Construction Law Beyond Borders

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A. Introduction to International Construction Law

I. What is international construction law?

In the realization of international construction projects there are always people from various countries as well as from various professional fields involved. At the same time, each construction project is unique and confronts all those involved with special challenges. Additionally, public law regulations that apply at the construction site must always be observed. This complex situation, which is commonplace in today's professional practice of international construction companies, has led to the development of extensive contractual practice worldwide.

As a rule, there is freedom of contract in construction law, but on the one hand there are certain legal restrictions that must be known, and on the other hand, in the event of a dispute, it has to be clarified in advance which court or authority is responsible and which law applies. These questions are not easy to answer when construction companies from different countries work together on a project and/or the construction site is located in a foreign country. Furthermore, not only the legal systems involved conflict with each other, but also technical standards and cultural customs, which can lead to numerous problems.

In order to understand these extensive contracts, which are required to avoid problems and disputes, and to make them legally binding, it is necessary to understand not only the contractual design as such, but also the underlying construction law. At this legal interface, the international construction law regulates the question which
construction law, i.e. of which legal system or which other set of rules applies to the construction agreement or individual clauses of the agreement. A completely unified international construction law, such as the UN International Sales Convention (CISG), does not exist, not even in the EU.

The great significance of international construction law therefore results from the need to have the knowledge to make international construction contracts in a legally secure manner and to clarify the possibilities for dispute resolution. And these aspects are essential in order to be able to calculate the opportunities, risks and costs of international construction projects.

II. The construction contract and its content

1. Scope of the construction contract

In general terms, the construction contract governs both the building contractor’s tasks and the remuneration he receives for the work from the builder. In addition, the contract regulates, among other things, who exactly is responsible for which tasks and risks and how the approval of the result and the determination of defects shall be carried out upon completion. In addition to the building contractor, the architect also stands opposite to the builder. In this respect, it has to be stipulated how exactly the interaction between the planning of the architect, and the realization by the contractor and the co-determination of the builder should take place.
In many, but not in all legal systems, construction contracts are regulated by explicit statutory rules. In some cases, rules do exist, but they are not mandatory and only apply if they are not replaced by contractual agreements.

2. Typical rights and duties of the parties involved

A characteristic element of the construction contract is that the customer (builder/owner) must participate in the manufacture of the work in some specified ways. He must make the property available and may even provide certain building materials. In addition, as already mentioned, he must inspect and approve the work upon completion. The construction contract differs from the purchase contract in that the contractor owes not only the result of the work but also the performance as such. Insofar as the object of purchase does not yet exist, so the contractor has to manufacture it. The construction contract varies from the employment and service contract in that it is not the effort but the success that is owed to the customer. Aside from that, the contractor carries out his activities independently and on his own account without instructions from the customer.

The rights and duties of the parties therefore include in particular:

- Obligation to independently build or construct a specific work of construction on a prescribed construction site and in this regard coordinate and carry out the construction work, including instruction and supervision of employees.
- The builder/owner has the duty to provide the property / construction site and to provide the idea and the planning for the structure.
• Obligation of the builder/owner to pay the work remuneration.

3. Overview of construction contract types

<table>
<thead>
<tr>
<th>Contract type</th>
<th>Obligations</th>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Architect contract / Design and Build contract</td>
<td>Plan the structure and supervise the construction side</td>
<td>All services from a single source</td>
<td>Comprehensive liabilities</td>
</tr>
<tr>
<td>Lead management contract</td>
<td>Comprehensive site management with partly own specialist workers</td>
<td>Construction supervision from one hand</td>
<td>Liability for subcontractors</td>
</tr>
<tr>
<td>General transferee contract / Management contract</td>
<td>Only coordination of the construction site, no own workers</td>
<td>Flexibility</td>
<td>Liabilities; Partial incompatibility between the authorization to present building documents and the</td>
</tr>
<tr>
<td>Building promoter contract</td>
<td>Conveyance of property and building</td>
<td>Consumer protection</td>
<td>Required form of contract (purchase of real estate); No model contracts</td>
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<tr>
<td>Guaranteed Maximum Price-Contracts</td>
<td>Fixed maximum price</td>
<td>No unexpected costs for the builder</td>
<td>Contractor bears cost risk; Disclosure of the original calculation</td>
</tr>
<tr>
<td>Plant construction contract</td>
<td>Engineering services, planning, construction</td>
<td>Comprehensive settlement</td>
<td>No agreement on compensation</td>
</tr>
<tr>
<td>Engineer construction contract</td>
<td>Manufacturing liability (planning and construction)</td>
<td>Sample contracts (FIDIC)</td>
<td>Valuation of increased services</td>
</tr>
</tbody>
</table>
III. Applicable law and choice of law clauses

In light of the above, the question arises what happens if the parties do not agree on anything with regard to the applicable law and the place of jurisdiction? Which rules apply and which obligations arise to the parties? In what way is it even permitted to choose the law to which the construction contract is subject and choose the place of jurisdiction by including a clause in this matter in the construction contract?

1. Which law applies if nothing is agreed upon?

On the one hand, with regard to public law regulations, the regulations prescribed by law at the building site always apply. On the other hand, with regard to the contractual agreements, there is no internationally unified construction law as already explained above. So, in each individual case, the so-called international private law has to be considered. These conflicts of law rules state which law is applicable in the individual case.
In this respect, every country has its own international private law, which regulates which law applies. In order to determine which law applies to the case, at first the circumstances of the case must be evaluated ("qualified"), because for different matters there are different conflicts of law rules.

So there are various aspects of the case by which the conflict of law rules can distinguish / qualify in order to define the relevant reference point which then determines the applicable law. Aspects of the subject matter by which a distinction is made by the law are in this context e.g.:

- Content of the legal relationship / type of contract
- Legal entity / personality of the parties
- Legal object of the case
- Actions of the persons involved

Construction agreements are contractual relationships, so the relevant choice of law rules in this regard apply. In a next step, there are various possible reference points on which the respective choice of law rule can take up, in order to determine the applicable law, such as:

- Place where the contractual service shall be performed
- Place of the building site
- Place where the contractor’s company is seated
- Place where the customer resides
- Is there obviously a much closer connection to the law of another state from the overall context?

The answer to this question then also is the answer as to which law, i.e. which state’s construction law applies in the case.

2. Choice of law clauses

In view of the complexity of determining the law that applies to the case, it is therefore very important to always include a choice of law clause in the construction contract where permissible. Otherwise, in the event of a dispute, there is a high risk that the dispute will be resolved by applying completely unknown and unexpected legal provisions. This involves considerable liability risks for the parties involved. In addition, legal proceedings in some countries can take an extremely long time and cause very high costs. In some cases, these costs of the legal proceedings and advice must even be borne if the case is won. Also, it is difficult to solve problems in a foreign language and translations are very expensive. Statistically, therefore, only 20% of the parties to a construction contract do not agree on a choice of law clause.

A choice of law clause helps to clarify the basis of the contract and all the liabilities, avoid unnecessary complications, and can also be combined with an agreement of jurisdiction.
3. Which other aspects help to define the applicable law?

Even though there is no complete legal certainty in this respect, if no specific choice of law clause has been agreed upon, the following facts and provisions, even stipulated implicitly, may also have an influence on the determination of the applicable law:

- Agreements on jurisdiction
- Compliance rules: They can be taken into account when determining the applicable law. But, Compliance rules only oblige compliance with local public law and do not actually refer to contracts.
- Follow-up agreements: To this end, the will of the parties must be known precisely.
- Contract language
- Agreement on an institutional arbitration court with a permanent location
- Use of forms based on a specific legal system
- Quoting a particular legal system word for word
- Internal link to other contracts with explicit or implicit choice of law clause

4. Choice of law clauses in the EU

In the case of service contracts with European companies, Article 3 of the Rome I Regulation provides that freedom of choice of law applies in principle.
However, Article 3 (4) Rome I Regulation states that if all other elements of the case except the choice of law clause are located in one or more EU Member States at the time of the choice of law, the choice of the law of a third country (outside the EU) by the parties shall not affect the application of the provisions of EU law which cannot be derogated from by agreement.

Reference points for the choice of law are in such cases with cross-border implications:

- Citizenship
- Place of residence or company headquarters
- Place of performance: According to European regulations, the law of the state of the contractor / entrepreneur, not of the customer.

5. How to define the place of jurisdiction

As a rule, the place of jurisdiction is to be determined with the help of contract interpretation. Otherwise, the lex fori ("law of the forum") applies. Lex fori refers, in international private law, to the law applicable at the place of the court.

Besides that, there are, among others, the following international agreements:

- Hague convention on civil procedure law (Hague, 1 March 1954)
- Hague convention on the delivery abroad of judicial and extrajudicial documents in civil and commercial matters of 1965
Hague convention on the taking of evidence abroad in civil and commercial matters

6. How to enforce a judgement

To obtain and enforce an enforcement title in the respective state of the court ruling, the following applies:

- The enforcement is subject to the state jurisdiction in which it is to be carried out and needs to be clarified in each case.
- Translations may be necessary and difficulties may occur during notification / delivery of documents.
- It also needs to be clarified
  - to what extent the private property / estate is protected
  - how long an enforcement procedure takes
  - and whether the enforcement debtor has assets / property in the state of the enforcement title, e.g. shares, stock portfolios, receivables etc.

B. International Standard Contracts

Aside from the opportunity to arrange specific conditions, there are many sample contracts from different organizations that can be used. These samples can help to set a basis for a construction contract. The sample contracts are particularly helpful because many years of experience and expertise have been contributed to their creation. In some cases, these contract models have been overstated and adapted for several decades.
They are particularly helpful in not overlooking any important aspects and taking everything that matters. There are many different kinds of contract samples that have to be elected appropriate in order to achieve the objective of the contract. The following chart shows a variety of different international sample contracts. It shows, how the fundamental relationship between contractor (= C) and employer (= E) is developed and how the contract parties (= P) are obliged / tied.

1 Hök, Götz-Sebastian, Handbuch des internationalen und ausländischen Baurechts, pages 301 ff.
<table>
<thead>
<tr>
<th>Contract sample</th>
<th>Fundamental relationship</th>
<th>Practical or legal impossibilities</th>
<th>Risk assumption</th>
<th>Legal chances</th>
<th>Subcontractor</th>
</tr>
</thead>
<tbody>
<tr>
<td>FIDIC Red Book 1987</td>
<td>C has claim for defects in case of delay</td>
<td>P are exempt from obligations</td>
<td>C bears the risk during the construction and for the work done during the time for warranty of defects „All risk insurance“ required</td>
<td>Basically claim for additional cost, Extension of time not provided</td>
<td>Engineer is entitled to pay directly the subcontractor that C didn’t paid; According to this the claim of C has to be reduced</td>
</tr>
<tr>
<td>FIDIC Silver Book 1999</td>
<td>Assumption that C has all the information for pricing and risks. C bears all the price risk. (exceptions provided)</td>
<td>Non-performance is excused just in case of Force Majeure</td>
<td>C bears risk till taking over certificate, after that or all still pending works at the time of</td>
<td>Adjustment of price for costs that arise after the start date on the basis of a change</td>
<td>No direct payments; C has to loan a prepayment guarantee</td>
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<tr>
<td><strong>Australian Standard</strong></td>
<td><strong>ECC</strong></td>
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<tr>
<td><strong>C has claim for defects in case of soil chances in relation to the contract and in case of delay</strong></td>
<td><strong>C has claim for price adjustment for soil</strong></td>
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<tr>
<td><strong>Not specifically addressed</strong></td>
<td><strong>C has to inform the project manager</strong></td>
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</tr>
<tr>
<td><strong>C bears the risk during the construction and for the work done during the time for warranty of defects „All risk insurance“ required</strong></td>
<td><strong>C bears the risk for damages and lots of work till the issuance</strong></td>
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<td></td>
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<tr>
<td><strong>Basically adjustment of price; extension of time not provided</strong></td>
<td><strong>Claim of additional costs and extension of</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>E can directly settle payments, if this has been order by law, court or C ordered it. Such payments reduce the claim of C</strong></td>
<td><strong>E can settle a trust for payments to the subcontractors</strong></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>FAR</td>
<td>C has claim for price adjustment and extension of time in case of soil conditions that deviate from the contractual agreement</td>
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<td></td>
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<tr>
<td></td>
<td>Not specifically addressed</td>
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<tr>
<td></td>
<td>C has no fault for any type of non-performance, if the cause is outside his control</td>
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<tr>
<td></td>
<td>C bears risk till finalization and formal acceptance</td>
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<tr>
<td></td>
<td>Claim of additional costs in case of tax increases of property transfer</td>
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<tr>
<td></td>
<td>C should enter a guarantee if the contract exceed 100.000 USD</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>AIA</th>
<th>C has claim for price adjustment and extension of time in case of soil conditions that deviate from the contractual agreement</th>
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<tbody>
<tr>
<td></td>
<td>Not specifically addressed;</td>
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<tr>
<td></td>
<td>C has to take precautions to avoid</td>
</tr>
<tr>
<td></td>
<td>Not specifically addressed</td>
</tr>
<tr>
<td></td>
<td>E can cancel the contract if C miss to pay a subcontractor</td>
</tr>
<tr>
<td><strong>ENAA</strong></td>
<td>C has claim for additional costs for expenses and extension of time for delay because of physical conditions that couldn't be expected</td>
</tr>
<tr>
<td>Singapore</td>
<td>C has claim for additional costs for expenses and extension of time for delay, because of unnatural obstructions that couldn’t be expected</td>
</tr>
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</tr>
<tr>
<td>GC/Works/1</td>
<td>C has claim to adjust the contract price for work, that has to be done because of extensions of time for delays because of soil</td>
</tr>
</tbody>
</table>
changes that he doesn't know about and that he couldn't reasonably expect

loss, damage and fire till completion or contract termination; “All risk insurance” is optional

| **JCT 80 and 81** | Site measuring agreement which shifts the soil risk mainly to the E | P can terminate the contract, if the contractual obligations for a defined time are suspended because of force-majeure reasons | Risk assumption for work activities not specifically regulated; C is responsible for loss or damage to not yet processed but paid working material on the site | Claim for extension of time and additional costs if legal chances change the construction | E is entitled to make direct payments to all named subcontractors that C fails to make. The payment shall free him vis-à-vis C |
| ICE 6th Edition | C has claim for additional costs and reasonable profit and extension of time in case of delays because of soil changes that couldn’t be expected | C should be working in strict accordance with the contract and complete the structure unless it is impossible because of legal or natural causes | C bears the risk of the work activities and material, facilities and equipment from agreed start till substantial completion and work during the warranty period; Special risks are excluded; | Not regulated | E is entitled to make direct payments to all named subcontractors that C fails to make. The payment shall free him vis-à-vis C |
| Key       | Orgalime Turn | C has claim for extension of time and reimbursement if there are circumstances, that he couldn’t have expected | Not specifically addressed; Force-majeure is defined very broadly | „All risk insurance“ required | C bears the risk till “taking over”; Exceptions provided, if risks of E are the cause of the damage | C has to follow change orders in case of legal changes; costs and time has to be adapted appropriate | No arrangements |
C. Alternative dispute resolution

The parties also have the opportunity to agree on alternative dispute resolutions. Special attention should be paid to the fact that in the absence of an agreement on alternative dispute resolution methods, legal clarification of the matter is difficult. In the event of a legal assertion, it first needs to be evaluated which jurisdiction is proper from the parties’ agreement. The process to be conducted in the country of the place of jurisdiction shall be governed by the applicable procedural law. There are differences in the several countries, so this needs to be observed when carrying out a procedure. In particular, the standards concerning service and support by a lawyer must be observed accordingly. When resolving a legal dispute in front of a legal court, it should be noted that the involvement of a lawyer is usually unavoidable in the country of the place of jurisdiction.

In addition, it must be kept in mind that proceedings in construction matters are lengthy and expensive. However, in the event of disagreement, the parties should always ensure that the project is completed on time. Still, the difficulties are particularly evident following a court decision. In order to obtain a court decision in another country (debtor’s domicile), if enforcement is not possible in the country of the recognizing court, a new decision must first be reached in the country in which enforcement has to take place. Enforcement of titles is not a private matter for the creditor; instead, enforcement is in the hands of the state.

After usually lengthy proceedings in building law on the basis of comprehensive taking of evidence, measures also have to be taken, which are above all time-consuming.
In most cases, for example, a translation of the relevant court decisions must first be made before it can be reviewed and recognized by a court. In addition, service of the debtor may also prove difficult or impracticable, depending on the applicable law.

In addition to a judicial clarification of a dispute, alternative dispute resolution options can be agreed upon. These are upstream of court decisions and have the advantage of usually being completed more quickly. Furthermore, in these cases, the parties negotiate an agreement or solution on equal footing, which are in most cases more binding and quicker to implement for both parties on the basis of the jointly achieved results. It is particularly helpful that the parties in alternative dispute resolution do not get a result prescribed by a judge, but can themselves influence the result by the choice of the mediating person and the voluntary appeal.

Following are several examples for alternative dispute resolutions:

1. Construction conflict prevention

The aim of construction conflict prevention is to avoid construction conflicts in advance. Preventive use of aids and information about potential conflicts and stress situations, which must be provided in advance, can help to avoid conflicts. This type of conflict prevention can be helped in particular by so-called workflow programs, which can help to ensure the smooth running of work processes. Through the coordination of the participants and continuous monitoring, conflicts can be identified at an early stage and escalation could be avoided.
In addition, the prevention of possible conflicts through early warning systems in the form of interviews with employees or even observations by those responsible makes sense. Confidence-building and security-building measures help to ensure that construction progress can be completed without major disagreements.

It has to be noted, however, that there must be a willingness on both sides, particularly with regard to the method of dispute resolution related to such prevention. Depending on the size of the construction site, specially trained personnel must be recruited, who can also carry out the measures. In addition, there is the risk in such a situation that every issue and every conflict, no matter how small, is immediately perceived as a danger that could actually have been resolved on a small scale.

2. Construction mediation

Building mediation is a method of dispute resolution as an alternative to the judicial clarification of a conflict. The basis for such a building mediation is agreements (so-called mediation clauses) in the construction contracts. However, it is also possible to conclude a mediation contract subsequently.

The construction mediation is carried out with the help of a so-called mediator who prepares the talks to be held and accompanies the contracting parties on the way to finding a solution. It is necessary for the parties to be ready to reach an agreement. If this is not the case, mediation is not appropriate. In resolving the conflict, the mediator applies
various methods which should lead to an amicable result and to a continuation of the joint cooperation.

3. Conciliation

Conciliation is another private dispute resolution method involving a private individual as a neutral and independent arbitrator. Here, too, it is possible to include an arbitration clause in the original contract. However, a so-called arbitration agreement can also be concluded subsequently during the contractual relationship.

A disadvantage of this type of dispute resolution, as well as of the ones mentioned above, is that the conciliator or mediator does not make a final assessment of the claim. But because of the voluntariness the chances that the contract parties hold on to the results are more probable.

4. Expertise of a third party/expert arbitration report

This type of alternative dispute resolution can be used if the existence of defects and their authorship are in dispute between the contracting parties. An independent expert, on whom the parties agree, will be commissioned to prepare an expert opinion on these causes and authorship of defects. The latter can then also make a proportional assessment of the causes of several possible causes. The parties submit to the result
determined by the arbitrator. A professional judgment is reached, which is more cost-effective than a judicial clarification of the deficiencies in dispute.

In addition, this type of dispute resolution is advantageous, since it involves discreet handling of the conflict, which does not result in undesirable damage to reputation, as may be the case in a public court case.

5. Arbitration proceedings

In this type of dispute resolution, a binding decision is reached on the basis of the parties' obligation, on the basis of a contractual obligation of the parties. It can, in principle, have contractual or legal bases, depending on the applicable law of the state. In most cases, a tripartite contractual relationship is then established, including the arbitrator. In this agreement, time limits can then be agreed for the arbitrator, which he must adhere to when conducting the procedure. This means that this method can in turn lead to a quick result without having to contend with years of litigation.

Existing permanent arbitration tribunals can be called upon or an agreement can be reached on an ad-hoc arbitration court, which is only constituted in the specific dispute.

For the agreement of so-called arbitration clauses, there are also internationally customary models as well as established arbitration courts, which can be agreed as contact points. These include the UNCITRAL arbitration rules and the rules of the ICC (International Chamber of Commerce).
A multi-level structure of dispute resolution methods has been established in most international models of treaties. Thus, a solution in accordance with the contracting parties is to be reached in several steps before the use of judicial assistance and a judicial decision is only to be chosen as a last resort.