The idea for this book was born out of the belief that the increasing dissemination of FIDIC forms of contract throughout the Civil Law world requires a different approach to the subject matter than that which is found under the Common Law. An English native speaker will naturally not encounter many difficulties when reading the FIDIC forms, although of course the wording used will sometimes be subject to interpretation. Again an English native speaker will usually be familiar with the underlying legal principles, which mostly derive from Common Law, despite the fact that some Civil Law-inspired features have been incorporated in the FIDIC books. Thus there is a clear need to explain Common Law concepts and legal terms in the context of Civil Law. This may often prove to be difficult as the very nature of Civil Law language is in many respects different from Common Law language. Both systems have terms which are often difficult to translate literally because of the fact that the terms reflect legal concepts which are unknown in the other legal world.

Although many difficulties in understanding the wording may be overcome if the terms and concepts are carefully explained, the English wording may sometimes be in direct contradiction to Civil Law concepts and practice. Whether the FIDIC wording will then prevail depends on the strength of the pacta sunt servanda principle. Civil Law systems usually determine and categorise the very nature of a contract. If the contract falls within the limits of a nominated contract, the relevant default rules (lois supplétives, dispositives Recht) and additionally the relevant mandatory rules will apply. Whether the FIDIC based contract will be recognized as an agreement sui generis or at least as a valid agreement although being in contradiction to the law must be ascertained on a case by case basis.

On the other hand, English native speakers will hopefully appreciate this book as a means of understanding better the members of the constructing team originating from Civil Law nations. Common Law practitioners should realise that the export of services does not always follow the export of Common Law practice. Common Law practitioners will encounter unknown legal concepts, such as pre-contractual duties, specific performance, duties to negotiate in good faith and judicial powers to adapt contracts to changed circumstances. They will also become aware of different
approaches as to the designer’s scope of service, its content and the resulting duties and obligations.

The authors have combined both practical experiences and an academic approach. They have also combined the views of an engineer with the views of a lawyer, which sometimes proves to be difficult. However, lawyers should understand that the practical needs are sometimes stronger than any sophisticated legal thinking can envisage. Engineers should accept that the law is a useful and a necessary feature because it makes decisions predictable and therefore calculable. It is the law which gives the engineer the powers to do what the parties expect him to do, although it is also the law which places constraints and limits on him when acting as a certifier or decision maker. Thus an exchange of ideas, impressions and experiences between lawyers and engineers appears to be not only helpful, but even essential.

Both authors wish to emphasize that a contract is not only a means to solve misunderstandings and disputes. Thus it should be read and prepared with the common understanding to follow its provisions from the outset. Only then can the contract provide easy answers. Legal help will then quite often be unnecessary. However, if, as is too often the case, the Parties ignore the contract on a day to day basis until it proves difficult to find a common understanding, sophisticated and expensive legal solutions have to be worked out and disputes will then become unavoidable.

The authors are further of the unanimous opinion that even though standard forms of contract may be as good and balanced as possible and even better, they are as good as worthless if the project is badly prepared and if in particular the bespoke documents such as the specifications, schedules, bills of quantities and/or employer’s requirements do not reflect the intentions of the employer in a comprehensive and unambiguous way and if the aforementioned documents ignore the basic requirements of a FIDIC contract. Preparing a contract means taking into account that a FIDIC contract includes specific documents, defines terms, contains references to sub-clauses and comprises fall-back clauses. Multiple details must be specified in the documents and they should be implemented as provided and required by the FIDIC documents. It should be the primary interest of both parties to the contract to do so in order to avoid misunderstandings, lacunas and the debate and disputes which will inevitably result.

Finally the authors wish to apologise to their wives and families for the time spent on this book, and neglecting their needs and hopes, and also wish to thank all those who have contributed to this book, in particular Mr. Robert Leadbeater and Mr. Henry Stieglmeier.

Berlin and Cologne
September 2009

Axel-Volkmar Jaeger
Dr. Götz-Sebastian Hök
FIDIC - A Guide for Practitioners
Jaeger, A.-V.; Hök, G.-S.
2010, XXXVI, 446 p. 41 illus., 20 illus. in color., Hardcover
ISBN: 978-3-642-02099-5