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engineering and construction contracting association



# JOURNEY INTO UNCHARTED TERRITORIES

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How are owners, contractors and suppliers adapting to successfully execute projects and reposition their businesses in the ever evolving project environment?



**REPOSITIONING THE PROJECTS BUSINESS IN A WORLD WITH CHANGING BOUNDARIES**

**Adapting the Way we Contract and Manage Risk for Major Projects**

**Vincent  
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Trends in Contracting  
Approaches – tackling  
head on the contractual  
and legal issues



**Partner, Reed Smith LLP**

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**REPOSITIONING THE PROJECTS BUSINESS IN A WORLD WITH CHANGING BOUNDARIES**

# Adapting the Way we Contract and Manage Risk for Major Projects

## Why Change? A Basic Proposition

- The increasing scale, complexity and technological challenges involved with major projects necessitate constant review of how they should be implemented.
- Such review, from a technical standpoint, is second nature to the Industry; designs, construction methods and equipment are continually developed in order to identify how projects can be improved, made more efficient, made better for the environment and safer to build and operate.
- On its own, such an approach may not be sufficient to ensure the successful and economic delivery of a major project.

# Adapting the Way we Contract and Manage Risk for Major Projects

## Why Change? A Basic Proposition

- It is also important to undertake a complementary review of how a project can be better structured and managed from a commercial and contractual point of view.
- In other words, the project process and the contracts used should also evolve and be improved to address, reduce or remove the risks that might otherwise threaten the successful implementation of a project.
- The Industry can be somewhat hesitant towards tackling head on the question of contracts and legal issues.

# Adapting the Way we Contract and Manage Risk for Major Projects

## Reasons to Say No to Change

- The Industry can be “suspicious” of change – our system of contracting is familiar, tried and tested, it remains “fit for purpose” and “at least we know where we stand”.
- A change can be equated to getting “legal”, or simply change for change sake.
- No owner or project professional wishes to be overtly "legal", that can create a less than collaborative atmosphere, and itself harm the prospect of a successful project.

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## Reasons to Change

- Increasing evidence of international projects with significant delays and cost overruns, and in turn major claims and disputes between owners and their contractors or project professionals.
- Some of the project risks which have led to or contributed to this situation might have been avoided with greater attention to the sort of contracts the Industry uses, and subsequently how those contracts and the project itself is managed to completion.
- The following sets out a number of “themes” or “trends” which might account for an increase in problem contracts internationally, together with some thoughts on how to tackle the situation.

# Adapting the Way we Contract and Manage Risk for Major Projects

## What has changed and what needs changing?

- New Project Scale
  - Many projects are larger and more technically challenging than ever before, yet has there been little real change in contracts to reflect this. New project scales (and the volume of work generally) can create new risks.
  - Risk transfer in contracts needs to be adapted in terms of, for example, total EPC risk, site risk, resource risk, caps on liability, bonding levels, risks connected with co-ordination between work packages and the need for greater awareness and management of the subs/supply chain. Is there a need to shift to more “open”, cost based/target price contracting, perhaps using partnering and framework agreements?

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## What has changed and what needs changing?

- New Project Locations
  - Many projects are being built in new and challenging markets; increasingly in South America, Africa, Middle East, Central Asia, yet the forms of contract (and international parties) often pay little or no attention to how they might work in these jurisdictions.
  - There is a need to understand and to adapt to how civil code or Sharia and new legal systems (e.g. in the ex communist countries) impact on parties' "usual" contractual and legal rights and obligations.



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## What has changed and what needs changing?

- New World Order – New Players
  - In the last 15 years or so we have witnessed the emergence of the NOCs, new Government owners and the Asian contractors and yards. This reflects the emergence of the BRICS, Middle East and African economies. The contracting and business culture of these new players makes for new contracting dynamics.
  - Contracts must now be managed differently to reflect the influence and attitudes of these new players. Can a Major still deal with contractors in the same way it always has when it is part of a joint venture with a NOC? How, if at all, does the increased presence of the Asian contractors/suppliers affect the way in which contracts are negotiated and managed?

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## What has changed and what needs changing?

- More Haste Less Speed
  - There are ever increasing pressures on project delivery; speed to market, but at what long term cost? Many problem projects appear to have been doomed from the start.
  - Projects are started with insufficient preparatory work; put simply, with not enough site work, FEED or basic design on the part of an owner, and not enough appreciation of what's involved in a project on the part of a contractor. Pressures of time and money seem to get the better of all concerned. Though difficult, this needs to be addressed.

# Adapting the Way we Contract and Manage Risk for Major Projects

## What has changed and what needs changing?

- Manage Early and Manage Often
  - Projects are often awarded on an EPC, Turnkey or other Design Build basis, yet these projects can falter early on because of a reluctance and/or inability to get to grips with the design and procurement phases of a project.
  - Delays in design and procurement are often missed because progress is less tangible, but such issues cascade through to construction, when it is either too late or very costly to overcome. Contracts require better and more transparent design development and approval procedures.

# Closing Thoughts

- Take nothing for granted before signing a contract, pause, take a deep breath, ask will it work for this project, this client/contractor, this location? If the answer is no, or maybe no, be strong and make adaptations/changes.
- Be “contractual” (commercial) to avoid getting “legal”. Manage contracts openly and unashamedly, using their terms, but not so as to interfere with the work and working relationships. Adopting this approach quickly educates on whether in practice the contracts work or not! (see first bullet)
- In my view there is no such thing as the perfect, “watertight” contract, but as someone once said, “if you chase perfection, you often catch excellence”, and we should all settle for that in our contracts and contract management.