Expecting The Unexpected: Anticipating and Managing Key Risks to Successful Projects

“Bones, Bombs & Bribes: Unique Construction Risks in International Contracting”

Alexandra Cole
Perkins Coie, LLP
Chicago, IL

Paul J Taylor
Berrymans Lace Mawer
London, England

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The Scale of International Contracting

The majority of large construction companies now operate internationally – the 2005 KPMG survey\(^1\) establishes that 59% of these organizations operated multi-nationally and 53% were multi-national organizations. In 2004 international contractors had a combined international project revenue of $167.24 billion, of which American contractors billed $32,299 billion. So, nowadays, contractors in large numbers of major projects are not working on home ground – they find that economics, politics, environment, religion and custom often raise the unexpected. They may think they know this but too often fail to manage the risks. Again, the KPMG 2005 survey provides interesting insight, quoting contractors who admit that they “bid without fully understanding risks”, that their “risk management procedures are ineffective”, or that they “do not comprehend the risks when accepting projects in new markets”.

Laws and Logic

Much national and international law reflects a broad consensus of approach (usually based, in some form, on reasonableness) to liability, blame and risk. Too often, though, we see that contracts, the majority of which seek to transfer the risk away from the owner to the contractor or the designer, intervene to reallocate the risk, often unreasonably. Many (perhaps too many) international construction contracts are reworked versions of domestic contracts. There are about a dozen of these.\(^2\)

This paper is essentially practical but, in anticipating and managing key risks, it is important to keep a sense of proportion. Max Abrahamson, a leading Dublin based Construction law expert, suggested as long ago as 1984 that a party should bear a construction risk where:
“1. It is in his control, i.e., if it comes about it will be due to wilful misconduct or lack of reasonable efficiency or care; or
2. He can transfer the risk by insurance and allow for the premium in setting his charges to the other party... and it is most economically beneficial and practicable for the risk to be dealt with in that way; or
3. The preponderant economic benefit of running the risk accrues to him; or
4. To place the risk on him is in the interests of efficiency (which includes planning, incentive, innovation) and the long term health of the construction industry on which that depends; or
5. If the risk eventuates, the loss falls on him in the first instance, and it is not practicable or there is no reason under the above four principles to cause expense and uncertainty, and possibly make mistakes in trying to transfer the loss to another.

The job of trying to balance the five principles in practice is the hard one.... But at least it is best to work from declared principles rather than undeclared and perhaps unconscious prejudices.

Often, to keep a project alive the Owner will follow these principles rather than enforce the strict terms of the contract.”

Broadly and internationally speaking, the law also reflects this. Experience (spread across scores of countries, many of which are former British Colonies) reveals a broad consistency of attitude about anticipating and managing risks but not, regrettably, a consistent contractual approach to responsibility. The correct choice of contract is important – the Grove Report stated in 2000 that the correct choice of contract can create greater efficiency and savings of around 5%.

Choice and knowledge of local law is equally crucial - in some jurisdictions the law is dangerous; the Commercial Transaction Code of the UAE imposes strict liability, regardless of fault, or even contractual term, on the contractors and designers of certain construction projects.

Legal Variations

The globalization of the construction industry and the resultant need for harmonization of standard contracts (and indeed Contract Law) is the subject of much
legal debate. Many commentators have addressed the problems in applying Standard Form Contracts such as FIDIC within civil law jurisdictions; an overall duty of good faith, which is recognized in most Civil Law jurisdictions in Europe, is not generally expressly stated in Common Law, though it is in certain jurisdictions in the United States of America. Thus the way that Courts make decisions about the same contractual terms will vary. For example in France a Judge must simply follow the Civil Code, in Switzerland the Judge can decide as if he were a legislator, and thus can vary the Code, and in England a decision will be based on statute or binding precedent. Many take the view that the applicable law is that of the country where the work is being carried out. This, as is clear from the examples in this paper, can lead to unexpected solutions to unexpected risks. Better to try to choose, knowledgeably, than leave to circumstances, we suggest. Certainly better to know the risks of legal unknowns and react defensively.

Knowing the Risk

So, in anticipating unique construction risks in international contracting Counsel needs not only to know the local laws, but to assess how the contract will operate within that framework and be sensible enough to anticipate and manage the unexpected. Counsel needs to identify what can be properly defined as foreseeable, how the financial risks should be managed and how to achieve fairness between the parties. Anticipating and managing the unexpected risk is not just a question of Bones, Bombs and Bribes but Fairness, Finance and Foreseeability.

Any successful international construction project must emphasis risk management as the centerpiece of the project’s strategic development. Owners,
architects and contractors must contain foreign risks, and to do so, they must
contemplate unique and complex contingencies. This paper deals with the most
“foreign” of foreign risks and contrasts the international response to each with the
domestic. To illustrate, let us examine these examples:

• Security of the site
• Fossils/Archaeological remains
• Corruption and bribery
• Currency
• Labor law
• Title/ownership of the plant and materials
• Embargoes
• Delays in shipment and customs clearance
• International Insurance Problems
• Suspension of Works
• Dispute Resolution

We will take each in turn and pick up on other points as we go.

Security of the Site

Violence – a Force Majeure
Many international construction projects involve creating basic infrastructure in far-flung corners. Others drive railways or highways through densely populated areas. The former attract security risks because of their remoteness, whilst too often the latter prompt political protest. International projects face risks of bombs, terrorism or local criminal activity. It is arguable that nowadays none should be described as unexpected. The Bomb Disposal Unit of the Belgium Army is still finding about ten World War I bombs a day, over eighty years after the war ended. Bombs Away, working in the Asia-Pacific Rim, unearths unexploded ordnance every day, left over from World War II, which ended sixty years ago. In England and Germany bomb disposal experts believe they will be kept busy well into the 21st Century, because both countries were so heavily bombed during World War II.

America does not face this risk, but the whole world faces the dangers of terrorism. We have dealt with claims arising from the kidnapping of the entire engineering staff from jungle sites by local rebels; four recent examples are attached as Appendix 1 to this paper.

The law in every country of which we have direct experience treats the interruption of work on site by the discovery of bombs or an act of terrorism as a force majeure— a risk for which the Contractor cannot be held responsible and which the owner has to carry. In some instances the Owner can turn to the Government for compensation. This approach is reflected in many contracts although they do not specifically define or allocate the risk of bombs or terrorism; FIDIC contracts include terrorism in their definition of force majeure.

The U.S. Congress, in the Terrorism Risk Insurance Act (TRIA) of 2002, defined “terrorism” as an act causing damage in the United States carried out by persons
acting on behalf of foreign interests to coerce the U.S. government or its citizens. Though this definition specifically refers only to acts occurring within U.S. borders, it provides a helpful framework to the type of activity that international construction projects may encounter.

Credible risk assessments of the potential for terrorist activity is difficult to achieve without information on the capability of a terrorist group to achieve an attack. That said, rarely will terrorists target a project under construction. Terrorist groups seek the highest visibility and emotional impact for their attacks, and an attack on most construction sites would not achieve such results. However, certain projects remain at greater risk. For example:

- **Infrastructure**: Dams, bridge, or electrical distribution networks may be targeted for strategic reasons
- **Sensitive Facilities**: Refineries and chemical or nuclear plants may be targeted for strategic reasons or for the level of impact
- **Dangerous Areas**: Projects in hazardous locations are more at risk than projects in more secure areas

Most construction projects, however, are not at risk for a direct terrorist attack. That said, construction projects must confront the risk of indirect consequences resulting from a terrorist attack. Thus even though a particular terrorist activity may not intend to harm the specific project site or its personnel, the after-effects of an attack may result in the frustration of the construction project’s purposes.

**Standard Contracts – Site Security**

The FIDIC Red Book offers a specific provision for the security of the site.

Under Clause 4.22 (“Security of the Site”):

Unless otherwise stated in the Particular Conditions:
(a) the Contractor shall be responsible for keeping unauthorized persons off the Site, and
(b) authorized persons shall be limited to the Contractor’s Personnel and the Employer’s Personnel; and to any other personnel notified to the Contractor, by the
The Contractor is therefore responsible for the security of the site by implementing a satisfactory system to monitor access to the site and prevent any unauthorized persons from entering the site. This is typical of international construction contracts – this is the Contractor’s risk.

*Terrorism Insurance*

Many standard form contracts, including the JCT main forms, require the Contractor to take out ‘all-risk’ insurance policies to cover works during construction. In the UK many policies were amended in 2001 to cover acts of terrorism as defined in the Reinsurance (Acts of Terrorism ) Act 1993:

“Acts of persons acting on behalf of, or in connection with, any organization that carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty’s government in the United Kingdom or any other government de jure or de facto.”

It is important that Counsel ensure that acts of terrorism are clearly defined in both the insurance policy and contract to avoid uncertainty and ensure they are covered for all acts of terrorism under a modern definition. For example - the UK JCT Major Projects Form defines terrorism by reference to the Terrorism Act 2000, so cover for certain acts of terrorism may be excluded from the policy. Examples of acts of terrorism which may not be included are terrorists motivated by vengeance, religious extremism, or a sympathizer acting alone.8

Professional indemnity policies usually exclude claims in respect of terrorism but construction professionals may be covered if the damage may have resulted partly
from their negligence as well as an act of terrorism, for example if the design of the building fails to withstand a particular type of impact which it was required to withstand.\textsuperscript{9}

**Fossils/Archeological Remains**

*Protecting the Past*

The European Convention on the Protection of Archaeological Heritage (otherwise known as the Valetta Convention) was signed in 1992 and states that parties to the Convention should institute a legal system for the protection of archaeological heritage to include mandatory reporting of chance archaeological discoveries and implement measures to protect, maintain and preserve archaeological heritage. The Convention has been ratified by 33 EU Member States.

In the UK, the discovery of remains and items of archaeological importance is governed by the Ancient Monuments and Archaeological Areas Act 1979 in the UK. Any building, structure or works (below or above ground) and any cave or excavations, or sites with the remains of these may be classed as an ancient monument.\textsuperscript{10} Sites where any vehicle, vessel, aircraft or otherwise moveable structure are found (or the remains of are found) may also be classed as ancient monuments.\textsuperscript{11} The Act gives the Secretary of State the power to schedule such monuments, making it an offence to execute works which result in the destruction or damage to a scheduled monument without obtaining scheduled monument consent.\textsuperscript{12} Applications for consent may be similar to planning applications and may result in a hearing or local inquiry.\textsuperscript{13} Parties to a project which is halted by a refusal of scheduled monument consent should
be aware that a party with an interest in the monument who incurs expenditure or sustains loss or damage as a result of the refusal may be entitled to compensation. Owners should beware as the Secretary of State or local authority may choose to prosecute if they suspect they have caused damage to a scheduled monument.

Planning Policy Guidance (PPG)15 and 16 are the government guidelines in the UK for archaeological protection. Planning authorities expect developers to provide information on the archaeological implications of their proposals where is it suspected there are important remains. PPG15 covers conservation areas, listed and standing buildings. PPG16 governs the general policy regarding archaeology, therefore, in Britain it is a requirement that the potential for archaeological artifacts to be found on site must be considered and accounted for at a very early stage. Disagreements often arise over the length of time of the archaeological investigation of the site and a balance must be struck between the needs of the owner to proceed as soon as possible and with the interests of archaeologists.

Some countries take archaeological prevention more even seriously – in both Italy and Greece such protection is embodied in the Constitution. This seriousness of purpose – the protection of heritage – is worldwide, including many parts of Africa and Asia, often with an emotional edge. So Counsel must be aware of this importance given to the protection of “bones”, unexpected or otherwise, and allocate the risk.

Sometimes this law works, but regrettably, sometimes not. The Rose Theatre, where many of William Shakespeare’s plays were originally performed, was discovered
during a routine excavation on a building site near Southwark Bridge in London in 1989. It was known that the site corresponded roughly with the location of the theatre and the foundations had been preserved surprisingly well by the peat soil. The development of the site was debated in Parliament after campaigns to prevent the construction of an office block. The UK Government offered the owners £1m to preserve the theatre in the building’s basement and 3 years later the site was scheduled as an ancient monument so that any future development would need Government approval. Unfortunately by this time the office block had been built, damaging the remains; it is ironic that the building was unable to attract a tenant for some years and the rent had to be sharply reduced. We attach examples of other “international” archaeological discoveries, in England and abroad, as Appendix II.

In the US, Congress passed the Archaeological Resources Protection Act (ARPA) in 1979, in order to protect archaeological resources and sites found on Indian and public lands.

In 1979, Congress passed ARPA in order to protect archaeological resources and sites found on Indian and public lands. ARPA defines “archaeological resources” as any “material remains of past human life or activities which are of archaeological interest.” The Act lists several examples of such “material remains,” including psychical objects (e.g., pottery, weapons, tools), physical structures (e.g., pit houses, portions of structures), and cultural specimens (e.g., rock paintings, intaglios). The definition also includes “human skeletal materials,” including graves containing such materials. Thus, if contractors or architects uncover human skeletal remains during the
excavation or construction of the site, they must respond pursuant to the ARPA guidelines.

ARPA prohibits four types of activities: the excavation, removal, damage, alteration, or attempt to do the same, of any archaeological resources located on Indian or public lands without a permit; the sale, purchase, exchange, transportation or receipt, or offer to do the same, of any archaeological resources excavated or removed without a permit or otherwise in violation of federal law; the sale or purchase in foreign or interstate commerce of such resources excavated or removed in violation of state law; and finally, counseling or aiding an individual to violate any of these provisions.\textsuperscript{17} ARPA also provides for the imposition of a civil penalty by a federal land manager for the violation of the ARPA regulations or a construction permit issued pursuant to the regulations. In addition to its protection provisions, ARPA promotes the study and evaluation of these resources through increased cooperation between governmental authorities, the professional archaeological community, and private individuals.

Though ARPA proscribes the taking of archaeological resources from Indian or public lands, it also prohibits the trafficking in interstate commerce of such resources. In an important decision interpreting ARPA, the Seventh Circuit held that this latter provision prohibited trafficking of archaeological remains discovered not only on Indian or public land, but on private land as well.\textsuperscript{18} In \textit{U.S. v. Gerber}, the court held that the reference to interstate commerce in the Act “would be superfluous if the subsection were limited to artifacts taken from federal or Indian lands, since either source would establish federal jurisdiction with no need to require proof that the artifacts were transported in interstate commerce.”\textsuperscript{19} The court’s holding is particularly significant because it confirmed that
“ARPA can now be used to protect archaeological resources located on private land if they (w)ere obtained illegally and moved across state lines.”

Primarily, this should, under local law, be the Owner’s risk and responsibility.

*Contractual Responsibility*

The FIDIC Red Book reflects this and offers a specific provision for the recovery of any archaeological remains. Under Clause 4.24 (“Fossils”) the Contractor may be entitled to an extension of time and costs in respect of delays caused by the discovery of fossils, coins, articles of value or antiquity, and structures and other remains or items of geological or archaeological interest.

In most other international contracts the risk of unforeseen physical conditions such as the discovery of archaeological remains and fossils is usually assumed by the Owner, providing the contractor with a right to claim for extension of time for delays and costs or an adjustment of the contract price. However, in Hong Kong, the Contractor bears the cost of discovering the unexpected even if misled by the Government. Malaysia also allocates the risk of such unforeseen ground conditions to the contractor.

In the AIA documents, such discoveries had not been addressed, but in its new A201 General Conditions, to be released in 2007, the AIA has indicated that it proposes to treat the discovery of burial or archeological sites as it does the discovery of hazardous materials – the Contractor must stop work, notify the owner and receive direction before proceeding.
Many government contracts in the United States also put the burden of unforeseen conditions on the Contractor. Force majeure insurance can be obtained to cover such risks, but it is expensive.

**Corruption and Bribery**

*The Size of the Problem*

Legislators throughout the world have sought to combat the potential for corruption in construction projects. Large-scale domestic and international construction projects involve a substantial number of participants in a complex contractual structure, and for this reason, often attract corruption. Surveys show that construction projects are perceived to have the highest level of corruption of any other economic sector – higher than the arms industry and the oil and gas sector. A recent overview of corruption in construction projects posited several factors that suggest why construction projects are particularly prone to corruption, including the size of projects; the uniqueness of projects; the number of contractual links; the number of phases, making oversight difficult; complexity of projects; and the lack of transparency.

Bribery poses a particular threat to the integrity of construction projects, especially during planning and design and in the award of contracts. A developer or contractor may illegally purchase support for a project from public officials who must approve of the project; or a contractor may pay representative of the client a percentage of the contract price to secure the award of the contract.
Bribery and fraud can render contracts void or unenforceable and/or give innocent parties the option to terminate the contract and claim for damages, causing delay, disruption and increased cost.\textsuperscript{28} There may also be time consuming civil claims and criminal prosecutions against the firm and/or individual, as seen in the Lesotho Highlands Water Project. (See Appendix III)

Transparency International is a non-governmental organization devoted to combating corruption on a global scale.\textsuperscript{29} According to the Transparency International Bribe Payers Index 2002,\textsuperscript{30} Russia, China (excluding Hong Kong) and Taiwan were the three countries considered to have a high propensity for using bribes overseas. Australia, Sweden and Switzerland were perceived as the least likely to use bribes. The surveys also revealed that the construction industry and public works are the business sectors which were considered to be most likely to accept bribes in the surveyed countries. The Transparency International Corruption Perceptions Index 2005 revealed that Iceland was perceived as the least corrupt, and Bangladesh and Chad as the most corrupt countries according to the data collected.\textsuperscript{31}

In order to reduce the risk of corruption to projects, Transparency International suggest companies should consider the following\textsuperscript{32}:

\begin{itemize}
  \item[a)] An internal anti-corruption code of conduct and management programme
  \item[b)] Adequate contractual safeguards such as anti-corruption warranties, termination and compensation rights in the event of corruption, and claims management codes.
  \item[c)] Due diligence to ensure no corruption paying particular attention to staff in key posts and subsidiary and associated companies, agents, sub-contractors and suppliers.
  \item[d)] Support moves to make all pre-qualification, tendering and project management procedures more fair, reasonable, objective and transparent.
  \item[e)] Report all allegations of corrupt practices to the authorities.
  \item[f)] Only enter contracts with organizations with an internal anti-corruption code of conduct and management programme.
\end{itemize}
g) Support the introduction of an internationally externally audited ethical standard, and only companies attaining such a standard should then be eligible to tender for public sector projects.

h) Appoint an independent assessor to monitor pre-qualification, tender and execution of a project to ensure it is free from corruption.

i) Use project integrity pacts, with enforceable sanctions and arbitration mechanisms.

j) Support fair, proportionate and transparent blacklisting procedures.

OECD Convention

In December 1997, the United States and thirty-three other nations signed the Organization for Economic Cooperation and Development (OECD) Conventions on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Conventions”). The OECD Conventions entered into force on February 15, 1999, and since then, all signatories have ratified the OECD Conventions and adopted implementing legislation. Some countries have argued against the need for further implementing legislation if existing legislation covered the substance of the OECD Conventions. For example, the United Kingdom initially argued that existing legislation from 1889, 1906 and 1916 could serve as the implementing legislation of the OECD Conventions. In early 2002, the U.K. amended the Anti-Terrorism, Crime and Security Act of 2002 to include provisions implementing the portions of the Conventions not covered under existing legislation.

US legislation

In the United States, in order to combat bribery in domestic construction projects, legislators in both the federal government and in every state have criminalized bribery. In response to increased investment in international construction projects, federal legislators sought to eliminate the potential for corruption in these foreign investments. In 1977, the United States became the first nation to pass an anti-foreign bribery statute with the Foreign Corrupt Practices Act (FCPA). The
FCPA prohibits foreign bribery through two provisions: first, through anti-bribery provisions outlawing certain categories of payments; and second, by requiring certain record-keeping and internal accounting controls and disclosure.

**Anti-bribery**

Under the FCPA’s anti-bribery provision, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining business. The law applies not only to “issuers”, but to “any person” engaging in the prohibited activity. The 1998 amendments to the Act expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals who make any act in furtherance of such corrupt payment while in the United States. Individuals convicted of violating the FCPA anti-bribery provisions may be fined for up to $100,000, imprisoned for up to five years, or both; businesses may be fined up to $2 million.

**Accounting provisions**

The FCPA amended the Securities and Exchange Act of 1934 to require companies with securities listed in the U.S. to meet certain disclosure, record keeping and accounting requirements. Issuers must disclose in reasonable detail any unlawful foreign payment or transaction “in reasonable detail,” and must devise and maintain internal accounting controls over international transactions. The SEC, operating in coordination with the Department of Justice, ensures enforcement of these accounting provisions. Individuals convicted of violating the FCPA accounting provisions may be fined up to $1 million, imprisoned for up to ten years, or both; businesses may be fined up to $2.5 FCPA and the OECD Convention
**US Implementing Legislation**

In 1998, the United States amended the FCPA in order to implement the main provisions of the OECD Conventions. In addition to the amended FCPA, the U.S. has taken several other implementing actions, including: amending the sentencing guidelines to adjust the penalty for bribery of foreign officials; issuing an executive order that added the European Union’s organizations and Europol to the definition of “public international organizations”, thereby criminalizing bribes to officials from those organizations; and expanding the grounds for civil and criminal forfeiture to include proceeds from FCPA violations. The International Anti-Bribery and Fair Competition Act of 1998, which entered into force on October 5, 2000, seeks “the promotion of good governance through combating corruption and improving transparency and accountability” through foreign governments. Under the act, the U.S. government may aid any nation in preventing and detecting corrupt practices.

**Impact of the FCPA**

The FCPA had a major impact on how U.S. companies conduct international business. As a result of the FCPA, U.S. businesses developed corporate compliance programs and ethical guidelines to fight bribery and corruption. However, prior to 1997, no other nation had implemented similar legal prohibitions against foreign bribery. This lack of anti-bribery legislation put U.S. companies at a distinct competitive disadvantage over their counterparts in other nations, who could continue to pay bribes without penalties. As a result of several years of lobbying for international regulations to match the domestic FCPA, the United States eventually won international support for the OECD Conventions.
Corruption – an International Crime

So “bribes” in all forms and all directions are a crime. They are also penalized contractually. Clause 15 of the FIDIC Red Book, the UK JCT contractual forms and, for example, the Singapore Public Sector Standard Conditions for Construction Works entitle the Owner to terminate the contract as of right if the Contractor

“has offered or given or agreed to give to any person, any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any action in relation to the obtaining or execution of this Contract with the Employer, or for showing or forbearing to show favour or disfavour to any person in relation to this Contract or any other Contract with the Employer, or if any of the like acts shall have been done by any person employed by the Contractor or acting on his behalf (whether with or without the knowledge of the Contractor), or if in relation to this Contract or any other contract with the Employer the Contractor or any person employed by him or acting on his behalf shall have committed any offence under the Penal Code or the Prevention of Corruption Act or any reenactment or modification of such Code or Act or shall have abetted or attempted to commit such an offence or shall have given any fee or reward the receipt of which is an offence under the said Acts”

(to quote the Singapore contract).44

The Dubai Municipality terms go further -

“Any commission, advantage, gift, gratuity, reward or bribe given, promised or offered by or on behalf of the Contractor or his agent or servant or any other person on his or their behalf to any officer, servant, representative or agent of the Employer or the Engineer or to any person on their behalf or on behalf of any of them in relation to the obtaining or to the execution of this or of any other Contract with the Employer shall, in addition to any criminal liability which may be thereby incurred, subject the Contractor to the cancellation of this and of all other Contracts with the Employer and also to the payment of any loss or damage resulting from such cancellation.”

The risks of bribery and corruption are obvious – and the Lesotho case (Appendix III) shows the dangers to all involved. No matter how distantly the corruption is suspected, retaliate first, we suggest.

Currency

Overview of the Risk

Any contractor operating internationally must safeguard against currency risks. A currency may collapse (as in Zimbabwe, now) or it may prove impossible to remove
payment from that country (as, from time to time, in Nigeria and some sub-continental
countries). There are bound to be currency fluctuations which can considerably effect
the profitability or even viability of the project. Thus, unlike other contracting
contingencies discussed in this paper, currency risks arise exclusively in the
international arena. As in any international Financing Agreement, an international
construction project must address the form of currency used and the contractors must
evaluate the risks associated with using a specific currency.

*Foreign Exchange Exposure*

The prototypical risk related to choice of currency in international contracting is
“foreign exchange exposure”. This refers to the impact of a future change in a country’s
exchange rate. If the construction contract is written in terms of local currencies,
fluctuations in exchange rates may impact the project’s cost and ultimate profit. Thus if
a firm enters into a construction contract with payment in a local currency, a 10% drop
in the value of the currency results in a 10% reduction of the contract revenues. Such
fluctuations occur for a variety of reasons, including changes in government policy,
shifting external market forces, and changes in monetary policy of various jurisdictions.

The most commonly employed contractual method of managing this risk is to
match the currencies of payment with those for labor, materials, financing and equity
commitments. If all such currencies are not reasonably matched, a lender may require a
purchase of a currency hedging product. One must also be cautious to review local
requirements for contracting in local currency. Some countries, at least nominally,
require one to denominate certain contracts in local currency. Certainly, payments for
government social benefit programs for labor must almost always be paid in local
currency. Payment for expatriates working on a project may require multiple contracts
and payments in more than one currency. Checking on local laws and customs in the area will be vital, not only for compliance with local law but to remain competitive for good talent (and see Labor Laws, below).

In addition to currency fluctuations issues and their potential effect on costs and profits, one must be sensitive to the foreign exchange regulations in effect for the jurisdictions of your project. Much has been written about such regulations, most notably on China’s system of foreign exchange and exchange rate management. As such, it is too big a topic to be handled here other than to say you must consult the accounting and legal professionals in the project jurisdiction to fully understand the proper mechanisms to repatriate profits. Even in the United States, which is often viewed as having few such restrictions, foreign companies doing business in the U.S. must be cognizant of the requirements of the anti-money laundering and federal tax withholding regulations before casually sending money out of the country.

Currency issues, including those of variations, are usually matters left to the parties for specific agreement. It is worth noting that Common Law jurisdictions can operate differently from Civil Law. In Common Law, a party who loses through the operation of currency changes will not (in the absence of a contractual provision) be able to obtain compensation. Under Civil Law, where the Owner is a Government body and the Contractor has suffered the loss, it is possible to seek (by application to a court or arbitrator if necessary) an order that “financial equilibrium” be restored. In other words, such losses could be recoverable.

Labor Law
Local Employment Law can create its own problems. While this is not a uniquely international risk, the range of the variations in local laws is enormous. For example in July 2005 the UAE Ministry of Labor (in Dubai, Abu Dhabi etc) enforced outdoor working restrictions between the hours of 12.30pm and 4.30pm, during the hottest months of July and August. Even adopting a 6 day working week (and many contractors work 7) this would have lost 212 hours or 26 ½ days for the duration of the ban. The resulting delays are leading to disputes which will be difficult to resolve as contracts in the UAE usually do not provide for an extension of time due to changes in law and contractors in the UAE (although not elsewhere) usually tender tightly, so the effects of this ban are potentially financially disastrous.

In the UK, what might seem a sensible commercial decision to reduce the number of hours worked by an individual or group can lead to a claim for constructive dismissal and an appearance before the Employment Tribunals.

The focus on labor law in U.S. construction contracts has been primarily one of “harmony” – a euphemism for ensuring that a job employing union workers is union throughout. Under the AIA Conditions, the Contractor must “enforce strict discipline and good order among the Contractor’s employees and other persons carrying out the Contract.”47 While domestic contractors may read this provision as addressing labor union employment, this might not be readily apparent as a first-time user of the documents. Many contracts which include governmental involvement, even if only for the grant of certain incentives or financing guarantees, are required to employ workers from designated geographic areas or a certain percentage of ethnic groups or genders. Sometimes these are contractual requirements; other times, the are stated as goals or targets. Failure to follow these provisions – even if not strict requirements – can land a
project in an undesirable public relations posture, or, worse, subject to boycotts and demonstrations, which can bring the project to a standstill.

International contracts are clear – Clause 6.4 of the FIDIC Red Book – “Labour Laws” states:

“The Contractor shall comply with all the relevant Labour Laws applicable to the Contractor’s personnel, including laws relating to their employment, health, safety, welfare, immigration and emigration and shall allow them all their legal rights. The Contractor shall require his employees to obey all laws, including those concerning safety at work”.

This is typical of contracts applied internationally – an international Contractor will find that he must comply with this broad range of Employment Laws, no matter how unforeseeable or unpredictable. But he may be able to claim if the law changes and this costs him money.

Every contract places the burden of complying with Labor Law on the contractor. It is clearly sensible to do so. There should be no unexpected risks, certainly if there has been adequate legal research. It is not so much the contract that creates the unexpected risk as the state of the local law.

Title/Ownership of the Plant and Materials

In many countries, owners or contractors might not be getting what they think they are paying for. In the Middle East, for example, several States affect to transfer ownership of land when in fact this can either be closely restricted or subject to seizure at short notice. In Build Operate Transfer contracts we have seen problems in defining the moment when title or ownership passes. If there are problems in operating a system the owner might prove unwilling to take it over. If it proves efficient and highly profitable, the owner might demand title and thus profit sooner. Whether it is a
Government or a private organization which is taking over title and ownership, sooner or later this will happen, but the moment needs to be defined carefully.

Clause 7.7 of the FIDIC Red Book “Ownership of Plant and Materials” reads:

“Each item of Plant and Materials shall, to the extent consistent with the Laws of the Country, become the property of the Employer at whichever is the earlier of the following times, free from liens and other encumbrances:
(a) when it is delivered to the Site;
(b) when the Contractor is entitled to payment of the value of the Plant and Materials under Sub-Clause 8.10 [Payment for Plant and Materials in Event of Suspension ]

This may seem sensible in theory but the devil is, as ever, in the detail.

The AIA General Conditions also provide for the ownership of the materials in the project. Under Article 9.3.2, “payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work.” Payments may also be made for materials and equipment stored off the site, but the Owner must first agree to such a condition. Furthermore, the contractor warrants that the title to the work “will pass to the owner no later than the time of payment.” The Contractor also warrants that once the payment has been received by the owner, the work is free and clear of liens, claims, or other encumbrances. These address concerns where either one has pledged to the lender, a lien has attached, and the work can no longer be claimed by the Contractor’s lenders; or for risk of loss transfers, where the parties intend to ensure that the insurance companies compensate the correct parties. These familiar and sensible provisions could usefully be adopted in international projects.

**Embargoes**

Embargoes on trade may prevent materials specified in the contract from being purchased or even brought into the country in international projects. The effect of embargoes may be to render part of the contract legally and even physically impossible,
or to increase the costs by forcing the contractor to purchase alternative materials. There are various motivations behind embargoes.

**Political / Religious**

Saudi Arabia and other Arab countries imposed an embargo dating back to 1957 against Israel. The embargo prohibited goods of Israeli origin from being imported into the participating country. Saudi Arabia also blacklisted companies with Israeli connections. A German company was, for example, blacklisted for importing plastic originating from Israel into Saudi Arabia and an Italian company for importing cotton from Israel.

**Environmental**

Increasingly, countries are refusing to accept materials which they believe may cause environmental problems. An obvious example is nuclear waste but, in international contracts, we have seen refusal to accept certain types of chemicals used in the laying of concrete and certain types of pipe, particularly those containing asbestos. These are often imposed from above, by a change of law.

International contracts try to allow for these by “change in law” clauses, which expressly provide relief for Contractors where law change causes delay or loss. Clause 13.7 of the FIDIC Red Book states that the contract price should be adjusted to take account of a variation in costs resulting from a change in legislation after the base date. The Contractor may be entitled to an extension of time for delays caused by canceling and re-ordering replacement material and the payment of additional costs incurred as a result of an embargo.
It should perhaps be noted that this change in law clause, whilst clearly relevant to the introduction of the embargo, is as relevant to Labor Laws, where contractors could seek to argue that, if the law has changed during the period of the contract, they should be entitled to a price adjustment.

An embargo could also be treated, at least in English law, as a force majeure – the English High Court in 1920 stated “Any direct legislative or administrative interference would of course come within the term: for example, an embargo”\textsuperscript{50}. This is probably the best solution for owners or contractors – to argue that there was a force majeure, and thus it would fall within the contractual force majeure clauses.

It could also be argued that an embargo could render an international contract physically or legally impossible. If so it is a standard feature of international construction contracts that the parties are not bound to perform the impossible (although English law is less certain on the point). It is instructive to study quotes from a number of relevant contracts, used internationally, about the requirement to achieve the impossible.\textsuperscript{51} Essentially, no contract creates the duty to do so – this would be an absurdity.

\textbf{Delays in Shipment and Customs Clearance}
If shipments or clearance is delayed through the fault of suppliers, contractors or sub-contractors then they must carry the responsibility – there is, for example, extensive British legislation to this effect. But if these are due to matters beyond the control of the Contractor they must be subject to the same legal and contractual requirements as embargoes.

International contracts reflect the need for a Contractor to take these problems seriously. Experience indicates that it is in fact rare for the contractor to establish that problems such as these can properly be treated as force majeure or contractual impossibility.

FIDIC recognizes this. Sub-clause 4.16 of the FIDIC Red Book places the responsibility for transport of goods on the Contractor including packing, loading, transporting, receiving, unloading, storing and protecting all goods and other things required for the works. The Contractor should also indemnify the Owner against all damages, losses and expenses resulting from the transport of goods and pay all claims arising from their transport. This would presumably include indemnifying the Owner against all losses and expenses caused by delays in transport of goods.

In the US, the AIA General Conditions address the consequences of shipment delays. Under clause 8.3.1, if the Contractor is delayed at any time during the project by an “unusual delay in deliveries,” then the parties may agree to extend the contract time “for such reasonable time as the Architect may determine.” To extend the contract time, the parties must execute a “Change Order,” defined by clause 7.2.1 as a “written instrument prepared by the Architect and signed by the Owner, Contractor and
The Order must state the nature of the change; the amount of the adjustment to value of the contract; and the extent of the adjustment in the contract time. This remedy under clause 8.3.1 for delay and subsequent extension of time does not preclude the recovery of damages for such delay by either party.

Delays in shipment and customs clearance can scarcely be treated as unexpected. We have seen them where there has been a change in government, sometimes through revolution, so nothing can be imported to the chaotic country (usually because there is no Customs bureaucracy in operation). Here, delayed shipment or customs clearance would be the least of the Contractors problem, but where the project is located in an established and constitutional state, contractors will find it hard to avoid responsibility and liability, no matter how unexpected the cause of the delay might be.

**International Insurance Problems**

These should not create problems – after all, insurance is all about the recognition, allocation and management of risk. If the insurance contracts are properly placed (even if divided between US cover and Rest of the World cover) so that there is a single seamless Worldwide policy where necessary, there should be few problems. The policy conditions have to met; many insurers will look for breaches, but this is not an area where general international law becomes involved, unless there are arguments about applicable law and how this would operate in the context of the relevant policy and vice versa.

It can scarcely be said that arguments flowing from insurance problems are unexpected, although there may be problems about geographical coverage, for example, or whether a particular risk is covered under the terms of the policy. Clause 18 of the
FIDIC Red Book requires the Contractor to insure, usually in the joint names of the contractor and the owner. The FIDIC contract has the dubious advantage of being used so widely that it can be relevant to the operation of policies written in the various major insurance markets, in America, Europe and the Far East. And this is key – Counsel will need to know which insurance market is leading the insurance of the policy and which law will apply.

The ICE and JCT contracts, both used internationally but essentially British, identify Accepted Risks or Specified Perils which fall inside or outside the required insurance cover. On international projects, increasingly, project policies are obtained, insuring all involved, including the owner, so that there can be no argument between various insurers covering various risks. If not, then the insurer (if there is one) covering the Owner can pursue, where necessary, the Contractor’s liability insurer, the All Risks insurer, the professional indemnity insurers involved for the designers and, indeed, the insurers of sub-contractors and suppliers. There may also be cover for existing, neighboring buildings, written by local insurers, in contrast to the international team of insurers assembled for the international construction project. These inter-insurer disputes can involve complex arguments about policy terms, local law and which law is applicable to the interpretation of the policy.

Some countries require that every relevant policy be led by a local insurer; they are often wholly reinsured, if not, we have seen them advance the “can’t pay, won’t pay” argument, leaving the following market to pick up the bill.
International insurance problems occur when a major loss is suffered and insurers try to avoid paying. This is particularly relevant to US projects, because many insurers specifically exclude the US from their worldwide cover. This is not the place for a discussion of insurance law, but we have, on many occasions, been instructed by insurers to advise them on claims arising in major international projects, not merely to make sure that arguments about liability and quantum are properly advanced, but to analyze the application of the policy to the particular risk, unexpected or not.

**Suspension of Works**

Many of the unexpected problems discussed above can cause disruption and delay to construction projects. In the worst case the contractor will be forced to terminate the contract, but it is likely that this will follow a period of suspension of the works whilst the cause of the disruption is resolved.

*Common Law Jurisdictions*

In common law jurisdictions, suspension of fundamental obligations under the contract will be treated as a repudiation of the contract, in the absence of justification by way of legislation or a relevant clause in the contract. In the UK, section 112 of the Housing Grants, Construction and Regeneration Act 1996 provides parties to construction contracts with a right to suspend performance of their contractual obligations where a sum has fallen due under the contract and has not been paid in full by the final date for payment, no effective “withholding notice” has been given and the party seeking the suspension gives 7 days notice of its intention to suspend work. This provision applies only to default in payment and may be exercised by Contractor or owner. The right ceases upon full payment of the outstanding amount.
Many international contracts seek to define the circumstances and operation of contractual suspension. FIDIC, clause 8.8, states that the Engineer may instruct the Contractor to suspend progress of part or all of the Works, and the Contractor must protect the site against deterioration, loss and damage. This provision does not expressly prevent the Owner using it when the Contractor is in default. Under clause 8.11, if such suspension carries on longer than 84 days, the Contractor may request the Engineer’s permission to proceed. If permission is not given within 28 days, the Contractor may be able to terminate the contract or it may be seen as an omission, entitling the Contractor to a variation. Similar provisions are contained in other standard form contracts.

The UK JCT 1998 With Contractors Design clause 30.3.8 similarly gives the Contractor the right to suspend performance for non-payment. Clause 25.4.17 allows the Contractor to claim an extension of time in respect of delay caused by suspension.

FIDIC, clause 16.1 states that the contractor is entitled to suspend or reduce the rate of work if the Employer fails to comply with certain payment-related obligations, including the provision of evidence that the Employer has financing arrangements in place and the manner of making payments. The Contractor may claim reasonable profit as well as costs where delays are suffered as a result of a permitted suspension, and its entitlement to this is established on a case by case basis.

Civil law jurisdictions

Although under the common law, suspension of contractual obligations may be seen as a repudiation under the contract, there is a right to suspend performance in some civil law jurisdictions. Under the German Civil Code, section 320 states that each party has a right to suspend performance of its obligation until the other party has performed
its part, unless the party wishing to suspend was obliged to perform its obligations first. Under section 648 the Contractor may have a right to suspension if the Owner does not comply with adequate notice requesting security for the value of the outstanding work.

Parties to contracts subject to civil law jurisdictions are likely to find clauses abolishing such rights, rather than creating them, much as in standard form contracts in Common Law jurisdictions.

US Law

In the United States, Article 14 of the AIA General Conditions address the termination or suspension of the contract. The provisions generally provide for various methods by which an Owner may suspend or terminate a contract, and fewer methods by which a Contractor may terminate a contract. Under Article 14.1, a Contractor may terminate a contract if the project is stopped for thirty days for a variety of reasons (e.g., issuance of a court order; the architect fails to issue a certificate of payment; etc.). An Owner, on the other hand, may terminate a contract for cause (e.g., the Contractor persistently fails to supply properly skilled workers) or for the Owner’s convenience under Article 14.2. Only an owner may terminate for convenience. Additionally, an Owner, and only an Owner, may suspend a contract without cause under Article 14.3.

Again, it is the cause, rather than the fact, of suspension which is unexpected. There can be no doubt that many contracts entitle the parties to suspend performance of the contract in many of the circumstances we have described. Suspension often results in disastrous losses and sometimes the abandonment of the project. This is another reason to look for the unexpected, and manage that risk.

Dispute Resolution
The handling of disputes, in domestic and international contracts, has evolved over the past two centuries. An interesting analysis in 2004 traced the development of the so-called impartial Engineer and the gradual restriction of that role, particularly in international projects, where trust and confidence is at a premium but also particularly at risk. The 19th Century view that an Engineer could be trusted to make an impartial decision has been eroded, so that the word “impartial” has been removed from recent FIDIC publications. An overbearing Dispute Adjudication Board has been introduced, perhaps because of the fear of corruption, although it is perhaps open to argument whether a Dispute Adjudication Board is more or less likely to take a bribe than the engineer. We have had experience of a Dispute Resolution Board failing where the contract did not make provision for how the Owner and the Board should react if the Contractor objected to a decision on the ground that the Board itself was corrupt, because one member had a family relationship to the Owner, and the other two (wholly independent) members of the Board had known of this but had continued to work with the third member.

Eventually the Board had to resign, and a new Board, no more capable or distinguished but demonstrably unrelated to the owner, was appointed. The original Board had strictly interpreted the contract; its replacement, having seen the problems caused by this approach, took a softer line. There was, in fact, no validity to the allegation of corruption or bias but the contractor succeeded in unbalancing the running of the project, delaying it unnecessarily and, in the long term, improving their contractual position.
Dispute Resolution Boards should be useful – full time, following the project, appointed by both parties, available to address problems instantly, so they can make fast, well-informed decisions. By comparison, Arbitration fails on almost every count.

Arbitration Problems

There is an international acceptance of arbitration highlighted by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) Arbitration is still widely perceived as time consuming, disruptive and costly. To avoid arbitration, these are some pre-arbitral ADR concepts in place:

a) “mandatory pre-arbitration negotiation clauses and court annexed pilot mediation programmers that are now reported as being used in certain cities in Germany
b) the issuance of the ICC’s new ADR Rules, providing for the amicable settlement of commercial disputes with the assistance of a neutral
c) the application of the Dispute Review Board on the long term infrastructure and operating agreement concept in Eastern Europe
d) the dramatic growth of the Dispute Resolution Board Foundation which started with 54 initial members in 1996 and has reportedly grown to over 500 members worldwide in more than 30 countries
e) the principles of the “partnering” concept initially developed in the United States and premised on the availability of reducing the likelihood of disputes on major construction and engineering projects through fostering co-operation, collaboration and teamwork amongst project participants, that have recently inspired a new “BE Collaborative”
construction contract form in the United Kingdom
f) the use in Australia of final and binding expert determination as an alternative to ADR
g) the introduction in at least two Australian states of a system of statutory adjudication modeled upon the UK Housing Grants, Construction and Regeneration Act 1996.”

Dispute Resolution problems/successes

- Dispute Boards (“DBs”) typically consist of a panel of 3 engineers/lawyers (sometimes just one) appointed at the outset of the project. They visit the site 3
or 4 times a year and deal with problems and complaints that arise at an early stage to avoid them developing into disputes arbitration.

• DBs produce recommendations or decisions, depending on the type.

• The success of DBs is often attributable to the following reasons:

  (i) DBs meet regularly on site and hear complaints at an early stage and nip problems in the bud before they develop into disputes.

  (ii) Parties are given an opportunity to air any grievances, and often, all parties require is an opportunity to have their say.

  (iii) Parties often see DBs as intruders, encouraging them to unite and compromise to avoid interference by the DB.

  (iv) There is usually a mix of engineers and lawyers which is seen as more user friendly.

• Reasons for the development of Dispute Resolution Boards (“DRBs”):

  (a) US concerns in the 1960’s and 1970’s about escalating costs of arbitration and litigation

  (b) Concerns about the role of the Engineer as a dispute decision maker under the contract.

  (c) The development in the UK of adjudication and temporarily-binding decisions to facilitate the prompt payment of sub-contractors.

We favor the use of Dispute Boards, because they are good at coping with the unexpected. They usually take sensible, informed decisions. In January 1995 the World Bank introduced DBs into its standard bidding document, making DBs compulsory for
projects over US $10m, and a three person panel was stipulated for projects involving over US $50m

Clause 20 of the FIDIC Red Book – Dispute Adjudication Boards – requires effect to be given to Board decisions. Decisions are final and binding if no notice of dissatisfaction is issued within 28 days. If notice is served, the matter may go to arbitration but the decision must be complied with in the meantime. The ICE Rules on Dispute Resolution Boards, published in 2005, says much the same. Finally, the ICC Dispute Board Procedure offers three types of process - a Dispute Review Board, involving recommendations, a Dispute Adjudication Board, involving decisions and a Combined Dispute Board, a hybrid whereby recommendations are usually issued, but decisions may be requested.

There is (see above) the Dispute Resolution Board Foundation in the United States, which presses the cause very effectively, but, for DB’s to work, they have to be properly established and defined contractually, so do not allow these standard clauses to be prejudiced by ill-thought amendment. In the United States, Dispute Review Boards have not been heavily used in private contracts, though the boards have been used on large public projects. The standard AIA documents favor mediation, with a default to arbitration. This, again, is a topic extensively debated in the industry as the 2007 AIA documents are being prepared. The latest version of the AIA General Conditions will state a preference for the default to turn to either mediation, arbitration or litigation.

**Conclusions**
• These examples show the earnest attempts being made to anticipate and manage unexpected risks in international projects; too many problems flow from contracts that impose inappropriate contractual burdens without a realistic assessment of the consequences. Surprisingly often the transferor of those risks has to choose to take the responsibility back to keep the project going.

• With relatively minor exceptions the law works the same way across the world – it looks for reasonableness, responsibility and rationality but Counsel must always be vigilant in discerning where local law does not follow this general rule (for example in the UAE, where the law can create absolute liability).

• As in any construction project, the parties must maintain open lines of communication to confront problems while they remain insignificant; in international projects, communication is essential to ensuring that small problems do not unnecessarily evolve into larger ones. Effective methods of dispute resolution, both to help identify the dispute and resolve it quickly, are equally essential.

• International construction projects involve unique risks – but the risks, by and large, are manageable, although best solved quickly. As long as one combines a dual strategy of contracting to minimize the risk and performing due diligence to ascertain the custom and practice of the local territory, the parties will effectively mitigate any potential risks, and the project will ultimately succeed.
KPMG International, Global Construction Survey 2005: Risk Taker, Profit Maker?

Taken from Paragraph 3.5 of the Grove Report and updated


2. Fédération Internationale des Ingénieurs-Conseils (International Federation of Consulting Engineers or FIDIC), Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Second Edition (2005);


4. The Institution of Civil Engineers (United Kingdom), The Engineering and Construction Contract, (June 2005) ("NEC3");


7 For further examination of these and other risks to construction projects, see id.

8 Blackburne, Building (2005) No 30 page 56

9 Barnes, Building, 6 June 2003

10 Ancient Monuments and Archaeological Areas Act 1979, (“AMAA”) section 61

11 AMAA, Section 61

12 AMAA, Section 2

13 Castorina and Piatt, *Dig for a planning victory*, Estates Gazette, 11 September 1999, page 153

14 AMAA, sections 7 and 9


16 “The term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized palentological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.” 16 U.S.C.A. § 470bb(1).

17 16 USC § 470ee.
All fossils, coins, articles of value or antiquity, and structures and other remains or items of geological or archaeological interest found on the Site shall be placed under the care and authority of the Employer. The Contractor shall take reasonable precautions to prevent Contractor’s Personnel or other persons from removing or damaging any of these findings. The Contractor shall, upon discovery of any such finding, promptly give notice to the Engineer, who shall issue instructions for dealing with it. If the Contractor suffers delay and/or incurs Cost from complying with the instructions, the Contractor shall give a further notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

(b) payment of any such Cost, which shall be included in the Contract Price.

After receiving this further notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.

ICE clauses 12(1), 12(6)
The contractor is entitled to additional costs plus reasonable profit and an extension of time for delays resulting from physical conditions (excluding weather conditions) or artificial obstructions which could not have been reasonably foreseen by an experienced contractor. According to clause 12(5) even if the Engineer believes the conditions were reasonably foreseeable, any resulting variation ordered by the Engineer should be valued according to specified rates or prices or approximations thereof, and included in the contract price;

NEC clause 60.1.12
The Contractor is entitled to adjustment of the contract price and/or schedule for costs/delays resulting from physical conditions within the site (excluding weather conditions) which an experienced Contractor would have considered at the time of contracting, there was a small chance of occurring and that it was unreasonable to have allowed for them;

GC/Works/1 Condition 40(2)(n)
The Contractor is entitled to variation pricing for actions taken upon discovery of fossils, antiquities or objects of interest or value;

JCT SBC/Q & 05 clause 34.3
The Contractor’s direct loss and/or expense resulting from discovery and treatment of fossils, antiquities and other objects of interest or value be added to the Contract Sum and time may be extended in respect of delays resulting from the Architect’s variation instructions;

FAR Section 52.236-2
The Contractor is entitled to an equitable adjustment of the contract price and/or time for costs/delays resulting sub-surface or latent physical conditions at the site which differ materially from those indicated in the contract, or unknown physical conditions at the site which are of an unusual nature and differ materially from those ordinarily encountered;

AIA, Paragraphs 4.3.4, 8.3.1, 10.3
The Contractor is entitled to an equitable adjustment of the contract price and/or time for costs/delays resulting sub-surface or otherwise concealed physical conditions which differ materially from those indicated in the contract, or unknown physical conditions of an unusual nature which differ materially from those ordinarily found to exist and generally recognised as inherent in similar construction activities;
Australian Standard Clause 24.3
The contractor is entitled to additional costs incurred upon encountering minerals, fossils, or relics;

ENAA 35.1-3
The contractor is entitled to additional costs for expenses and extension of time for delays caused by physical conditions, excluding weather conditions, or artificial obstructions on site not reasonably foreseeable by an experienced contractor on the basis of information provided by the owner and information obtainable by a visual site inspection;

Singapore Clauses 5.2, 22.1(g)
Additional costs and extension of time are available to the Contractor for delays resulting from adverse physical conditions which are encountered while carrying out sub-surface work and which are not reasonably foreseeable by an experienced contractor.

23 GCC, Clause 13
24 The Grove Report, paragraph 12.3
27 Stansbury, supra note NOTE, at 38-39.

28 Cameroon Airlines v Transnet Ltd [2004] EWHC 1829
This case was referred to the High Court as Cameroon Airlines (“C”) applied to have an arbitration award set aside. And the matter remitted to the tribunal for further consideration. Transnet (“T”) were to maintain C’s aircraft under the contract which was subject to South African law. In the arbitration, C’s case was that the maintenance contracts were tainted with bribery and construction after T had engaged a company providing agency services for aircraft contracts to bribe various representatives of the Cameroon government and of C, to secure the award of the contracts. C sought repayment of all monies paid under the contract. The tribunal decided that T had added “commission” being the money paid as bribes to the commercial price and C was entitled to repayment of the commission. Langley J held that the award should be remitted to the tribunal for further consideration.

29 Transparency International is a non-governmental organisation which works to raise awareness about the damaging effects of corruption and encourages policy reform, monitoring governments, corporations and banks, www.transparency.org.

30 The Transparency International Bribe Payers Index 2002 was published in May 2002, and is based on surveys conducted in 15 countries by Gallup International Association (Argentina, Brazil, Columbia, Hungary, India, Indonesia, Mexico, Morocco, Nigeria, the Philippines, Poland, Russia, South Africa, South Korea and Thailand.) These countries are among the largest involved in trade and investment with multinational firms. The questions in the surveys relate to the propensity of companies from 21 leading exporting countries to pay bribes to senior public officials in the above countries.

31 Transparency International Corruption Perceptions Index 2005 was published on 18 October 2005, and is worked out from data from surveys which reflect the vies of analysts and business people around the world. Countries are ranked in terms of the degree to which corruption is perceived to exist among public officials and politicians and focus on the public sector. 159 countries are included in the index.

In November 2001, Slovenia became the thirty-fifth signatory to the OECD Convention.


E.g., N.Y. Penal Law § § 200.00, 200.30.


15 U.S.C. § 78dd-1 (amended to include “any person”) provides in part:

(a) Prohibition. It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to -

(1) any foreign official for purposes of -

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of -

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of -

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action. Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of
which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses. It shall be an affirmative defense to actions under subsection (a) or (g) of this section that -

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to -

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.


40 15 U.S.C. § § 78dd-2(g), 78dd-3(e), 78ff(c)(1)

41 Subsection 13(b)(2), as codified at 15 U.S.C. § 78m(b)(2), provides:

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall -

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that -

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.


43 Id.

44 Clause 31.1(2)(b)


46 18 USC 1956 and 1957.

47 AIA A-201 General Conditions of the Contract § 3.4.3 (1997)

48 AIA A-201 General Conditions of the Contract § 9.3.2 (1997)

49 AIA A-201 General Conditions of the Contract § 9.3.3 (1997)

50 Lebaupin v Crispin [1920] 2 KB 714

51 FIDIC, clause 19.7:

“Notwithstanding any other provision of this Clause, if any event or circumstance outside the control of the Parties (including, but nor limited to, Force Majeure) arises which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations or which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract, then upon notice by either Party to the other Party of such event or circumstance:

a) the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Contract, and

b) the sum payable by the Employer to the Contractor shall be the same as would have been payable under Sub-Clause 19.6 [Optional Termination, Payment and Release] if the Contract had been terminated under Sub-Clause 19.6.”
ICE clause 13(1)
The contractor shall construct and complete the work in strict accordance with the contract and to the Engineer’s satisfaction, “save insofar as it is legally or physically impossible”.

NEC3, Clause 18.1
The contractor should notify the project manager if contract data requires the performance of anything illegal or impossible and the project manager may give instruction to change the contract data accordingly.

GC/Works/1
Not addressed expressly

JCT clause 6.71, 13, 25
Any alteration to work caused by a change in defined statutory requirements after the base date will be treated as a variation instructed by the architect, and the contractor may be entitled to an adjustment of the contract price and/or extension of time. The contractor is also entitled to extension of time for delays caused by the UK Government’s exercise of statutory power after the base date restricting availability or use of labour or preventing/delaying the securing of necessary goods or materials.

FAR section 52.249-14 and 52.229-3
Not addressed expressly although the contractor is entitled to extension of time for delays beyond his control not due to his own fault or negligence. The contract price shall be increased by the amount of any new or increased Federal excise tax or duty on transactions or property in the contract.

AIA Paragraph 13.4.1
Not addressed expressly. The contract states that it shall not limit the rights and remedies otherwise available by law, therefore the defence of impossibility depends on the applicable law.

Australian Standard, Clause 40
Not addressed expressly, however, the contract may be terminated for frustration (which is not defined), with the incident costs payable to a contractor.

ENAA, GC 37.3
Not addressed expressly but the contractor is excused from performance to the extent that such performance is prevented by specified force majeure events.

Singapore Clause 4.1
Not addressed expressly. The contract provides that it shall not affect the contractor’s responsibilities at common law to complete the works. It is therefore the applicable law which determined whether the defence of impossibility is valid (Under clause 36.1 the applicable law is the law of Singapore).

GCC, Clause 15
The contractor is excused from performance if strict compliance with the terms of the contract is physically or legally impossible.

52 C J Elvin Building Services v Noble [2003] EWHC 837 (TCC)
53 ICE clause 40(2), Singapore clause 13.2, GCC clause 55
55 Taken from Marston, The Internationalisation of ADR, Donald L Marston (2005) International Construction Law Review p17