



Understanding
and Negotiating **EPC**
Contracts

Volume 2: Annotated Sample Contract Forms

Howard M. Steinberg

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Understanding and Negotiating EPC Contracts

Volume 2

Any project that involves an EPC contract is also likely to involve a number of other complicated contracts. The challenge of the parties to an EPC contract is not to try to eliminate risk but rather to put into place a narrative structure that enables the parties to predict the contractual result that would obtain if a risk materializes. If the EPC contract does not allow the parties to determine the consequences of an unanticipated situation, they will have to look to an expert, mediator, tribunal or court to impart guidance or pass judgment.

The sample forms of contract contained in Volume 2 of *Understanding and Negotiating EPC Contracts* are intended to serve as a guide to demonstrate how risks and responsibilities can be allocated among project sponsors, EPC contractors and the various other parties that may be involved in a project.

Collectively the sample forms in this volume offer an extraordinary resource that provides the benefit of lessons learned and a priceless insight into any project being undertaken that can help assure the resilience of any EPC project.

Howard M. Steinberg is of counsel and a retired partner in the law firm Shearman & Sterling LLP and has more than 25 years of legal experience in the infrastructure sector in more than 100 countries. He is named a leading lawyer in project finance by Chambers & Partners and IFLR 1000. He represents sponsors, off-takers, miners, suppliers, engineering firms, consultants, financial advisors, contractors, operators, underwriters, lenders, export credit agencies and multi-lateral institutions in the development, acquisition, restructuring and privatization of projects around the world. He holds bachelor's and business degrees from Columbia University and law degree from New York University.

Every lawyer involved in project finance should read this book!

Oscar Frota, Senior Legal Counsel, Engie Energy Latin America

From the finance side, before we can even look at the economics of a project, we need to know that its contractual structure is sound. This book is a must for any serious banker.

Edmundo Lujan, Executive Director, Project Finance Latin America, Banco
Bilbao Vizcaya Argentina S.A. (BBVA)

There would be a lot less restructuring work if a proper risk allocation had been put in place since inception. This book provides a must-read guide to project parties to achieve that goal.

Jean-Valery Patin, Managing Director and Head of Project Finance Latin
America, BNP Paribas

It's truly astounding how much money companies will spend only to learn they do not have a project that can be financed. This book should be the first investment for any project.

Halil Sunar, Director of Power for Turkey, State Oil Company of Azerbaijan
(SOCAR)

Financing projects is all about understanding the risks. Anyone who hasn't read this book is just giving himself an unnecessary handicap.

Natasha Kirby, Associate Director, Strategic Energy Solutions Group, HSBC

Reader's Note

Liquefied natural gas (LNG) is shipped around the globe these days as readily as wood and coal were shipped centuries ago. Only massive infrastructure and planning have made this LNG energy trade possible. This “virtual” gas pipeline connecting our continents is a testament not only to engineering prowess but also legal coordination of contracts that cut across jurisdictions and industries. Projects are only as good as the contracts that hold them together. Fear of legal and contractual uncertainty is far more likely to sink a feasible project than is a technical challenge or lack of capital.

When the unexpected strikes—and it will—contractual protection is the best insurance. Years of watching the unexpected occur has taught me one thing—never stop the search for drafting clarity. Nothing is more disappointing than reading a provision of a signed contract that is not clear once an unanticipated contingency has arisen. A vague contractual provision is as useless to a project participant as if it were a hieroglyph.

Ambiguity prevents prediction. Without prediction come judges, juries and arbitral panels. Not a good commercial result, even for the most technologically solid of projects.

Can problems always be avoided? No. But the following text goes a long way to help minimize problems that need not arise if the proper analysis has been made.

Gabriel Touchard
Senior Legal Counsel
Global Gas and LNG
Engie
Paris, France

Foreword

Several years ago I was being considered by a prospective client to serve as its counsel on a large construction project involving an engineering, procurement and construction (EPC) contract. Toward the end of the meeting the prospective client reviewed our discussions and noted that I seemed to have a good grasp of what they needed from their counsel—an understanding of what would be involved in the project’s development and subsequent financing, and that I came highly recommended from their biggest competitor. Despite all that, the prospective client went on to say that this would be a very important project for their company and that they had not worked with me in the past; how could they be assured that I would not make a mistake? I responded that I had already made all the mistakes that could be made so they need not worry about that. Years later, they remain a client.

The objective of this Volume II is to try to assist in avoiding unnecessary mistakes. In some sense, mistakes are just another name for experience. Experience is always good. In this volume, experience is used as the basis to suggest how to implement the concepts and concerns that were outlined in Volume I. Lack of focus and clarity in a contract can lead to great disappointment for all parties involved in a project.

In composing the contractual provisions of an EPC contract, each provision must try to address the situations that could arise within its ambit. I have found the first six questions of any news reporter—who, what, when, why, where and how?—to be the most effective way to understand, analyze, draft and agree upon any contractual terms. Once there is tentative agreement on a contractual term, the next step necessary to gauge the provision’s robustness is to try to anticipate the project’s future at two different stages—construction and then operation. The parties should hypothesize an event that would trigger the operation of the contractual provision in question and posit that such event has just occurred and that the affected party has assembled its relevant work team in a conference room in order to determine what the EPC contract requires be done and also try to identify what might be the various courses of action. This “academic” exercise (as non-academics say) should expose any weaknesses that may exist in the formulation of the provision and any further textual elaboration of the contractual provision that could be helpful.

Risk is sometimes defined as “decision-making under uncertainty.” The challenge of the parties to an EPC contract is not to try to eliminate risk but rather to put into place a narrative structure that enables the parties to predict what contractual result would be obtained if a risk materializes. If the EPC contract does not allow the parties

to determine the consequences of an unanticipated situation, they will have to look to an expert, mediator, tribunal or court to impart guidance or pass judgment.

Keen foresight and rigorous scrutiny are the parties' only hope for a sturdy contractual structure. Once the ink on the signature lines of the EPC contract is dry, time will reveal whether the parties have anchored their EPC contract to a bedrock of jurisprudence or mired it in legal quicksand.

About the Author



Howard M. Steinberg is a retired partner and now “Of Counsel” to the project development and finance group of the international law firm of Shearman & Sterling LLP. He concentrates on transactions involving the energy sector and focuses on the power industry in particular. He has represented sponsors, offtakers, miners, fuel suppliers, contractors, operators, underwriters and lenders in the development, acquisition, restructuring and privatization of infrastructure projects around the world. He co-authored a chapter on Brazil in the book *The Principles of Project Finance* and has written articles in periodicals such as *Power*, *Astronomy*, the Institute for Energy Law’s *Energy Law Advisor* and *Asia Law & Practice*. He is listed as a leading lawyer in project finance by Chambers & Partners and IFLR 1000.

Mr. Steinberg is a member of the New York State Bar, a member of the Advisory Board of the Institute for Energy Law and holds a J.D. from New York University School of Law, an M.B.A. from Columbia Business School and an A.B. from Columbia University’s College, where he majored in philosophy and economics and graduated *magna cum laude* and was inducted into *Phi Beta Kappa*.

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