



Avoiding Peril Abroad: Understanding Foreign Contract Law Will Help Avoid Later Project Difficulties

By Christian A. Carrillo, Esq., Morris Polich & Purdy LLP

In today's globalized economy, overseas construction projects present opportunities for exciting and prosperous work. But perils exist when unfamiliar laws govern the projects. When involved with foreign construction projects, a construction manager must be familiar with the effect of local contract laws.

China, with its massive construction projects, remains a magnet for American investment, but Chinese contract laws, while superficially similar, are different in important ways from Anglo-American traditions. Awareness of these similarities and differences is essential for a Construction Manager to fulfill his or her duties for the client.

Prior to 1999, China's contract law was quite rigid, emphasizing the centralized, planned economy's "public interests" and severely restricting the autonomy of the parties to a contract. The 1999 Act radically altered that balance away from the collective and toward the free marketplace and the individual parties within it, emphasizing freedom of contract, restricting government interference, and increasing the contractual freedom of the parties. The 1999 Act also tries to "codify," or establish by statute, specific rules and provisions which are often unwritten in Anglo-American jurisprudence because they have developed over hundreds of years of judicial decisions (the "common law"). Despite these market-friendly improvements, the former focus on the State occasionally reemerges.

Article 1 of the 1999 Act is such a throwback to earlier Chinese law, establishing the purpose of Chinese contract law as "protecting the lawful rights and interests of the parties to contracts, maintaining the social economic order, and promoting the progress of the socialist modernization drive." While Anglo-American contract law may void or otherwise alter contracts due to public policy (such as child

labor usage), its traditional focus is almost solely on, for example, "the agreement to do or not to do a certain thing." See, e.g., CAL. CIV. CODE § 1549. Chinese law's explicit focus on the collective is alien to Anglo-American law, and creates a backdrop where the welfare of society, as defined by the State, looms over every contract.

This broad, social welfare-based focus continues beyond Article 1, with the general provisions of the 1999 Act specifying that "[n]either party may disrupt the socio-economic order or damage the public interests." The 1999 Act then shifts to more traditional contract concerns, such as requiring the parties to be of equal footing, act in good faith, abide by the laws and administrative regulations, and observe social ethics.

A construction manager should be aware that Article 12 requires contracts to contain specific clauses with precise information. That information includes: The title or name and domicile of the parties; the contract's object; quantity; quality; price or remuneration; time limit, place and method of performance; and liability for breach of contract and methods to settle disputes.

Most American contracts contain "boilerplate" provisions, which are critical as they typically govern such things as dispute resolution, claims administration, and the various rights and duties of each party. The 1999 Act defines these as "standard terms"—clauses prepared in advance for general or repeated use by one party and which are not negotiated with the other party. If a dispute arises over the meaning of the contract's standard terms, those terms are interpreted according to "general understanding" and are construed against the terms' supplier. (This is somewhat akin to the common law rule that ambiguities are construed against the drafter.)

While not extensively addressing the protection of trade secrets, Article 43 does provide that a "business secret" learned in concluding a contract not be disclosed or unfairly used, and establishes liability for damages caused by the use or disclosure of the business secret if such use or disclosure causes the other party loss.

A Construction Manager should also be aware of the circumstances under which Chinese law renders a contract null and void. This occurs when the contract is obtained through the use of fraud or collusion with the intent of damaging the interests of the State or a third party, the contract is damaging to the public interests, or the contract violates laws or administrative regulations. A party also has the right to request that the people's court modify or revoke contracts that are concluded as a result of a "serious misunderstanding" or were "obviously unfair at the time of concluding the contract." However, a party should be aware that seeking modification waives the right to revocation.

Consistent with its "codification" approach, Chinese law attempts to resolve contract ambiguities in advance. In the performance of contracts which contain unclear quality requirements, the State standards or trade standards shall apply. Similarly, when the price or remuneration is unclear, the market price of the place of performance at the time the contract was concluded is applied. If the place of performance is unclear and the payment is currency, the place of performance is the location of the party receiving payment. In the case of government contracts, the 1999 Act is state-friendly: If delivery under the contract is delayed and the price has dropped, the new price is adopted; if the price has risen, the original price remains valid.

Other provisions important to Construction Managers include the circumstances, liabilities, and remedies for breach of contract. Article 114 is, essentially, a liquidated damages provision, stating that a contract's parties may establish, in advance, a certain amount of contract damages for a breach, or a formula for calculating damages. The amount agreed upon may, however, be adjusted, at any party's request to the people's court or to an arbitration panel.

With international projects, contracts may be in two languages. Chinese law provides that "where two or more languages are adopted in the text of a contract, both texts are equally authentic." When the terms and expressions are inconsistent between the texts of different languages, a contract will be interpreted in a manner consistent with the contract's purpose.

Chapter 16 of the 1999 Act governs contracts for construction projects. Some notable provisions include a requirement that construction projects be in written form. Article 275 requires

construction contracts to contain clauses establishing, among other things, the construction's scope, the time period, the cost, and quality.

Also required in the construction contract are provisions addressing the deadline for submitting technical data, the responsibility for supplying materials and equipment, allocating funds and settling accounts, and the mutual cooperation of the parties. And Article 276 governs "supervision" of a construction project, requiring that the "contract letting party shall enter into a written supervision commission contract with a supervisor." The Act allows the contract letting party, the general contractor, or the contractors for the survey, design, or construction to assign part of the contracted work to a third party, who becomes jointly and severally liable. The subcontractors may not sublet that work again.

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International projects can be profitable, exciting and dynamic. But awareness of the local laws' effects on the projects' contracts is essential so that problems, which can ultimately entail litigation in distant jurisdictions, are avoided. As can be seen from Chinese law, even superficial similarities can obscure differences of which one must be aware so that projects can be built without problems or delays. A clear understanding of local contract law, with clear contracts at the beginning of a project, will help ensure a smooth and prosperous construction experience. **CM**



Christian A. Carrillo is an associate with the Los Angeles office of Morris Polich & Purdy LLP. He has represented owners, general contractors, and construction managers in complex, contractual litigation, and also litigates delay and defect claims. Carrillo also litigates commercial actions involving trade secrets, trademarks, copyrights, and false advertising, and has extensive experience with actions brought under the False Claims Act and in administrative proceedings brought by public entities. He can be reached at CCarrillo@mpplaw.com.