does not deal with the costs resulting fro the parties from the occurrence of such events
* Under traditional force majeure clauses, the loss therefore lies where it falls;
  + A nber of modern contracts or contract forms proceed differently and allocate between the parties the risks of such unforeseen or exterior events
    - Under the corresponding clauses, the contractor is entitled to compensation for extra costs if certain risks materialize.
  + Variety of criteria used to allocate between the parties the costs caused by such events
    - But generally result of the parties bargains

1. **Claims**

* Whenever the implementation of a project differs from the parties expectations and agreements, either party or both tend to present claims
  + Contractor: for additional payment
  + Purchaser: price reduction
* Complexity, duration and difficulties of implementation,… almost inevitable that situation arise in which either side formulates claims
  + Quiproquo
  + But sometimes: formal claims and disputes
* Importance of the legal or contractual basis: often neglected
  + Grounds of entitlement have to be clearly identified:
    - 1stly, because if there are no grounds there are no claim
    - the grounds for entitlement also affect the nature of the claim, the form required for its presentation, the valuation and the period of limitation

1. Claims for a variation (or change) orders

* the employer or purchaser or his engineer or architect may require the contractor to perform works different from those described in the contract
  + “variation orders” English
  + “change orders” in American terminology
* normally the contract: limits for variation
  + but in many cases the contractor is obliged to give effect to request for a variation only if he has accepted it and agreed on a price
* where the contractor is obliged to give effect to variation orders, certain forms are required: writing form
  + letter in generam
  + but in the US: constructive change orders: situation in which the conduct of the architect or engineer in its nature amounts to a change order and has to be construed as such
    - variations orders are a unilateral right of the employer, architect or engineer
      * the contractor has no right to vary the work on his own
    - if the change is necessary, contractor proposes but no answer : tacit agreement
* where the variation requires the consent of the contractor and an agreement on the price, the valuation of the variation does not pose major legal problems
  + except if contractor asks for unreasonable financial terms
* the application of contract prices to the varied work implies that the contractor’s costs in performing the variation in principle are irrelevant and that he may be paid above or below his costs according to how he had calculated his prices
  + if after variation, the contract price become unsuitable, they have to be adjust as appropriate
* where the contract does not contain a schedule of prices applicable to the varied work, one first has to attempt to derive from the contract prices new prices for the variation

1. Escalation

* it is hardly possible for the contractor to control fully the escalation of his costs during performance
  + may attempt to estimate the expected escalation and to build this estimate into his prices or provide for an escalation of the original prices
* where the contract provides for escalation by reference to a formula, the price adjustment normally can be calculated without difficulty
  + provided the formula have been properly chosen and the various factors can be asserted without dispute
  + arisen of difficulties if formula are wrong and dispute on factors
* where the contract does not contain an escalation clause, the contractor nevertheless may have a claim for cost escalation
  + if delays occur which fall in the employer’s responsibility, the contractor may be entitled to compensation for the escalation due to this delay
* the valuation of this escalation claim depends on the ground of which the contractor is entitled to the claim
  + contractor will most of the time to show the costs

1. Compensation for breach of a contractual obligation or warranty

* the breaches most frequently invoked against the contractor relate to defects in the works or to delays in their completion
  + such a breach gives rises to a claim for damages by the employer
    - contractual law: employer has to repair all the losses of the employer, including the loss of use of installation and the loss of profit
    - however, most system of law provide for limitation to the scope of the losses which have to be repaired
      * remote damages/dommages indirects
* most of the losses suffered by an employer can be foreseen: so limitations are if little comfort to the contractor
  + contractor therefore frequently try to protect themselves either by excluding claims for certain types of losses of by the provision of liquidated damages: sometime both approaches are applied cumulatively
    - exclusion of certain types of losses generally is possible under the applicable law
* liquidated damages : often used: limited to a percentage of the price
* with respect to breaches by the employer, the obligations which have to be considered generally are of a greater variety than those which are relevant in claims against the contractor
* under the applicable law a failure of a party to peform a contractual obligation does not necessarily give a claim to the other party for breach of contract
* the issue frequently has to be solved on the basis of the applicable law: surprises for the contractor
  + date, statutory interest rate
* valuation of claims of brases : based on the losses suffered by the injured party and the contract may provide limits as to the losses which have to be compensated

1. Compensation for excepted risks

* contracts sometimes provide for an allocation of risk between the parties:
  + change in legislation, natural disasters, war…depending also on the country or region
  + the employer undertakes to indemnidy the contractor in case certain risks matzeialize, the contractor’s claim normally is limited to his additional costs
    - exclusion of compensation for loss of profit
* it is submitted that this limitation to addtionnal costs is justified even in the absence of an express contract provision to this effect
  + insure the contractor against certain risks

1. Claims for time extension

* certain events which entitle the contractor to additional payments also give him the right to an extension of the time for completion
  + it does not automatically imply additional payments: events outside the parties’ control

1. Valuation of some cost factors

* costs of delay are particularly difficult to value : more than comparing the schedule and the completion date
  + the contractor has to establish that in the absence of the event in question, the activity would have been performed to programme
  + once the contractor has established the delay for which he can claim compensation, he has to show the resulting costs
    - delay can be dramatic especially work can be done only at certain time of the year for instance
    - the costs come from the absence of activity of personnel, plants and other assets : non use
      * need to prove that impossible to use them somewhere else
    - also delays in critical activities normally increases the costs of the site installation
      * financing expenses and cost escalation
    - events for which the contractor can claim compensation, without creating a delay in the program, may have caused disruption in the contractor’s work and reduced the productivity of personnel and the plant
      * particularly difficult to establish
    - when evaluating the costs of disruption or loss of productivity, one can refer normally to the contractor’s operating costs for personnel and plant
    - where the claim can be valuated by reference to contract prices, overhads and profits are to be included at the rate provided by the contractor in the original make up of his prices
    - where the claim is based on breach of contract, the contractor is entitled to compensation for the loss as it actually occurred

**3° Turnkey contracting under the FIDIC Silver book: what do owners want? What do they get?**

Introduction

The thesis developed is that owners do not get the turnkey solution they want

* the turnkey solution is not as simple as it sounds :
  + inevitable complexities of large projects
  + decreased appetite of contractors in the global projects arena
* there is a shortfall between expectation and actuality in many of the FIDIC provisions:
  + the appearance of risk transfer to the contractor is not as complete as might be suggested by FIDIC’s use of the term turnkey to describe the Silver book

1. Turnkey contracting

* the idea behind the turnkey approach is “for the contractor to be given the job to engineer, procure and construct the required works and then, once ready for operations, to hand over the keys to the owner so that it may operate the facility”
  + Turnkey means a contract whereby the contractor provides whatever is necessary for a certain purpose
    - “Lump sum turnkey” or LSTK: the intended bargain :
      * responsibilities allocated to the contractor to deliver the project on time and to a required performance level
      * in return for payment of a fixed price
    - LSTK include contingency allowances
  + EPC: engineer, procure and construct
* A feature of the turnkey approach to contracting, including revenue generating facilities, is the requirement for the contractor to prove the reliability and performance of the plant and equipment
  + Critical importance for the project to be delivered
    - Within the time and cost constraints
    - But also so that it is capable of meeting its designed production and output levels

1. Projects have a large number of moving parts

* a turnkey contract will be but one part of the contractual framework and one component of the risk management arrangements and contractual framework used on large projects
  + The risk allocation depends on a certain number of factors
  + The turnkey contract is the means by which the risk is allocated
* **The key risk in any construction project is completion risk**:
  + Within the agreed lump sum price, or,
  + Within the agreed time scale program, or,
  + To the required performance quality

1. Impact of an over-heated market

* Document dated from October 2007: huge change in the market
  + “At the time of delivering this paper, it is probably no exaggeration to state that the global construction economy is overheating. Demand for construction goods and services is high, driven particularly by the industrialized growth of large economies in both the People’s Republic of China and in India”

1. A score sheet for the FIDIC Silver book

* Market practice is to amend the silver book to cater for issues which commonly arise in practice and to take account of the particular features of each project

1. Unforeseen ground conditions

* Generally: test of foreseeability
  + “The contract price shall not be adjusted to take account of any unforeseen difficulties or costs”
    - But in practice the provisions of the Silver book are commonly subject to heavy negotiations between the parties

1. Design liability

* The issue of design liability can play a major role in determining the extent to which the turnkey solution is deliverable
  + Contractor is required to take full responsibility for the entirety of the design works
    - Numerous disputes arise where there are changes in the design of the works following award of the contract
    - In practice the risk allocation is frequently changed
      * Depending on the market for instance

1. Handover, testing and commissioning

* in many cases, the owner does not want to wait to take over the plant only after the plant is tested, commissioned, performance tested and ready for start up
  + often the owner will be an experienced operator of the plant
    - the Silver book does not explicitely deal with the issue commonly encountered on many lrge projects: the need for provisions to reflect the pre completion control required by owners
      * testing always a risky enterprise
  + in practice the silver book terms will often be subject to amendment to allo the owner’s team to have control and commercial operation (but not responsibility) by providing expressly for such an apparent dichotomy

1. Force majeure

* if turnkey means allocation of risk to the contractor, clause 19 of the Fidic silver book (force majeure) leaves the door open for that risk to migrate back to the owner
  + 1) both the time and cost impacts of such an event are allocated to the owner
  + 2) also the silver book’s definition of what constitutes force majeure is wider than one might have expected given the supposed turnkey qualities of this form

1. Limitations of liability

* this clause (17.6) is in two parts:
  + 1st: consist of a mutual waiver and release by each party in favor of the other in respect of liability for any indirect or consequential loss, subject to exception
  + 2nd part of the clause comprises a financial cap on liability: the contract price

1. Extension of time

* The Silver book adopts the term “time for completion” allowing the flexibility to apply this to a series of milestones:
  + Silver book contains a mechanism for the extension of this time for completion

Conclusion

* Critics
* But in many respects the Silver book does what it says on the tin: the provisions dealing with undorseen ground conditions, responsibility of the owner’s design and the provisions as to the sufficiency of the contract price are all good devices that help assure the silver book a true turnkey contract
* However: there are undoubtedly a number of areas where the turnkey qualities of yje form can be improved by tighter drafting

Cours 3 - Préparation

* **The legal context and contractual schemes for global infrastructure projects**

**1° LE GOFF, Pierrick : Theory and practice of contracts for the Construction of industrial facilities in Germany: towards a lex mercatoria germanica?, RDAI 2004, p. 5.,** [**http://www.iblj.com/abstract.htm?lg=en&ref=120045-32**](http://www.iblj.com/abstract.htm?lg=en&ref=120045-32)

Abstract:

The contract for the construction of industrial facilities is a complex long-term contract featuring diverse obligations and raising significant risk management issues. Unlike more traditional contracts, this contract does not benefit from any tailor-made provisions found in the German Civil Code. As a result, legal scholars have had to define it and analyze its particularities. While German case law and most scholars classify the industrial facility construction contract as a contract for works, the provisions of the German Civil Code dealing with contracts for works are either absent or not well-suited to address efficiently the real issues in large infrastructure projects. This situation has necessitated the development of solutions to fill the legislative gap in practice. Associations of builders or developers have played an important role in this regard by promulgating guides and model contracts.  More importantly, a specific set of terms and conditions specially adapted to construction projects and known as “VOB” conditions have been initiated by public authorities and enjoy a widespread recognition in the industry.  Finally, the lack of suitability of the German Civil Code has encouraged project participants to negotiate detailed contracts with the hope of avoiding the applicability of statutory provisions. This trend indicates the emergence of a form of customary law, which, by reference to a similar phenomenon in the international contract practice, could be called “lex mercatoria germanica”.

Extract:

Conditions relating to the award and the completion of construction works: Conditions VOB

Legal status of the VOB conditions:

* Recourse to the VOB conditions is compulsory for state utilities awarding public works construction contract, their use for private construction projects is optional
* Jouent un rôle considérable sur le marché allemand de la construction et en particulier pour les contrats de réalisation d’ensembles industriels
  + Pour certains fondamentales dans le droit de la construction allemand

Contents of the VOB Conditions:

Divided into 3 sections:

* VOB/A section includes the rules governing the award of public works,
* VOB/B section is a list of contract clauses: constitutes a model of general conditions similar to the FIDIC Contract conditions at the international level
  + In 18 articles, these conditions attempt to cover exhaustively the main contractual and legal issues recurrently arising in the context of large construction projects
    - Remuneration of the contractor, conditions applicable to the completion of the works on the site and delays in the project schedule, termination of the contract, transfer of risks, indemnifications and liabilities, liquidated damages, take-over of the works, warranty ans settlement of disputes
* VOB/C section contains technical norms applicable to construction projects

VOB conditions: useful instrument to fill the German legislative gaps

* The need for cooperation and communication between the parties involved
  + Art 3 and 4.1 and 4.4
* Address also the circumstances giving rise to time extension and additional cost compensation in several provisions
  + Art 2.5 and 4.9 and 6
* Risk of destruction of the works by unexpected events
  + Art 7
* Finally, the VOB conditions set aside the BGB rules on cancellation of contracts and authorize only contract termination which is a much more realistic approach in view of the size and nature of large construction projects
  + Art 9

The trend towards “contract without a Governing law”

* Participants’ desire to achieve a certain independence from the legal system in which they evolve in doing so they prompt the rise of a form of autonomous law designed for large construction projects

1. The urge for independence vis à vis statutory norms

* through very detailed contracts, the parties attempt not only to cover all possible difficulties likely to arise during the project execution but also to escape simultaneously any law that would otherwise be applicable to such a contract
  + leads to contract “without a governing law” in practice: contracts are supposed to be self sufficient fully freed from any legal system governing the contractual situation
    - ex: penalty clauses: BGB pples: only a min assessment of the expected damage that would result from a breach of contract
    - but permissible to derogate contractually from this statutory pple and many contracts prevent the owner from claiming further damages beyond the caps agreed for the penalty clause
* There is a clear intent by participant in German construction projects to avoid legislatives rules, subject of course to the applicability of mandatory statutory provisions
  + But German law attempts whenever appropriate to limit the applicability of mandatory rules when the contract is between professionals

The consequences of the trend towards “contracts without a governing law”: development of a set of customary rules specially adapted for large construction projects

2. The development of a customary law for large construction projects

* When elaborating sophisticated cntracts, the parties involved in large construction projects take part (consciously or unconsciously) in the debelopment of a legal phenomenon regered to as “a certain form of autonomous law” (W. Kirchgasser)
* Other scholars: “a modern type of contract”
* Comparison of these statements with the idea of the Emergence of a Lex Mercatoria adapted for the needs of international business
  + Lex mercatoria assembles a certain number of fundamental principles that arise from the international contract practice
  + Berger: recent efforts of international practice (such as the publication of the UNIDROIT principles) for international commercial contracts could serve as a reference to define the content of the lex mercatoria
  + Would it be possible to consider that the VOB conditions because they were drafted especially for the construction market by representatives of the various professional groups involved in such market, constitute a form of codification of fundamental principles for large construction projects ?

**2° LE GOFF, Pierrick : A new standard for international turnkey construction contracts: The FIDIC Silver Book, RDAI 2000, p. 151.,** [**http://www.iblj.com/abstract.htm?ref=22000151-158**](http://www.iblj.com/abstract.htm?ref=22000151-158)

The Need for a New Standard for International Turnkey Contracts / The Silver Book in a Nutshell / What is the Future of the Silver Book?

* 1998 : Silver Book

1. The need for a new standard for international turnkey contracts

EPC contracts are the result of a wave of liberalization of certain economies mainly in Asia and Latin America

* especially true of the electricity sector where deregulation and privatization have enabled independent power producers to enter the marker, thereby creating a significant number of privately financed power plants construction projects in developing countries
  + countries have enabled the investment of private funds in the development of local economies
* An interesting feature: the purchaser (owner) is almost invariably a company created specifically for the particular project
* Another major feature of EPC projects: the strong involvement of the financing institutions in the contractual relations between the contractor and the owner
  + Lenders/banks are entitled to specified rights of supervision during the performance of the contract (visit/witness of test)
  + Need for specific contract terms which are not needed for contracts involving publicly financed turnkey infrastructures

2. The silver book in a nutshell

* Employer/purchaser: giving the contractor access to the site, assisting the contractor with obtaining licenses and permits, and paying the contract price
  + an interesting feature of the SB is the requirement that the Employer provide the Contractor with reasonable evidence that financial arrangements have been made to enable the Employer to pay the Contract Price
    - in absence of which the Contractor may terminate the contract
      * often because the Employer is a typical EPC turnkey project : Special Purpose Company with minimal assets
* Contractor: obtain the necessary permits and licenses, carry out the design of the works, provide the Employer with the required operation and maintenance manuals, put in place the agreed performance bonds as security for the due performance of the contract and more generally to provide the works on a turnkey basis and remedy defects in accordance with the contract
  + Particularity of the SB: place on the contractor the risk of unforeseen ground conditions
    - General pple according to which the Contractor is to accept “total responsibility for having foreseen all difficulties and cost of successfully completing he Works”
      * Lenders rely heavily on the certainty of the project costs and schedule: so insist on limiting the number of possibilities for the Contractor to clim extra costs or extra time to perform the works
  + Also the SB contains a full array of standard clauses for major turnkey contracts
* Finally the SB contains a detailed clause regarding the settlement of disputes which, absent of an agreement to the contrary, are to be settled under the arbitration rules of the ICC Article 20
  + Notable characteristic of the settlement of disputes clause is the provision of a fast track pre-arbitration procedure through the constitution of a Dispute Adjudication Board
    - 84 days: decision
    - if parties unsatisfied: full-fledged arbitration

3. What is the future of the SB?

* First it is likely that potential Employers and Contractors will be dissatisfied by the position taken by the SB on certain crucial issues
  + The need to amend the SB to suit a particular project or the general corporate policy of the participants should not be viewed as a significant impairment to its possible use
* Second: although the Sb is primarly intended for EPC turnkey projects involving private finance, it appears that several features typically involve in such projects are missing
  + SB generally silent on the Lenders’ involvement on the project
  + But it recognizes that there may be a need for additional clauses to satisfy the requirements of financing institutions
    - Responsibility of the potential users to tailor the silver book via special conditions to respond to the particular desiderata of the lenders
* Finally, the SB arrives on the market at a time when EPC projects developed with recourse to private project finance have been in existence for several years
  + American and UK law firms: already developed their own standards for EPC contract
    - But reduction of the costs and speed up the process
* Several years needed to fully appreciate how the SB is being received by the international construction industry

**3° The many lives –and faces- of Lex Mercatoria: History as Genealogy in International Business Law, Nikitas E. Hatzimail,** [**http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1484&context=lcp**](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1484&context=lcp)

For over a half century, it has been claimed that cross-border business transactions are governed by a transnational body of norms specific to international trade: generally known as lex mercatoria, the “law merchant.” This legal phenomenon is in fact often described as the “new” lex mercatoria, as distinguished from the “ancient” law merchant, which purportedly flourished in medieval and early modern Europe.

Reading about lex mercatoria is reminiscent of the proverbial Arlésienne: we never get to see her but every one talks about her :

* many have denied its existence
* debate : more and more theorists
* **What is lex mercatoria ?**

Lex mercatoria has been variously described by its advocates as:

* “**a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law,”**
* a “regime for international trade, spontaneously and progressively produced by the societas mercatorum,”
* “a single autonomous body of law created by the international business community,”
* “a hybrid legal system finding its sources both in national or international law and in the vaguely defined region of general principles . . . called ‘Transnational law’”
* “[the] phenomenon of uniform rules serving uniform needs of international business and economic co-operation,”

In the end, regardless of whether an autonomous legal system of transnational commercial law exists now or shall exist in the near future, today lex mercatoria exists as a concept, with strong resonance and powerful symbolic capital.

The divergence of opinion is noticeable even at the level of definition.

There is disagreement as to:

* the legal nature of lex mercatoria (is it a “legal system” complete with its metanorms, a “body of law” less systematic but rather coherent, or a “phenomenon”?),
* as to the process of its creation (spontaneous or evolutionary),
* and as to the lawmaking role of business actors themselves.
* The main dividing line concerns the relationship of lex mercatoria with state law and more generally the states system.
  + There are two main camps:
    - the former—call them “purists” or “autonomists”—insist on the “a-national” or “stateless” character of lex mercatoria.
    - The latter—call them “integrationists”— insist on the ability to “freely combine elements from national and non-national law.”

Article examines in detail two paradigmatic narratives of *lex mercatoria* historiography: the principal historical accounts provided by the two founding fathers of the modern *lex mercatoria*, Clive Schmitthoff and Berthold Goldman

These two historical accounts come from two classic essays providing a comprehensive outlook of the authors’ respective worldviews and normative projects: genealogical narratives form a vital part of the argument in both essays

Schmitthoff and Goldman were instrumental in the formation and shaping of the *lex mercatoria* discourse from its beginnings in the early 1960s until the late 1980s.

More generally, they played important roles in the academic elaboration of international commercial law and international commercial arbitration.

They are also regarded as emblematic of the two basic approaches to *lex mercatoria*:

* **with Schmitthoff emphasizing the use of state and nonstate sources,**
* **and Goldman insisting on the stateless (a-national) character of *lex mercatoria*.**
* **Conclusion**

Article studied the accounts of the two founding fathers of lex mercatoria, who are also identified with the two principal approaches within the mercatorist coalition.

* **Schmitthoff** sought to construct a uniform law of international trade with merchant customs and trade practices alongside international instruments, and possibly national legislation.
  + He even suggested that such coexistence might allow for better growth and adaptability of international business law in the long run.
* **Goldman** was, on the contrary, preoccupied with providing a theory of an autonomous legal system independent from (while respected by) state legal systems (including intergovernmental institutions).

Both are in effect seeking to provide theoretical foundations for something:

* Schmittthoff seeks a foundation for international legislative initiatives and for “vertical” academic treatment of international business law.
* Goldman seeks a legal justification for arbitrators using their good judgment, their knowledge of, and “feel” for the law.

Competing as they may appear, the two narratives do share a lot. They do not differ in their basic facts (medieval customary law, early modern incorporation by state law, low-key persistence of innovative mercantile practice, postwar resurgence of transnational commercial law). They share this normative commitment to the autonomous regulation of transnational business, which is characteristic of all mercatorists. They also share, along with most mercatorist literature, their basic sentiment—what another author calls “the romance of the law merchant.”

**4° Additional document for reference: UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works** [**http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal\_Guide\_e.pdf**](http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf)

Cours 4 - Préparation

**Global Law: A legal Phenomenon emerging from the process of Globalization, P. Le Goff**

* In connection with the process of globalization and its impact on international trade, the question has arisen as to whether a notion of global law, converging around common international practices and values, is emerging for the benefit of multinational economic players and the international community at large
* Ole Lando : "[t)he growing globalisation requires a harmonisation and unification of the rules of law governing world trade."
* Diverging national laws create significant obstacles to cross-border transactions, such that efforts toward the harmonization of national legal principles through the production of a "set of global substantive rules" are more than welcome.
* As Professor Ribstein understandably pointed out during the Indiana University School of Law symposium, *Globalization of the Legal Profession,* it appears that the concept of global law is rather lacking the precision and formality one would normally expect from a classical legal system.

**I. THE NOTION OF GLOBAL LAW**

***A. Global Law and Related Legal Notions***

*1. Global Law and International Public Law*

* International public law is traditionally defined as the set of norms and rules governing the relations between governments or state entities.

*2. Global Law and International Private Law*

* it can generally be said that this field of law serves the purpose of establishing i) rules for the selection of the law applicable to an inter- national situation or contract and ii) rules for the selection of the court competent to rule over an international dispute.
* In a nutshell, international private law covers both the areas of conflict of laws and conflict of jurisdictions.
* in the end, international private law leads to national law and national courts; once a governing law is designated by applying the relevant choice of law rule, such governing law is the national law of a specific country.
* International private law is actually not a very international legal field.
* Since global law is supposed to find its roots in the emergence of internationally recognized legal rules and principles of interest for the world economy at large, its basis is very international compared to international private law and its ambition is to cover much more ground than just choice of law or competent court selection.

*3. Global Law and Comparative Law*

* Comparative law is about comparing, and the comparison is generally between i) national laws of different countries (e.g., comparing German law and English law) or ii) groups of legal systems (e.g., comparing common law and civil law systems)
* Comparative law is also fundamental to the process of international harmonization, since it enables the identification of diverging views between national laws and the submission of proposals to make such laws converge toward a unified solution.
* The essence of comparative law is to compare national laws

*4. Global Law and International Economic Law*

* The broad field of international economic law certainly covers many areas that global law is meant to cover
* The rules governing the World Trade Organization constitute the backbone of international trade law, which is one of the components of inter- national economic law.
* the multidisciplinary nature of the notion of global law requires extending the frontier of global law beyond mere trade relations.
* cross-border pollution
* This leads us to conclude that global law is broader than international economic law

*5. Global Law and the Lex Mercatoria*

* The *lex mercatoria* can be defined as a collection of transnational legal principles, which derive from international contract practice and are especially suited to meet the needs of international commercial transactions.
* U. Stein: "There are doubts about the nature and scope of the *lex mercatoria,* about its legal basis, its field of application, its sources, its state of development and its relation to national and international law."
* Professor Berger at the Center for Transnational Law of the University of Cologne in Germany, clearly ac- knowledge the existence of the *lex mercatoria* as the expression of global economic reality.
* the *lex mercatoria*
* rely expressly on the *lex mercatoria* as a body of governing legal principles applicable to the contract.
* We believe, however, that the notion and scope of global law is much wider than the *lex mercatoria,* since global law is not meant to be restricted to the development of legal principles exclusively applicable to international commercial contracts. Obviously, the *lex mercatoria* plays an important role as a body of norms evolving in a globalizing economy. The *lex mercatoria* should not be treated, though, as being similar to the notion of global law, but as constituting one of its key elements.

***B. Global Law: Attemptat a Definition***

This leads us to make a proposal presenting global law primarily as a multicultural, multinational, and multidisciplinary legal phenomenon, which has not yet reached the maturity and formality of a structured legal system

***1.*** *Global Law Is a Multicultural, Multinational and Multidisciplinary Legal Phenomenon.*

* The foregoing developments on global law and related legal notions teach us that global law is broader than legal fields such as comparative law, international private law, or international public law. **All** these legal fields are relevant to the process of globalization of the world economy, but are too narrow to reflect its overall dimension. Thus, they can only be viewed as forming part of the contents of the notion of global law. The fact that all these fields, without exception, are included in the course offerings of major law schools or institutes focusing on global law confirms this analysis.
* A large variety of international and multidisciplinary legal fields. On this particular point, we fully share the views expressed by Professor Weiler, Faculty Director of the Hauser Global Law School Program, who explains that "Global Law School is not only, or even mostly, about 'International' or 'Globalization' with a capital I or 'G' but is a reflection of the internationalization and globalization *of all dimensions of law,* be they corporate or environmental.",
* we would tend to define global law as a multi- cultural, multinational, and multidisciplinary legal phenomenon finding its roots in international and comparative law and emerging through the international legal practice that was prompted by the globalization ofthe world economy. What conclusions can be drawn from this definition? This is precisely what we need to address next

*2. Global Law Does Not Yet Constitute a Formal and Structured Legal System*

* Professor Ribstein during the Indiana University School of Law symposium, *Globalization of the Legal Profession:* It is indeed correct that there is currently no "Global Law Code" or other formal legal instrument or database to access precise information on the rules and regulations forming global law. It is equally correct that there is no "Global Law Court of Justice" sanctioning violations of the global law and setting forth global law judicial precedent.
* A decent indication that global law is moving in this direction is seen in the developments in the field of international criminal law, which is an area of law falling within the notion of global law according to our definition. The summary of the core achievements of the International Criminal Tribunal for the former Yugoslavia, emphasized that the Tribunal
* [H]as expanded the boundaries of international humanitarian and international criminal law.... It was the first international criminal court to enforce the existing body of international humanitarian law, and in particular judicially determine its *customary law aspects....* It has created an *independent system of law,* comprising elements from adversarial and inquisitory criminal procedure traditions.... The Tribunal has created a *Judicial Database* of all its jurisprudence
* In another area, namely international trade law, H. van Houtte and P. Waute- let remind us that various websites are dedicated to the collection of decisions applying the 1980 United Nations Convention on Contracts for the International Sale of Goods, and that arbitral awards applying the Principles of International Commercial Contracts conceived by UNIDROIT are now published on the website of this organization.
* Against these developments, the authors conclude: "Globalization, the very phenomenon that called for the creation of uniform rules, lends a helping hand in securing an international reading of uniform rules."
* As we can see, there is hope for more formalism and more precision in the development of global law and in the definition of its parameters.
* By comparison, when referring to the notion of global law, Professor Paliwala distinguishes between the "regional global" and the "universal global" approach. This is an indication that global law will not emerge simultaneously on a worldwide basis.
* Once the efforts toward shaping these sub-categories reach a more advanced stage, an overarching vision of the concept and con- tents of global law will emerge more clearly.

**II. THE CREATION OF GLOBAL LAW**

*It would be too burdensome to review in an exhaustive manner all institutions and groups of legal professions influencing or taking a leading role in shaping the contents of global law. We will therefore focus on a few selected examples enabling us to outline in a clear manner the process of developing norms, principles, and regulations specifically adapted to the needs of a global economy.*

***A. The Role ofInternationalOrganizations***

*1. The United Nations*

* The impact of the United Nations is tremendous.
  + Institutions such as the World Bank, the International Monetary Fund, the World Intellectual Property Organization, the World Health Organization, or the United Nations Industrial Development Organization contribute to the emer- gence of norms, rules, or practices of direct relevance to the development of global law
* Slowly but surely creates a set of global references, even for private projects not funded by the World Bank.
  + If we take the field of international construction projects, UNCITRAL has developed very useful tools for international practitioners, such as the UNCITRAL legal guide on drawing up international contracts for the construction of industrial works or the more recent model legislative provisions on privately financed infra structure projects.
* Professor Gross and Dean Cachard emphasize that they constitute some form of "soft law" developed by UNCITRAL after a thorough analysis of the contractual practice in relation to BOO (Build-Own-Operate) projects.

*2. The European Union*

* Live example of a regional effort toward harmonizing legal systems.
* Major advantage of the European Union is the existence of the European Court of Justice, which enables judicial precedents to be consistent throughout the Member States.
* In addition, the European Union has embarked more recently on wider legislative efforts with a view to accelerate the process of harmonization.
* The best example is probably the initiative of the European Commission to solve the divergence of national contract law by searching for more aggressive and broader unification in this field.
* All of this goes in the direction of establishing a "hub” of global contract law within the wider notion of global law.

*3. The International Chamber of Commerce*

* The International Chamber of Commerce (ICC) presents itself as the "world business organization.
* Among the highlights, the Incoterms (e.g., Ex Works, Free on Board, Cost Insurance & Freight, Delivered Duty Paid) certainly join the top ten of the best achievements of the ICC
* By compiling standard trade definitions most commonly used in international sales contracts, the Incoterms "are at the heart of the world trade," as the ICC proudly publicizes.

The ICC Model Contracts are another major contribution of the ICC worth mentioning.

*4. InternationalArbitrationCenters*

* International arbitration is a preferred way to settle international disputes
* For international construction projects, for instance, the normal approach is to exclude the competency of national courts in favor of an arbitration panel.
* As a result, international arbitration centers are necessarily at the heart of the development of practices shared by international lawyers and, consequently, contribute to the forming of this important area of global law.
* International arbitration centers facilitate the definition of and access to the source of law in the field of international commercial arbitration and, by the same token, are part of the global law experience.

*5. InternationalTradeAssociations*

* International trade associations regroup individuals or companies that belong to the same economic branch and are involved in international matters. Through- out the world, the number of these associations is difficult to estimate, but there are certainly thousands of them in all types of markets
* The most well known at the international level is the International Federation of Consulting Engineers (FIDIC) seated in Geneva, Switzerland
* For the benefit of their members and of international lawyers advising clients in the relevant industries, these trade associations produce very useful guidelines and model contracts that are quite widely used by practitioners.
* Of very global application are the various FIDIC conditions of contract, which are regularly encountered on numerous construction projects worldwide.
  + Worth mentioning among the FIDIC collection is the "FIDIC Silver Book-Conditions of Contract for EPC Turnkey Projects," which constitutes one of the most recent inter- national model contracts for privately financed infrastructure projects.

***B. The Role of International Law Practitioners***

* It will certainly not come as a full surprise that international lawyers strongly contribute to the development of global law. To a large extent, they stand to benefit the most from it.
  + As H. van Houtte and P. Wautelet put it, "[b]y far the greatest obstacle the international lawyer faces... is the existence of widely diverging national laws.... It is no wonder, therefore, that lawyers have welcomed the at- tempts of states and various organizations to unify and/or harmonize national legal rules."

*1. Global Law Firms*

* With such global infrastructures, international law firms clearly have the potential to contribute to the emergence of global law, and do so effectively. These firms traditionally work on major cross-border transactions.
* The role of global law firms in the process of legal harmonization transpires through their endeavors to ensure consistency in quality and to offer seamless legal service throughout their multi-office base.

*2. Global In-house Legal Departments*

* Multinational corporations are equipped with global in-house legal departments. Similar to global law firms with their multi-office base, global legal departments are made of in-house lawyers based at the main geographical sites where the corporation has a foreign industrial or commercial presence. Global legal departments are more discreet than global law firms, since their services are for the exclusive use of their employer.
* An interesting feature of global legal departments is that they need to integrate and spread identical corporate and business values over groups of lawyers with very diversified cultural, ethnic, and professional backgrounds. It is not unusual for legal departments of major international corporations to exceed the symbolic threshold of more than 100 members coming from a multitude of foreign jurisdictions and having different legal education or professional qualifications.

*3. InternationalJudgesandArbitrators*

* The contribution of judges and arbitrators involved in international cases to the development of global law is so obvious that only a few lines are needed to explain it. Actually, we have already touched upon this aspect when explaining the input of the International Criminal Tribunal for the former Yugoslavia in the formation of international criminal law.
* Burke-White refers with pertinence to the notion of "Judicial Globalization" when discussing the legal significance ofthis practice.
* As to international arbitrators, we have already mentioned their leading contribution in establishing and enforcing legal principles specifically suited for international commercial relations.

*4. International Lawyers' Associations*

* the International Bar Association (IBA), which presents itself as "the global voice of the legal profession."
* Another classic example is the Swiss Arbitration Association (ASA), which gathers Swiss and foreign lawyers specialized in, or having a strong interest in, the field of inter- national arbitration."

*5. International Alumni Associations*

* Similar to international lawyers' associations, international alumni associa- tions enable a multilateral flow of information and sharing of expertise among legal experts, especially if they are active in organizing alumni reunions

***C. The Role of Universities***

This article would be severely incomplete without mentioning the crucial role played by universities in the process of global law creation. Addressing the services rendered by universities toward the shaping of this international regime is all the more appropriate for a publication in a law review dedicated to global legal studies.

*1. International and Comparative Law Curriculum*

*2. International and Comparative Law Reviews*

*3. International Exchange Programs*

*4. International or Comparative Law Institutes*

**CONCLUSION**

Without the tremendous efforts deployed by international organizations, international practitioners, universities and other academic institutions such as international and comparative law institutes, the status of development of global law would probably be too negligible to dare to write about it. Even so, this does not imply that the status is very advanced. Much more needs to be done before all sub-categories of global law evoked in this article converge through a pyramidal effect toward a fully recognized and stand-alone global law system, with its own Global Law Code and its own Global Court of Justice applying it. Nevertheless, the current situation tells us that global law is in motion. It is a fact, not just a theory, and we can all contribute to it.

**The Lex Mercatoria and International Contracts: A challenge for International Commercial Arbitration?; A.F.M. Maniruzzaman, American University International Law Review, 1999**

1. The theory of the Lex Mercatoria
2. Different aspects concerning the Lex Mercatoria:

70. *See* Mustill, *supra* note 4, at 174-77. For an understanding of those rules it seems reasonable to reproduce them in the following manner:

1. A general principle that contracts should prima facie be enforced according to their terms: *pacta sunt serranda.* The emphasis given to this maxim in the literature suggests that it is regarded, not so much as one of the rules of the *Iex mercatoria* but as the fundamental principle of the entire system.

2. The first general principle is qualified at least in respect of certain longterm contracts, by an exception akin to *"rebussic stantibus'.* The interaction of the principle and the exception has yet to be fully worked out.

3. The first general principle may also be subject to the concept of *abus de droit.* and to a rule that unfair and unconscionable contracts and clauses should not be en- forced.

4. There may be a doctrine of *culpa in contrahendo.*

5.A contract should be performed in good faith.

6. A contract obtained by bribes or other dishonest means is void, or at least unenforceable. So too if the contract creates a fictitious transactions designed to achieve an illegal object.

7. A State entity cannot be permitted to evade the enforcement of its obligations by denying its own capacity to make a binding agreement to arbitrate, or by asserting that the agreement is unenforceable for want of procedural formalities to which the entity is subject.

8. The controlling interest of a group of companies is regarded as contracting on behalf of all members of the group, at least so far as concerns an agreement to arbitrate.

9. If unforeseen difficulties intervene in the performance of a contract, the parties should negotiate in good faith to overcome them, even if the contract contains no revision clause.

10. 'Gold clause' agreements are valid and enforceable. Perhaps in some cases either as gold clause or a 'hardship' revision clause may be implied.

11. 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.

12. No party can be allowed by its own act to bring about a non-performance of a condition precedent to its own obligation.

13. A tribunal is not bound by the characterization of the contract ascribed to it by the parties.

14. Damages for breach of contract are limited to the foreseeable consequences of the breach.

15*.* A party which has suffered a breach of contract must take reasonable steps to mitigate its loss.

16. 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.

17. 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.

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

19. Contracts should be construed according to the principle *ut res magis valeat quampereat.*

20. Failure by one party to respond to a letter written to it by the other is regarded as evidence of assent to its terms.

1. The role of Arbitrator in the development of the Lex Mercatoria
2. Application of the Lex Mercatoria by tribunals: the present state
3. The Lex Mercatoria as a Legal Order
4. Applying “Rules of Law” instead of a Legal System to settle international Contract disputes
5. The Lex Mercatoria as a Legal Process: the conceptual framework and caveat
6. Impediments towards the growth and development of the Lex Mercatoria

**CONCLUSION**

Having thus made observations and cautionary remarks on the various important aspects of the lex mercatoria, a few conclusions may be drawn. Although, from the positivists' point of view, the lex mercatoriais not a legal system per se and hence cannot be itself the proper law of an international commercial contract, there seems to be a recent trend to endorse the view, in both national and international arbitration practice, that "rules of law," which could include the lex mercatoria, may be applied in certain circumstances as well as on their own. The philosophy seems to be that if "rules of law" pro- vide suitable resolutions to a dispute, it is not necessary to consider whether they constitute a legal system.

Since there still remains serious disagreement among jurists as to the sources, methodology, and contents of the lex mercatoria, some are content to hold the view that the lex mercatoria may serve the purpose, at best, of subsidiary rules for the settlement of a dispute in hand. Professor Lowenfeld has considered that the status of the lex mercatoria is not, in other words, supposed to be revolutionary. What it does do, if properly used, is to clarify, to fill gaps, and to reduce the impact of peculiarities of individual countries' laws, often not designed for international transactions at all."

Even in the corpus of the lex mercatoria, some may claim that certain rules belong to it, while others are doubtful that those rules apply. Thus, the differences in formulation may lead to an incoherent body of rules to be claimed as the lex mercatoria, which, in turn, may cause the unpredictability of the outcome of any dispute.

It should be noted that the application of the lex mercatoria, or the third legal order, has been found to be acceptable either as an express choice-of-law provision or directly as applicable substantive law, in the absence of any choice of law, without reference to any conflict rules. In the present state of development of law, the application of the lex mercatoria to an international contract contrary to an express choice of a different law is not tolerated.

Sometimes arbitrators seem to be overtaken by their preconceived views and legal dogma, even in disregard of the actual context of the case. In many arbitral awards, arbitrators fail to provide sufficient reasons for their decisions on substantive matters, which may lead to ambiguous interpretations among jurists. This state of affairs in the context of international commercial arbitration is not favorable for the sound growth and development of the lex mercatoria. A global institutional control mechanism should be established to standardize international arbitral practice and jurisprudence and to help develop a consistent body of arbitral lex mercatoria. On the threshold of the twenty-first century, international commercial arbitration as an institution, with its growing popularity amongst the international business community, faces a tremendous challenge to develop a consistent body of international jurisprudence on the lex mercatoria that may be universally acceptable.

Cours 5 - Préparation

**Notion of “best efforts”:** [**http://www.callawyer.com/Clstory.cfm?eid=890865**](http://www.callawyer.com/Clstory.cfm?eid=890865)

 A "best efforts" clause must be one of the **most misunderstood provisions** to consistently worm its way into an agreement. To put such a claim to the empirical test, take a moment to define for yourself what is required by a party who promises to use best efforts to fulfill a contract obligation.

OK, have you given it your best effort?

A common assumption is that "best efforts" means exercising the highest level of duty required. In some cases, this isn't far off.

Contractual language: The next lawyerly instinct you might have is to look at the letter of the agreement to discern exactly what you are required to do under the best efforts clause. Unfortunately for you, all it says is that you are required to use your best efforts to market and promote what is now an outdated product. It gives no indication about how those efforts will be measured.

Case law: Some courts have defined best efforts by comparing it to other recognized diligence standards. For example, in National Data Payment Systems, Inc. v. Meridian Bank, the court held: "The duty of best efforts 'has diligence as its essence' and is 'more exacting' than the usual contractual duty of good faith." (212 F.3d 849 at 854 (2000).)

      And United Telecommunications, Inc. v. American Television & Communications Corp. (536 F.2d 1310 (1976)) held that, as between commercial parties, a best efforts clause is intended to impose a duty beyond a good faith, duly diligent performance of the contract. Hardly the clear-cut rule of law that tells you whether you are in breach of your agreement. (It would be a lot easier to become a celebrity and read about yourself in People.)

      Nearing desperation in your research efforts, you reach out to find the unpublished decision of Krinsky v. Long Beach Wings (2002 Cal. App. Unpub. LEXIS 9026) and digest its ruling. In construing best efforts, the court in that case observed that "the plain meaning of the term denotes efforts more than usual or even merely reasonable."

Code provisions: Uniform commercial code

The "standard industry practice" has served as a gauge for determining whether efforts are sufficiently "best" to defeat a claim for breach. (See Zilg v. Prentice-Hall, 717 F.2d 671, 681 (1983), cert denied, 466 U.S. 938 (1983), finding that the defendant's efforts were "perfectly adequate," although the defendant did not follow through as well as he might have.) But this assumes that industry standards can be identified.

* Here's the point: **Because of the uncertainty surrounding the legal effect of a best efforts promise, the best approach appears to be treating these clauses as unenforceable if they lack any objectively measurable standards.** (See Pinnacle Books, Inc. v. Harlequin Enter. Ltd., 519 F. Supp. 118, 12122 (1981): absent an objective criteria by which to measure performance, "best efforts" clauses are so vague as to be unenforceable; Jillcy Film Enter., Inc. v. Home Box Office, Inc., 593 F. Supp. 515, 520–21 (1984) (accord).)

In Pinnacle Books, an author granted his publisher an option to renew the parties' contract for a series of books. The agreement provided, however, that if after extending their best efforts, the parties were unable to reach an agreement, the author would be free to offer his rights in these books to any other publisher. The court held that this best efforts clause was unenforceable because its terms were too vague.

      Specifically, it held: " 'Best efforts' or similar clauses, like any other contractual agreement, must set forth in definite and certain terms every material element of the contemplated bargain." **And also: "Essential to the enforcement of a 'best efforts' clause is a clear set of guidelines against which the parties' 'best efforts' may be measured."** (519 F. Supp. at 121.)

      Furthering this end, the court noted: "Unless the parties delineate in the contract objective standards by which their efforts are to be measured, the very nature of contract negotiations renders it impossible to determine whether the parties have used their 'best' efforts. ... Thus, absent express standards, a court cannot decide that one party's offer does not constitute its best efforts; nor can it say that the other party's refusal to accept certain terms does not constitute its best efforts." (519 F. Supp. at 122.)

**This isn't hard: All it means is that if the parties are intent on including a best efforts clause, they must clearly define for themselves within the body of the agreement precisely what this means and how it will be measured**. They need to set guidelines a court can use to determine what was required by the promisor and whether those requirements were met.

      In the case of your agreement to sell software, for example, the contract might have included a requirement that you offer those products, explain their features, and wait for the customer to expressly ask for another product before you offer one. It might require that you offer the manufacturer's product to 100 prospective customers per month, or at least to as many as you offer any competitive product. As long as the agreement contains some objective standards, it would allow for a clear determination of breach.

      But without any measurable standards, the parties and the trier of fact are left to wonder what was meant by the term best efforts. Standing alone, its meaning is nebulous and its enforceability tenuous. This is risky business: It subjects one party to a claim for breach for having failed to perform to a level it never intended—and would never have agreed to—and subjects the other party to losing the benefit of a promise for which it thought it had bargained.

      When it comes to contractual provisions, no one benefits by being left to guess at what was meant by the words on the page. A best efforts clause must

**Kenneth A. Adams** [**http://www.adamsdrafting.com/downloads/Best-Efforts-Practical-Lawyer.pdf**](http://www.adamsdrafting.com/downloads/Best-Efforts-Practical-Lawyer.pdf)

 Contract provision using the phrase best efforts or one of its variants are often a source of contention and confusion when a contract is being negotiated. They can also be a source of dispute after the contract has been signed. This article analyzes how lawyers use best efforts and its variants; what best efforts and its variants mean when not defined by contract; and how courts go about determining whether a party has made the required efforts. **This article recommends that if you provide in a contract that a party is subject to an efforts standard, generally you should specify by means of a defined term what sort of actions would satisfy that requirement**. This article discusses which defined term to use and how to define it, and also ad- dresses issues relating to the wording of efforts provisions.

Contracts impose an efforts standard in connection with many different obligations, such as an obligation to cause a registration statement to become effective by a certain time, an obligation to obtain consents required for closing, or an obligation to promote sales of a product.

Some courts have held that the appropriate standard is one of good faith.

As an alternative to a good faith standard, some recent cases have used a reasonableness standard.

The case law on the meaning of best efforts suggests that instead of representing different standards, other efforts standards mean the same thing as best efforts, unless a contract definition provides otherwise.

Determining whether a party has complied with an efforts provision is facilitated if the efforts that were actually made can be compared against some benchmark

* promises made during the negotiations
* industry practice
* efforts used by the promisor in connection with other contracts imposing an efforts standard
* how the promisor would have acted if the promisor and promisee had been united in the same entity

Although the term best efforts and its variants are a standard feature of contracts, there is much confusion surrounding what those terms mean. Furthermore, a court could hold that a party subject to an efforts provision was obligated to make efforts out of proportion to the benefits to it under the contract in question. When in drafting a contract you wish to require that a party act diligently to further a contract goal, you could avoid these problems by using the defined term reasonable efforts and using the definition recommended in this article, while counsel to a party on whom such a requirement is imposed should consider the possible carve-outs listed in this article.

**Be Clear When Using Best Efforts, By Christopher W. Hamli**

**??!**

**Is There A Duty Of Good Faith In Construction Contracts? , Last Updated: 5 June 2008, Article by**[**Charlene Linneman**](http://www.mondaq.com/content/author.asp?article_id=61500&author_id=387748)**,**

 The rise of the use of partnering contracts and other contracts such as the NEC that expressly refer to phrases such as 'mutual trust and co-operation' and 'good faith' has turned the spotlight onto the general obligations of parties to construction contracts towards each other. In particular, do parties owe each other an implied duty of good faith when performing their rights and obligations pursuant to a contract that does not expressly refer to 'mutual trust and co-operation' or 'good faith'?

Good faith can be defined in many different ways. It incorporates both subjective elements by requiring honesty and objective elements by requiring adherence to standards of fair dealing. Variations in the meaning of good faith occur between different legal systems due to cultural and geographical differences. In England and Wales, it is often criticised for being a nebulous and vague concept and it has been stated that instances of bad faith are more easily recognisable than good faith.

English judges have on occasion attempted to define good faith. Generally good faith is taken to mean fair play and open dealing. Lord Justice Bingham (as he then was) in Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd defined good faith as "in essence a principle of fair and open dealing". The parties 'should not deceive each other' with obligations to 'play fair', 'come clean', or 'put one's cards on the table'.

On a European basis, the Lando Commission's Principles of European Contract Law defines good faith to mean 'honesty and fairness in mind, which are subjective concepts'. An Australian Judge, Mr Justice Miller in Bond Corporation Pty Ltd v the Western Australian Planning Commission defined good faith as having two divergent meanings: "*The first is a broad or subjective view which requires inquiry into the actual state of mind of the person concerned & The second involves the objective construction of the words by the introduction of such concepts as an absence of reasonable caution and diligence*."

Some Common Law jurisdictions such as Canada and various states of Australia recognise an implied duty of good faith in contractual performance. For example, the Supreme Court of Victoria, Australia, in the 2007 case of Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd ruled that the principles of good faith may apply to the operation of a termination for convenience clause present in the parties' contract.

Good faith is also recognised in many civil law countries such as France, Germany and the Netherlands. In these countries, the civil Codes govern the parties' obligations towards each other. For example, the German Civil Code provides at §242 that: "*The debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration*."

With the exception of contracts that are *uberrimae fidei* ("utmost [good faith](http://en.wikipedia.org/wiki/Good_faith)") such as insurance contracts, English law does not yet recognise an implied duty of good faith in the performance of contracts. Part of the court's reluctance to introduce a duty of good faith is because of the nebulous nature of the concept of good faith. The court also adheres to the principles of freedom of contract i.e. parties are free to contract on their own terms as far as possible and these agreements should be upheld and enforced by the courts.

However, parties sometimes include terms in their contracts that embody good faith concepts. In the context of construction contracts, the Technology and Construction Court considered a good faith clause when considering a project manager's duty of impartiality in administering a contract in Costain Ltd v Bechtel Ltd. In this case, the claimant and defendants were working on the Channel Tunnel High-Speed Rail Link. One of the contract recitals provided that: "*The Employer, the Contractor and the Project Manager act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract*."

Costain sought an injunction to restrain Bechtel from instructing, persuading or otherwise encouraging any employee, servant or agent of Bechtel or an associated company to seek to operate the assessment and certification functions of the project manager otherwise than impartially and in good faith. The evidence showed that Bechtel staff were advised to exercise their functions under the contract in the interests of the employer and not impartially. In obiter, Mr Justice Jackson referred to the use of the phrase "good faith" in the contract and stated that it was sometimes used as a synonym for impartially and sometimes as a synonym for honestly. In the context of certification, the Judge did not believe a debate about the meaning of the phrase "good faith" would serve a useful purpose. Therefore, the judgement concentrated on whether there was a duty of impartiality and whether it was arguable that this duty had been breached. The Judge believed that it was arguable that the duty had been to act impartially as between employer and contractor when the project manager was assessing sums payable to the contractor. However, an interim injunction was not granted.

This is the only case that has come before the courts considering the good faith obligations in the NEC3 contract. The court did not expressly consider the nature of the obligations of good faith and what the term 'mutual trust and co-operation' requires in the context of a construction contract. In particular, whether it required anything more from the parties than what they were required to do under 'conventional' construction contracts that do not import the obligations of good faith expressly into a construction contract. Therefore, the court actually shied away from such a discussion.

Rather than adopt a broad overarching principle such as good faith, the English courts have instead adopted solutions to unfair situations presented to them. For example, in relation to construction contracts, courts will commonly imply terms into the party's contract to remedy unfair situations on the basis of the parties' presumed intention. One example is that the contractor must do all work under the contract with proper skill and care. In the case of Balfour Beatty v Docklands Light Railway, Counsel for the employer accepted without reservation that an employer was not only bound to act honestly but also bound by contract to act fairly and reasonably, even when no such obligation was expressed in the contract. This concession was accepted by the Court of Appeal. This concession remedied a potentially unfair situation in the Contract.

Despite English court's reluctance to imply a general duty of good faith, they will interpret and give effect to express references to good faith in contracts. For example, in the case of Berkeley Community Villages Ltd, Berkeley Group plc v Fred Daniel Pullen, Kathleen Marguerite Pullen and Alan John Pullen¸ the parties' contract contained a term that the parties would act in the "utmost good faith". This was held to impose a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the relevant Agreement and also required faithfulness to the agreed common purpose and consistency with the justified expectations of the claimants.

Conclusion

Despite the rise of the use of construction contracts referring to good faith concepts, a decision on the interpretation of a good faith clause in a construction contract is awaited**. However, although there is no implied duty of good faith in construction contracts, the courts have found solutions to unfair (or bad faith) situations that have been presented to them. In this way, the courts have implemented incremental solutions to these situations rather than adopting a broad overarching good faith principle.** Until a decision is forthcoming on the interpretation of good faith clauses, whether there is a difference between the court's previous solutions to unfair situations that currently apply to 'conventional' contracts and good faith contracts remains to be seen.

**INCOTERMS,** [**http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/**](http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/)

The Incoterms rules have become an essential part of the daily language of trade. They have been incorporated in contracts for the sale of goods worldwide and provide rules and guidance to importers, exporters, lawyers, transporters, insurers and students of international trade.

Incoterms rules have traditionally been used in international sale contracts where goods pass across national borders. In various areas of the world, however, trade blocs, like the European Union, have made border formalities between different countries less significant. Consequently, the subtitle of the Incoterms 2010 rules formally recognizes that they are available for application to both international and domestic sale contracts. As a result, the Incoterms 2010 rules clearly state in a number of places that the obligation to comply with export/import formalities exists only where applicable. Two developments have persuaded the ICC that a movement in this direction is timely. Firstly, traders commonly use Incoterms rules for purely domestic sale contracts. The second reason is the greater willingness in the United States to use Incoterms rules in domestic trade rather than the former Uniform Commercial Code shipment and delivery terms.

**Understanding Incoterms - handy guide to Incoterms,** [**http://www.inboundlogistics.com/cms/article/understanding-incoterms/**](http://www.inboundlogistics.com/cms/article/understanding-incoterms/)

* *a handy guide to Incoterms, a set of international rules for the interpretation of the most commonly used trade terms. Applying Incoterms to sale and purchase contracts makes global trade easier and helps partners in different countries understand one another.*

When global companies enter into contracts to buy and sell goods they are free to negotiate specific terms. These terms include the price, quantity, and characteristics of the goods. Every international contract also contains what is referred to as an Incoterm, or international commercial term.

There are 13 main terms and several secondary terms that denote the points at which shipper, carrier, and consignee risk and responsibility start and end.

The parties to the transaction select the Incoterms, which determine who pays the cost of each transportation segment, who is responsible for loading and unloading of goods, and who bears the risk of loss at any given point during an international shipment. Incoterms also influence customs valuation basis of imported merchandise.

The International Chamber of Commerce in Paris oversees and administers Incoterms, and they are adhered to by the major trading nations of the world. The ICC first published this set of international rules in 1936 as "INCOTERMS 1936." Incoterms are amended every 10 years.

There are currently 13 Incoterms in use, and they are described below. Ex-works, Free on Board, Cost Insurance Freight, and Delivery Duty Paid are the most frequently used Incoterms.

Incoterms are recognized globally by courts and other authorities. Frequently, parties to a contract are unaware of the different trading practices in their respective countries. This lack of knowledge can lead to misunderstandings and disputes between customer and supplier. The incorporation of Incoterms in international sales contracts reduces this risk.

Group E (Departure)

**EXW: EX-WORKS**

The seller, or exporter, makes the goods available to the buyer, or importer at the seller's premises. The buyer is responsible for all transportation costs, duties, and insurance, and accepts risk of loss of goods immediately after the goods are purchased and placed outside the factory door.

The Ex-Works price does not include loading goods onto a truck or vessel, and no allowance is made for clearing customs.

If FOB is the customs valuation basis of the goods in the country of destination, the transportation and insurance costs from the seller's premises to the port of export must be added to the Ex-Works price.

Under EXW, sellers minimize their risk by making the goods available at their factory or place of business.

Group F (Main Carriage Not Paid By Seller)

**FAS: FREE ALONGSIDE SHIP**

Sellers transport the goods from their place of business, clear the goods for export, and place them alongside the vessel at the port of export, where the risk of loss shifts to the buyer. The buyer is responsible for loading the goods onto the vessel, unless specified otherwise, and for paying all costs involved in shipping goods to the final destination.

**FCA: FREE CARRIER**

The seller, or exporter, clears the goods for export and delivers them to the carrier and place specified by the buyer.

If the place chosen is the seller's place of business, the seller must load the goods onto the transport vehicle; otherwise, the buyer is responsible for loading the goods. The buyer assumes risk of loss from that point forward and must pay for all costs associated with transporting the goods to the final destination.

**FOB: FREE ON BOARD**

The seller, or exporter, is responsible for delivering the goods from its place of business and loading them onto the vessel at the port of export, as well as clearing customs in the country of export.

As soon as the goods cross the "ships-rails" (the ship's threshold) the risk of loss transfers to the buyer, or importer. The buyer must pay for all transportation and insurance costs from that point, and must clear customs in the country of import.

An FOB transaction will read "FOB, port of export." For example, assuming the port of export is Boston, an FOB transaction would read "FOB Boston." If CIF is the customs valuation basis, international freight and insurance must be added to the FOB value.

Group C (Main Carriage Paid By Seller)

**CFR: COST AND FREIGHT**

The seller, or exporter, is responsible for clearing the goods for export, delivering the goods past the ships rail at the port of shipment, and paying international freight charges. The buyer assumes risk of loss once the goods cross the ship's rail, and must purchase insurance, unload the goods, clear customs, and pay for transport to deliver the goods to their final destination.

If FOB is the customs valuation basis, the international freight costs must be deducted from the CFR price.

**CIF: COST, INSURANCE AND FREIGHT**

The seller, or exporter, is responsible for delivering the goods onto the vessel of transport and clearing customs in the country of export. The exporter also is responsible for purchasing insurance, with the buyer (importer) named as the beneficiary.

Risk of loss transfers to buyer as the goods cross the ship's rail. If these goods are damaged or stolen during international transport, the buyer owns the goods and must file a claim based on insurance procured by the seller. The buyer must clear customs in the country of import and pay for all other transport and insurance in the country of import.

CIF can be used as an Incoterm only when the international transport of goods is at least partially by water. If FOB is the customs valuation basis, the international insurance and freight costs must be deducted from the CIF price. A CIF transaction will read CIF, port of destination.

For example, assuming that goods are exported to the Port of Los Angeles, a CIF transaction would read "CIF Los Angeles."

**CPT: CARRIAGE PAID TO**

The seller, or exporter, clears the goods for export, delivers them to the carrier, and is responsible for carriage costs to the named place of destination. Risk of loss transfers to the buyer once the goods are transferred to the carrier and the buyer must insure the goods from that time on.

If FOB is the customs valuation basis, the international freight cost must be deducted from the CPT price.

**CIP: CARRIAGE AND INSURANCE PAID TO**

The seller transports the goods to the port of export, clears customs, and delivers them to the carrier. From that point, risk of loss shifts to the buyer. The seller is responsible for carriage and insurance costs to the named place of destination. The buyer is responsible for all costs, and bears risk of loss from that point forward.

If FOB is the customs valuation basis, international freight and insurance costs need to be deducted from the CIP price.

Group D (Arrival)

**DAF: DELIVERED AT FRONTIER**

The seller, or exporter, is responsible for all costs involved in delivering the goods to the named point and place at the frontier (the border between the two countries). Risk of loss transfers at the frontier. The buyer must pay the costs and bear the risk of unloading the goods, clearing customs, and transporting the goods to the final destination.

If FOB is the customs valuation basis, the international insurance and freight costs must be deducted from the DAF price.

**DES: DELIVERED EX-SHIP**

The seller, or exporter, is responsible for all costs involved in delivering the goods to a named port of destination. Upon arrival, the goods are made available to the buyer, or importer, on board the vessel. The seller is responsible for all costs and risk of loss prior to unloading at the port of destination.

The buyer, or importer, must have the goods unloaded, pay duties, clear customs and provide inland transportation and insurance to the final destination.

**DEQ: DELIVERED EX-QUAY**

The seller, or exporter, is responsible for all costs involved in transporting the goods to the wharf (quay) at the port of destination. The buyer must pay duties, clear customs, and pay the cost and bear the risk of loss from that point forward.

If FOB is the customs valuation basis, the international insurance and freight costs, in addition to unloading costs, must be deducted from the DEQ price.

**DDU: DELIVERED DUTY UNPAID**

The seller, or exporter, is responsible for all costs involved in delivering the goods to a named place of destination where the goods are placed at the disposal of the buyer. The buyer, or importer, assumes risk of loss at that point and must clear customs, pay duties, and provide inland transportation and insurance to the final destination.

**DDP: DELIVERED DUTY PAID**

The seller, or exporter, is responsible for all costs involved in delivering the goods to a named place of destination and for clearing customs in the country of import.

Under a DDP Incoterm, the seller provides literally door-to-door delivery, including customs clearance in the port of export and the port of destination. Thus the seller bears the entire risk of loss until goods are delivered to the buyer's premises.

A DDP transaction will read "DDP named place of destination." For example, assuming goods imported through Baltimore are delivered to Silver Spring, the Incoterm would read "DDP, Silver Spring."

If CIF is the customs valuation basis, the costs of unloading the vessel, clearing customs, and delivery to the buyer's premises in the country of destination—including inland insurance—must be deducted to arrive at the CIF value.

*Rules of the Road*

***A)*** *It is the seller's primary duty to deliver the goods on board the vessel named by the buyer at the named port of shipment on the date or within the period stipulated and in "the manner customary at the port." The parties in these circumstances have to follow the custom of the port regarding the actual measures to be taken in delivering the goods onboard. Usually the task is performed by stevedoring companies, and the practical problem normally lies in deciding who should bear the costs of their services.*

***B)*** *A special agreement has to be made to establish who is responsible for "trimming" or "lashing and securing."*

***C)*** *A special agreement has to be made to establish who actually pays import duty and/or other import taxes.*

**Reasonableness standard,** [**http://www.adamsdrafting.com/reasonableness-and-good-faith-in-contracts/**](http://www.adamsdrafting.com/reasonableness-and-good-faith-in-contracts/)

 In my [**recent post on moral turpitude**](http://www.koncision.com/charlie-sheen-and-moral-turpitude/), I noted that I found odd the phrase “its reasonable but good faith opinion.” I thought I should take a more general look at the relationship between those two concepts.

In [**this post**](http://www.koncision.com/using-reasonable-and-reasonably-in-contracts/), I considered a side issue—use of *reasonable* and *reasonably*. Now it’s time to address the main questions: When should you use a reasonableness standard and when should you use a good-faith standard? And does it make sense to use both in a given provision?

***Whether to Use a Reasonableness Standard or a Good-Faith Standard***

As a general matter, I prefer to have a reasonableness standard rather than a good-faith standard apply to the other side in a transaction. A reasonableness standard is objective—what would a reasonable person have done in the circumstances? By contrast, a good-faith standard is subjective—did the party in question think it was acting reasonably, regardless of whether it was or not when viewed from the perspective of a reasonable person? It seems counterproductive to give the other party room to act unreasonably but in good faith.

Of course, the difference between a reasonableness standard and a good-faith standard can be more apparent than real. Often it’s impossible to determine what a contract party was thinking when it acted a given way—either you have no evidence on that score, or the evidence you have is self-serving. So courts often end up deciding whether a party acted in good faith by considering how others have behaved in similar circumstances—in other words, by in effect applying a reasonableness standard. But I’d prefer to apply a reasonableness standard explicitly rather than have it applied by default.

So in the following extracts culled from EDGAR, I’d replace the good-faith standard with a reasonableness standard:

“and shall *make a good faith effort* [read *use reasonable efforts*] to accommodate the Consultant’s reasonable scheduling needs in coordinating such cooperation

provided, however, that any such tax, assessment, charge or levy need not be paid if the validity thereof is being *contested in good faith* [read *reasonably contested*] by appropriate proceedings

unless the Company has *in good faith* [read *reasonably*] determined that the matters relating to such notice do not constitute material, nonpublic information

any written notice, instruction, instrument, statement, request or document that the Escrow Agent *believes in good faith* [read *reasonably believes*] to be genuine”

But I can think of two contexts where a good-faith standard would be appropriate:

First, a good-faith standard is appropriate to qualify an obligation to negotiate. Because a good-faith standard is built into every contract through the implied duty of good faith (see *MSCD* 2.112), an explicit good-faith standard in this context should be redundant. But it’s standard, perhaps because (1) it reinforces the notion that you’re only required to negotiate as long as a meeting of the minds is possible and (2) it makes it clear that a reasonableness standard doesn’t apply—you can’t be forced to agree to something just because a reasonable person in your position would have done so.

And second, a good-faith standard is appropriate when you want to make it clear that the discretion granted a party in a given context is subject to an obligation to act in good faith. Courts in some jurisdictions have held that if Acme is authorized to do something and the provision uses “at its sole discretion” or comparable language, that discretion isn’t subject to the implied duty of good faith. For purposes of contracts governed by the laws of any of those jurisdictions, you should consider either (1) cutting back any grant of discretion that could be construed as particularly open-ended or (2) making it clear that it’s subject to a good-faith standard. (This is something that I’ll soon be writing about at greater length.)

And of course, if your client is the one subject to a given provision, you might want to use the less-exacting good-faith standard.

***Using Both Standards Together***

What about combining the two standards? I think it makes no sense to do so. If you meet the more exacting reasonableness standard, what could be the point of invoking good faith? Consider the following examples:

and it continues to actively employ~~, in good faith,~~ all reasonable efforts to cause the applicable Registration Statement to become effective

the amount of all taxes paid … (as determined reasonably ~~and in good faith~~ by a Financial Officer)

makes it inappropriate in the reasonable ~~good-faith~~ judgment of the indemnified party for the same counsel to represent both the indemnified party and the indemnifying party

**What is a Reasonable Time for Review of Submitt,** [**http://constructionadvisortoday.com/2010/10/what-is-a-reasonable-time-for-review-of-submittals.html**](http://constructionadvisortoday.com/2010/10/what-is-a-reasonable-time-for-review-of-submittals.html)

 Submittal, review and approval of shop drawings, descriptive literature, samples and other information is an inherent part of construction. For contractors, the process poses the risk of delay. Sometimes the contractor cannot proceed with the work without a response from the project owner or its representative. How much time should be allowed before it becomes a compensable delay?

Construction contracts seldom stipulate the amount of time allowed for turn-around of submittals. This is understandable because submittals vary greatly in their complexity. Most contracts simply state a standard of reasonableness. The AIA documents refer to “such reasonable promptness as to cause no delay to the Work.” Other contract forms use similar language.

Faced with this vague standard, courts and administrative boards have come down all over the place. In one case, ten to 12 weeks was deemed reasonable. In another, anything more than 14 days was considered unreasonable. Obviously there is no clear standard and no predictability in this matter.

I invite your comments. Should construction contracts specify a number of days for submittal turn-around or is that not feasible given the wide variety of submittals which must be reviewed? If the standard is simply reasonableness, what is the range of time to be allowed? Twelve weeks seems absurd, but 14 days could be very tight for review of many types of submittals.

[**Reasonableness, Honesty and Good Faith**](http://www.trans-lex.org/124900#toc-1)**, Peter Jones**

The common law has long recognised that traders may act honestly but still be unreasonable. There has been no general obligation in the common law of the British Commonwealth cast an -traders to behave towards each other with good faith in every aspect of their dealings. There are some specific classes of contract which require good faith, and, for instance, insurance contracts require parties to act towards each other with the upmost good faith because of the contracts being based an knowledge solely in the knowledge of the proposer or insured. It is true that over a wide range of duties in contract as well as tort the common law has implied obligations of reasonableness in conduct.

The Australian case of *Renard Constructions (ME) Pty Ltd v Minister for Public Works*1 contains an interesting discussion by Priestley JA of the question of the exercise of contractual powers reasonably, compared with their exercise honestly, and compared with the concept of good faith relative to considerations of reasonableness.

(…)

After further discussion of the development of the principle in the United States, His Honour noted the comment of the Ontario Law Reform Commission in its Report an Amendment of the Law of Contract' of 1987 that: ". . . while good faith is not yet an openly recognised contract law doctrine, it is very much a fact in everyday contractual transactions. To the extent that the common law of contracts, as interpreted and developed by our Courts, reflects this reality, it is accurate to state that good faith is a part of our law of contracts.

'In this vein, a great many well-established concepts in contract law reflect a concern for good faith, fair dealing and the protection of reasonable expectations, creating a legal behavioural baseline

(…)

It may be argued that there are circumstances where failure to act in good faith could comprise misleading and deceptive conduct in contravention of those statutes. The fact, however, that the legislature in each of Australia and New Zealand has seen fit to record that such behaviour is unlawful, where previously it was not necessarily so at common law (and certainly not in such broad terms), is a further indication of the widening scope of general obligations being imposed by Australian and New Zealand contract and sales law.

<http://www.trans-lex.org/124900>