

# Power Indicators in International Construction Law

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## SUMMARY

Construction law practice varies greatly between different jurisdictions and within the civil/common law traditions. A degree of commonality is discernible around the two dominant principles of freedom to contract and *pacta sunt servanda*. The extent to which these tenets govern construction law and are supplemented by others differs widely in varying approaches taken to tackle common problems. The literature reviewed in this work explores twelve international construction law practices and discusses their application in the selected jurisdictions in which they feature. The hypothesis examined is that differences in approach are not, as might be expected, to be found along the civil/common law divide but instead can be analysed in terms of the power balance in the countries discussed. The practices are measured against a scale indicating the extent to which they can be deemed pro-client or pro-supply side. The paper concludes by presenting a table where three national results on the occurrence of the practices are compared. The findings re-inforce the importance of cultural aspects as reflected in the comparative practices discussed.

## 1. INTRODUCTION

The study of international construction law invites comparison between the different working practices encountered. Making sense of the emergent themes and patterns is a useful way of understanding the subject. The fresh perspectives gleaned from such a study are valuable – not least in terms of what we can glean about our own approach.

*“The whole object of travel is not to set foot on foreign land: it is at last to set foot on one’s own country as a foreign land.”<sup>1</sup>*

The author does not claim a comprehensive knowledge of international construction law and practice. Such a claim is made by few in the industry. Eminent dispute resolvers and vastly

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<sup>1</sup> Chesterton, G.K. (1909) *Tremendous Trifles*, Methuen Publishing

experienced lawyers come closest, having gained understanding of different approaches the hard way through experience with, no doubt, the occasional surprise.

Literature fills the gaps in the absence of first-hand experience. Construction Law authors have taken different approaches to the collation of knowledge, including inviting contributions from a wide range of lawyers of different nationalities,<sup>2</sup> addressing the international standard form and examining the divergences encountered.<sup>3</sup> Relying on experience of international claims is the guiding principle in another notable work.<sup>4</sup>

The most significant development in modern legal research is the recent phenomena of the databases that now provide such ready insight.<sup>5</sup> The latter category of resource has revolutionised the practice and study of construction law. These databases give access to scholarly commentaries on national practices from practicing lawyers in a wealth of different countries. This paper uses these sources widely in presenting the examples illustrating the construction law practice points considered in this work. The national commentaries on the following countries are referred to in this paper: England and Wales,<sup>6</sup> United Arab Emirates (“UAE”),<sup>7</sup> France,<sup>8</sup> Germany,<sup>9</sup> United States of America (“USA”),<sup>10</sup> India,<sup>11</sup> Australia<sup>12</sup> & Brazil.<sup>13</sup>

## 2. COMMON THEMES AND THE QUESTION ARISING

The sources examined appear to agree that national differences in approaches to construction law are less pronounced now than was formerly the case. Harmonisation and convergence between different legal traditions is discernible. Globalisation is encouraged through more uniform business practices and the insistence of lenders, insurers and investors on FIDIC contracts<sup>14</sup>. Internationalisation is also promoted through treaties, economic and political unions and the adoptions of model laws. UNICTRAL<sup>15</sup> formulates and regulates international

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<sup>2</sup> Klee, L. (2015) *International Construction Contract Law*, Wiley Blackwell

<sup>3</sup> Bunni, N. (2005) *The FIDIC Forms of Contract*, 3<sup>rd</sup> Edition, Wiley Blackwell

<sup>4</sup> Morgan, D. (2005) *International Construction Contract Management: An Alphabetical Reference Guide*, RIBA Enterprises

<sup>5</sup> Practical Law Company available at <http://global.practicallaw.com> LexisPSL available at: [www.lexisnexis.com/uk/lexispsl](http://www.lexisnexis.com/uk/lexispsl)

<sup>6</sup> Harling, M., Gard, W. & James, S. (2013) *Construction and Projects in UK (England and Wales): Overview* Practical Law Company

<sup>7</sup> Mackenzie, A., Stevens, P. & Sellers, L. (2015) *Construction and Projects in United Arab Emirates: Overview* Practical Law Company

<sup>8</sup> Bonnard, S. (2015) *Construction and Projects in France: Overview* Practical Law Company

<sup>9</sup> Gardemann, J. (2015) Germany. In Peckar, R. ed. *Construction in 32 Jurisdictions Worldwide* LexisPSL

<sup>10</sup> Berry, M. (2016) *Construction and Projects in United States: Overview* Practical Law Company

<sup>11</sup> Parekh, S. (2015) *Construction and Projects in India: Overview* Practical Law Company

<sup>12</sup> Crespin, A. & Aversa, F. (2015) *Construction and Projects in Australia* Practical Law Company

<sup>13</sup> Bueno, J.C. (2015) Brazil. In Peckar, R. ed. *Construction in 32 Jurisdictions Worldwide* LexisPSL

<sup>14</sup> Klee, L. (2015) *International Construction Contract Law*, Wiley Blackwell at page 11

<sup>15</sup> United Nations Commission on International Trade Law

trade in cooperation with the World Trade Organisation. The Arbitration Rules it promotes are well known in the international dispute resolution business.

The two dominant universal forces at work with construction law are freedom to contract and *pacta sunt servanda*.<sup>16</sup> Put simply, the parties are largely free to agree the terms upon which they contract and are bound by that agreement once made. Differences in approach are discernible and these headline principles are circumscribed in some jurisdictions. A degree of intervention is common in all jurisdictions as the lawmakers delineate the limits of the application of the two tenets mentioned. The intervention is an issue of degree. For example, in the United Arab Emirates<sup>17</sup> mandatory provisions set out in the Law of Civil Transactions take precedence over contractual terms including the dominance of Sharia law.

It is the differences which provide the intrigue and the interest. The classic distinction in international comparative law is between the civil and common law traditions. The wider grouping of contemporary legal systems is made up of the Romano-Germanic group (civil law), the common law group, the Islamic law group and the socialist law group.<sup>18</sup> The essential difference is between what can be described as a “top down” approach where law comes down from above in the form of codes. Common law takes a “bottom up” approach where the law also rises from below on a case by case basis, allowing general principles of law to be created.<sup>19</sup> The two approaches converge to the extent that both have the necessary instruments to set limits on the freedom to contract and the binding nature of those undertakings. This can be achieved by statute law which has a dominant role in both traditions. Precedent can also be used. Interpreting codified law is one of the courts’ roles in civil law countries and, although not as potent a legal force as common law precedent, nevertheless amounts to jurisdictional control measures. The issue of whether or not a civil or common law country is more or less likely to intervene in the freedom to contract and *pacta sunt servanda* is an interesting one. The assumption made here is that it is not possible to gauge the level of intervention based solely on the civil/common law tradition.

A much more decisive pattern emerges when legal systems are compared. The theme presented in this paper is that the key to understanding different approaches is not identified by legal tradition but by the prevalent culture and socio-historic features of the country. The influence of social and political hierarchies and absolute forms of government dictate where the balance of power lies with the law-making function. Some countries clearly have a tradition of dominant client side arrangements. Other countries tend to re-align the balance more in favour of the supply side. This paper seeks to devise and apply a measure as to where any given country sits on the continuum of client- to- supplier power.

It is useful to isolate three factors in this study and explain why they do not feature. Firstly, it is open to any client to amend its contracts to give itself a better risk profile. Clearly, the party

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<sup>16</sup>Klee, L. (2015) *International Construction Contract Law*, Wiley Blackwell at page 25

<sup>17</sup> UAE Federal Law Number 5 of 1985

<sup>18</sup> Bunni, N. (2005) *The FIDIC Forms of Contract*, 3<sup>rd</sup> Edition, Wiley Blackwell at Section 2.7

<sup>19</sup> Mason, J. (2016) *Construction Law: From Beginner to Practitioner* Routledge at page 6

with the greater bargaining power will be tempted to amend the contract in its favour. In Australia, the use of standard forms in their unamended state is described as “rare to the point of non-existent”<sup>20</sup>. Amendments may be presented as being necessary to comply with legislative changes. More frequently it is a vehicle whereby risk is transferred onto the supply side. The pre-disposition to amendment is viewed as a neutral factor on the basis that such practices can occur in any jurisdiction. Clearly, the more power and influence exercised by the client, the more onerous the amendments are likely to be. The work of Abrahamson<sup>21</sup> in defining when and how the risks should be taken remains the definitive authority on risk management. The second factor is the extent to which the jurisdiction relies on contracts in its legal culture. China, Japan and SE Asia apply different philosophies to the hard assertive nature of western contractual rights and the exportation of the claims culture.<sup>22</sup> It is assumed here that contracts are the most potent legal consideration.

The third factor to be isolated is the influence of corrupt practice on construction arrangements. Transparency International<sup>23</sup> regularly identifies construction and engineering as the most corrupt sector internationally and the propensity exists for such practices to circumvent the law and to render the legal positions arrived at meaningless.

The question can be framed thus: “What does the presence of common construction law practices reveal about the balance of power between the client and supply side in any given country?” In order to answer these questions it is necessary to devise construction law “Power Indicators.”

Twelve construction law practices have been selected and given a value as to whether they are client or supplier friendly. The existence of each indicator within a country is taken as being indicative of where the balance of power lies. Six of the indicators indicate client preferential treatment and six indicate supplier bias. Some are familiar across a scattering of countries; others apply only to civil or common law countries. The indicators are introduced and then given a score out of five as to the extent that they reveal pro-client or pro-supplier bias. The selection of the indicators is based partially on their inherent “otherness” as they would appear to those unfamiliar with the concepts at work. Several of the practices have been chosen because they appear at odds with the certainty of contract approach adopted in England<sup>24</sup>. Into this category falls constructive acceleration, termination for convenience and hardship payments. The extent to which these notions merely appear alien and the ability to achieve the same results by different means is an interesting sub-hypothesis to this paper. Put another way, to what extent are these positions truly different or would the same results be achievable another way via different practices in a different jurisdiction or tradition?

When applied to any country the tests will give a score. A score of 0 would show an equal balance between client and supply-side power. A positive score reveals power on the side of

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<sup>20</sup> See Reference 12 above

<sup>21</sup> Abrahamson, M. (1984) “Risk Management” 2 ICLR 241

<sup>22</sup> See Reference 3 above

<sup>23</sup> [www.transparency.org](http://www.transparency.org)

<sup>24</sup> References are to England and Wales throughout

the client and a negative score the opposite. The results are presented in Table A at the end of the paper.

The twelve indicators are examined in turn:

## 2.1 Termination for Convenience

This clause is used widely in international construction contracts.<sup>25</sup> This involves unilateral termination by the employer at their discretion and without the need for any default on the supply side. A termination for convenience clause is attractive for public clients concerned about uncertain budgets and political appetite for large projects. The risk on the contractor is readily apparent and some form of indemnity would be prudent. The issue of whether or not the contractor is able to recover the profit on the unperformed work is an issue. In Brazil, where the practice occurs, the employer is likely to be liable for costs to date and loss of profit.<sup>26</sup> In England a termination at will by the client would allow the contractor to allege repudiatory breach of contract and the recovery of direct losses including profit.<sup>27</sup>

The ability to walk away from the contract on the client's side appears as a clear indicator of a dominant hand. However, the practice is not too far removed from the variation clause procedure where the client may order the omission of work and therefore potentially achieve the same outcome. The difference is one of proportion – the client may not omit the whole of the works. This indicator is therefore given a score of 3 out of 5 in terms indicating a client friendly practice but one which is likely to come at a price in terms of a loss of profit claim

## 2.2 Pay when Paid Clauses

At first glance a “pay when paid” clause appears to be a sensible way for a contractor to operate in terms of ensuring cash flow remains positive. The contractor seeks the agreement of the supply chain that they will wait for their payment until the contractor is himself paid. The flaw in the approach is quickly discovered when the position of the sub-contractor is considered. The sub-contractor may have executed their contract perfectly and yet remain unpaid indefinitely. Pay-when-paid clauses are generally adopted and enforceable under UAE law.<sup>28</sup> This practice was one of the easier targets for Sir Michael Latham to outlaw<sup>29</sup> as enshrined in legislation.<sup>30</sup> Strictly, pay when paid is not in favour of the client but the contractor. However, the client is usually fully aware of the power wielded by withholding payment. Indicator status: 2 out of 5.

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<sup>25</sup> Patterson, L. (2014) Termination at Convenience, *Building Magazine* 19<sup>th</sup> August

<sup>26</sup> See Reference 13 above

<sup>27</sup> See Reference 6 above

<sup>28</sup> See reference 7 above

<sup>29</sup> Latham, M. (1994) *Constructing the Team*, HMSO.

<sup>30</sup> Housing, Grants Construction and Regeneration Act 1996 & Local Democracy, Economic Development and Construction Act 2009.

## 2.3 Unconditional Bond

Of all the construction law practices encountered internationally unconditional bonds lead to most head scratching in England as to their true purpose. The client may call the bond, typically 5-10% of the contract sum, from the contractor at any time prior to practical completion. The reason for the call may not be stated and the call will be valid in the absence of bad faith.<sup>31</sup> There is every chance that an unconditional bond may be called in the UAE. The client usually makes the demand directly on the surety bank who readily complies.<sup>32</sup> In Brazil,<sup>33</sup> the courts rarely question the reason why a bond was called and require the call to be honoured. Unconditional bonds are prevalent in Australian projects, typically with a proportionate reduction in value over the construction and defects correction period.<sup>34</sup>

This approach appears most at odds with contractual certainty and fair balance of risks in construction contracts. However, ultimately the cost of the bond should form part of the contractor's price for the works. Notwithstanding this point, the client favouring of this indicator is given an indicator status of 5 out of 5.

## 2.4 The Ability to Subcontract

A contractor usually takes the risk of the performance of the supply chain in return for a free hand in appointing their sub-contractors. A veto arrangement is usually requested in England although rarely used.<sup>35</sup> In other jurisdictions the client expects more input on the sub-contractors used with a corresponding ability of the sub-contractor to claim payment from the client in the event of non-payment by the contractor.

In Brazil,<sup>36</sup> this can turn to the supplier's favour in that exceptionally the employees of a subcontract have the possibility, if the client has direct powers, to request the establishment of a direct relationship of employment with the client.

In India,<sup>37</sup> the sub-contractor has no privity of contract with the client. Exceptionally, the sub-contractor has been able to claim directly against the client without a nomination procedure being used.

In France,<sup>38</sup> the use of sub-contractors is strictly regulated and must be approved individually by the client before the conclusion of any agreement with the contractor. In the public sector, the sub-contractor must be paid directly by the client. In the private sector the contractor must

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<sup>31</sup> Bailey, J. (2016) *Construction Law* Routledge at page 1074.

<sup>32</sup> See reference 7 above

<sup>33</sup> See reference 13 above

<sup>34</sup> See reference 12 above

<sup>35</sup> Barnes, P. & Davies, M. (2015) *The JCT 2011 Building Sub-contracts*, Wiley Blackwell

<sup>36</sup> See reference 13 above

<sup>37</sup> See reference 11 above

<sup>38</sup> See reference 8 above

provide the sub-contractors with a bank guarantee covering all sums due or arrange for direct payment by the client.

In the UAE,<sup>39</sup> there are restrictions on the percentage of the contract works that can be purchased from overseas. There can be client insistence on the placing of contracts with local manufacturers. Saudi Arabian government projects must sub-contract at least 30 per cent of the value to wholly owned Saudi sub-contractors unless none exist.<sup>40</sup>

Limits on the ability to sub-contract and the extent of individual approval are therefore an indicator of the client power tempered by any accompanying responsibility. This practice is given an indicator status of 3 out of 5.

## 2.5 Duty to Warn

The duty to warn is one of the more problematic legal principles examined. The vexed question is the extent to which a party has to go further than performing his role and check on the work of others. In England the principle has been partially established through the law of negligence.<sup>41</sup> This does not amount to a firm principle of law and the courts take a case –by–case approach. This is one of the areas of law where Building Information Modelling could lead to some interesting developments in the field of collective responsibility.

The duty to warn is not applied in certain US states. For example, the Louisiana Design Sufficiency Law appears to provide the contractor with immunity for defects in the work where they are not to his design.

“No contractor shall be liable for destruction or deterioration of or defects in any work constructed if he constructed the work according to plans furnished to him.”<sup>42</sup>

The extent to which the supply chain is required to exceed their remit and draw specific attention to issues within the wider works clearly favours the client side. The presence of a duty to warn is therefore given an indicator status of 4 out of 5.

## 2.6 Time Bar

Time bars stipulate the giving of notice of a claim by a certain time. The failure to give the notice can result in the loss of the right to claim. In England the parties are free to agree these

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<sup>39</sup> See reference 7 above

<sup>40</sup> Hashmi, B. & Hammad, A. (2015) *Construction and Projects in Saudi Arabia: overview* Practical Law Company

<sup>41</sup> Edward Lindenberg v Joe Canning and others (1993) 62 BLR 147.

<sup>42</sup> Louisiana Revised Statute 9:2771

terms. A consideration of the reasonableness of the term may result from the Unfair Terms Act 1977 given their construal as exclusion/limitation clauses.<sup>43</sup>

Any attempt to limit liability for harmful acts are prohibited under UAE law.<sup>44</sup> In Qatar, the Civil Code stipulates<sup>45</sup> that contracting parties may not agree upon a prescription period different to that prescribed by law. Brief notification periods may contravene this mandatory provision.

Time bars are commonly used in construction contracts in Australia.<sup>46</sup> The value of these terms is in allowing claims to be investigated promptly and allowing the client to monitor its financial exposure to the contractor.

In Germany,<sup>47</sup> the failure to comply with a notification procedure may preclude a claim from being pursued. However, there is scope for the good faith principle to intervene.<sup>48</sup> The availability and approaches taken to good faith provisions would have been an interesting study to add to the list discussed in this paper. However it is not used as the doctrine may be pleaded by either party in the hope of censuring the behaviour of the other.

The operation of the time bar clause is in the favour of the client as there will be no later ambushes in respect of claims not notified. The logic of the timely communication of claims is also in the contractor's interest and something they should, in any event, undertake. The indicator value of time bars are therefore put at 1 out of 5.

## 2.7 Statutory Payment Regimes

Turning to the supply side, the mantra has long been repeated that cash flow is the lifeblood of the building industry.<sup>49</sup> There are several examples of legislative intervention to improve the position of the supplier often with the expressed intention of limiting the number of insolvencies. These interventions are indicative of a supplier power balance.

England and other common law countries have legislation enacting the Latham proposals and provide a statutory payment protection framework.<sup>50</sup> The Contractor has a statutory right to progress payments in Australia under the security for payment legislation.<sup>51</sup> This has been interpreted and implemented in different ways in the Australian states. For instance, in New South Wales<sup>52</sup> payments are fast tracked to the contractor within fifteen days of the claim having

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<sup>43</sup> See reference 6 above

<sup>44</sup> See reference 7 above

<sup>45</sup> Article 418(1)

<sup>46</sup> See reference 12 above

<sup>47</sup> See reference 9 above

<sup>48</sup> Article 242 of the Law of Obligations forming part of the German Civil Code.

<sup>49</sup> *Danways Limited v F G Minter Limited* [1971] 2 All ER 1389

<sup>50</sup> See reference 30 above

<sup>51</sup> See reference 12 above

<sup>52</sup> Building and Construction Security of Payment Act 1999

been received. Other security for payment devices include the transfer of a debt owed to a sub-contractor from the contractor to the client.

The existence of statutory payment regimes is therefore measured at 5 out of 5 as a supplier power indicator.

## 2.8 Supplier's Lien

In England,<sup>53</sup> once materials have been delivered to site and physically incorporated into the works the ownership transfers to the landowner regardless of the terms of contract and whether or not they have been paid for. This is at odds with the US concept of the “Mechanic’s Lien” which allows the supplier to register a charge over the property as security against payment.<sup>54</sup> This lien complicates matters to the extent that the client requires indemnities from the contractor that it will satisfy any lien and the sub-contractor to issue a release or waiver of any lien registered or unregistered upon payment.

In Brazil,<sup>55</sup> it is possible to lodge a constructor’s lien over land and property. Australian security for payment legislation includes the right to secure a lien over the site and any “unfixed plant or materials supplied.”<sup>56</sup> The lien is extinguished when the unpaid amount is paid to the contractor.

In Ontario, Canada,<sup>57</sup> the Construction Lien Act extends trust claims to the officers, directors and others who found to be the controlling mind of the contractor. This statutory remedy allows the corporate veil to be pierced and the directors held personally liable to subcontractors if project funds are not passed on to the right parties. As in the US,<sup>58</sup> this can lead to owners to require contractors to carry labour and material payment bonds as part of the security documentation for the project.

In France,<sup>59</sup> regularly used sub-contractors have a direct action against the client if the contractor fails to pay within one month of service of a formal notice.

The existence of a right for the sub-contractors to maintain an interest in the fruit of the labour or goods supplied is a strong indicator of supplier bias. The risk of the lien is often passed back to the supplier by requiring indemnities and release forms from the contractor. Notwithstanding this, the practice is given a score of 3 out of 5.

## 2.9 Force Majeure/Frustration

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<sup>53</sup> See reference 6 above

<sup>54</sup> See reference 10 above

<sup>55</sup> See reference 13 above

<sup>56</sup> See reference 12 above

<sup>57</sup> Alter, M., Robinson, T., et al (2015) *Construction and Projects in Canada: Overview* Practical Law Company

<sup>58</sup> See reference 10 above

<sup>59</sup> See reference 8 above

Force majeure is a French term meaning “superior strength” and is well known in international construction law. The concept is used in common law jurisdictions by inclusion in the contract terms where the only equivalent common law practice is frustration. This occurs when the performance of the contract is radically different to what was intended by the parties and the continued performance of the contract, or a part of it, impossible for a period of time. Force majeure allows the parties to be specific about which events constitute grounds for an extension and their consequences.

Force majeure clauses are available and enforceable in the UAE.<sup>60</sup> Force majeure exclusions are allowed in Brazil,<sup>61</sup> but must be included in the contract. Force majeure clauses are available and enforceable under Indian Law<sup>62</sup> and appear as a defined term in the contract. The exclusion of liability for force majeure is provided for in France.<sup>63</sup> The risks can be apportioned as in other jurisdictions.

Force majeure clause amounts to a (valid) excuse for non-performance by the supplier. However, this is a common sense arrangement and has benefits for the client side to avoid or mitigate against the effects of frustration. The indicator score is therefore 1 out of 5.

## **2.10 Hardship payments/Imprevisión**

Hardship payments or imprevisión payments (as they are known in France) arise from civil law traditions. UNIDROIT<sup>64</sup> principles set out that a party claiming hardship is entitled to a renegotiation of the contract. If agreement cannot be reached then the party claiming hardship can rescind or amend the contract on “just terms”. In the common law tradition, such arrangements appear to lead to contractual uncertainty and allow the proverbial coach and horses to be driven through the bargain terms. However, the clause is unlikely to be able to be invoked for anything other than very strong grounds. In this analysis, the hardship has been viewed as being akin to frustration or commercial impracticability under the common law.

In Brazil,<sup>65</sup> the debtor may terminate the contract if the obligation becomes excessively expensive as a result of extraordinary and unforeseeable events which lead to an extreme and disproportionate advantage to the other party. The affected party may request a judge or arbitrator to modify the contract.

The French Civil Code<sup>66</sup> has the theory of imprevisión. The meaning of imprevisión concerns an unforeseen obstacle which complicates the realisation of the contract. This can provide the

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<sup>60</sup> Article 287 Law of Commercial Transactions 1990

<sup>61</sup> See Reference 13 above

<sup>62</sup> See Reference 11 above

<sup>63</sup> Article 1148 of the Code Civil

<sup>64</sup> International Institute for the Unification of Private Law

<sup>65</sup> Article 478-480 of the Civil Code

<sup>66</sup> Article 1134 Code Civil

contractor with the right to claims increased costs and/or to terminate the contract. Examples include increasing costs and wages, interventions by public authorities, social unrest and forces of nature.

The right to claim hardship payment for what is essentially commercial impracticability is seen as a supplier friendly provision and is given a score of 4 out of 5.

## **2.11 Constructive Acceleration**

Constructive acceleration can be defined as being a refusal or by the client to recognise in a timely manner that the contractor has encountered an excusable delay for which he is entitled to an extension of time. The contractor may feel compelled to accelerate the programme in order to complete by the original completion date.

A contractor accelerating without being instructed may in some jurisdictions be viewed as able to claim. This has been tried as an argument in England<sup>67</sup> but has met with resistance where it is felt that there are sufficient contractual claims that can be made. In the USA<sup>68</sup> it is regarded as an acceptable head of claim.

In Brazil,<sup>69</sup> if the constructive acceleration increases contractor costs then it can be successful if an extension of time should have been granted. If bad faith is proven on the part of the client then loss of profits might also be claimed.

Australian law allows constructive acceleration.<sup>70</sup> In a leading case, the contractor was found to have been instructed by implication to accelerate in order to maintain the original completion date. The costs incurred were recoverable. The same principle applies in Singapore where if dates cannot be achieved by reason of the client's action then the contractor is entitled to recover the costs of additional resources necessary to accelerate the works.<sup>71</sup>

In France,<sup>72</sup> there are no established rules dealing with constructive acceleration. However, a decision to accelerate in such things as the threat of liquidated damages may succeed for the contractor.

Constructive acceleration is seen as a pro-supplier practice. The difficulty in proving it is likely to weigh against the strength of its potency for the supply side. The practice is given 2 out of 5 as an indicator.

## **2.12 Reasonable skill and care/fitness for purpose**

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<sup>67</sup> See reference 6 above

<sup>68</sup> See reference 10 above

<sup>69</sup> See reference 13 above

<sup>70</sup> See, for example, *Perini Pacific v Commonwealth of Australia* [1969] 2 N.S.W.L.R 530

<sup>71</sup> *Aoki Corporation v Lippoland (Singapore) Ltd* (1994) 8.5.3

<sup>72</sup> See reference 8 above

In most civil law countries the duty of fitness for purpose is encountered. This is evident in decennial liability in the UAE and France whereby the contractor and designer remain jointly liable for the total or partial destruction which threatens the safety and stability of the building within 10 years of its construction.<sup>73</sup> This liability cannot be exempted by inserting any wording into a contract between the parties. In the UAE, the three year limit on bringing a claim results in a decennial plus three arrangement.

The fitness for purpose standard is not regularly used in England but does exist.<sup>74</sup> The Design and Build standard forms in the UK typically limit the design obligation to that of a reasonably competent fellow professional. This reasonable skill and care test is a lower standard than fitness for purpose and its use signals a supplier side friendly practice.

The FIDIC Green form sets the obligation at the higher fitness for purpose.<sup>75</sup> Australian law has upheld the fitness for purpose requirement whilst tempering the same by defining the concept as reasonable fitness for the purpose intended.<sup>76</sup>

The supplier has a slight advantage where reasonable skill and care is applied compared to countries with a fitness for purpose standard. A reasonable care test is therefore valued at 3 out of 5 in terms of being a pro-supplier indicator.

This concludes the list of twelve practices examined. One point to note is that several of the practices overlap and the ability exists to arrive at the same result by different means. For example, common law commentators may recoil in horror at the “otherness” of hardship payments and termination for convenience. On closer examination these practices are not as alien as they first appear. Loss and expense claims and termination provisions may produce similar outcomes in other jurisdictions.

### 3. THE INDICATORS APPLIED

The stage now reached is that the twelve indicators have been scored in terms of what they reveal about the balance of power. These indicators can now be applied to any given country and a judgment made as to which of the indicators are present in the legal system. It is beyond the remit of this paper to apply the power indicator to every country mentioned. The indicator is applied to a sample of three examples, England and Wales, UAE and France in the table below. These readings are tentative and subject to a re-appraisal by a country expert and consolidation in a wider piece of research.

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<sup>73</sup> Article 880 to 883 UAE Civil Code and Article 1792 of the French Civil Code

<sup>74</sup> Greaves & Co (Contractors) Limited v Baynham Meikle & Partners

<sup>75</sup> Bunni, N. (2003) *Risk and Insurance in Construction* 2<sup>nd</sup> Edition Spon Press

<sup>76</sup> Viking Grain Storage Limited v T H White Installations 3 CON LR 52

**Table 1:** The Power Indicators Applied to England and Wales, UAE and France

Indicator	Value	England	UAE	France
Termination for convenience	3	0	3	0
Pay when Paid	2	0	2	0
Unconditional bonds	5	0	5	0
Subcontracting	3	3	3	3
Duty to warn	4	4	4	0
Time Bars	1	1	0	0
TOTAL		8	17	3
Statutory payment	5	5	0	0
Supplier's lien	3	0	0	3
Force Majeure	1	0	1	1
Hardship payments	4	0	0	0
Constructive acceleration	2	0	2	2
Reasonable care	3	3	0	0
SCORE		8	3	
OVERALL SCORE		0	14	-3

The three countries chosen in Table 1 demonstrate the range of outcomes possible. The UAE score reveals the dominance of the client side (+14). Five out of six of the client friendly practices are found with only two of the pro-supplier indicators. The influence of the importance of worker's rights are underlined in the French score (-3). Here, only one pro-client indicator is found compared to three supplier-friendly practices. England and Wales (0) comes out as the most balanced on this scale with three pro-client indicators and two supplier-friendly practices.

#### 4. CONCLUSION

The jurisdictions examined respect the freedom to contract and the sanctity of those obligations. Some of the many exceptions to these central tenets have been examined in this paper and a scoring system devised to assist in differentiating the legal systems discussed. The scoring system is promoted as a tool to open discussion around the different approaches and practices encountered in international construction law. Hopefully this will provide a focal point for further study and an appreciation of our essential similarities and differences.

#### BIOGRAPHICAL NOTES

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