

International Contractual Relationships: Business models, risks and dispute resolution

The Nature of Contractual Relationships in International Construction Projects

- Complex, long term projects
- Involve many players, including:
 - **Employer**
 - **Engineers/architects**
 - **Contractors**
 - Sub-contractors
 - **Suppliers**
 - **Funding organizations**
 - **Insurers**
- Specialized, often complex, forms of contract
 - **Mosaic of contracts**
 - **Document intensive**

The Nature of Contractual Relationships in International Construction Projects

- Risk is inherent in every aspect of the construction life cycle
 - Pre-Construction
 - Construction
 - Post Construction

Risk

- An event or set of circumstances that, should it occur, will have an effect on the achievement of the project's objectives*
 - **Performance**
 - **Time**
 - **Cost**

* Peter Simon, David Hillson and Ken Newland, **Project Risk Analysis and Management Guide**, The Association for Project Management

Construction Projects The Contract

- Close relationship between risk management and the construction contract
 - **Determining appropriate project delivery method and contract strategy can only occur after assessing and determining allocation of project risk**
 - Contract is the risk allocation tool
 - Contract
 - **Legally binding mechanism for allocating risk**
 - Mosaic of contractual relationships selected to support risk management strategy
 - **Main contract**
 - **Sub-contracts**
 - **Financing contracts**
 - **Insurance contracts**

Project Delivery Possible Pathways

- Traditional
 - D-B-B (Design-Bid-Build or “Traditional”)
- Single Point Responsibility
 - D-B (Design-Build)
 - D-C or D&C (Design & Construct)
 - EPC (Engineer-Procure-Construct)
 - EPCI (Engineer-Procure-Construct-Install)
 - S&I (Supply & Install, or Design, Supply & Install)
 - EP+C (Engineer-Procure & Construct)

Project Delivery Possible Pathways

- “Hybrid” type contracts
 - **EPCM (Engineer-Procure-Construct-Manage)**
 - **EP+CM (Engineer-Procure & Construction Management)**
- Concession Type Models
 - **BBO (Buy-Build-Operate)**
 - **BOT (Build-Operate-Transfer)**
 - **BOO (Build-Own-Operate)**
 - **BOOT (Build-Own-Operate-Transfer)**
 - **DBFO (Design-Build-Finance-Operate)**
 - **FDBOM (Finance-Design-Build-Operate-Maintain)**
 - **BLT (Build-Lease-Transfer)**

Project Delivery Possible Pathways

- Non-Traditional Project Delivery Models
 - IPD (Integrated Project Delivery)
 - IPD (Innovative Project Delivery)
 - Alliance Contract
- Contracts for managing projects
 - PM (Project Management)
 - CM (Construction Management)
 - CMAR or CM/GC or CM At-Risk (Construction Management At Risk)

Conditions of Contract

- Bespoke
 - **Specially drafted for each project**
- Standard
 - Developed by various organizations and available off the shelf
 - FIDIC – International standard form

FIDIC Conditions of Contract

- Structure

- **General Conditions**

- Risk allocation strategy
 - Regulate issues that generally arise in construction
 - ex: Time, changes, insurance, claims for equitable adjustment, subcontracting, termination, dispute resolution

- Conditions of particular application**

- Project specific – define technical and legal issues specific to project

FIDIC standard forms....the 1999 Suite



- ▶ Red Book
 - Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, 1st Edition 1999
- ▶ Yellow Book
 - Conditions of Contract for Plant and Design Build, for Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor, 1st Edition 1999
- ▶ Silver Book
 - Conditions of Contract for EPC/Turnkey Projects, 1st Edition 1999

FIDIC 1999 Suite...Risk Allocation and Claims

- FIDIC Guide, pp. 88-89

“.... Major projects give rise to major risks, which have to be dealt with if they occur....In these events, the claims procedures are specified so as to provide the degree of formality considered necessary for the proper administration of a...project.

complying with these procedures and maintaining a co-operative approach to the determination of all adjustment should enhance the likelihood of achieving a successful project.”

***Only pay when the risk eventuates**

FIDIC 1999 Suite...Risk Allocation Approach

Owner
Retains risk

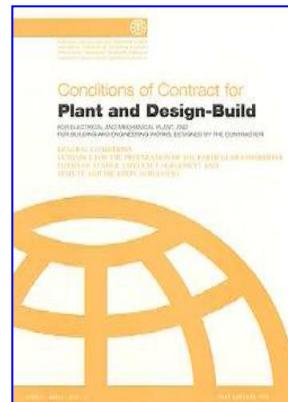
Risk Transfer

Contractor
Assumes risk

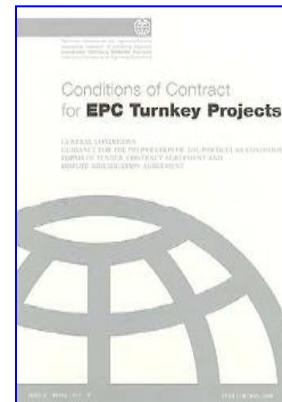
Design – Bid - Build



Design - Build



EPC/Turnkey



Successful Project Management FIDIC 1999 Suite...Risk Allocation and Claims

- Detailed and thoughtful project planning
 - **Issues raised, addressed and disputes resolved during project progress**
 - **Dispute avoidance and containment**
- Project success requires effective handling of **claims**
 - **Timely raising of issues**
 - **Open and structured communication**
 - **“Real Time” issue resolution**

Effective Issue Management and Dispute Resolution The FIDIC Approach

- Multi-tier dispute management
 - Engineer
 - Dispute Adjudication Board
 - Amicable Settlement
 - Arbitration
- Dispute avoidance



Note: Arbitration typically final step in a multi-tiered dispute resolution clause

- **Disputes that could not be solved by pre-arbitral dispute resolution tools**

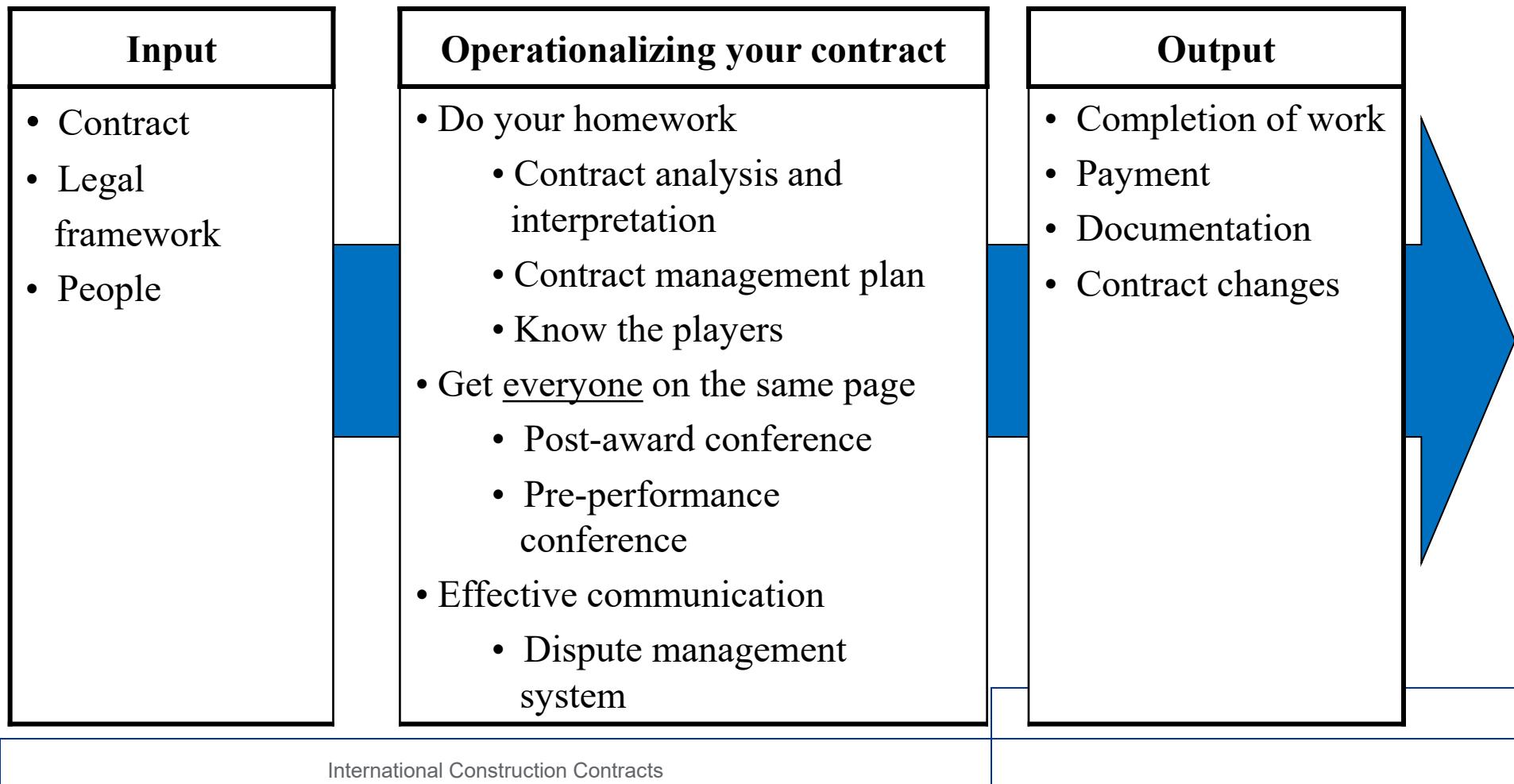
Third Party Assisted DR: The Role of the Neutral

Process	Neutral	Role of the Neutral
Arbitration	Arbitrator	Final and internationally binding decision
Adjudication	Adjudicator	Binding decision
Expert Determination	Determination	Binding/non-binding decision
Mediation/Conciliation	Mediator Conciliator	Facilitating dialogue/negotiation Recommendation
Dispute Boards	Dispute Board Member	Recommendations or binding decisions that may become final

Causes of Construction Disputes

- Errors and/or omissions in the contract document
- Incomplete design information or employer requirements (for Design-Build and Design & Construction)
- Failure to administer the contract
 - **Poorly drafted or incomplete and unsubstantiated claims**
 - **Employer/Contractor/Subcontractor failing to understand and/or comply with its contractual obligation**
 - **Failure to comply with contractual notice provisions and other breaches of formal requirements**

Successful Operational Contract Management..... begins at inception and continues throughout the procurement life cycle



An Important Note

- The contract governs the relationship between the buyer and the seller within the context of the applicable law and regulations
- Governance
 - The procurement law
 - Public/private parties?
 - The procurement regulations
 - Donor regulations
 - Agency regulations
- Procurement law and regulations govern the procurement process
 - National, institutional and project levels

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