COMMENT

Risk Allocation Norms of Civil Construction Contracts in Ethiopia

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Abstract

Risk is any uncertainty in an industry including the construction sector. Claims and disputes arise when risks occur in construction projects. This comment discusses risk allocation under Ethiopian construction law and examines risks in civil construction contracts. The comment highlights the gaps in risk allocation norms under the standard format of construction contract that was issued by the Ethiopian Ministry of Work and Urban Development (MoWUD) in 1994. I argue that MoWUD's principles of risk allocation should be updated so that they can include employer insurance and embody provisions that adequately regulate legal risks which can arise from amendment of laws.

Key terms

Risk · Civil construction contract · FIDIC · MOWUD format · Employer · Contractor

Introduction

Risk in the construction industry refers to any uncertainty.[1] Whenever risks occur in projects, claims and disputes arise.[2] The modern understanding of risk

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List of Acronyms:
FIDIC Fédération Internationale Des Ingénieurs-Conseils
MoWUD Ministry of Works and Urban Development.

[1] Nael G. Bunni (2003), *Risk and Insurance in Construction* (Spon Press, 2nd ed). pp. 27-52.
[2] Will Hughes, Ronan Champion and John Murdoch (2015), *Construction Contracts Law and Management*, (Routledge, 5th ed), p. 94.

presupposes accountability of subjects or institutions which err in their actions or decisions under conditions of apparent uncertainty.[3] Risk is understood as intentional interaction with uncertainty. Uncertainty is a potential, unpredictable and uncontrollable outcome; risk is a consequence of action taken in spite of uncertainty.[4]

When one thinks about researching risk and related issues, the challenge of which field of study to approach the issue from presents itself. Many of the institutions that humanity has built, could be viewed as a way to address uncertainty, including politics, religion, philosophy, technology, laws, ethics and morality.[5] Therefore, human wisdom has been capable of identifying patterns for uncertainty and developing heuristics.[6] As a result, whenever risk occurs, every discipline devises its own solutions to prevent or minimize it.

Risk is usually recognized and accepted as inevitable and unavoidable in every field of human endeavor.[7] Conversely, there are also proponents of the view that risk can be avoided. Irrespective of such variation in views, identifying risk factors and solutions require advanced knowledge.[8] As Greene notes "any definition of risk is likely to carry an element of subjectivity, depending upon the nature of the risk and to what it is applied. As such, there is no all-encompassing definition of risk."[9]

The Association for Project Management defined risk as "Any uncertain event or set of circumstances that, should it occur, would have an effect on one or more objectives".[10] In light of the elements of the definition given above, risk could be any uncertain event or unpredicted situation, secondly, the said event should at least happen, and finally the effect aspect the risk must have impact on our objectives. Thus, as Association for Project Management notes,

[3] Karin Zachmann (2014), "Risk in Historical Perspective: Concepts, Contexts, and Conjunctions", in C. Klüppelberg *et al*. (eds.), *Risk – A Multidisciplinary Introduction*, (Springer), p. 3.

[4] Ricardo Antunes *et al* (2015), A Production Model for Construction: a Theoretical Framework, *Buildings* 5(1) 209-228, p. 209.

[5] David Hillson (2006). *The Risk Management Universe: A Guided Tour*, British Standards Institution. p.4.

[6] Ignacio C. Spikin (2013), "Risk Management Theory: The integrated perspective and its application in the public sector", *Estado, Gobierno, Gestión Pública*, Nº21, pp. 89, 126

[7] Ibid.

[8] Brayn S. Shapiro (2005), *Transferring Risks under Construction Contracts* (SHK, Vancouver, BC, Canada), p.2.

[9] Adam Greene(2006), "A Process Approach To Project Risk Management", *Journal of Business Economics and management*, Vol. VII, No. 2, p.17.

[10] Association for Project management (2000), *Project Risk Analysis and Management, A Guide* (APM, 2nd ed.), p. 3.

risk is uncertain event or condition that ultimately affects one of our objectives stipulated in the project plan.[11]

With regard to Ethiopian civil construction laws, the Ministry of Works and Urban Development (hereinafter MoWUD) 1994 format does not expressly define the term risk. However, the format gives a functional definition. From a joint reading of clauses 20, 25, 36 and clause 70(6) of the format, one can understand that risk means any loss, damage or costs associated to a project and it can be mitigated through insurance scheme.

Based on the above definitions, risk has the following features. *First*, risk is characterized by its probability of occurrence and its unknown impact on project objectives.[12] Risk refers to any uncertain situation that jeopardizes the effective performance of projects.[13] *Secondly*, risk is caused by internal or external vulnerabilities.[14] *Thirdly*, risk will have an affirmative or negative effect on construction projects.[15] *Finally*, risk can be avoided through the instrumentality of taking action by anticipation of the events. Risk can be minimized or mitigated after the occurrence of such uncertain situations *via* insurance, assurance or claim settlement.[16]

Disputes in most cases emanate from the allocation of risk in construction projects[17] between the major parties in relation to whether that risk is shared equitably, or whether it is legally imposed, or based on the bargaining power of the parties. This comment makes a comparison between the formats of MoWUD and the Fédération Internationale Des Ingénieurs-Conseils (hereinafter FIDIC). The following sections show that MoWUD has adopted anachronistic principles of risk allocation, which in turn, have to be revisited to incorporate employer insurance and also include provisions as to who bears law amendment risks.

The first section of the comment elucidates the classification of construction risks. Section 2 briefly states the competing views on risk allocation and risk identification. The third section highlights how risk is allocated in the FIDIC format. A brief discussion on the MoWUD 1994 format will be made in the fourth section which is followed by concluding remarks.

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[11] Ibid.
[12] Bryan A. Garner (2009), *Black's Law Dictionary*, (9th Ed., Thomson Reuters) p. 1442.
[13] Edwards Peter J and Bowen Paul A (2007), Construction Risk Management as a Universal Systematic Application, CME 25 Conference Construction Management and Economics 'Past, Present and Future' 16th–18th July 2007 University of Reading, UK Volume 1, p.1345.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Nael Bunni, *supra* note 1, p. 43.

1. Categories of Construction Risks

Various authorities classify construction risks into different categories. However, it is impossible to enumerate all risks which might arise during the development of construction projects.[18] Based on insurance coverage, the Manual on Construction Risks, Damage to the works and Advanced Loss of Profits ('the ALOP Manual'*)*, attempts to classify construction risks into three categories, i.e., Conventional (ordinary) risks,[19] catastrophic (extra-ordinary) risks[20] and risks inherent in the works.[21]

Writers such as Han and Diekmann attempted to classify construction risks into five categories, namely: political, economic, cultural/legal, technical/ construction and other risks.[22] Nael Bunni used a chronological classification which divides risks into –pre-construction; construction; and post-construction phases.[23] There are also others who classify risk into two broad categories, i.e., man-made risks and natural risks.[24]

This comment uses the classification into five categories based on who ultimately bears responsibility. These are: (a) employer risks, (b) contractor risks, (c) sub-contractors risks, (d) third-Party risks, and (e) common risks. The nature of risk in each category is discussed below.

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[18] MAPFRE (2012), *Manual on Construction Risks, Damage to the Works and Advanced Loss of Profits* (Alop) Construction Risks, p. 22.

[19] Ibid. According to the Manual, conventional risks are caused by circumstances such as fire, lightening, explosion, theft and bird falling…[sic], and they are covered by insurance, p.22-23.

[20] Ibid. "The most remarkable are those derived from Acts of God (which are foreseeable, although their effects are unavoidable), as well as other risks which are absolutely unforeseeable. For example: winds, storms, hurricanes and cyclones, floods and water-induced damage, earthquake, ground subsidence, landslides and rock falls… [sic]…the fortuitous case excludes the insured's liability [and makes] the insurance company to cover the risks," p. 23-27.

[21] Ibid. "These include the risks due to the activities carried out during the construction stage. Among the infinity of risks which may be present, the most frequent are: defects in workmanship, unskillfulness, negligence and malicious acts (fraud) and errors in calculation or design and employment of defective or inadequate materials."

[22] Han, S. H. and Diekmann, J.E. (2001), "Approaches for making risk based go/no-go decision for international projects", *Journal of Construction Engineering and Management* 127(4), 300-308

[23] Nael Bunni *supra* note 1, p 51.

[24] Peter Edwards & Paul Bowen (2005), *Risk Management in Project Organizations* (Routledge; 1st ed.), pp. 7-16.

a) Employer risks

These types of risk are related with actions, forbearances or negligence by the employer, his or her representatives or other persons/bodies ultimately attributable to the employer (client).[25] If a certain event occurs and such event falls under the ambit of employer risks, then the responsibility is borne by the employer.[26] Employer risk is further classified into *owner's* risk, *engineers* risk and *consultants*' risks.

Owner's risk covers situations such as social and political risks including strike, lock-out, war, civil commotions and disorders.[27] Legal risks are also borne by the owner.[28] Hence, any risk associated with changes or amendment in legislations after the project contract enters into force, will be the responsibility of the employer.[29] Under the Civil Code of Ethiopia, the employer –as the owner of the property– has property risks if the project poses damages to neighbouring property.[30] However the owner can seek contractual compensation from the contractor.

The second sub-category of employer risk is the *engineer's risk*, which is closely associated with damages or risks as a result of the engineer's action or inaction during the supervision of projects.[31] It mostly emanates from losses or damages due to wider roles assigned to him or her by the standard conditions of contract.[32]

Under construction law, the engineer's role includes, but is not limited to the following roles: acting as designer,[33] employer's agent,[34] supervisor,[35] certifier of the works,[36] adjudicator or quasi-arbitrator,[37] and other roles.[38] The role of the

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[25] Zhang Shuibo, Zhang Le & Gao Yuan, "Risk Allocation in Construction Contracts: A Comparison of China's Standard form of Construction Contract and the FIDIC Conditions of Contract for Construction", *Surveyors Times*, p.37

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid.

[30] The Civil Code of Ethiopia, Proclamation No. 165 of 1960, Article 1210 provides: "An owner who makes excavations or works below the surface of his land shall not shake his neighbour's land, expose it to damage or endanger the solidity of the works thereon."

[31] Ibid.

[32] Ibid.

[33] Ministry of Works and Urban Development (MoWUD), *Standard Conditions of Contract For Construction of Civil Works*, (December 1994), Clause 1(l) & (m).

[34] The engineer, as agent, will perform acts of management and administration. *See* Civil Code, Arts 2204 and 2205.

[35] Bunni *infra* note 38, p. 175.

[36] As a certifier, the engineer will prepare payments certificate within 28 days under the FIDIC format , *infra* note 68, Clause 14(13) or within 14 days under the MoWUD format

engineer in the allocation of risks has come under attack both from the employer and contractor for bias. *First*, the contractor accuses the engineer for favouring the employers in relation to with the fee paid by the owner (or the employer); second, there can be tension between the contractor and the engineer if the latter has acted as adviser to the employer prior to construction and may wish to continue this role upon completion of the construction stage, and if he/she is required to consult with the employer prior to making certain decisions.[39] On the other side, the engineer may be accused by the employer for being biased towards the contractor during the administration and execution of the contract in areas such as awarding extensions of time and in determining amounts of claims, etc.[40]

The last sub-category under employer risk would be *consultants' risk*, which is linked to risks caused by poor drawings and advice on the proposed plans of the projects.[41]

b) Contractor's risks

These types of risk result from actions, forbearances or negligence of contractors and their staff during the construction process and the contractor bears responsibility.[42] One example is in the area of economic risks which is often related with the fluctuation of prices of materials, price adjustment, labour and equipment.[43] Principally, in the construction industry, the contractor is duty bound to come up with necessary materials and staff for the completion of the project.[44]

c) Sub-contractors risks

This type of risk arises because sub-contractors might face risks they take over certain specific parts of the construction from the main contractor.[45] The

Clause 48 & 60(3). However, The MoWUD 1994 format requires the engineer to have the specific approval of MoWUD for the execution of his duties in connection with:- Sub-clause 2-1(d): Variations exceeding 10% under Clause 52(3); Sub-clause 2-1 (i) Time Extension under Clause 44 where the cumulative Time Extension granted under the Clause 44 exceeds 25% of the Contract Time.

[37] FIDIC, *infra* note 68, Clause 22(2); *See* also MoWUD, *supra* note 33, Clause 67.

[38] Nael G. Bunni (2005), *The FIDIC Forms of Contract*, (3rd ed., Blackwell Publishing), pp.155-183

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] Civil Code, *supra* note 30, Art 2613(1).

[45] Michael F. James (1994), *Construction Law* (The Macmillan Press Ltd, 1st ed., 1994), pp. 75-81.

Ethiopian Civil Code recognizes the function of sub-contractors.[46] As the main contractor is usually engaged in two or more projects and works, it will likely find itself working with new and unfamiliar subcontractors.[47] There are various clauses employed and inserted to make sub-contractors responsible to take risks. For example, flow-down clauses illustrate this point.

d) Third party risks

Such risks are associated with encumbrances' created by persons other than the contracting parties. This includes unauthorized entry in the project sites by third parties;[48] and interference by governmental authorities in the performance of the contract.

e) Common risks

Risks shared by the contractor or the employer depending on the merits of the case are common risks. The best examples of common risk are behavioural risks. It encompasses risks sustained due to misconduct if the employer delays handover of the site to the contractor.[49] Other examples include: undue delays in payments, issuance of design drawings or instructions, attendance to tests[50] and failure of the engineer to notify financial arrangements upon request by the contractor, notification of incorrect data to the contractor, and unreasonably withholding permissions or certificates.[51]

Common risks may also relate to the occurrence of natural catastrophes (natural disasters) since the very nature of such risks would potentially affect both parties irrespective of their actions. Such risks necessitate additional time for the completion of projects.

Most international construction contracts adopted either the FIDIC or World Bank format which recognize almost all types of risks such as employer risks, contractor risks, common risks and third party risks. On the other hand, most domestic construction contracts in Ethiopia embrace three types of risks, namely, employer risks, contractor risks and sub-contractor risks.[52] Practically

[46] Civil Code, *supra* note 30, Art 3201(1)

[47] James T.Dixonand *et al* (2016), *Killer Clauses in Construction Subcontracts: Allocating Risk with Subcontractor Agreements*. p.1 <http://www.lexology.com/library/detail.aspx?g=dc6540a8-c0bb-4b17-8960-c0900319ac2e>, accessed on 7 July 2016

[48] Ibid.

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] **ዮሐንስ እንየው አያሌው፣ በኮንስትራክሽን ውሎች አፈጻጸም ወቅት ለሚስተዋሉ ጉዳቶች ተጠያቂ ማነው? ናሽናል ኮንስትራክሽን መጽሔት፣ ቅጽ** 11 **ቁጥር** 110፣ *ሚያዝያ* 2008፣ **ገጽ** 66-67

our construction industry recognizes only three of them; and the concepts of third party risks and common risks seem to be yet nascent in Ethiopia.[53]

2. Competing Views on Risk Allocation and Risk Identification

Almost all construction contracts allocate risks. To this end, there are some choices to be made. For instance, The American institute of architects holds the view that all risks belong to the employer when no other party can either control the risks or prevent the losses.[54] One logical basis for the sharing solution could be to give both parties (employer and contractor) incentive to avoid and mitigate project risks. However, since both parties are adequately motivated for undertaking the project or to enter into a contract, the sharing solution has no appeal other than the spirit of compromise.

The ultimate goal of optimal risk allocation is to promote project implementation on time and on budget with specified quality in the contract, that is to obtain the greatest value of money. Hence, the goal of the employer in general should be to minimize the total cost of risk on a project, i.e. not necessarily the cost of either party.[55] Likewise, the contractor aims at the timely completion of projects.

There are two views on the issue whether risk can be avoided. While the first view regards risk as inevitable, the second considers it as avoidable. The second perspective contends that risk can be avoided by effective anticipation, and actions and decisions such as insurance packages.

The first conception that considered risk as unavoidable gained momentum since the times of Niccolo Machiavelli,[56] but this view meanwhile believed that risk can be minimized and also allocated. According to Machiavelli:

> [a]ll courses of action are risky, so prudence is not in avoiding danger (it's impossible), but calculating risk and acting decisively. Make mistakes of ambition and not mistakes of sloth. Develop the strength to do bold things, not the strength to suffer.

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[53] Training Workshop on Construction Law for Owners, Contractors and Engineers organized by the Ethiopian Contractors Association in Collaboration with Conmis Engineering Plc, held at Addis Ababa University Institute of Technology, September 28-29, 2016. In focused group discussion, some of the participants (including project owners and engineers) stated that they did not know about owners/client's risk, contractors risk and sub-contractors risks before the training.

[54] J. B. Grove (1998) , Consultancy Report on Review of General Conditions of Contract for Construction Works for the Government of the Hong Kong Special administration Region, pp.4-7.

[55] Ibid.

[56] Niccolo Machiavelli (1532), *The Prince*, (1961, Penguin Classics), p.84.

Drawing on the inevitability theory of risk, there are four theoretical standards. These are: (i) the *fault Standard*, (ii) the *foreseeability standard*, (iii) the *management standard,* and (iv) the *incentive standard*.

According to the *fault standard*, the cost and time impacts of risks caused or not avoided through the fault of a party should be borne by that party. In other words, he who makes damage shall bear the risks. This common concept runs through most of the construction contracts.[57]

Under the *foreseeability standard*, potential risks should be included in the original contract so that the employer/owner is familiar with such uncertainty. The rationale for this standard is that employers will pay for (un)materialized risk if the contractors are forced to include contingency sums in tenders. This rationale may apply in some circumstances, but the traditionally stiff competitive conditions in the construction industry forces contractors to set aside such contingencies, except for large construction projects.[58] Most conditions of contract include the theme that "a contractor should only price for those risks which an experienced contractor could reasonably be expected to foresee at the time of tender".[59] Therefore, the foreseeability standard could be subject to fair criticism on the ground that uncertainty is introduced.

The *management standard* approach holds that risk belongs to a party who is best able to evaluate and to control (or manage) it because that party will do its utmost to minimize the occurrence and severity of the risk for the good of all parties in the contract. However, the parties' ability to bear the risk should be given proper consideration as absolute control from risk materialization is not manageable.[60] The management standard does not explain the rationale for allocating risks that neither party can evaluate and control. Furthermore, allocation according to ability to manage the risks may not be consistent with well-developed notions of fundamental justice, fairness and equity.

According to the *incentive standard*, risk should be placed on a party most in need of incentive, i.e. presumably the ability to prevent and control them. This is expected to motivate people to play their part. Compensation events or provisions of construction conditions of contract should be examined if they demonstrate this rationale uniformly as contractors and employers are already motivated to avoid and mitigate risk materialization. Both parties lose when a

[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid, "[M]ostly, it is the employer who can reduce risks through pre-construction planning, exploration and design effort, while it is mostly the contractor who can mitigate the effect of an occurred risk during construction. If a risk such as ground conditions is subject to both pre- and post- construction mitigation, the management standard may not provide obvious association rule."

project is impacted by cost, and time overruns regardless of risk allocation, although one may lose more than the other.

In the context of the construction sector, owners, contractors, architects and engineers are required to deal with common recurring project risks which affect all of them in almost every project. As usual, some risks may be common to all projects, and some risks may be unique to particular projects. In this regard, Eybpoosh *et al* observed that in the construction industry, risk identification is usually made at the pre-construction or pre-contract stages, in which very limited data and information are available about the upcoming project condition.[61]

The various risk identification techniques employed in construction projects are checklist, Delphi technique, pondering, brainstorming, diagrams, interview/ expert judgment, nominal group technique, flow charts, root-cause identification, questionnaire, SWOT analysis (strengths, weaknesses, opportunities and threats), case based approach and business impact assessment.[62] With regard to the risk avoidance-non-avoidance debate, it shall not be taken for granted that risk could be inevitable, but at the same time it is also avoidable as well as identifiable.

3. Risk Allocation under the FIDIC Standard Forms of Contracts

The FIDIC produces standard forms of contract for civil engineering construction which are used throughout the world. FIDIC contracts are usually referred to as the international standard.[63] There are important changes between the FIDIC contracts issued in 1987 and 1999. The contract formats issued in 1999 are:

- *Conditions of Contract for Construction* (First Edition, 1999) is known as the Red Book,
- *Conditions of Contract for Plant and Design-Build* (First Edition 1999) called the Yellow Book,
- Conditions of Contract for EPC/Turnkey Projects (First Edition, 1999) also called the Silver Book,

[61] Matineh Eybpoosh, Irem Dikmen & Talat Birgonul (2011), "Identification of Risk Paths in International Construction Projects Using Structural Equation Modeling", *Journal of Construction Engineering and Management*, Volume 137 (12), p. 1165.

[62] Martins C. Garrido and et al (2011), "Risk identification techniques knowledge and application in the Brazilian construction", *Journal of Civil Engineering and Construction Technology,* Vol. 2(11), pp. 242-252.

[63] Standard Form Construction Contracts, p.1, Available at: <www.ibanet.org/.../Default.aspx?...E906.> (Accessed: July 28 2016).

– *Short Form of Contract* (First Edition, 1999) named, the Green Book, and
– others such as *Form of Contract for Dredging and Reclamation Works* "Dredgers Contract" called the Blue Book.[64]

Generally the FIDIC deals with the issues of risk in its three clauses: Clause 17 (risk and responsibility), Clause 18 (insurance) and Clause 19 (*force majeure*). Traditionally, the allocation of risks in construction contracts is based on a sharing between the parties involved, in accordance with the provisions of the contract usually executed between the parties to a construction contract.[65] Such sharing could be agreed upon between the employer/owner and the design professionals/consultants; or it could be between the employer/owner and the main contractor. From the latter agreement, flows another line of risk sharing between the main contractor, on the one hand, and sub-contractors, suppliers, manufacturers, insurers and others, on the other.[66]

Although the terms used in clause 17(1) of FIDIC's Red Book are "indemnities" and baffling sequence,[67] the contents of the provision advance the purposes of risk allocation.[68] Clause 17(1)(a) allocates risk to the contractor due to failure in contractor's design. Clause 17(1)(b) renders the contractor liable to the risk when there are design defaults or any negligence, wilful act or breach of the contract by the contractor, the contractor personnel, their respective agents or workers whose fault is attributable to the contractor. On the other hand, the FIDIC clause 17(1) second paragraph makes the employer liable for all claims, damages or losses –including bodily injury attributable to any negligence, wilful act or breach committed by him/her and affiliates.[69]

Moreover, the joint reading of clauses 17(3) and 17(4) oblige the employer to bear risks other than losses or damages that are attributed to the contractor. Thus, clause 17(3) indicates the grounds whereby employer risks become applicable, such as war and rebellion.[70] However, the FIDIC format under Clause 17(3), while advancing the checklist of employer's risks, upholds conditional

[64] Ibid.
[65] Lukas Klee (2015), *International Construction Contract Law*, (John Wiley & Sons, Ltd, 1st ed), p. 331.
[66] *Supra* note 38, at 9.
[67] Nael G. Bunni (2001), *FIDIC's New Suite of Contracts* -Clauses 17 to 19 Risk Responsibility, Liability, Indemnity, Insurance and Force Majeure, the International Construction Law Review -ICLR, Vol. 18: 3, p.1.
[68] Fédération Internationale des Ingénieurs-Conseils (FIDIC), 1999, *Conditions of Contract for Construction*, 1st ed, 1999, The Red Book. Clause 17.1, Indemnities: "The contractor shall indemnify and hold harmless the employer, the employer's personnel and their respective agents against and from all claims, damages, losses and expenses…."
[69] Ibid.
[70] Id., FIDIC. Clause 17(3).

standards for cases that fall under (c), (d), (f) and (g). For instance, the occurrence of riots, commotion or disorder within the country by persons other than the contractor's personnel and other employees of the contractor and subcontractors could be the risk of the employer. *A contrario* reading of the same indicates that if riots, commotion and disorder occur as a result of contractor's act, employees of the contractor or subcontractors, then the risk shifts to the contractor.

Seppala considers employer's risks that are embodied in Sub-clause 17(3) as contractual risks to be borne by both the contractor and employer.[71] Sub-clause 17(3) allocates risks in advance and allows exception under clause 17(3)(f) through contractual engagement.

The FIDIC format clearly sets out the consequences of employer risks.[72] The first effect relates to rectifying losses or damages that the contractor incurs based on the reports by engineer. The second effect is related with the first, i.e. if the contractor due to rectifying the losses suffers delay and in turn incurs cost, the contractor is entitled to require claims as per clause 20(1) of the FIDIC format.

Clause 18 deals with insurance, which is another scheme of risk allocation. "Construction insurance is a practice of exchanging a contingent claim for a fixed payment to protect the interests of the parties involved in a construction project".[73] The clause begins by defining the term 'insuring party' to mean the party responsible for effecting and maintaining the insurance specified in the relevant sub-clause. The beneficiary or insuring party might be different in various policies or sometimes both the contractor and employer might buy an insurance policy.

Clause 18(2) is relevant regarding tasks of the contractor or the employer. When each premium is paid, the insuring party shall submit evidence of payment to the other party and also whenever evidence or policies are submitted, the insuring party shall also give notice to the engineer.[74] The insurance under FIDIC format covers all losses or damages, excluding those cases that are listed as employer risks under Clause 17(3).

The FIDIC format under clause 18(2)(e), lists out cases of risk that are not covered by insurance. For instance, part of work which is defective due to

[71] Christopher Seppala (2000), FIDIC's New Standard Forms of Contract - Force Majeure, Claims Disputes and Other Clauses, ICLR Vol. 17 :2, p..231

[72] FIDIC, *supra* note 68, Clause 17(4).

[73] Junying Liu, Bingguang Li & Jiong Zhang, Insurance and construction project risks: a review and research agenda, p.2. Available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.549.689&rep=rep1&type=pdf

[74] FIDIC, *supra* note 68, Clause 18(1), para, VIII.

designing or materials or workmanship, which is lost or damaged, or which has been taken over by the employer (save the extent that the contractor might be liable for the loss or damage and goods that are not in the country). Parties should thus take note of the terms of the insurance policy entered with the insurer (insurance companies.)

The FIDIC provision that deals with *force majeure* is clause 19. The FIDIC allows *force majeure* to be invoked in exceptional circumstances. FIDIC's format embodies four conditions that are required to invoke force majeure. *First,* the situation or the matter at hand should be beyond the control of the party that invokes force majeure. *Secondly*, "parties could not reasonably have provided against" such occurrence "before entering into the contract". *Thirdly*, after the incident occurred, parties could not reasonably have avoided or overcome it, and finally the situation is not substantially attributable to the other party.[75] The FIDIC format illustratively lists cases of force majeure.[76] The above four conditions are cumulative.

The FIDIC format delineates the implication of force majeure which may enable the contactor to claim for costs incurred in relation to it,[77] which may also allow the employer to at least seek optional termination and release.[78] Upon the occurrence of force majeure, if performance is impossible, then both parties are released from obligation by law.[79]

4. Ministry of Work and Urban Development Standard Conditions of Contract (1994): Risk allocation norms

The Ethiopian construction industry is regulated by civil construction law and public construction law –also called procurement law.[80] The regulatory organs in charge of actively implementing these laws are respectively the MoWUD and the Ministry of Finance and Economic Development. The MoWUD has issued the 1994 standard conditions of contract for civil works. The power and

[75] Id., Clause 19(a-d).
[76] Id., Clause 19(1).
[77] Id., Clause 19(4).
[78] Id., Clause 19(6).
[79] Id., Clause 19(7).
[80] Tecle Hagos Bahta (2009), "Adjudication And Arbitrability of Government Construction Disputes", *Mizan Law Review* Vol. 3 No.1, March 2009, p.1; *See* also **ሚካኤል ጉንታ የኮንስትራክሽን ውል ገጽታዎች፣ የኢትዮጵያ ጠበቆች የሕግ መጽሔት፣ መግቤ** 1 **ቁጥር** 1 **ሚያዚያ** 1998 **ገጽ** 143

mandate of the MoWUD with regard to works of construction contracts is now transferred to the Ministry of Construction.[81]

In July 1959, format conditions of contract were prepared by Ministry of Urban Development and Housing (MoUDH) entitled 'General *Conditions of Construction Contracts*'.[82] Nearly three decades after the first format, the second format titled *Standard Conditions of Contract for Construction of Civil Works Projects* was endorsed by Building and Transport Construction and Design Authority (BaTCoDA) in December 1987.[83] The *third* format was *The Standard Conditions of Contract for Construction of Civil Works Projects* issued by MoWUD in December 1994.[84] There was also another draft format titled '*General Conditions of Contract and Tender Procedure Document'* prepared by MoWUD in 1995 which was not put into effect.[85]

With regard to public procurement, the format titled '*General Conditions of Contract for the Procurement of Works'* was issued by the Public Procurement Agency (PPA) in January 2006. This format is used for international and national competitive bidding and the amended format (PPA 2011) is the most recent document that is used for procurement of public/government construction contracts. This comment focuses on the 1994 MoWUD format with particular attention to its risk allocation provisions.

Since its advent in 1994, the MoWUD format is used by MoWUD (currently called the Ministry of Construction), and the format applies for private parties who want to be bound by it. Procurement laws apply for government construction contracts both at the federal and state levels.[86] In general, standard conditions of contract are agreements whose terms are binding to parties who sign it.[87] They cannot be easily changed, even by courts.[88]

Clause 20 to clause 25 of the MoWUD format directly or indirectly deals with risks such as, responsibility for risks and insurance. Clause 34(6) generally

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[81] Definition of Power and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 916/2015, *Federal Negarit Gazette*, 22nd Year No. 12, Addis Ababa, 9th December, 2015, Art 27(2).

[82] Getaneh Gezahegen (2011), *Assessment of Conditions of Contract Problems in Ethiopian Construction Industry*, A Thesis Submitted to School of Graduate Studies in Partial Fulfillment of the Requirements for the Degree of Master of Science in Civil Engineering, Addis Ababa University (Unpublished), p. 47.

[83] Ibid.

[84] Ibid.

[85] Ibid.

[86] Interview with Mr. Endalew, Legal Expert at the legal directorate, Ministry of Construction, 6 February 2017.

[87] Civil Code, *supra* note 35, Art. 1731.

[88] Ibid, Art. 1763.

deals with incidents, and clause 70(7) refers to change in legislation. The Contractor will take full responsibility for the care of the project works from the commencement of the works until the date stated in the certificate of completion for the whole of the works.[89] So, the MoWUD format stressed that contractors bear the obligation of due diligence and care for the works until the date of completion. The engineer issues a certificate of completion in respect of any part of the permanent work; thereafter, the contractor shall cease to be liable for the care of that part of the permanent work, and in effect, the responsibility for the care of that part shall pass to the employer.[90] Accordingly, the risks are transferred from the contractor to the employer upon issuance of certificate.

During the period of the contractor's responsibility (for the care of any outstanding work which he/she has to undertake), the contractor bears all risks for any damage, loss, or injury other than the exceptions that fall under force majeure.[91] The contractor shall be responsible for the completion the permanent works in good order and as per the engineer's instructions.[92]

Unlike the FIDIC format discussed above, the MoWUD format allowed insurance mechanisms only for the contractors.[93] The insurance may be made between an insurer and the contractor in terms approved by the employer.[94] I argue that the MoWUD format in that regard seems unduly limited because it envisages only contractors as parties to insurance policies, and the terms of the insurance policy to be covered are very narrow in scope.

Moreover, the MoWUD format lacks provisions dealing with legal and law related risks, unlike the FIDIC format.[95] During the performance of projects there may be changes in legislation. For instance, a new law might be enacted that allows the contractor's employees to get better provident fund or medical service, and the issue as to who bears these legal risks would arise. The MoWUD format is silent and fails to answer such questions. However, the MoWUD format acknowledges changes in price due to law enactment.[96]

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[89] MoWUD format, *supra* note 33, Clause 20(1).
[90] Ibid.
[91] Id., Clause 20(2).
[92] Ibid.
[93] Id,, Clause 21.
[94] Ibid.
[95] FIDIC, *supra* note 68, Clause 13(7).
[96] MoWUD, *supra* note 33, Clause 70(1)(b): If "the said rates of wages and other emoluments and expenses are increased or decreased by any Act, Statute, Decree, Regulation and the like after the said date of bid pricing, then the net amount of the increased or decreased of the emoluments and expenses shall after due consultation with the Employer and the Contractor, be determined by the Engineer and shall form an addition or deduction as the case may be to or from the Contract Price and be paid to or allowed by the Contractor accordingly."

According to the interviews that this author has conducted on the practice of risk allocation using the MoWUD format especially on risk provisions, most projects are held under the leading role of the contractors. The interviews with contractors revealed that the majority of them rarely use the MoWUD format.[97]

This author has also distributed questionnaires and used purposive sampling taken from individual contractors and private limited companies. This was neither meant to conduct survey nor intensive field research. The purpose was to merely gather some data that can give descriptive insights, which is far from generalization.

Out of 24 individual contractors who answered the questionnaires to the question on how far they use the risk provisions of the MoWUD 1994 format, 17 (70.8%) of them replied they did not use it at all, and there were respondents who even did not know about it. 4 respondents (16.6%) replied that they frequently use the MoWUD format for civil projects.

The respondents who used the MoWUD format were asked to state the problems, if any, encountered during the implementation phase. Three out of the four respondents who frequently used the format stated that issues of price adjustment and changes of legislation (i.e., legal risks) cause controversy, while one individual contractor stated that he did not face any problem.

This author had also purposively approached 13 companies that work as contractors and consultants. 8 companies (61.5%) replied that they did not even know about the existence of the format, while 5 companies (38.5%) have intermittently used the format for civil works.

Concluding remarks

The views on the definition of risk range from the inevitable presence of risk thereby recognizing risk as inevitable and unavoidable to views of risk as avoidable through anticipation accompanied by proactive decisions and actions. This comment has highlighted the various categories of risk that require their identification. In the context of construction projects, risk identification (as highlighted above) may involve various techniques.

The two standard conditions of contract, discussed in the comment, i.e., the MoWUD format (1994), and the FIDIC format (1999) embody provisions that deal with risks. Critical examination of the Ethiopian standard conditions of contract prepared (in 1994) by the Ministry of Works and Urban Development

[97] Interview with Beha Construction PLC, Office Engineer Ms. Abinet Haile on 7 November 2016, Addis Ababa, "She added that most of the projects currently undertaken by their company are governmental construction projects" and as "the client is government, they frequently use Public Procurement Agency (PPA) 2011 format." Other four respondents made similar statements.

(MoWUD) in light with the FIDIC format shows that there are major issues that remain untouched. The first deficiency relates to law amendment risks as well as issues of price adjustment. The second problem in the Ethiopian MoWUD format is that the clause that deals with insurance only obliges contractors.

The MoWUD format should thus be revised to incorporate issues such as price adjustment in the event of legal risks, i.e., changes in legislation. Moreover, the obligation regarding insurance should not be limited to contractors. In the domain enhancing awareness about and the implementation of the MoWUD format, the Ministry of Construction, as a principal regulatory organ, should take the lead in creating awareness for the stakeholders especially contractors, consultants, engineers and lawyers so that the format can be used in most future projects. ■