International Construction Contract Law

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Foreword

Svend Poulsen
Chief Project Manager, COWI Consulting Engineers, Chairman FIDIC Contracts Updates Task Group

We often hear the word "project" when work needs to be done. "I have a project at home" is a regular phrase in daily conversation. In general, we see more and more of our life as a series of projects. Going on holiday is a project; preparing a dinner with friends can be a project and training for a marathon can be a project. This mindset is likely to be something we have adopted from the construction industry.

One of the first things you notice when starting work in the construction industry is that the unknown has a major impact on any project. You can even divide the unknown into the "known unknown" and the "unknown unknown." The way to handle the unknowns is to use tools developed in the risk management field. These tools have been developed over many years and, when used correctly and continuously, can lead to more successful projects.

We do not know all the risk aspects when starting a project. For example, can we know and predict all the risks and problems associated with an industrial process for mass manufacturing? Designing a new car is a project. Once the design is agreed upon and all the details for manufacture are in place, the task is complete. The next step is industrial production with certainty of performance and quality of the car known—at least in principle.

Projects in the building and construction industry are unique and often only have a limited aspect of industrial process. For example, construction might use some well-defined processes such as the laying of sleepers and rail on a railway using a track-laying machine. However, uncertainty of the sub-soil conditions and other specific local conditions for the completed works will always sow the seed for risks and surprises. During execution of the works, the weather, the market situation, labor availability, and so on influence the progress and certainty of achieving the agreed quality, budgeted price, and finishing date.

An essential element of any project is the need for good agreements between the parties to a project. Since the 1950s, FIDIC has produced standard contracts for the construction industry. The principles of these contracts focus on fair risk sharing and the most effective mechanisms for administering the project. FIDIC contracts for construction and design-build make the engineer the responsible party for administering the contract and managing the project. Thus, FIDIC contracts are two-party agreements for a three-party process.

The role of the engineer is an issue that is often discussed. As an example, how can the engineer avoid actual or apparent bias toward/against the contractor when being paid by the employer? The engineer is an agent of the employer but their job is also to act fairly when making determinations under the contract. Contract conditions do

state this obligation and it is paramount for the correct administration of contracts that the assigned engineer acts in accordance with this requirement. One of the advantages of having an engineer and not a project manager is that the engineer has the technical understanding of the project complexity and can manage the project so that questions and unforeseen events are handled properly. Therefore, it is very difficult to succeed with a complex project without the right understanding of the contractual arrangements and the nature of the project.

In the construction business, various kinds of standard contracts are available and set different priorities depending on where they are from. Some have a very strong focus on administrative procedures and are very prescriptive. Others set up a standard framework for the contract and are very dependent on a set of special or particular conditions. Thus, choosing the right form of contract from the outset is critical. The employer should think about how they want to monitor the project and handle risks. On one side of the spectrum are the works designed by the employer and, on the other, turnkey agreements. Some extreme versions of the latter place all risk on the contractor. Risk and influence, therefore, go hand in hand.

Transfer of all risks to the contractor under a turnkey form of contract gives the contractor full control of the processes to mitigate consequences of risks. The employer has to accept that by transferring risk, they also transfer control. Why is this form of contract so popular then? Answer: the industry has seen a growing need for certainty of price and time. Financial institutions focus on budgets and time more than ever. Under these circumstances, it is extremely important that the technical requirements for the project are well defined because changes at a later stage are, in principle, not possible.

The reader of this book will see that there are a lot of people in the industry striving to make projects successful and they put in a lot of effort into improving contracts, procedures, and tools to become even better at managing complex projects. Our industry has produced spectacular achievements throughout modern history. In particular, the world's need for efficient transport has been a huge driver for the engineering industry. When new and more efficient transport is introduced, society prospers. Today the focus on sustainability also influences the way we design and construct. New ways of working, new ways of cooperating, and new types of projects call for new types of agreements.

Whether you read this book from cover to cover or as reference guide, you should realize that because of this book your contribution to more successful projects will have a higher value. The book gives you access to a treasure chest of knowledge collected by experienced engineers and contract managers—experience you can use when faced with the challenges that projects bring—challenges that arise from the basic fundamental nature of projects themselves.

We who work with projects know that successful projects give out positive energy and a good feeling of developing our society. With this book in hand, it is now your turn to feel the power of this positive energy.

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Introductory Remarks

Shuibo Zhang
Professor of international construction contracts, Tianjin University, People's Republic of China

God says, "*If as one people speaking the same language they have begun to do this, then nothing they plan to do will be impossible for them.*" (Genesis 11:6)

The modern era has brought with it a never-before-seen demand for high-quality and high-quantity civil infrastructures and industrial facilities. Their importance cannot be underestimated in raising the living standards of human beings, particularly in developing countries. Estimates of global demand for infrastructure over the next decade is somewhere between US$10 to 20 trillion. Meanwhile, with the advances in productivity, construction projects are getting larger in scope and more complex in technology. They usually involve an input of vast resources, including human expertise, equipment, and various materials, among other things. This makes it very hard, if not impossible, for a single country or region to cope alone. In addition, comparative advantages make it more likely and efficient for construction-related firms from all over the world to work on the same project. As a matter of fact, large and global projects are ubiquitous on current international construction markets. Take China's World Bank-financed *Xiaolanglangdi* Multipurpose Hydro Project as an example. More than one hundred organizations participated in the construction, including contractors, subcontractors, suppliers, and consultants, from over 50 countries/regions. This project was thus nicknamed the "small United Nations." According to the *Engineering News Record*, the overseas turnover of the top international 225 contractors has been increasing for the past 10 consecutive years, reaching a total of US$511 billion in 2012 compared to US$116 billion in 2003. This indicates an annual average growth rate of more than 15%.

Indeed, the construction industry has been globalizing with the globalization of the whole world. However, globalized construction projects are temporary and inter-organizational activities and require intense communication and coordination efforts from many participants who possess different cultural and legal backgrounds. Such institutional differences tend to act as obstacles and pose problems in communication among project participants, resulting in poor coordination, misunderstandings, chaos, and even unfortunate project failures. The project of the A2 motorway in Poland undertaken by a Chinese contractor is a good illustration of the latter situation. The frequent occurrence of disputes in international construction is an ever-occurring phenomenon. Therefore, a good mechanism must be designed to alleviate such a situation—namely, the construction contract. This document, at its core, is designed to make all participants *speak the same language*.

Project contracts are legally enforceable and binding, and managerially instrumental, offering "the rules of play" to act as a guide for the parties to work together. To cooperate efficiently and effectively, it is a must for all parties involved in international projects to have a good understanding of the rules first. However, due to the very nature of construction contracts and the different legal systems governing each individual contract, confusion may arise in the understanding, interpretation, and execution of a given contract. For construction project professionals in general, this presents a challenge unless they are well informed with sound knowledge of construction-related contractual and legal issues. To the best of my knowledge, very few books on the market are available to explicitly deal with this topic.

I am pleased to learn that Dr. Lukas Klee, an experienced lawyer in international construction, has filled this gap with this new book that specifically targets international construction contracts in practical terms. This book covers the key legal and contractual knowledge areas for international construction, such as civil law/common law interrelationships, delivery methods, standard forms of contracts, risk allocation, variations, claims, dispute resolution, insurance, and securities. Accompanying these subjects, the lessons learnt from the industry and many vignettes collected from all continents make this book a real "international" and "practical" guide. The comprehensive knowledge conveyed in this book, in my personal judgement, will perfectly cater for the urgent needs of international construction professionals.

I am confident that this new book will be a great help to professionals allowing them to speak the same construction language in international projects and, in turn, will facilitate them in building a *stairway* to a better world in an efficient and harmonious way.

Introductory Remarks

Robert Werth
Owner of Werth-Consult Dispute Resolution Services, Essen, Germany

Construction law literature is usually written by lawyers for lawyers. This often means that texts are very technical and contain a lot of law-related jargon. To a large extent this is necessary, but may exclude or "scare off" the majority of construction project practitioners.

My daily business experience has shown me that the biggest issues in international contracts are managing communication and understanding of the behavior of people. We all know that international contracts are usually large, contain/demand complex documents and we could assume that the people involved have the proper skills to do the job. But do these people have the proper skills under the conditions agreed to under the terms of the contract? Many construction project participants (usually engineers) use their skills gained from working with domestic construction contracts and apply this knowledge internationally. Effectively, this often means that the job goes ahead, irrespective of what the contract says. This approach may be correct from a technical aspect, but riskier when considering the administrative requirements under international contracts.

For these reasons, the most important issues for management staff when dealing with international contracts is an understanding of (1) the contract itself; and (2) the legal system in which it operates.

The advantage of this book is that it covers all important international construction law aspects in a comprehensible, easily readable, and user-friendly manner. This enables finding a common understanding of an issue, before it can be discussed in terms of specific contract conditions in a particular case. It is an essential reference for all parties involved directly or indirectly in international construction projects.

This book is particularly helpful because it contains a number of practical examples from real "on-site" experience that can assist the practitioner to immerse themselves quickly into the specifics of construction projects. This also makes the book interesting and "readable."

I highly recommended this book to anyone involved in international construction contracts, wherever adequate. And there was something unique, I have noticed, when I made some recommendations about that book during lectures in many places of the world. People replied: "I have read that book," which is different to just saying "I have or own that piece of literature."

And that is what makes the book different. It is a book to be read, not owned, written by practitioners. And finally, I am really proud to be a member of that illustrious team behind Dr. Lukas Klee to support him and also making one of the best even better. Thank you, Lukas.

Introductory Remarks

Ilya Nikiforov
Managing Partner, Egorov, Puginsky, Afanasiev & Partners, Russia

My experience with international contracting in Eastern Europe, Russia, and the CIS spans some 25 years. I have learned that in spite of international prominence of commonly applicable construction practices (e.g., under FIDIC standard forms of contract) their use and implementation in construction projects are relatively unknown in Russia and the CIS. Domestic industries in the region work on the basis of traditional workflow documentation and contract writing dating back to the socialist era. These practices experience substantial turbulence when international construction projects "come to town." Typically, there is a conflict of expectations of accepted standards of contract and the rights and responsibilities of the parties.

In a fast-moving and globalized world, developers and constructors need a quick-reference guide to manage their expectations in an international construction project environment. As a professional in this field, I have many books in my legal library dealing with construction projects. However, these are mostly limited in their scope to a particular legal system or territory of implementation. First edition of this book has broken a new grand of omnibus coverage of construction topics at a global level.

Construction disputes are infamous for being costly, lengthy, and voluminous. In an industry where "time is money," participants in the field need knowledge, a calm head, and oversight to minimize delays and keep the project moving. This book is a vital tool for making this possible. Therefore, it is of great benefit to all private consultants involved in the industry, engineers in developing countries and emerging markets where international practices of implementation of infrastructure projects are just becoming known will find it particularly useful. The title also appeals to in-house counsel and private practitioners for whom construction law is not a mainstream practice area. It's also a "must read" for the wider audience of consultants, surveyors, architects, employers (public and private), and domestic construction industry specialists.

This book is praised for its practical approach, lucidity of text and clarity. The author's experience, know-how, and international prospective in major construction company make him perfectly positioned to write this text.

The book has the further advantage of being written by an author from a non common law country. He provides a unique, fresh, and unbiased look at the subject matters as they stand today, for example, the chapters on claims and claims management. These two chapters are literally "from the front lines" and convey the author's experiences in a practical way.

The majority of prominent publications are written by Anglo-American authors. Mr. Klee was trained and practices in a continental European law setting. The legal system is based on Roman and Napoleonic Law principles that operate not only in continental Europe, but also in South-East Asia, the Middle East, Africa, and South America. For this reason, readers in these jurisdictions will find this title an invaluable, relevant, and user-friendly tool to solve daily questions that arise in construction, for instance, how to apply the standard forms of contract developed in common law countries locally. Common law practitioners will benefit from knowing what to expect when dealing with colleagues and partners in non-common law countries.

A key feature of this book is the fact that the author is not a native English speaker. Most of the forms and precedents relating to the subject matter are in English. Thus, the author is in the best position to assess "translation difficulties"—in other words, managing the linguistic aspect. Readers will become familiar with technical terms used in the industry. Moreover, the reference material included in the appendices—charts/diagrams, a dictionary of construction terms, add great value, and facilitate learning. This treatise is an information source, which the reader will turn to time and time again as construction project demands unwind and develop.

Supranational construction law lives and develops primarily through arbitration. Arbitration awards are not systematically published and the counsel who practice in the field "learn by doing." Unfortunately, the benefits of experience of arbitration are seldom passed down to other participants of construction projects (including to those whom counsel represent). The book is generously enriched and illustrated by case studies and references to arbitration awards, decisions, and findings of arbitration tribunals. It is an entertaining and excellent supplement to the black letter law.

We have all been told to write in plain, easy-to-understand terms, to avoid legalese and to employ construction industry terms where possible while maintaining accuracy. This is not always an easy thing to do. The title successfully implements these principles and empowers its readers to steer the construction project.