

CONTRACT EXECUTION AND PROJECT MANAGEMENT: THE IN-HOUSE COUNSEL PERSPECTIVE

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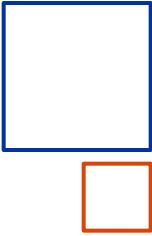


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International Construction Contracts

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International Construction Contract: Definition



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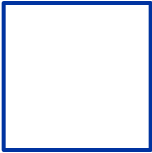
Elements of the contract are similar to those of national construction contracts required under the various jurisdictions

The contract has to be executed in a foreign state, other than the national state of the contractor, in most cases in emerging countries

The owner is a public entity belonging to the state where the construction contract is performed

The contractor is a multinational company having its headquarters in an industrial country

The scope of the construction contract is a complex work

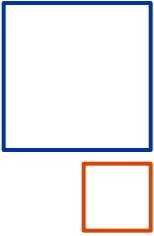


MAJOR CONTRACT TERMS AND CONDITIONS



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- Identification of the parties
- Identification of the work or services to be provided
- How may the Owner check that Contractor's performance complies with the contract?
- Definition of time at which the contractor is expected to complete
- Price and payment
- Consequences of any failure to perform a party's obligation
- Limitation of liability
- Suspension and termination clauses
- Insurances for damage to works and injury to persons
- Intellectual property rights and ownership of the plant
- Security package
- Force majeure
- Claims and disputes resolution
- Applicable law
- "Boilerplate" or standard clauses



The Engineering Contract



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The contractor is responsible for

- i) the entire project - from design through construction and testing
- or
- ii) realization of a project elaborated by other parties, plus technical assistance, if any

The owner is responsible for paying the price plus royalties, if any

Two types of engineering contract:

- i) **consulting engineering**: the scope is the project of the works
- ii) **commercial engineering**: the scope is the project, execution, management and maintenance of the works

The New Types of Engineering Contracts

❑ Turn Key Contract

The owner requires the general contractor to execute a project with a guarantee on the costs, time and performances thereof, plus in some cases, the project financing

Based on the different method of payment:

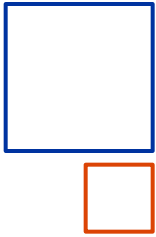
i) Lump sum – the contractor agrees to provide specific services for a fixed price undertaking all risks related to time and costs of the project

ii) Cost plus fee - the owner pays the contractor the actual cost of the construction (based on competitive bids for each trade subcontract) plus certain reimbursable expenses without any profit mark-up, and is charged a fixed fee by the contractor for the services provided

iii) Unit price - the work to be performed is broken into various parts, usually by construction trade, and a fixed price is established for each unit of work

❑ Open Book

The parties define the contract price and schedule on negotiated and transparent basis, following a preliminary phase of basic design and costs estimate



The insurance clause and the claim



- Insurance Clause
- Contract Management
- Claims Management
- In-house counsel role
- An Enel case

Insurance clause



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Enel shall contract and maintain until the execution of the Provisional Acceptance Certificate with a reputable, internationally recognized insurance company an Erection All-Risks Insurance policy. The franchise amounts set out in such insurance policy shall be paid by Enel as well as additional premium, penalties and other amounts to be paid in relation to such policy. The afore mentioned insurance's costs shall be included in the Provisional Forecast Cost Book of the project. With respect to the Scope of Work under the Contract, the beneficiaries of the policy will be the Employer, Enel and the subcontractors that take part in the performance of the works and services under the Contract. Enel shall require its subcontractors to maintain in force all their labor accident and policies covering personnel and civil liability insurance policies.

Insurance Clause EPC: Article 18 FIDIC



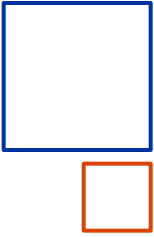
The insuring Party shall insure the Works, Plant, Materials and Contractor's Documents for not less than the full reinstatement cost including the costs of demolition, removal of debris and professional fees and profit. This insurance shall be effective from the date by which the evidence is to be submitted under sub-paragraph (a) of Sub-Clause 18.1 [*General Requirements for Insurances*], until the date of issue of the Taking-Over Certificate for the Works.

The insuring Party shall maintain this insurance to provide cover until the date of issue of the Performance Certificate, for loss or damage for which the Contractor is liable arising from a cause occurring prior to the issue of the Taking-Over Certificate, and for loss or damage caused by the Contractor or Subcontractors in the course of any other operations (including those under Clause 11 [*Defects Liability*] and Clause 12 [*Tests after Completion*]).

The insuring Party shall insure the Contractor's Equipment for not less than the full replacement value, including delivery to Site. For each item of Contractor's Equipment, the insurance shall be effective while it is being transported to the Site and until it is no longer required as Contractor's Equipment.

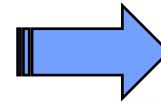
Unless otherwise stated in the Particular Conditions, insurances :

- shall be effected and maintained by the Contractor as insuring Party,
- shall be in the joint names of the Parties, who shall be jointly entitled to receive payments from the insurers, payments being held or allocated between the Parties for the sole purpose of rectifying the loss or damage,
- shall cover all loss and damage from any cause not listed in Sub-Clause 17.3 [*Employer's Risks*],

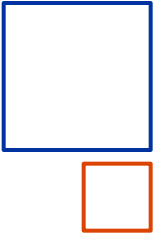


Insurance Claims must be ...

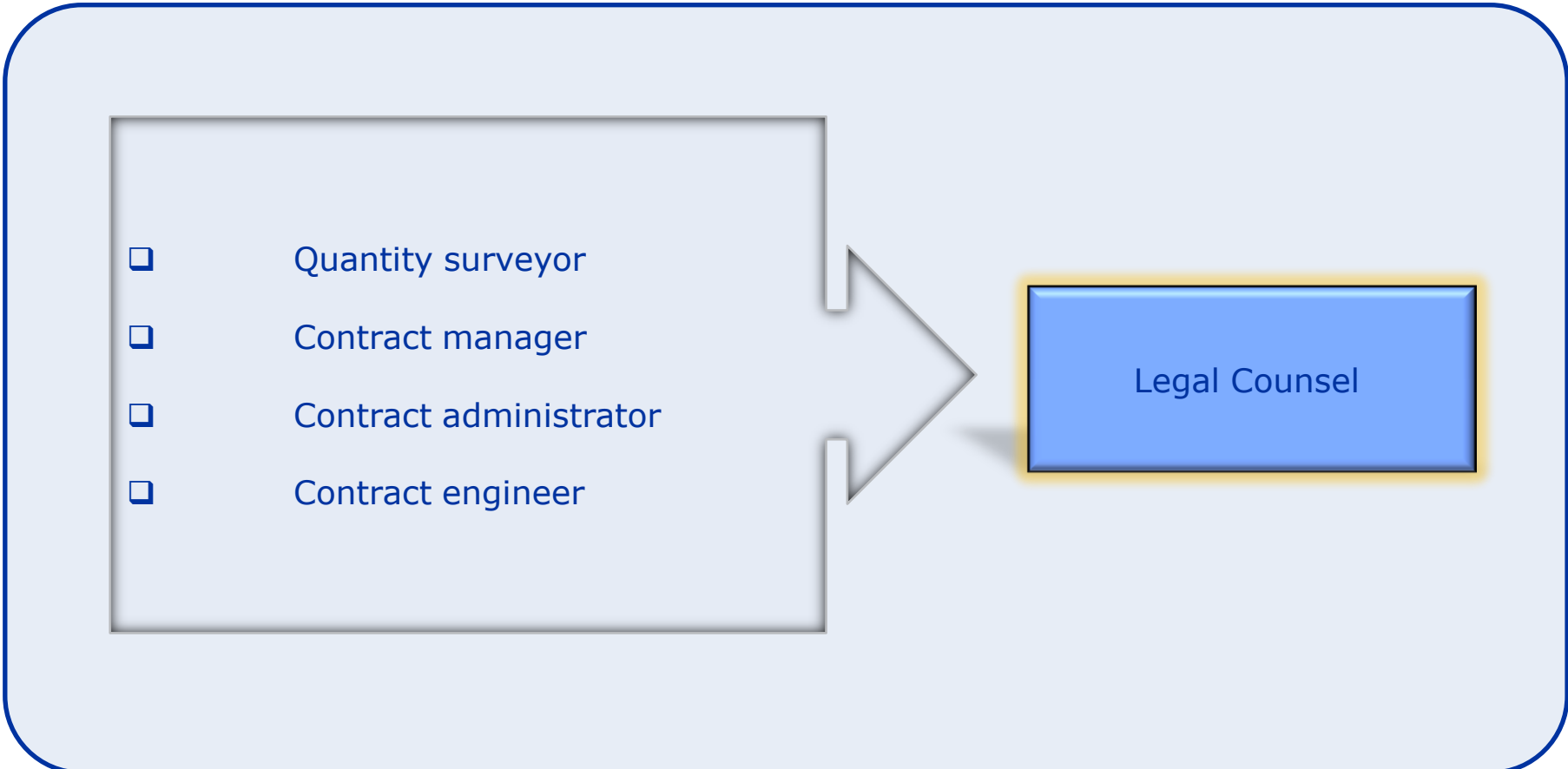
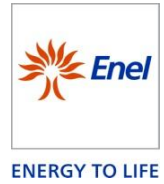
- ❑ Valid
- ❑ Submitted on time, in compliance with the time bar provisions
- ❑ Complete, i.e. contain
 - description of events
 - contract and legal references
 - impact on time and costs

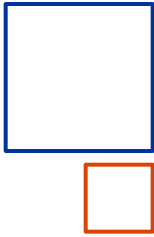


all properly documented



Contract Management / Claim Management

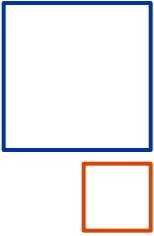




Involvement of In-house Counsel

➤ Consultive task force on the role of the parties and in-house counsels in Insurance Claims

- *To encourage the parties to seek agreement on tailor-made procedures for each insurance claim that are time and cost effective, having regard to the complexity and the value of the dispute*
- *To produce a document to assist internal party representatives, in particular in-house counsel, in participating effectively in a tailor made proposal for a settlement of the insurance claim.*
- *In case the contractor is a consortium or a JV involving different parties assist internal party representatives for the determination of the allocation of the liabilities. Any disbursement of the proceeds of the claim payable to one party is to be dealt with by the other party without further reference to Insurers.*
- *In case of settlement Insurers are irrevocably released from any further obligations or claims arising out of the claim by any party whatsoever.*



Major Activities of an In-house Counsel with Respect to Insurance claims



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- Decide whether to submit the claim to the Insurer : pros and cons
- Manage various steps of claim proceedings until the reimbursement, *consisting inter alia of:*
 - Careful studying of the case (parties, facts, law and procedure)
 - Instructing the internal client on the overall strategy of the claim with respect to the rights and liabilities related to the EPC and the parties
 - Preparing files and documents in the company for the claim

Art of Anticipation

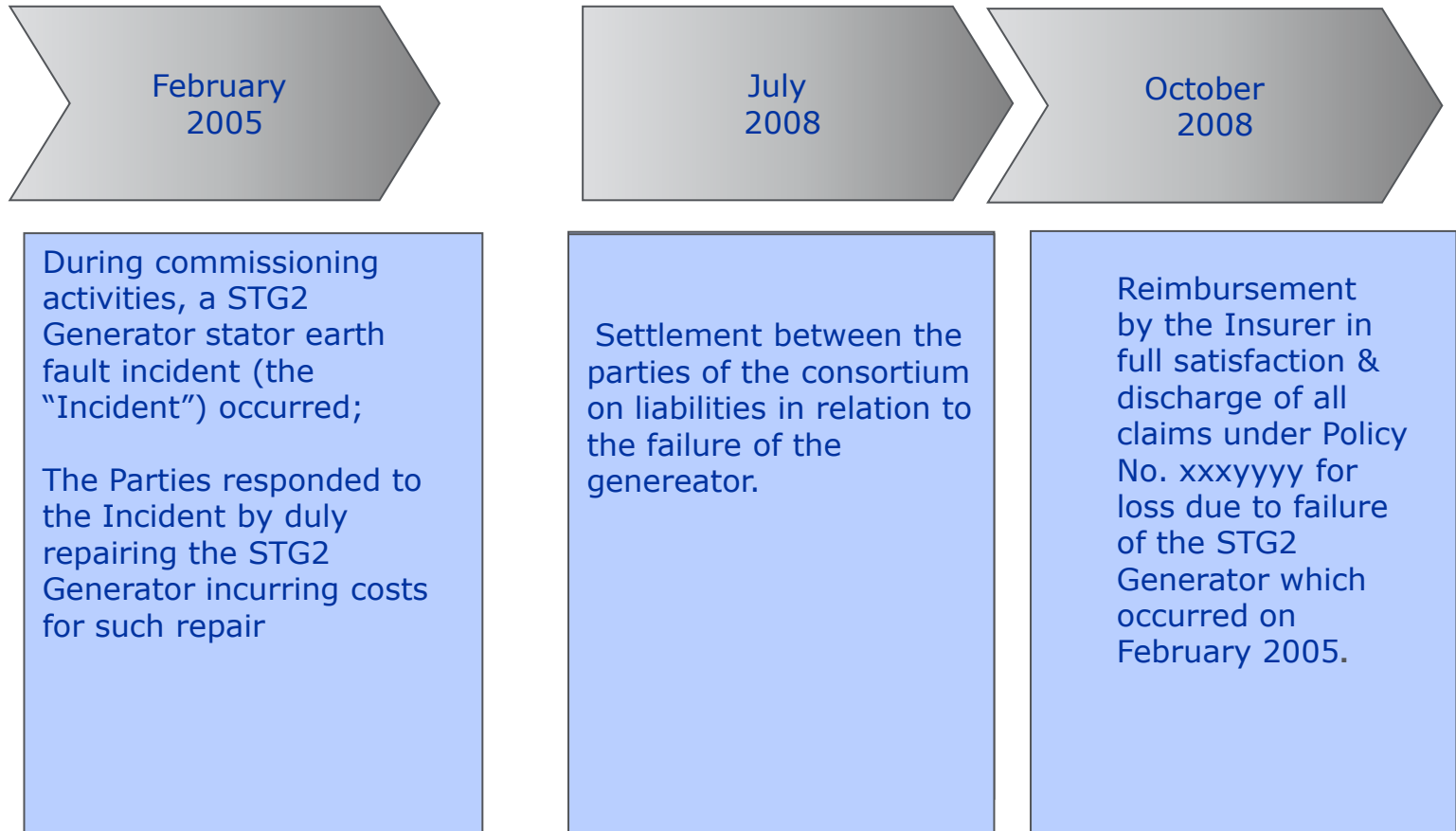
Enel Case: EPC for construction of a power plant in Alfaland



Enel Case: EPC for construction of a power plant in Alfaland



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**Many thanks for this kind invitation and
your attention**



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