

## A COMINDIS Feature: Top 10 Project risks in Plant Engineering and Infrastructure Projects

### Top 7: Contractual Ambiguities<sup>1</sup>

- Top 1      Unclear scope of works.
- Top 2      Miscalculation and cost overrun.
- Top 3      Design problems & defective works.
- Top 4      Extension of time & delay LD's / liability, costs of prolongation and inefficiencies due to disturbances and variations.
- Top 5      Deficiencies in commercial implementation of (EPC) contracts (weak contract management, lack of notifications, and lack of collecting evidence).
- Top 6      Lack of experiences and resources (technical and staffing).
- Top 7      **Contractual Ambiguities.**
- Top 8      Difficulties in enforcing claims (absence of a neutral court, long and costly proceedings).
- Top 9      Relying on co-operation with weak third parties (e.g., planner, sub-contractor, or consortium partner).
- Top10     Compliance, unknown markets, customers & contractors.

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<sup>1</sup> Please note that this publication does not constitute legal advice. Each project requires intensive legal review and negotiation with the counterparty.

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Contractual ambiguities belong to the most important risks in (EPC / turnkey) plant engineering projects.

*What are "Contractual Ambiguities"?*

Contractual ambiguities are uncertainties, contradictions and gaps that arise directly from the underlying contract, including its annexes. Such ambiguities prevent or affect the clear allocation of risk and interpretation of legal requirements or consequences and/or the enforcement of claims.

Some real-life examples:

- Agreeing to a contract without identifying and enclosing the annexes that were mentioned in the contract text.
- Agreeing to liquidated damages (LD's) in a contract without clarifying the calculation / reference for the percentage value.
- Agreeing to an availability guarantee of a plant without defining the regular operating hours per year, ignoring regular maintenance interruptions.
- Agreeing on securities without specifying what kind of securities are owed, such as On Demand Bonds, Performance Guarantees or suretyships.
- Inclusion of contradictory dispute clauses, which refer to both ordinary courts and arbitration.
- Agreeing to unfeasible mechanisms for claims related to disturbances at site.
- Agreeing to non-existent dispute resolution mechanisms, e.g. non-existent adjudication at the Chamber of Commerce in a specific country.
- Agreeing to unfeasible multi-tier dispute clauses.

Additionally:

- Avoid including references in the contract to applicable technical specifications when the specifications provide only recommendations or options (e.g. certain VGB<sup>2</sup> or VAIS / FDBR<sup>3</sup> standards).
- Refrain from referencing approvals that have not yet been granted, as the approval may include certain conditions.

*What are reasons for contractual ambiguities?*

In plant construction projects, contractual ambiguities can be caused by imprecise or contradictory wording or lack of knowledge of the underlying legal system.

The problem of wording can be avoided, or at least minimised, by using one of the standard model contracts for plant construction, such as the FIDIC books (e.g. FIDIC Yellow Book 1999 or 2017) or NEC contracts. The clear advantage of using a model contract is that you have a standardised and proven text that has been developed,

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<sup>2</sup> VGB = VGB Power Tech e.V., now acting under "vgbe energy e.V."

<sup>3</sup> VAIS = Verband für Anlagentechnik und IndustrieService e.V.; formerly „FDBR“ = Fachverband Dampfkessel-, Behälter- und Rohrleitungsbau (FDBR) e.V.

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used and tested by experienced practitioners over many years. In addition, in most cases the standard model contracts provide for a fair and sustainable allocation of risks. Sometimes, depending on the market situation or market position, customers may be tempted to shift risks to their suppliers in an unfair and unsustainable way. However, any short-term benefit in terms of risk transfer and price will be offset by long-term consequences as the contractor seeks to improve its position by taking an aggressive commercial stance. This is one of the reasons why a fair and balanced project contract with clear wording is key to project success.

The use of standard form contracts has another advantage: the parties must disclose deviations from the standard in the special conditions, so that it is easy to identify which clauses deviate from the standard. The annexes are often left blank, but at least the parties have been reminded to fill them in.

In practice, bespoke contracts are often used in combination with standard terms and conditions. In any case, it is highly recommended to carefully analyse and comment on tailor-made project contracts. Often this type of contract lacks a systematic and consistent approach, e.g. there is no order precedent, guarantees or availability guarantees are described in an unclear way, or words do not have the same meaning in different articles or chapters.

Another source of ambiguity is that annexes have been drafted inconsistently and independently of the wording of the main contract. It is highly recommended that annexes are also reviewed and aligned.

Sometimes parties know and see the clear ambiguities in a contract but rely on a later clarification or hope to improve their position after the contract has been awarded. In most cases, this remains a vague hope because the commercial interests of the parties diverge significantly.

## *Risk factor time pressure*

Ambiguities and omissions were often overlooked due to time constraints in the tendering process. Reading, understanding, and commenting on a 100-page contract takes time and requires close coordination between several disciplines (technical, commercial and legal). It is never just a matter of the legal or sales department involved, or external consultants. A good contract review requires a multi-disciplinary approach that draws on the entire corporate memory and intelligence. Neither the client nor the contractor would be well advised not to take the time to review, discuss and agree the wording of a contract - before signing it.

## *What happens if the ambiguity already exists?*

If, despite objective and subjective interpretation, the contract contains gaps or ambiguities, a court / tribunal seized of the matter has to fill these gaps or resolve ambiguities. It does so by resorting to a "specific" or "typical" addition that best

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reflects the presumed intent of the parties (*mutmaßlicher Parteiwille*). The supplementary contract interpretation (*ergänzende Vertragsauslegung*) may also consider trade customs and legal provisions to fill gaps and supplement contractual provisions.<sup>4</sup>

Supplementary contract interpretation is an important principle in German contract law, designed to interpret contracts in line with the intentions of the contracting parties and to fill gaps in a fair and just manner. It allows for a flexible and equitable application of contract law in cases where the contract is unclear or incomplete. This principle also exists in various other legal systems worldwide, including Common Law and Civil Law systems, and it is often used to interpret and supplement contracts when gaps or ambiguities arise.

*What can the Parties do to avoid ambiguities?*

- Take a holistic view on the project and review all parts and clauses of the contract (not just the main body).
- Adhere to your minimum requirements, always keeping the corporate memory alive.
- Do not only involve commercial or legal advisors, but consider the review as a joint approach of all functions (technical, commercial and legal).
- Do not rely on future "opportunities" or hopes to change the contract after the award.
- Involve experienced staff/advisors.
- Know the legal regime - including its particularities - agreed in the contract.
- Check references to technical specifications, purchase orders, etc.
- Avoid time pressure when reviewing a complex contract.

*Key Takeaways*

- The problem of contractual ambiguity can be avoided by careful review, a holistic view on the project and the involvement of an experienced multi-disciplinary team.
- Supplementary contract interpretation in Germany aims to fill gaps and resolve ambiguities in contracts by considering the presumed intent of the parties, and it may also take into account trade customs and legal provisions. This principle is fundamental in German contract law and is found in various legal systems globally, serving to interpret and supplement contracts when uncertainties or gaps emerge.

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<sup>4</sup> *Busche*, in *Münchener Kommentar*, 9th ed. 2021, §157 marginal no. 26 et seq.

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COMINDIS is a boutique law firm specialising in plant engineering, insurance and compliance. If you need legal support for your project, please contact us.

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