

“Contractual Practices Worldwide – Tailoring New Contractual Frameworks for the Demands of the Local Market”_

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ITA Contractual Practices Group

- 30 years embracing the legal challenges of underground construction
- Bring confidence to those whom seek our counsel

Tunnelling

- Adversity will be encountered
- This Adversity must be overcome
- Payment will be required

Contractually

- Adversity must not mean failure
- Project Success must not mean bankruptcy of state or corporation
- Payment must be fair and just

State

- Must be prudent with citizens natural and fiscal resources
- Political “champions” reputations rise and fall on project success

Companies

- Reputations are just as important for survival as individuals
- Corporate interests are not served by failed projects either

Contracting

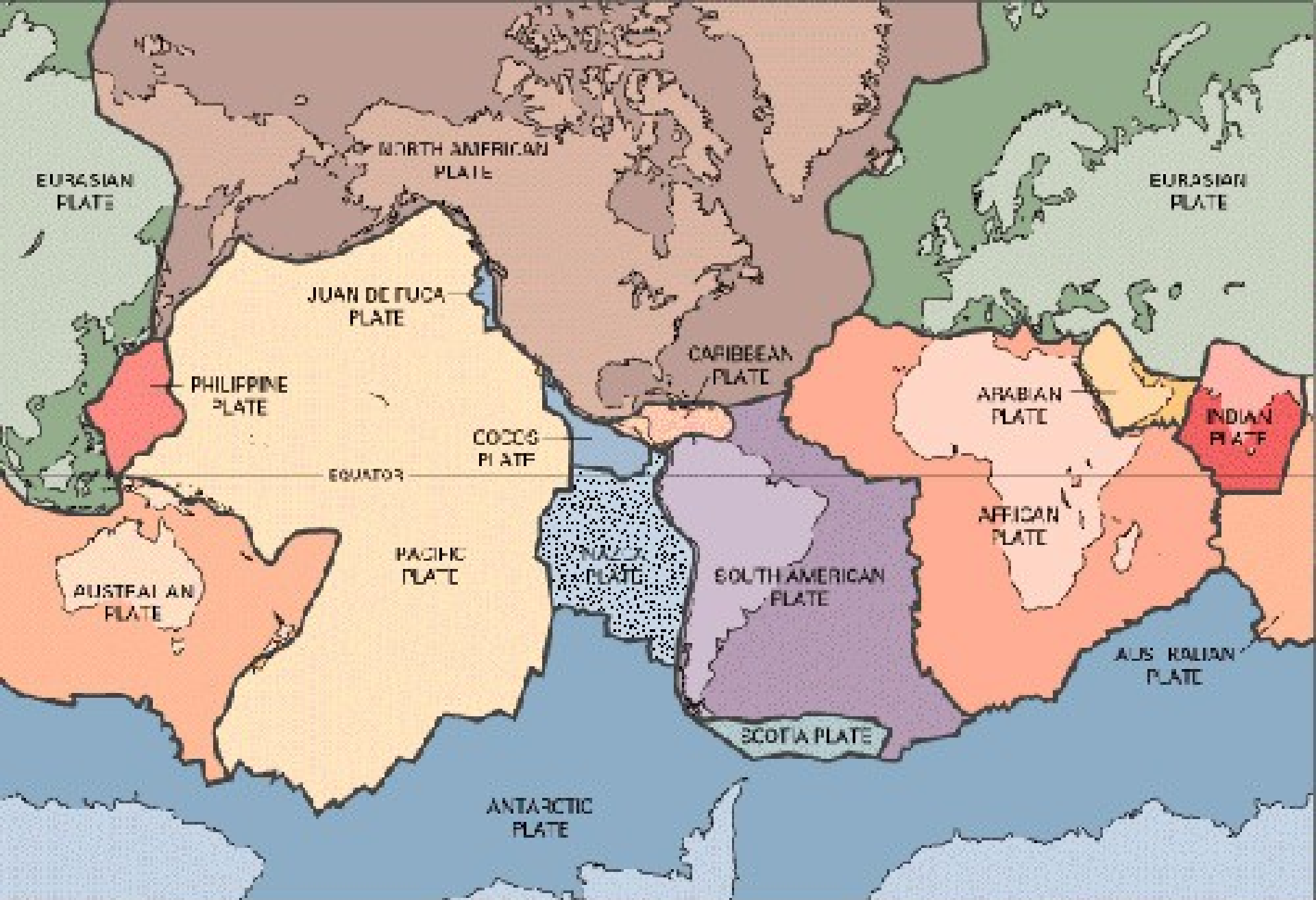
- The terms and management of the contracts we create greatly influence the successful management of the inevitable technical challenges tunnelling
- It is in all parties interests to optimise tunnelling as a commercial arrangement - not engage in gambling and fighting

Contracts

- Universal principles
- Local approach

Colonialism

- It is wrong to impose a contract from one country upon another country.
- To do so is a form of legal and economic colonialism







Switzerland and India

- Both Alps involve Eurasia Plate
 - Geological similarities
- Both countries need contracts
 - Geopolitical/commercial differences

Options

- *Almost infinite*

Contracts – only limited by creativity of their authors

- Build
- Design and build
- Design and build and own
- Design and build and own and operate
- Design and build and own and operate and transfer
- Etc etc

Example Contracts

- FIDIC
- NEC New Engineering Contract
Version 3 issued by the ICE June
2005
- American Society of Civil Engineers
- VOB German Standard Form of
Contract
- French Conditions of Contract
- SIA Swiss Conditions of Contract
Latest Revision November 2004
- etc

The FIDIC Contracts Guide
SUPPLEMENT
WITH DETAILED GUIDANCE ON USING THE FIRST EDITION OF FIDIC
CONDITIONS OF CONTRACT FOR CONSTRUCTION
MULTILATERAL DEVELOPMENT BANK HARMONISED EDITION
DRAFT DECEMBER 2005

Construction
FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER
GENERAL CONDITIONS
GUIDANCE FOR THE PREPARATION OF PARTICULAR CONDITIONS OF CONTRACT
FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER

Conditions of Contract for
Plant and Design-Build
FOR ELECTRICAL AND MECHANICAL PLANT AND
FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE CONTRACTOR

Conditions of Contract for
Construction
MDB HARMONISED EDITION
FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER
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GUIDANCE FOR THE PREPARATION OF PARTICULAR CONDITIONS OF CONTRACT
FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER

Conditions of Contract for
EPC/Turnkey Projects
GENERAL CONDITIONS
GUIDANCE FOR THE PREPARATION OF PARTICULAR CONDITIONS OF CONTRACT
FORMS OF TENDER, CONTRACT AGREEMENT, DISPUTE ADJUDICATION AGREEMENT

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Managing reality
Book 5
Managing
procedures

Custom “Bespoke” contracts

- Exactly what is demanded

Hybrid

- Mixtures of contracts and/or edited standard form contracts

New Frameworks...

- Eg

- Public Private Partnerships

- Alliancing

Public Private Partnerships

- Last year in Prague...



The Problem

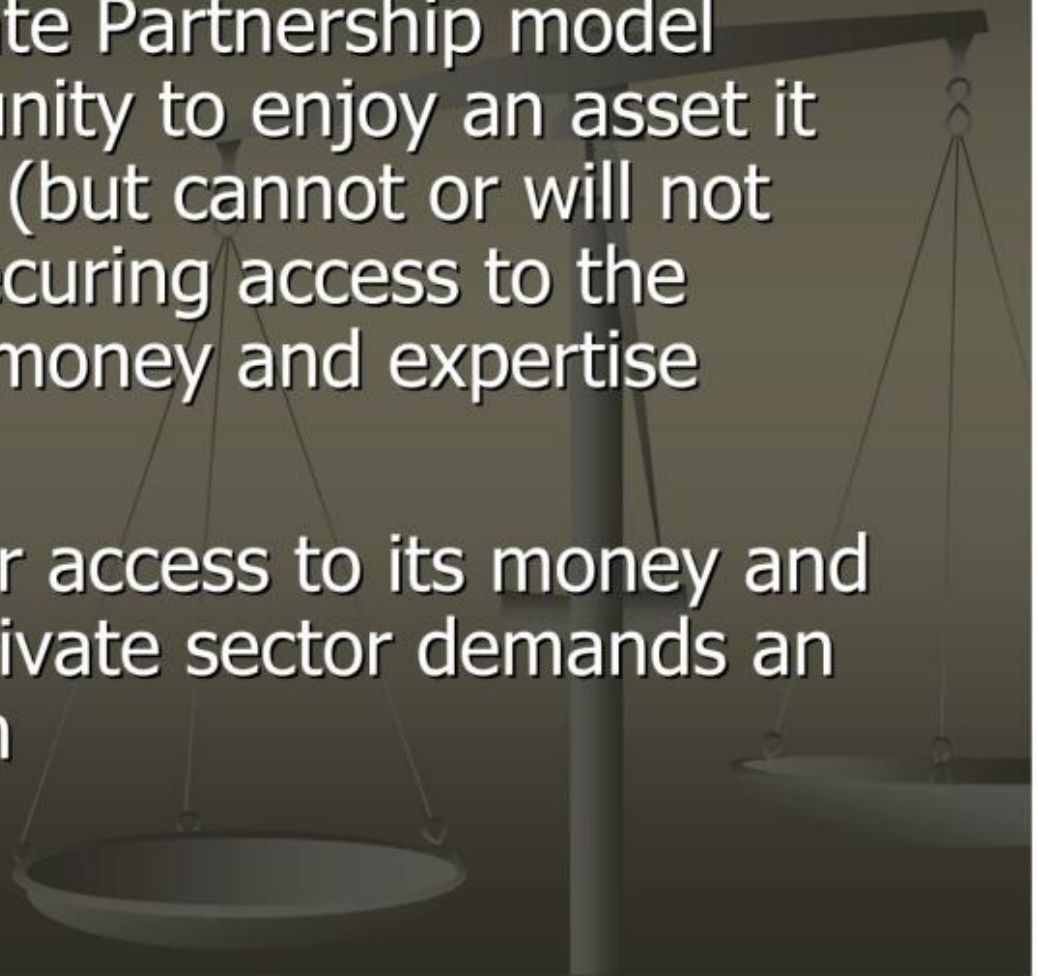
- Late 20th century economic policy has left many countries cash poor
- Citizens demand complex expensive infrastructure
- Societies unwilling or unable to fund assets today with long design lives (e.g.. 150 years for a tunnel)
- Downsizing of Government causing migration of expertise to private sector
- Globalisation - expertise and capacity to deliver major infrastructure does not reside in countries its found in trans-national corporations

What's Old is New

- In the 19th Century many major projects were privately funded with the blessing of the Government
- In the 20th Century most major projects were funded by the Government
- In the 21st Century the private sector is once again funding projects

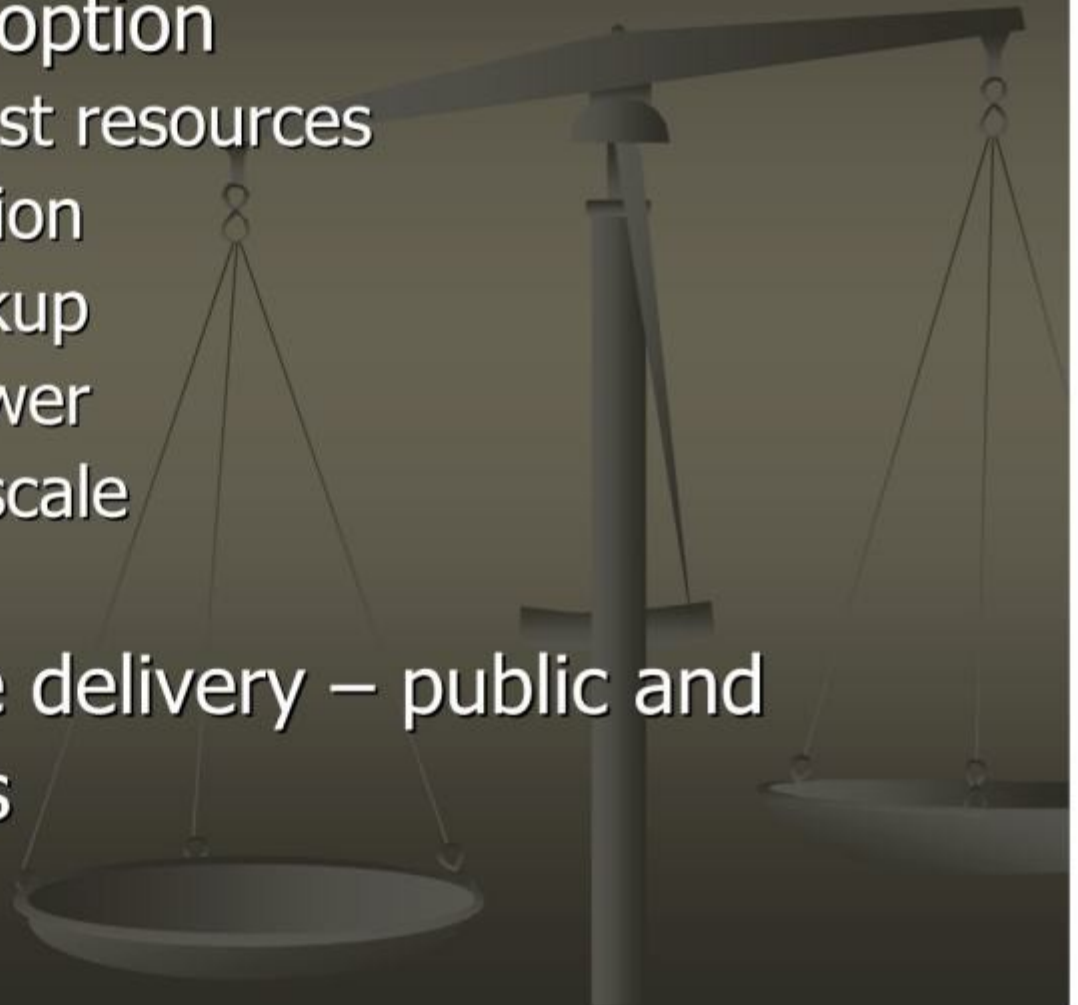
A Solution? - PPP

- The Public Private Partnership model allows a community to enjoy an asset it demands today (but cannot or will not purchase) by securing access to the private sectors money and expertise
- In exchange for access to its money and expertise the private sector demands an economic return



Multi billion dollar projects

- PPPs are a real option
 - Attracts the best resources
 - Early mobilisation
 - Corporate backup
 - Purchasing power
 - Economies of scale
- Earliest possible delivery – public and economic benefits



Striking the Balance



- Financial capital
 - A PPP can span 100% private capital requirements to only a fraction of the project
- Intellectual capital
 - A PPP can span 100% private intellectual capital requirements to only a fraction of the project
- Return on investment
 - A PPP can embrace the full spectrum of financial return from substantial ownership of an asset to rights to an income stream or a simple return on investment

India is not Europe

- Large capital reserves
- Expansive infrastructure investment strategies
- Large, cost effective workforce (But huge number of projects)
 - Skilled
 - Semi skilled
 - Unskilled

Strong demand outside India for Indian skilled workers

Challenge?

- Adjust contracts to suit India's needs

Example – Hydro Power

- 11th Plan for 16,000 megawatts of new hydroelectricity power by 2012
- 12th plan 30,000 megawatts
- demands marrying the latest contractual models with the realities of doing business in India.

- Delivery of these mega underground hydro projects in India demands translation of new contract models into Indian commercial context.

Learn from current needs and past failings

Indian Electricity Context

- India currently has an (official) peak electricity energy shortfall of approximately 13.8% on average and overall, an energy shortage of -9.6%.

- the Central Government Hydropower Capacity Addition Program of 16,553 MW in the eleventh plan and the 30,000 MW in the twelfth plan is looking very difficult to achieve

- Morgan and Stanley (Mumbai) identifies the electricity sector as India's biggest infrastructure bottleneck, noting that there are daily supply cuts in all but a select few cities.

- The result is a reduction in the Indian economic growth rate of around 2 percent

Reasons?

- Contractual Problems:
 - Design changes
 - Geological and ground problems
 - Poor weather conditions
 - Delayed deliveries of plant and equipment
 - Lack of understanding out of communication mechanisms between the parties
- Could be better managed through better contract management systems.

Deficiencies in Tender / Contract Documents

- Failure to define clearly the rights and obligations of the parties including sharing of risks
- The physical realities of the work in difficult conditions are often underestimated

The need for a System for Establishing Accountability for Delays

- Conditions of contract are often varied or modified to such an extent that the contract loses its intent
- Deficiencies in contract administration frustrate effectiveness of the endeavour
- Lack of effective management and minimisation of disputes within the contract inflames conflicts between parties
- Multiple contracts complicate the contract landscape leading to inefficiencies.

Shortcomings Attributable to the Owner

- The employer doesn't actually own the site so construction can't begin:
 - Approval is not obtained
 - Insufficient site investigation
 - Finance not ready
 - Cost estimates unrealistic
 - Risk allocation unworkable
 - Variations in design
 - Unrealistic scheduling
 - Lowest price bidding selection
 - Relationship management
 - Delayed approvals for construction programs
 - Etc

Shortcomings Attributable to Contractor

- Competence of management team
 - Non-compliance with labour laws
 - Shortage of tradesmen and supervisors
 - Failure to implement approved construction methodology
 - Etc

Shortcomings Related to Valuation of Changed Conditions

- Changed conditions are poorly handled including bad records
- Non-payment for work
- Bad assessment of work
- Etc

Dispute Resolution

- Failure to accept decisions
- Appeal rights almost always exercised
- Payments delayed/refused

Options

- It is right to present contractual "options"

Tailoring

- It is the duty of the Lawyers to tailor the contractual framework.

Suggestion

- Clearly define what India Wants
- Eg 30,000 MW by 2015?

Understand

- How business is conducted in India
 - BANKING
 - INSURANCE
 - LABOUR MARKET
 - REGULATIONS
 - POLITICS
 - DISPUTES

Identify Current Known Weaknesses

- Difficult geology
- Poor dispute management
- Beurocracy
- Delays
- Funding

LOOK ELSEWHERE (For inspiration)

Project Delivery *Models*

- Traditional
- Standard
- Modern
- Emerging

Tailor

- Use ITA as a barometer to check that due regard has been had to critical subject areas
- Tailor the contracts to meet the local commercial and political conditions.

Conclusion

- In Contracting there are new tools to better embrace the inevitable challenges of underground construction
- These contracting tools must be tailored the special needs of the countries in which they are used.