

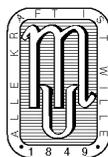
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Selected Issues in Construction Law

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I. Introduction

Construction disputes have specific characteristics. People involved must have a sound understanding of complex technical issues in order to determine the relevant facts of the case and to take the necessary actions appropriately. In case a construction dispute is the subject of arbitration proceedings, efficient case management is absolutely essential. In addition to case management techniques, which are commonly applied, the Final Report on Construction Industry Arbitrations¹⁾ published by the International Chamber of Commerce (ICC) takes account of special features of construction disputes and is worthwhile to be taken into consideration.

This paper sheds light on two issues of particular importance to construction disputes, namely so called “*multi-tiered dispute resolution clauses*” and “*risk allocation*” in construction contracts.

Multi-tiered dispute resolution clauses, which are also called “*escalation clauses*” or “*waterfall clauses*”, provide for various alternative dispute resolution techniques (ADR) prior to the initiation of an arbitration or court proceedings. The respective section will focus on the main reasons for employing multi-tiered dispute resolution clauses in construction contracts and a recently published decision of the Commercial Court of England and Wales regarding the enforceability of an escalation clause, according to which amicable negotiations were a prerequisite for arbitration.

Moreover, this paper addresses the relevance of “*risk allocation*”, which is commonly understood as the assignment of responsibility of a particular risk to a party (e.g. natural catastrophes such as earthquakes, hurricanes or volcanic activity). In practice, it is of utmost importance to know which party assumes the respective risk before actual works are being carried out. As an elaborate description of all potential risks involved in construction arbitration would be beyond the scope of this paper, it will focus, in particular, on events of *force majeure*.

¹⁾ 12 Nael G. Bunni & Humphrey Lloyd, *Final Report on Construction Industry Arbitrations*, ICC International Court of Arbitration Bulletin 8 *et seq.* (2001).

Finally, the article illustrates the importance of a realistic and fair allocation of risks in international construction contracts as well as the need for efficient dispute resolution mechanisms.

II. Dispute Resolution

A. Escalation Clauses

An efficient dispute resolution mechanism is essential in international construction projects,²⁾ which is why they are very commonly used.

For instance, the FIDIC Red Book published by the Fédération Internationale des Ingénieurs-Conseils (FIDIC) provides for disputes to be determined by the engineer.³⁾ The remaining disputes must be resolved by a decision of a Dispute Adjudication Board (DAB).⁴⁾ The party being dissatisfied with the decision of the DAB shall give notice to the other party of its dissatisfaction; otherwise the decision of the DAB becomes final and binding. However, before commencing arbitration proceedings, the parties shall attempt to settle the dispute amicably for a period of 56 days. Only following the expiry of this period, the dispute shall be referred to arbitration. The same applies if no attempt to settle the dispute has been made.⁵⁾

One reason for the employment of escalation clauses in international construction contracts could be that complex and long-term contracts require, to a greater extent than other types of contracts, on the parties' continuous cooperation. Moreover, these contracts are typically associated with a considerable diversity of potential disputes.⁶⁾ Considering that, it is of utmost importance that appropriate means to settle disputes effectively at the earliest possible stage are in place in order to avoid any further escalation of the conflict. Furthermore, international construction projects are imminently time-sensitive as any delays may lead to increased costs. Hence, it is essential to settle disputes arising between the parties rapidly, at least on an interim basis, in order to avoid any further increase in costs. However, if a pending dispute is not decided within a reasonable period of

²⁾ JANE JENKINS, *INTERNATIONAL CONSTRUCTION ARBITRATION LAW* pp. 49 *et seq.* (2013).

³⁾ Under the FIDIC Red Book the engineer assumes the functions of design, management of design, supervision and certification. The engineer, however, is not a party to the contract between the contractor and the employer, as he has a separate contract with the employer that covers the work of the engineer and is deemed to act for the employer unless agreed otherwise.

⁴⁾ MICHAEL ROBINSON, *A CONTRACTOR'S GUIDE TO THE FIDIC CONDITIONS OF CONTRACT*, 78 (1st ed. 2011).

⁵⁾ *See, e.g.*, Sections 20.4, 20.5 and 20.6 FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (1st ed. 1999).

⁶⁾ NAEL G. BUNNI, *THE FIDIC FORMS OF CONTRACT 93* (3rd ed. 2005).

time, impediments in the construction process and thus an increase in costs are oftentimes inevitable.

Based upon this background, escalation clauses provide for efficient procedures to resolve disputes rapidly and at reasonable costs.⁷⁾ This applies, in particular, for disputes of low value as well as for issues of lesser importance within a project, all of which can be resolved more effectively on a cooperative basis. Finally, alternative dispute resolution procedures avoid negative implications on on-going projects and business relationships.⁸⁾

If the parties have agreed on multi-tiered dispute resolution, the parties are required to take several steps to settle their dispute before being able to refer them to arbitration or litigation.⁹⁾ These steps may include mandatory discussions or negotiations, mediation, mini-trial or expert adjudication by a dispute board.¹⁰⁾ Furthermore, the contract may provide for contractual time limits to commence with the succeeding dispute resolution procedure if the dispute cannot be resolved within the agreed period of time.¹¹⁾ Thus, the conflict is referred to the next level, if no solution can be found and the agreed period of time has expired.¹²⁾ Arbitration or court proceedings are typically the last resort. The main idea is to resolve disputes by alternative dispute resolution procedures rapidly and efficiently.¹³⁾

B. Dispute Resolution Procedures

The following is an overview of the most common alternative dispute resolution procedures that are used in international construction contracts.

Settling disputes by negotiations between the parties is considered to be the least disruptive and least expensive method of dispute resolution.¹⁴⁾ However, this does not per se mean that negotiation clauses should be included in every dispute resolution clause. It depends on the particular contract and it is, therefore, of utmost importance that the dispute resolution clause should be properly drafted – that is tailor-made for every contract. The language used should be clear and spe-

⁷⁾ Michael Pryles, *Multi-Tiered Dispute Resolution Clauses*, in *INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY*, ICCA CONGRESS SERIES 24 (van den Berg ed., 2001).

⁸⁾ Didem Kayali, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, *Journal Of International Arbitration* 551 (2010).

⁹⁾ John M. Townsend, *Promoting Peace Before Conflict: Integrating Alternative Methods of Dispute Resolution into the Arbitration Process*, in *ARBITRATION ADVOCACY IN CHANGING TIMES*, ICCA CONGRESS SERIES, 35 *et seq.* (van den Berg ed., 2011).

¹⁰⁾ Jenkins, *supra* note 2, at 121 *et seq.*

¹¹⁾ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, pp. 916 *et seq.* (2nd ed. 2014).

¹²⁾ Jenkins, *supra* note 2, at 49.

¹³⁾ Pryles, *supra* note 7, at 23.

¹⁴⁾ Kayali, *supra* note 8, at 551.

cific.¹⁵⁾ It could be unclear whether the pre-arbitration procedural requirements are mandatory or optional. In that case, the parties may commence court proceedings to determine whether negotiation is a pre-condition to the commencement of arbitration proceedings or not, and thus complicating the dispute resolution process instead of rendering it more efficient.¹⁶⁾

The parties may furthermore attempt to resolve their disputes by mediation or conciliation.¹⁷⁾ Somewhat simplified, mediation and conciliation are a dispute resolution procedure in which a neutral and impartial third person assists the parties to reach a settlement to their dispute. However, the neutral third person usually does not have the authority to settle the dispute by giving a binding decision. Therefore, a settlement reached between the parties has to be consensual.¹⁸⁾ The mediator or conciliator encourages and assists the parties to negotiate a solution to their dispute.¹⁹⁾

The employment of ADR techniques and mediation in particular has, over the last years, been encouraged by legislative reforms, which can be seen from the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.²⁰⁾

Moreover, it is possible to appoint experts to determine the disputes. An expert is a neutral third party with particular expertise and may be appointed by the parties to decide a dispute between them either on an ongoing basis or ad hoc. Such dispute resolution procedure is commonly referred to as “expert determination” or “dispute board”.²¹⁾ International construction contracts usually provide for a sole adjudicator or a dispute adjudication board consisting of three or more members. As mentioned above, the FIDIC Red Book provides for a dispute adjudication board²²⁾ comprising of either one or three suitably qualified persons. They usually decide on a binding interim basis.²³⁾ For that reason, the parties agree in the contract to implement and abide by the decision of the dispute board or the adjudicator, until the dispute is finally resolved.

¹⁵⁾ Domitille Baizeau & Anne-Marie Loong, *Multi-tiered and Hybrid Arbitration Clauses*, in *ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 1455* (Arroyo ed., 2013).

¹⁶⁾ Mauricio Gomm Ferreira Dos Santos, *The Role of Mediation in Arbitration: The Use and the Challenges of Multi-tiered Clauses in International Agreements*, in *Revista Brasileira de Arbitragem* 8 (2013).

¹⁷⁾ Jenkins, *supra* note 2, at 122.

¹⁸⁾ Born, *supra* note 11, at 921 *et seq.*

¹⁹⁾ Kayali, *supra* note 8, at 551.

²⁰⁾ Directive 2008/52/Ec Of The European Parliament And Of The Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters.

²¹⁾ Kayali, *supra* note 8, at 551.

²²⁾ See Sections 20.2 and 20.4 FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (1st ed. 1999).

²³⁾ Jenkins, *supra* note 2, at 56 *et seq.*

C. Recent Case Law

Notwithstanding the aforesaid, the execution of multi-tiered dispute resolution clauses can often be problematic. One of the most important problems concerns disputes regarding the validity and enforceability of requirements for negotiations prior to commencing other dispute resolution procedures.²⁴⁾ Under English law, agreements to negotiate disputes are considered to be uncertain and indefinite and therefore invalid, although in a number of other jurisdictions courts uphold the validity of agreements to negotiate, if a clear set of substantive and procedural requirements was set.²⁵⁾

In the recent decision *Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited*, the Commercial Court of England and Wales held that dispute resolution clauses in an existing and enforceable contract which requires the parties to seek to resolve a dispute by friendly discussions in good faith for a limited period of time is enforceable under English law.²⁶⁾

The applicant and the respondent agreed on a long term contract for the purchase of iron ore. Clause 11.1 of the contract provided that:

“In case of any dispute or claim arising out of or in connection with or under this LTC including on account of a breaches/defaults mentioned in 9.2, 9.3, Clauses 10.1(d) and/or 10.1(e) above, the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consuLTCtion [sic] to resolve a dispute or claim. If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration.”²⁷⁾

The applicant failed to lift the iron ore expected to be taken up in the relevant periods. The respondent thus claimed for liquidated damages and terminated the contract. Several meetings took place between the applicant and the respondent in order to negotiate their dispute. Discussions lasted from 1 December 2009 until at least 9 March 2010. The claim was referred to arbitration in June 2010. Arbitration proceedings took place in London under the ICC Arbitration Rules. The respondent claimed that the arbitral tribunal lacks jurisdiction because the applicant had not tried to resolve the dispute by friendly discussions for at least a continuous period of four weeks. The arbitrators held that the multi-tiered dispute resolution provision in clause 11.1 did not contain an enforceable obligation. Moreover, they were of the opinion that even if the obligation to negotiate had been enforceable,

²⁴⁾ Born, *supra* note 11, at 916.

²⁵⁾ 27 Simon Chapman, *Multi-tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith*, *Journal Of International Arbitration* 91 (2010).

²⁶⁾ *Emirates Trading Agency LLC v. Prime Mineral Exports private Limited* (2014) EWHC 2104 (Comm).

²⁷⁾ *Emirates Trading Agency LLC v. Prime Mineral Exports private Limited* (2014) EWHC 2104 (Comm).

the parties would have complied with it. Thus, the arbitral tribunal found itself to have jurisdiction.

The dispute was referred to the Commercial Court of England and Wales for revision. The court held that the agreement had sufficient certainty to be enforceable. Therefore, it was a mandatory and enforceable condition precedent to arbitration, namely the passing of four weeks. As discussions between the applicant and the respondent lasted from 1 December 2009 until 9 March 2010, the condition precedent to arbitration was satisfied, and thus the arbitral tribunal had jurisdiction to decide the dispute.

“Difficulty of proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty. In the context of a dispute resolution clause pursuant to which the parties have voluntarily accepted a restriction upon their freedom not to negotiate it is not appropriate to suggest that the obligation is inconsistent with the position of a negotiating party. Enforcement of such an agreement when found as part of a dispute resolution clause is in the public interest, first, because commercial men expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration.”²⁸⁾

The decision contrasts previous decisions of English courts regarding the enforceability of agreements requiring the parties to settle disputes by negotiations prior to commencing arbitration proceedings. Agreements to negotiate or to settle disputes by amicable discussions were not enforced by English courts so far.²⁹⁾ Therefore, the decision in *Emirates Trading Agency LLC v. Prime Mineral Exports private Limited* indicates a significant change in the English courts’ position. In doing so, the English court considered a number of Australian and Singaporean authorities.³⁰⁾

Considering the aforesaid, multi-tiered dispute resolution clauses must be drafted with utmost care in order to meet the party’s needs and to avoid costly and time-consuming discussions regarding jurisdiction. As stated above, parties involved in international construction projects oftentimes require expedited decisions when problems or conflicts arise. In these circumstances, they will usually seek to commence arbitration proceedings without any delay. In light of the decision in *Emirates Trading Agency LLC v. Prime Mineral Exports private Limited*, an agreement to negotiate a dispute may constitute a mandatory and enforceable condition precedent to arbitration. For that reason, the respondent could be in-

²⁸⁾ *Emirates Trading Agency LLC v. Prime Mineral Exports private Limited* [2014] EWHC 2104 (Comm).

²⁹⁾ See, e.g., *Cable & Wireless v. IBM* [2002] EWHC 2059 (Comm).

³⁰⁾ See, e.g., *International Research Corp. PLC v. Lufthansa Systems Asia Pacific Pte Ltd.* [2012] SGHC 226; *United Group Rail Services v. Rail Corporation New South Wales* [2009] 127 Con LR 202.

clined to raise jurisdiction challenges for tactical reasons. Parties of international construction contracts under English law should be aware of that.

III. Risk Allocation in Construction Contracts

A. Definition of Risk

Risk is commonly understood as “[a] combination of the probability, or frequency, of occurrence of a defined hazard and the magnitude of the consequences of the occurrence”³¹⁾

Every project is inevitably associated with risks. However, this in particular applies to construction projects. As such, they are susceptible to a wide variety of risks and the period of recurrence of risks is often smaller than the time required to plan, investigate, design, construct and complete a construction project.³²⁾ The reasons for this are manifold.

To start with, construction projects do require a careful analysis of technical, organisational and monetary issues. Some construction projects involve advanced and complex technology.³³⁾ Also, the materials used may include new products of unproven performance or strength.

Furthermore, international construction projects may be erected in isolated regions of difficult terrain, sometimes stretching over extensive areas and exposed to natural hazards of unpredictable intensity, frequency and return period, such as tsunamis, hurricanes or earthquakes.³⁴⁾ In addition thereto, construction projects in general require a large number of legal provisions under various laws and regulations (e.g. safety regulations) to be satisfied.

It should also be taken into consideration that the number of people involved in a (large) construction project is generally very high and that these people often come from varying countries and cultures with different goals and a different level of commitment. The parties are obliged to act flexibly and with organisational efficiency in order to ensure that labour, equipment and material are available at the agreed upon time. Extensive interaction, communication and coordination between the parties (e.g. the contractor, the subcontractor or the engineer) are therefore essential in construction projects much more than they may be required in other international contracts.³⁵⁾

Within this setting, it is of great importance that the parties concerned properly evaluate and manage the risks they are facing in the course of a construction project. It is often advisable to seek advice concerning risk evaluation, assessment

³¹⁾ British Standard No. 4778, Section 3.1.1991.

³²⁾ Bunni, *supra* note 6, at 93.

³³⁾ *Id.* at 94.

³⁴⁾ *Id.* at 93.

³⁵⁾ *Id.* at 94.

and management.³⁶⁾ In any event, it is crucial to understand both the concept of risk and its legal implications as well as most particularly how risk is allocated between the parties themselves. The allocation of risks is determined by the contract on one hand and by the applicable law on the other. Therefore, risk allocation may differ enormously and it is crucial, that the contracting parties are aware of this fact.

The type of contract (e.g. re-measurement contracts or lump sum contracts) and the scope of work agreed have a major impact on the allocation of risks. If the parties enter into a turn-key contract as provided for in the FIDIC Silver Book,³⁷⁾ the contractor takes responsibility for the design and execution of works including the risk of completeness of the design, the risk of faulty design, the risk of unforeseeable ground conditions and the risk of variations in the quantities estimated. If the employer is responsible for the design and the detailed description of the works to be performed under the contract (which is the concept under FIDIC Red Book³⁸⁾), the contractor assumes a smaller share of risks.

The contractor must, therefore, very thoroughly assess his contractual obligations before signing the contract. Moreover, he has to evaluate the risks resulting from his contractual obligations. The scope of construction contracts is usually determined by employers unilaterally, due to the highly competitive environment in the construction industry. Hence, employers usually seek to transfer a broad share of risks to the contractor. This may be restricted by the applicable law under the concepts of equity and good faith (“*Sittenwidrigkeit*”).³⁹⁾ For instance, Austrian civil law provides for provisions referring to the concept of equity and good faith which *inter alia* prohibit an unbalanced allocation of risks between the parties in standard forms of contract. However, when using international construction contracts, the contractor oftentimes takes a greater share of the risks depending on the applicable law. Nevertheless, impediments oftentimes lead to additional costs and delays which usually are borne by the party who bears the respective risk. Thus, the allocation of risks either by contractual arrangements or by the applicable law is of major importance when dealing with these implications. In any event, the potential for disputes increases significantly if the allocation of risk is not clearly determined in the agreement or not fully understood by one of the parties.⁴⁰⁾

In the following, this article compares the legal concept of risk allocation under the scheme of the Austrian civil law with that of nationally and internationally used standard forms of contract. Moreover, this paper will focus on events of *force majeure*, as a systematic analysis of all risks would be beyond the scope of this paper. The term *force majeure* is commonly understood as “*unforeseen circum-*

³⁶⁾ *Id.* at 93.

³⁷⁾ FIDIC Conditions of Contract for EPC/Turnkey Projects, First Edition 1999.

³⁸⁾ FIDIC Conditions of Contract for Construction For Building And Engineering Works Designed By The Employer, First Edition 1999.

³⁹⁾ Section 879 para. 3 Austrian Civil Code.

⁴⁰⁾ Bunni, *supra* note 6, at 470.

stances which prevent, totally or partially, one or both parties from fulfilling their contractual obligations".⁴¹⁾ In practice, events of *force majeure* require special treatment as the allocation of risk resulting from events of *force majeure* is oftentimes unclear. Hence, disputes are more likely to arise. It is however worth noting, that the definition and the legal consequences of events of *force majeure* may considerably differ depending on the applicable law.

B. Austrian Civil Law

The Austrian Civil Code (ABGB)⁴²⁾ provides for a legal concept to allocate risks of contracts of works (sec. 1168, 1168a ABGB): Austrian statutory civil law distinguishes between several spheres of risks ("*Sphären*"). These spheres of risk include that of the employer ("*Sphäre des Auftraggebers*"), that of the contractor ("*Sphäre des Auftragnehmers*") and the neutral sphere ("*Neutrale Sphäre*"). The responsibility for a particular risk such as events of *force majeure* depends on the sphere assigned to one of the parties.⁴³⁾

However, the parties may generally deviate from statutory law and allocate risks differently by agreement. This, however, is not possible at all times. As such, the risk of wrong orders given by the employer, defective materials and faulty design provided by the employer shall, as decided recently by the Austrian Supreme Court, remain with the employer.⁴⁴⁾ The contractor's sphere of risk includes the technical sequence of performance, the supply with material and staff, defective construction equipment, obtaining permits as required by law, miscalculation and recognizing apparent defects in the employers design. Risks that cannot be controlled by either party are assigned to the neutral sphere of risk.

As the Austrian Civil Code does not explicitly refer to *force majeure*, there is no definition of *force majeure* under Austrian statutory law. According to case law, the term *force majeure* refers to an impact of inevitable and extraordinary events that could not have been foreseen by the parties.⁴⁵⁾ The neutral sphere is applicable to events of *force majeure* such as landslides⁴⁶⁾ or exceptional strong storms.⁴⁷⁾ In light of the aforementioned, the neutral sphere of risk is assumed by the con-

⁴¹⁾ Bunni, *supra* note 6, at 470.

⁴²⁾ Section .1168 *et seq.* Austrian Civil Code.

⁴³⁾ M. Bydlinski, in ABGB KURZKOMMENTAR § 1168 (Koziol & Bydlinski & Bollenberger eds., 3rd ed. 2010).

⁴⁴⁾ E.g. OGH, June 28, 2012, docket no. 8 Ob 59/12b.

⁴⁵⁾ GEORG KARASEK, ÖNORM B 2110 ALLGEMEINE VERTRAGSBESTIMMUNGEN FÜR BAULEISTUNGEN – WERKVERTRAGSNORM, 542 (2nd ed. 2009).

⁴⁶⁾ Katharina Müller & Mara-Sophie Häusler, *Kostenüberschreitung beim ÖNORM-Vertrag*, bau aktuell 2010, 235.

⁴⁷⁾ E.g. OGH, Mai 22, 1928, docket no. 2 Ob 343/28, SZ 10/137.

tractor under the scheme of Austrian civil law.⁴⁸⁾ For that reason, the contractor also bears the risk of events of *force majeure*.

In practice, the contractor often assumes risks he can neither control nor manage properly. Furthermore, premiums for taking certain risks are declining due to market pressure. Finally, the contractual arrangements regarding the scope of work are more and more detailed and thus ruinous for some contractors as they cannot compensate for these pecuniary disadvantages.⁴⁹⁾

C. Standard Forms of Contract

The General Conditions of Contract for Works of Building and Civil Engineering Construction ("*ÖNORM B 2110*") are a standard form of contract negotiated by interest groups of employers and contractors and published by the Austrian Standards Institute. The Austrian Standards Institute is a non-profit service organization that develops *inter alia* national standards, such as the ÖNORM standards. The ÖNORM B 2110 determines the scope of spheres more precisely than the Austrian civil law.⁵⁰⁾ The contractor is entitled to claim for additional costs and time, if the respective risk is assigned to the employer.⁵¹⁾

For instance, the employer assumes the sub-soil risk ("*Baugrundrisiko*"), the risks of preliminary works ("*Vorleistungen*") and orders ("*Anordnungen*"). Moreover, section 7.2.1 of the ÖNORM B 2110 assigns the risk of events of *force majeure* to the employer. These events typically prevent the contractor to perform his obligations under the contract. Moreover, they are neither foreseeable nor avoidable for the parties.⁵²⁾ For instance, according to the Austrian Supreme Court heavy thunderstorms in summer are no event of *force majeure*, because such thunderstorms are to be expected on the basis of statistical data even during summertime.⁵³⁾ Moreover, the employer has to describe the circumstances the contractor has to consider when performing his obligations under the contract in the tender documents ("*Beschreibungsrisiko*"). Hence, the employer has to describe the specific conditions, which are to be expected at the site.⁵⁴⁾ Furthermore, the employer bears the risk of non-compliance with these requirements.⁵⁵⁾

Risks that are not formally assumed by the employer are assigned to the contractor including assumptions made to calculate prices during the tender stage

⁴⁸⁾ Karasek, *supra* note 45, at 542.

⁴⁹⁾ See, e.g., Robinson, *supra* note 4, at 100.

⁵⁰⁾ OGH, Aug 12, 2004, docket no. 1 Ob 144/04i, RdW 2004/589c.

⁵¹⁾ See Section 7.4 ÖNORM B 2110.

⁵²⁾ Katharina Müller, *Die Risikoverteilung beim Bauprojekt*, in HANDBUCH CLAIM MANAGEMENT 253 (Müller & Stempkowski ed., 2012).

⁵³⁾ OGH, Mai 22, 1928, docket no. 1 Ob 285/01w, bbl 2002,116.

⁵⁴⁾ Müller, *supra*, at 254.

⁵⁵⁾ Karasek, *supra* note 45, at 585.

(“*Annahmen zur Preisermittlung*”) as well as depositions made by the contractor (“*Dispositionen des Auftragnehmers*”) and its subcontractors.⁵⁶⁾

The ÖNORM B 2110 does not provide for an explicit definition of the term “*force majeure*” but it does assign events of *force majeure* to the employer’s sphere of risk if these events are not to be foreseen by the contractor upon signing the contract. The employer assumes the risk of unforeseeable events as he is entitled to terminate the contract according to Austrian civil law.⁵⁷⁾ Hence, the approach of the ÖNORM B 2110 is more balanced than that of the Austrian civil law insofar as concerns risk allocation. In contrast, the contractor assumes the risk to calculate his offer carefully considering the circumstances and risks that are apparent at the tender stage. Therefore, from the contractors’ point of view the legal concept under the scheme of the ÖNORM B 2110 is more advantageous than that of the Austrian Civil Code.

The Fédération Internationale des Ingénieurs-Conseils (*FIDIC*) publishes a series of standard forms of contract for the international use (*inter alia* the FIDIC Red, Yellow and Silver Book). The FIDIC Red Book is recommended for building or engineering works designed by the employer, after which the contractor is responsible for construction works, but not for the design and joint risks. Under the FIDIC Red Book the contractor bears all risks that are not specifically allocated to the employer.⁵⁸⁾

However, risk allocation is more complex in the FIDIC Red Book. Events of risks that are assigned to the employer typically entitle the contractor to claim for extension of time and/or costs.⁵⁹⁾ For instance, the risk of delayed drawings is assigned to the employer⁶⁰⁾, if the delay or the incurred costs are caused by the employer. Otherwise, the contractor is not entitled to claim for an extension of time and costs.

Other than the Austrian Civil Code or the ÖNORM B 2110 the FIDIC Red book provides for a definition of the term *force majeure*.⁶¹⁾ Under the scheme of the FIDIC Red Book the term *force majeure* means exceptional events:

- “(a) Which are beyond a party’s control
- (b) Which such party could not reasonably have provided against before entering into the Contract
- (c) Which, having arisen, such Party could not reasonably have avoided or overcome, and
- (d) Which is not substantially attributable to the other party.”⁶²⁾

⁵⁶⁾ Section 7.2.2 ÖNORM B 2110.

⁵⁷⁾ Section 1168 Austrian Civil Code.

⁵⁸⁾ Bunni, *supra* note 6, at 86.

⁵⁹⁾ Robinson, *supra* note 4, at 86.

⁶⁰⁾ Clause 1.9 of the FIDIC Red Book.

⁶¹⁾ Robinson, *supra* note 4, 25.

⁶²⁾ Clause 19.1 of the FIDIC Red Book.

Moreover the FIDIC Red Book provides several examples of events of *force majeure*. The list, however, is not exhaustive. Hence, exceptional events or circumstances as stated above are *inter alia*:

- “(i) War, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- (ii) Rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
- (iii) Riot, commotion, disorder, strike or lockout by persons other than the Contractor’s Personnel and other employees of the Contractor and Subcontractors,
- (iv) Munitions of war, explosive materials, ionizing radiation or contamination by radio-activity, except as may be attributable to the Contractor’s use of such munitions, explosives, radiation or radio-activity, and
- (v) Natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.”⁶³)

After, becoming aware of an event of *force majeure*, the respective party is obliged to give notice to the other party by describing the events that have led to impediments. The time-limit for doing this is 14 days.⁶⁴) Having informed the other party about the adverse events, the party concerned is excused to perform the relevant obligations under the contract as long as the circumstances identified are still present. In any event the party affected by the event of *force majeure*, has to give notice to the other party if the impediment has ceased to exist. The contractor may claim for an extension of time, if completion is delayed. Moreover, the contractor could claim for additional payment if any costs have incurred due to the event of *force majeure*.⁶⁵) The parties seek to determine these claims by a mutual agreement. The engineer, however, shall make a fair determination, if no settlement could be reached between the parties.

D. Comparison

Both, Austrian civil law and the ÖNORM B 2110 do not provide for a definition of the term “*force majeure*”. However, there is well established case-law of the Austrian Supreme Court (“*Oberster Gerichtshof*”) referring to events of *force majeure*, which are assigned to the neutral sphere under the scheme of Austrian civil law.⁶⁶) However, events of *force majeure* are assigned to the employer’s sphere if the ÖNORM B 2110 applies. The allocation of risks depends on the question, whether a specific event could have been foreseen by the contractor at the tender

⁶³) BRIAN W. TOTTERDILL, FIDIC USERS’ GUIDE – A PRACTICAL GUIDE TO THE RED AND YELLOW BOOKS 282 (2nd ed. 2006).

⁶⁴) Robinson, *supra* note 4, 93.

⁶⁵) Clause 19.4 of the FIDIC Red Book.

⁶⁶) E.g. OGH, Mai 22, 1928, docket no. 2 Ob 343/28, SZ 10/137.

stage and calculation of the offer. Hence, either the contractor or the employer may assume the specific risk of *force majeure*, depending on the circumstances at hand.

Under the scheme of the FIDIC Red Book the definition of *force majeure* covers a number of circumstances; some of them are listed as examples. Thus, the most noteworthy feature is the detailed definition of the term *force majeure* in Clause 19.1. of the FIDIC Red Book.

The need of a specific definition of events of *force majeure* is disputable and subject to further discussions. In fact, the definition of *force majeure* under the FIDIC Red Book is wide and not limited to specific circumstances. Moreover, the definition refers to “*exceptional events or circumstances*”, but it does not determine the characteristics of an “*exceptional event*”.⁶⁷⁾ In practice, the examples given in Clause 19.1 are used as a guideline. It should be noted however that circumstances in construction projects are usually much more complicated than the examples listed in Clause 19.1 might suggest. Thus, risks specified in Clause 19.1 require careful treatment considering all issues relevant to the circumstances of the individual case.

IV. Conclusions

The assignment of risks and responsibilities to a party, commonly understood as risk allocation, is a key-issue in the construction industry. However, the allocation of risk differs from contract to contract and from jurisdiction to jurisdiction. The latter applies to international construction contracts in particular.

The contractor should, therefore, employ a very careful analysis of the contractual obligations and different categories of risks in particular taking into account the relevant jurisdiction(s). In doing so, the assessment of risks should not be done as late as just prior to the commencement of performance; it is highly advisable that it is started much earlier, namely at tender stage when calculating the offer. The tenderer has to have a clear picture in respect of expected costs and risks.

However, risks in particular those involving unidentified hazards are extremely difficult to measure and allocate. Of course, there are statistical methods that could be applied. Insurance would be another option, as the contractor or employer will usually seek to protect him against risks allocated to him. Still, a balanced allocation of risk in the construction contract is most important.

As demonstrated above, there are different legal concepts to achieve this. In some contracts risks are allocated to one or the other party as a whole. Others provide for different categories of risks and allocate these categories to the contracting parties.⁶⁸⁾ In any event, the risks assumed by the contractor should be reflected by the contractor’s price for accepting that particular risk. It is a fact that, competi-

⁶⁷⁾ Bunni, *supra* note 6, at 535.

⁶⁸⁾ Bunni, *supra* note 6, at 8.

tion often makes it difficult to consider these implications at tender stage. Consequently, risks in particular unforeseen hazards are regularly subject to disputes between the parties.

As a matter of fact, disputes are almost inevitable in international construction projects. For that reason, it is the approach that matters when dealing with construction disputes. A sound understanding of complex technical issues and an efficient management are absolutely essential. Moreover, construction disputes require efficient procedures to resolve disputes rapidly and at reasonable costs as they are imminently time and cost-sensitive.

Escalation clauses could generally provide for appropriate means in order to achieve this. However, these clauses may be associated with numerous problems and pitfalls that have to be taken into account, especially in the light of *Emirates Trading Agency LLC v. Prime Mineral Exports private Limited* mentioned previously in this paper.⁶⁹⁾ The decision held that dispute resolution clauses in an existing and enforceable contract which require the parties to seek to resolve a dispute by friendly discussions in good faith for a limited period of time before initiating arbitration is enforceable under English law. The take-away from this decision is that the conditions precedent to the commencement of arbitration proceeding should be drafted carefully using a clear language. As the recent decision deviates significantly from established English case law, it should be taken into consideration in particular with regard to international construction contracts as these contracts often provide for agreements to resolve a dispute by way of negotiations.

Escalation clauses do provide for appropriate means to resolve disputes more efficiently and rapidly in construction disputes. Given the important role such clauses can play, it is of utmost importance that care is taken in the drafting process: only correct drafting can ensure disruptive behaviour or even the employment of guerrilla tactics, which will, as a consequence, almost automatically lead to delays and an increase in costs.

⁶⁹⁾ *Emirates Trading Agency LLC v. Prime Mineral Exports private Limited* (2014) EWHC 2104 (Comm).