Construction

Contributing editors
Robert S Peckar and Michael S Zicherman

2017

GETTING THE DEAL THROUGH

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Getting the Deal Through is delighted to publish the tenth edition of *Construction*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Austria, Denmark, Ireland, Japan, Norway and Singapore.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Robert S Peckar and Michael S Zicherman of Peckar & Abramson, PC, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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Introduction

Robert S Peckar and Michael S Zicherman
Peckar & Abramson PC

For the last several years, our Introduction to *Getting the Deal Through–Construction* has focused on the issue of corruption of government officials in the construction industry – corruption by those who work with those officials and by the officials themselves. For the most part, we concentrated on the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act. Last year, we wrote 'corporate compliance with anti-corruption laws, both local and international, must be at the core of any company that works internationally' and we cited several examples of companies that paid a high price for their participation in corrupt activities. So, then, what could be 'new' in respect to this issue and why should it be spotlighted, yet again, this year?

The discussion of what is new starts with a different industry – football! As most people who follow professional sports are aware, there was a huge shake-up in the world of international football. The leadership of its key organisation, FIFA, and many of its executives, have been targeted with allegations of widespread corruption, involving massive bribes being accepted (if not solicited) from governments and country representatives seeking to, among other things, bring the World Cup to their nation. These bribes are alleged to have taken place in many countries, but yet it was the United States Department of Justice that brought the formal charges against those individuals. While many Americans enjoy 'soccer' (with apologies to our football-fan colleagues around the world), the sport hardly enjoys a following in the US that FIFA football enjoys in most of the world. The World Cup has never been in the US. So, why then is the US Department of Justice in the middle of this and how does it claim to have jurisdiction over these officials who are located in Switzerland, Brazil, Trinidad, Argentina and Paraguay? We are not in a position to know what motivated the US Department of Justice to focus its resources on the FIFA scandal. However, we do know that the answer to the issue of jurisdiction should sound the alert to construction industry members around the world – the FCPA casts a very wide net – and it is likely that other countries with similar laws will follow the lead of the US Department of Justice and seek to establish jurisdiction over people who thought they would never be subject to such laws from governments foreign to their citizenship and residency. Corporations and individual citizens, who engage in corrupt activities with the representatives of foreign governments, are no longer the exclusive targets of just their own country's anti-corruption statutes. With the announcement of the FIFA indictments, as well as indications from countries other than the US that they too are looking to apply their foreign corrupt practice laws with a long reach, the importance of maintaining a strong compliance programme becomes even more critical. Certainly, the basis upon which the US Department of Justice has justified its imposition of long-arm jurisdiction will be subjected to a very strong defence by the defendants pulled into this prosecution. Nevertheless, the message about the importance for companies to operate in compliance with international standards and applicable anti-corruption laws is accentuated by this development.

Although most of the attention afforded to prosecutions for corruption is focused on the FCPA and the UK Bribery Act, both of which are robust regimes, more attention should be paid to the regimes of other countries, where corruption is also treated very seriously. Based upon the experience we have had in the last several years counselling construction industry members in the establishment of appropriate anti-corruption compliance programmes, the local anti-corruption laws in many nations beyond the US and the UK, including developing nations with very poor standing in Transparency International's Index, possess robust laws with requirements and penalties that exceed those of the FCPA and other standard-bearer regimes. Nowadays, for an international construction industry company to be expert only in the FCPA or the UK Bribery Act is not sufficient, and we thus welcome our readers to benefit from the insights of our 27 national experts who have contributed to this year's edition, and who have provided answers to some new questions focused on this important area.

United States

Robert S Peckar and Michael S Zicherman

Peckar & Abramson PC

Foreign pursuit of the local market

1 If a foreign designer or contractor wanted to set up an operation to pursue the local market what are the key concerns they should consider before taking such a step?

Few legal concerns arise simply because a company establishing a US operation is foreign. Rather, the primary concerns facing foreign contractors are more of a practical nature, including the following:

- determining whether or not to operate as a union or merit shop (non-union) operation;
- obtaining sufficient bonding capacity with a qualified surety;
- finding qualified domestic executives and supervisors to ensure the cultural transition to US industry practices;
- locating qualified legal counsel and becoming conversant with important legal considerations that regularly challenge and affect contractors;
- establishing relationships with local trade subcontractors; and
- establishing, with the guidance of counsel, an appropriate programme to ensure compliance with US laws and regulations that apply to the contractor's work and to ensure that the company's expatriates comply with US law, instead of relying upon the presumed acceptability of conduct and practices with which they are accustomed. Many of the regulations and laws that pertain to a contractor's or designer's entertainment of government employees, as well as others who, although they are not government employees are nonetheless governed by the same rules, are not intuitive, and proper legal guidance is essential for a company entering the US market.

Many foreign contractors have entered the US market successfully, employing different models to establish their operations. Two models have worked well for European contractors: purchasing a domestic operation and pursuing business through that operation, and establishing joint ventures with domestic companies. These models eliminate many potential problems in forming a US operation, particularly if the contractor purchases a domestic company, as it 'inherits' an operation already fully integrated into US practices and its target markets. In fact, foreign companies are increasingly pursuing the acquisition of US construction companies, as the condition of the US economy has created new opportunities. Asian contractors, on the other hand, have typically established their operations in the US by initially working with businesses owned by their fellow countrymen and women and then growing domestically from that base. This model requires a greater investment in developing a unit that can succeed in the US markets than the European models. The Asian model, however, has undergone some recent changes as Asian-based companies are now pursuing the purchase of US companies to compete in the US market.

Licensing procedures

2 Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

Licensing requirements vary from state to state and even within a state. Not all states require contractors to have licences. States such as California have statutes requiring virtually all contractors to be licensed, while others, such as New York, do not require contractor licensing on a state-wide level, but leave contractor regulation to the municipalities. A growing number of states have also begun requiring entities that provide pure construction management services to be licensed, either by procuring a specific construction management licence issued by the state or by requiring the construction manager to possess a general contractor or mechanical contractor licence or an architect or engineering licence. Architects and engineers typically require local licences by the states in which they provide professional services. However, as an alternative, the laws in New York and some other states provide that a foreign engineer or architect may be granted a limited permit to perform design services in connection with a specific project. Nonetheless, where a licence is required, the licence must be kept current and the contractor must be able to demonstrate that it is properly licensed.

Failure to be licensed is viewed as illegal and courts will typically refuse to enforce such contracts. The laws in many states provide that if a contractor is not licensed (when required), or if the licence has lapsed without renewal, the contractor is not entitled to compensation for the work it performed and may be required to return monies already paid. There have even been reported instances of public entities scrutinising a contractor's licensing history and, if a technical lapse is found, filing a lawsuit to recover any monies already approved and paid. To overcome such inequities, some jurisdictions have established a 'substantial compliance' doctrine that allows a contractor or designer, in certain limited circumstances, to recover payment for services performed.

Competition

3 Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

Though not intended to disadvantage foreign contractors, various local laws effectively give local contractors an advantage in public contracting. Regardless of nationality, construction companies awarded federal contracts must comply with the Buy American Act, which requires that materials incorporated into the project be made in the US or in a trade agreement-compliant country. Otherwise, 6 per cent of the cost of the foreign materials is added to the bidder's price proposal. The American Recovery and Reinvestment Act of 2009 (ARRA) imposes even more restrictive 'buy American' requirements under ARRA-funded contracts. More than half of the individual states in the US, as well as many local governments, have similar 'buy local' requirements. Thus, while foreign and domestic contractors are treated alike, foreign contractors may be disadvantaged by lack of access to domestic material suppliers and competitive pricing in the local market. The US government also has a goal of awarding 23 per cent of its procurement budget to small businesses. Additional goals of 3 to 5 per cent are set for preferential classes, such as small disadvantaged businesses, service disabled veteran-owned small businesses, etc. Foreign contractors are explicitly excluded from these set-aside programmes, since eligibility requires the company to be organised for profit, with a place of business in the US, and to operate primarily within the US, or to make a significant contribution to the US economy through payment of taxes or use of US products, materials or labour.

As a consequence of the large number of contractor and designer acquisitions by large domestic and foreign companies, there have been a significant number of situations where companies have been disqualified from competing for a publicly funded project because of the role that a parent or sister company had in the project, which was perceived to create a possible advantage to the competing contractor. With the increasing frequency of contractors and designers serving at times as project managers,

and contractors serving as construction managers or general contractors, depending upon the opportunity, the possibility of this organisational conflict is substantial.

Bribery

4 If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

A bribe is generally defined, under state and federal laws, as the giving of money or something of value to a person who can control or influence action favourable to the person making the gift. This would include giving a government contracting officer money to influence the manner in which a contract is awarded. Giving money or something of value to a purchasing agent at a private company to influence the award of a contract is a commercial bribe, but a bribe nonetheless. In this same regard, facilitation payments to expedite or secure the performance of routine governmental functions are likewise deemed to be impermissible bribes if made to government officials in the United States. However, these same facilitation payments are legal if made abroad by US companies and their subsidiaries, and constitute an exception to the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA). Even though facilitation payments are technically permissible under the FCPA, this exception is very narrowly construed and such payments are closely scrutinised.

Bribery in the US is a crime punishable by imprisonment or fines, or both. Importantly, it can also result in forfeiture of the benefits of the crime, including the right to payment for services provided under the illegally procured contract. In short, offering a bribe to get work is a serious mistake in the United States. The person and the company offering the bribe will suffer criminal prosecution, will likely lose the right to be paid under that contract (even if the work was performed) and may suffer other adverse consequences as a by-product of the illegal activity, such as suspension or debarment from the right to perform work for any government agency. Bribery is taken very seriously in the United States and is zealously prosecuted.

Foreign companies working in the United States need to learn the distinctions between acceptable practice in other jurisdictions internationally and in the United States, as innocent, allowable gift-giving to a government representative in other parts of the world is looked upon harshly in the United States and can have serious legal consequences. Even treating a government employee to a dinner can result in serious disciplinary action against the government official and, at a minimum, the suspicion of illegal bribery by the contractor. Moreover, foreign contractors should be aware that civil and criminal prosecution under the FCPA is not restricted to just US companies working abroad or foreign companies working in the US or on a US-funded project. Instead, the FCPA is far-reaching and has been successfully used by the US government to investigate and prosecute foreign corporations for corrupt practices occurring in foreign countries on non-US projects, based merely on incidental or tangential contacts with the US that are unrelated to the project.

Reporting bribery

5 Under local law must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?

In the US, employees of most project teams have no affirmative obligation to report suspicion or knowledge of bribery of a government official or government employee. Similarly, the employee has no obligation to report any fraudulent or criminal conduct by its employer or other project participants. However, on projects performed pursuant to contracts with the federal government or funded by the federal government, there is an obligation to self-report conduct that violates any law, thus requiring that any participation in bribery be reported. Federal contractors are obliged to maintain a compliance programme that includes, among many other elements, policies to encourage employees to report their suspicion or knowledge of such violations. 'Whistle-blower' laws also exist pursuant to both federal and state statutes to encourage employees to voluntarily report incidents of fraud, bribery, criminal conduct, and other statutory violations. These laws are designed to protect employees who report such activities against retaliation, such as by demotion or termination of employment. If an employee was retaliated against for whistle-blowing, a court can order reinstatement of the employee to the same position, and award compensation for all lost wages and benefits, reasonable costs and attorneys' fees, and punitive damages.

Political contributions

6 Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

Whereas bribery statutes focus on money or gifts given directly to public officials, the federal government and a growing number of states have enacted legislation that addresses attempts to influence public officials through indirect means, by way of political contributions. These statutes are commonly referred to as 'pay to play' laws. Pay to play is the practice of making contributions to elected officials in order to garner their favour and to influence their awarding of government contracts. Although particular statutory requirements vary, these laws generally prohibit any company from making campaign contributions to a political official, candidate or to a political action committee for up to several years prior to the award of a public contract. These laws further require contractors bidding on public works to disclose all previous political contributions. If the contractor discloses a political contribution during the proscribed period, the contractor will be disqualified from being awarded the contract. In addition, if the contractor intentionally fails to disclose an offending contribution, the sanctions can be severe, including a monetary penalty up to the value of the contract awarded, and the contractor may be debarred from further contracts with any public entity in the jurisdiction for a period of years. Given such extreme sanctions, one ordinarily would expect that there would have to be a large political contribution. However, in at least one state, the offending political contributions were as little as US$300 over the preceding 18 months.

Other international legal considerations

7 Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

The US is probably one of the most welcoming jurisdictions for foreign investment or active participation in the construction industry. Although there are few obstacles to doing business in the US, it is not a single jurisdiction as most other countries are. Being a contractor in the US requires knowledge of a spectrum of issues in the particular states in which the contractor intends to operate, ranging from basic legal principles to cultural and business practices. This is often the reason why some contractors in the US operate within certain geographical regions and not others. Even within large states, while the law is uniform, the range of cultural issues can be quite varied. For example, Florida is a single state but has at least seven or eight different areas so culturally diverse that each could almost be considered different states. New Jersey is divided culturally between the north (New York-centric) and the south (Philadelphia-centric). California is equal to the length of seven states on the east coast and offers a diversity of culture one would expect in different states. New York City has its own unique culture and then there are other parts of the state that have their own culture, none of them at all similar to New York City.

The cultural and business practices aspect of doing business in the US is critically important. From labour relations to subcontractor relations, work practices and 'acceptance' of 'out-of-towners' (not less foreign companies), these issues will determine the potential profitability of a newcomer more than any others. Further, the ability of the foreign contractor to adapt to the way business is conducted and individuals behave in the US is critical to success.

For example, the representatives of foreign companies assigned to work in the US may not understand or appreciate US laws relating to conduct in the workplace (eg, sexual harassment and age discrimination), which may result in claims, litigation and other serious legal issues. That is why entrance into the market through purchasing an existing and successful US contractor, or joint-venturing with one, is the wisest path for a foreign company.

Construction contracts

8 What standard form contracts are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

There are many different form contracts utilised in the United States. The most widely used form contracts are those published by the American Institute of Architects (AIA), which has developed contracts not only for architectural services, but also forms commonly used by owners, contractors and construction managers. Its A201 document, which sets forth general conditions of contract for general construction contracts, is unquestionably the most commonly used document in the industry and is often attached to customised contract forms that are not written by the AIA. In addition to the AIA series of contracts are the 'ConsensusDOCS' construction documents, which were developed jointly by 22 owner, contractor, designer and surety organisations, including the Associated General Contractors of America (AGC). These documents purportedly present a more collaborative approach to contractual relationships, and also have several specialised contractual addenda to address the needs of projects that utilise building information modelling or involve 'green' building. Other available industry form contracts that are less widely used are those published by the AGC, which are generally considered by many to be more favourable to contractors, as well as those published by the Engineers Joint Contract Documents Committee, whose members are representatives of several societies representing professional engineering disciplines and tend to favour the interests of engineers. Moreover, many large owners and developers, governmental entities and contractors also have their own standard form contracts, which they may impose on contractors and subcontractors with little ability to negotiate the terms.

Regardless of the form of contract used, there is no requirement that the contract be written in English, although that is typically the case. In respect of the applicable law and the venue for dispute resolution, federal law and the law of most states generally provides that parties to a contract are free to agree upon the choice of law that governs their contract and the venue for their dispute, as long as the choice of law and venue bear a reasonable relationship to the parties or the dispute. If not, the courts may engage in a conflict of laws analysis to determine the appropriate jurisdiction's law to apply, and as to venue, the court may dismiss or transfer the action to a location that is more convenient for the parties and witnesses. Several states, however, have enacted a special law that prohibits parties to a contract for a construction project being performed within the state from agreeing in their contract to apply the laws of a different state.

Payment methods

9 How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Most construction contracts between owners and general contractors and between general contractors and subcontractors provide for payment on a monthly basis, while labourers are traditionally paid on a weekly basis. Payments are typically made in accordance with the contractor's certified requisition for work completed during the preceding monthly period, less a withholding of usually between 5 and 10 per cent of the amount payable, which the owner or contractor retains until the final payment requisition as security for the contractor's completion of the contract. On fast turnaround projects, such as tenant fit-outs, which only last a couple of months, it is not uncommon for requisitions and payments to be made on a biweekly basis as a means for the contractor to be paid for the first part of the work before the entire project is completed. There is no uniformity or custom for the manner in which payments are made, but it is standard for payments to be made either by cheque or electronic wire transfer.

Contractual matrix of international projects

10 What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

The most common contractual structure in the US is where the owner contracts directly with an architect or engineer for the design of the project and with a general contractor for the construction. The general contractor then enters into subcontracts with all of the trade contractors. However, that structure often varies depending upon the needs or desires of the owner, the project delivery method (design-bid-build, design and build, etc) and pertinent laws. For example, sophisticated owners on large private construction projects are increasingly using construction managers on an 'at-risk' basis to hold all the contracts with the trades and to furnish the completed work at a guaranteed maximum price, or on an 'agency' basis, where the owner contracts with each of the trades separately through the construction manager. Also, several states have laws requiring public entities on certain improvement projects to enter into separate contracts with each of the major trades (mechanical, electrical, plumbing, general contracting and structural steel), as opposed to a single-source contract with a general contractor.

PPP and PFI

11 Is there a formal statutory and regulatory framework for PPP and PFI contracts?

There is no general statutory PPP or PFI framework applicable to federal procurements. Legislation enabling such partnerships is either project-specific or specific to a federal agency. For example, the Veterans Administration and the Department of Defense regularly enter into PPPs through their enhanced use lease procurement procedures, and now the US Army Corps of Engineers is authorised to undertake a PPP pilot programme for water and navigation projects.

Although the most significant PPP road projects may be perceived as federal projects (due to designation of the road as an 'interstate' highway), the reality is that they are state projects administered by the state department of transportation pursuant to state statutes. Nonetheless, there is an important federal component as these projects often rely on federal funding. There is no common statutory scheme or governmental approach towards PPPs among the 50 states, but the Federal Highway Administration has a model PPP law for private toll roads that allows for both solicited and unsolicited bids from private developers.

PPPs remain a highly political issue, despite all the excellent reasons for them to flourish in the US. However, as states have a growing need to undertake major infrastructure projects that are frequently estimated to cost in excess of US$1 billion, they are beginning to adopt legislation to permit PPPs on either a statewide or project-specific basis. At present, there are approximately 39 states that now have some form of P3 legislation, either for transportation or social infrastructure (such as public buildings), or both, and many others have pending legislation. States with a legal framework for PPPs typically exempt them from the traditional procurement rules, which are often too impractical or onerous for PPP proposers and may award a contract based on the best value rather than the lowest bid. Where state agencies consider unsolicited proposals, the PPP laws normally require that final bidding be opened up to other qualified proposers.

Joint ventures

12 Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

Parties to a contract are free to allocate liability as they deem appropriate. Thus, members of a consortium may allocate, in their consortium agreement, the percentage for which each member is responsible for losses or claims against the consortium. Notwithstanding this internal allocation, when contractors choose to operate as a consortium in the US, the consortium is effectively treated, for legal liability and responsibility purposes, as a joint venture or general partnership, which means that each member of the consortium is jointly and severally liable to third parties for the actions of the consortium. Unless a contract with a project owner limits the owner's rights to only seek relief against the assets of the consortium, each consortium member will be liable to the owner (or to any other party with claims against the consortium) for the full amount of the damages claimed. If a consortium member pays more than its allocable share of a claim against the consortium, that member can then seek indemnification from the other consortium members.

Tort claims and indemnity

13 Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

Generally, an indemnification provision in a construction contract is valid and fully enforceable. Such clauses, when properly drafted, may require a

contracting party to indemnify the other party not only against the contracting party's negligent acts, errors and omissions, but against the other party's own negligence as well. In determining the extent to which a party is contractually required to indemnify the other, courts in many states look solely to the intent of the parties as gleaned from the terms of the contract. However, before requiring one party to indemnify the other against the other party's negligence, some states require such intent to be stated expressly in the contract, so the indemnifying party indisputably knows that it is, in effect, insuring the other against its own negligence. Regardless of the language employed, some states have enacted laws proscribing parties to a construction contract from being indemnified against their own negligent conduct. In New York, for example, a party cannot be indemnified against claims for bodily injury or property damage, where that party's negligence wholly or partially caused the damages. By contrast, in New Jersey indemnification is only proscribed in situations where the indemnitee's negligence was the sole cause of the loss or damage. These laws do not apply, however, to insurance companies that are in the business of taking the risks involved in protecting negligent people, nor do they apply to claims for economic loss.

Liability to third parties

14 Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

Whether a contractor bears responsibility to third parties for the work it performed depends upon the nature of the construction and the type of damages sustained by the third party, as well as the state in which the work is performed (since statutes and case law on this issue vary). Typically, in a commercial context, absent privity of contract, a third-party purchaser or lessee does not have any direct recourse against a contractor for claims of defective work, delays in turnover of the work and the like. However, there are some circumstances where the contractor still may be subject to liability in tort for a duty owed to the third party where improperly performed work results in personal injuries, wrongful death or property damage (excluding warranty-related claims). In residential construction, particularly condominium projects, while privity is also the standard requirement for a person to pursue a legal claim against a contractor, several states, especially Florida, Nevada and California, have enacted legislation that provides condominium owners with the right to bring a direct action against a contractor for claimed defective work that it performed in connection with the individual's dwelling. In those states, the right of condominium owners to sue contractors has become a mini-industry unto itself, as plaintiff's attorneys specialising in representing condominium owners join with forensic engineers to pursue claims on many such projects. Consequently, the contractor (and its insurance carrier) is exposed to liability and significant litigation costs from someone with whom it never contracted or had any dealings.

Insurance

15 To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

There are many different insurance products available to contractors and subcontractors in the US construction market. Collectively, these insurances will cover most types of third-party liability exposure for personal injuries, property damage, environmental damage, and in some cases economic losses.

Many forms of insurance also are required by contract or by local laws, but, regardless, the most common insurances procured by contractors and design professionals include the following:

- employer liability insurance;
- errors and omissions insurance;
- comprehensive general liability insurance;
- pollution liability insurance;
- property insurance;
- builder's risk insurance;
- owners and contractors protective liability insurance;
- umbrella or excess liability insurance;
- worker's compensation insurance; and
- subcontractor default insurance (SDI).

There is no limit on the quantum of a contractor's liability to a third party, but there may be limits on the amount of coverage that an insurer is willing to provide in respect of a particular risk, such that the contractor is exposed to personal liability for damages sustained by a party in excess of the policy limits. For this reason, depending on the project, some contractors may procure umbrella or excess liability coverage to insure against the risk that the limits of a particular insurance policy are exceeded, but even these excess policies have limits that may conceivably be exceeded on a particular claim. Depending on the specific terms of the policy, insurance coverage may be available to cover delay damages sustained by a third party, but due to coverage exclusions typically found in most liability policies, a contractor will usually not be able to insure against delay damages or liquidated damages the contractor sustains due to its own actions or the actions of its subcontractors. The one exception may be in respect of SDI, which is specifically designed to insure the contractor against damages attributable to the default of one of its subcontractors.

Labour requirements

16 Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

Generally, contractors are free to determine staffing levels for all components of their projects. For public works projects, however, the contracting entity may require contractors to utilise a certain percentage of 'minority' or 'disadvantaged business' enterprises to perform the work. Requirements range from 'best efforts' to recruit such enterprises, with no specific utilisation requirement, to a specific 'set aside', requiring utilisation of such enterprises for a fixed percentage of the work. Collective bargaining agreements, project labour agreements and trade union work rules may oblige contractors to have crews of a certain size depending upon the nature of the work. For example, a labour agreement with an equipment-operating union may require that a mechanic be employed whenever a certain number of machines are operated on a project. On public works projects, applicable prevailing wage laws may incorporate staffing requirements contained in local collective bargaining agreements. Lastly, contractors that are awarded a federal contract or subcontract are required to electronically verify employment authorisation of all employees performing work on the project using the E-Verify internet-based system operated by the Department of Homeland Security and the US Citizenship and Immigration Services.

Local labour law

17 If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

The only legal obligations towards employees that might remain after the completion of employment are any continuing obligations that may exist under the federal Davis-Bacon Act (DBA), and corresponding state statutes, as well as the Employee Retirement Income Security Act of 1974 (ERISA), for work performed during the course of the employment. The DBA requires payment of locally prevailing wages and fringe benefits to labourers and mechanics employed on most federal government contracts for construction, alteration or repair (including painting and decorating) of public buildings or public works. Under the DBA, contractors and subcontractors must pay all mechanics and labourers employed directly on the site, not less often than once a week, the full amount accrued at the time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual obligation that may exist. Many states have also enacted their own public works statutes, known as 'Little Davis-Bacon Acts', which operate much in the same manner, including their own prevailing wage requirements. Further, to the extent that a contractor, or a union utilised by a contractor, maintains a pension plan on behalf of its employees, ERISA serves to regulate the operation of the plan, and would obligate the contractor to fund the plan on behalf of a terminated employee, where the employee's benefits were earned prior to his or her termination. When a contractor enters into a collective bargaining agreement with a US labour union that requires the contractor to contribute towards the union's fringe benefits fund, the contractor assumes the risk that, if and when it terminates a relationship with the union, it will be liable

for some portion of the unfunded liability of the union fringe benefits fund. The unfunded liability can be significant and is, therefore, an important issue for all contractors who enter into collective bargaining agreements.

Labour and human rights

18 What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?

Foreign construction workers that entered the US legally, and have proper work authorisations from the federal government, essentially have the same rights as any US citizen, and are equally protected by local workplace laws and labour laws. While employers cannot legally hire undocumented workers (workers that have not legally entered the country (eg, illegal aliens)), if they do, those workers still are afforded many of the basic rights and privileges guaranteed by the US Constitution and are entitled to many of the same protections secured by the US labour laws, such as the right to be paid minimum or prevailing wages, overtime pay, and the right to be free from discrimination and wrongful termination. These undocumented workers even have the right to press claims and sue for a violation of these laws and to recover proper payment for work performed, but they cannot sue for back pay for work they had not performed, as a US citizen is permitted to do. Moreover, 'work camps' populated with foreign construction workers do not exist in the US and, therefore, many of the abuses of workers known to exist in work camps also do not exist.

Close of operations

19 If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

When a contractor decides to cease its operations, there are various laws and other considerations that are implicated in that decision. The primary statute affecting such decisions is the federal Worker Adjustment and Retraining Notification (WARN) Act, which protects workers, their families and communities by requiring employers with 100 or more employees to provide at least 60 calendar days' advance written notice of a plant closing or a mass lay-off affecting 50 or more employees at a single site of employment. These requirements do not apply when the lay-offs occur because of unforeseeable business circumstances, faltering companies and natural disasters. Also exempt are workers on a particular building or project, or recurring seasonal work, if the workers understood at the time they were hired that their work was temporary. Advance notice gives workers and their families transition time to adjust to the prospective loss of employment, to seek and obtain other jobs and, if necessary, to enter skill training or retraining that will allow these workers to compete successfully for employment. In addition to the federal statute, some states have their own versions of the WARN Act, which must be adhered to as well.

Additional considerations affecting a company's decision include whether the company has unionised employees and if it contributes to a defined-benefit pension plan. Further, as stated in question 17, if the employees are unionised, it may have to bargain with the union before closing its operations. If corporate contributions have been made to the union's defined-benefit pension plan (known commonly as fringe benefit funds), liability may be incurred for a portion of the unfunded pension benefits measured at the time when the employer ceases contributing to the plan.

Payment rights

20 How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

There are a number of options available to contractors to ensure payment from owners. The simplest means is for the contractor to satisfy itself at the outset that the owner has made adequate financial arrangements to fulfil its contractual obligations. The AIA's General Conditions (AIA Document A201-2007) provide that, prior to the commencement of the work and upon the contractor's written request, the owner shall furnish reasonable evidence to the contractor that it has made adequate financial arrangements to pay the contractor. Contract documents published by other industry trade groups contain similar provisions. Contractors also may be able to file mechanic's liens (sometimes called construction liens) on the improved property, which would provide them with a security interest in the property to ensure payment. However, the lien laws of each state must be checked and strictly adhered to in order for a contractor to avail itself of this remedy. The notice and procedural requirements are stringent and there are often penalties for improperly filed liens. Additionally, the federal government and numerous states have adopted 'prompt pay laws' that require payment within a certain specified time period and provide for penalties such as higher interest rates and attorneys' fees if payment is not made in a timely fashion by an owner. Under these laws, the contractor may also have the right to suspend work in the event payment is not made within the prescribed time. In the absence of such a statute, the contractor may still attempt to include similar terms in its contract. Lastly, if non-payment constitutes a material breach of the contract, the contractor may be justified in terminating its performance.

Contracting with government entities

21 Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

Historically, governmental entities were immune from liability arising from the actions of their agents and could be sued only if they granted their consent or otherwise waived immunity. Today, the federal government and most, if not all, state governments have enacted legislation waiving their sovereign immunity, consenting to be sued in respect of certain issues and claims arising under the contracts they enter into.

For federal contracts, sovereign immunity was waived through passage of the Contract Disputes Act (CDA). The CDA identifies the types of actions that can be brought against the federal government and enumerates the procedures that must be followed to bring suit. Specifically, the CDA waives sovereign immunity so that a contractor may appeal the final decision on its certified claim to the Civilian Board of Contract Appeals (or other contract appeals boards) or the United States Court of Federal Claims.

Significantly, waivers of sovereign immunity are limited by the specific terms of the relevant legislation and the government may avoid liability for actions that are deemed sovereign acts, as contrasted with acts undertaken in its contractual capacity. The distinction is whether the government's act affects the public generally or whether it is directed at the contractor only. Although rare, the federal government has attempted to avoid contractor claims on this basis. Also significant is that the federal government and most state governments are protected by sovereign immunity from quasi-contract claims, such as quantum meruit and unjust enrichment. Moreover, where sovereign immunity has been waived, the relevant statutes may also have various notice provisions and deadlines within which legal proceedings must be commenced. For this reason, it is extremely important that contractors strictly adhere to the procedures established in the CDA and its state law equivalents. Failure to do so will likely cause a contractor to forfeit its claim.

Statutory payment protection

22 Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Apart from any contractual remedies that may be available to a contractor for the suspension or convenience termination of a project, all states have one or more legal remedies available to unpaid contractors for the work that they performed. The most common legal remedy available to unpaid contractors is the right to file a mechanic's lien, which serves as a lien against the improved property for the amount of the unpaid contract work that was performed. If the project was for a public improvement, state and federal laws require the general contractor to post a payment bond, which guarantees payment to unpaid subcontractors and suppliers. In some instances, payment bonds may also be required by statute for private improvements on public property.

Many states, and even the federal government, also have statutes known as 'prompt pay' laws, which require that subcontractors, and in some cases contractors, be paid within a specified number of days after receipt of payment from the employer. Failure to make timely payment in accordance with these requirements can result in significant legal consequences. These laws typically provide the contractor with a right to interest on the unpaid monies and may entitle the unpaid contractor to suspend its future performance on the project (without recourse by the owner) until payment is finally made. On public projects, a common condition for receiving payment from the government is the requirement that the contractor 'certify' on the payment requisition that all subcontractors have

been paid in accordance with the prompt pay provisions. A false certification can result in serious claims by the government, including claims of making false statements, false claims and fraud. The government has been known to make these claims in both civil and criminal contexts, depending upon the circumstances.

Force majeure and acts of God

23 Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

The law applicable to construction contracts is very rigid and, absent total impossibility of performance or a specific contractual provision excusing non-performance, a contractor is bound to perform its contract, even if doing so will be more burdensome or less profitable than it had anticipated. If the contract provides a required date of performance, that date generally must be met, irrespective of whether events occur that are beyond the control of a party.

The reason for this is that contracting parties are deemed to have assumed the various risks encountered in meeting their contractual promises. If the parties wish to protect themselves against hardships due to circumstances beyond their control that can hinder or delay their performance, they must incorporate specific protective provisions into their contract.

Two common protective provisions are the force majeure clause and the termination for convenience clause. A force majeure provision usually identifies the specific delaying events or occurrences beyond a party's control for which it will be entitled to an extension of time to complete its obligations, such as acts of God, fires, floods, acts of the government, etc. A termination for convenience provision allows a party, at its discretion, to prematurely end the contract. This type of clause may be used by a contractor to avoid having its subcontractors complete their work where the owner has abandoned the project. However, termination for convenience clauses typically require the terminating party to pay the other party for the work performed up to the date of termination, costs incurred by the termination (ie, demobilisation costs and subcontractor close-out costs) and sometimes lost profits on the uncompleted work.

Courts and tribunals

24 Are there any specialised tribunals that are dedicated to resolving construction disputes?

With very few exceptions, in most states there are no special courts or public tribunals dedicated exclusively to the resolution of construction disputes. However, the federal government and various states have tribunals dedicated to resolving disputes against public entities, and given the volume of construction-related disputes in the public sector, these tribunals have developed a particular specialisation in such claims.

Under the Federal Claims Act, a contractor has the choice to challenge a contracting officer's final decision in the United States Court of Federal Claims (USCFC) or before a board of contract appeals (BCA). The USCFC is the single and central court in which contract claims brought against the federal government are heard. A BCA is a quasi-court within the federal agency that hears disputes resulting from the issuance of a contracting officer's final decision. At present, there only are three BCAs: the Civilian Board of Contract Appeals (CBCA), the Armed Services Board of Contract Appeals and the Postal Service Board of Contract Appeals. The CBCA will hear challenges brought in all the civilian government agencies.

Some states also have special courts that hear claims brought against that state. For example, the New York Court of Claims is the only court that hears contractual and other claims brought against the state of New York. In addition, some state and municipal governments have established specialised boards to hear disputes, similar to the BCAs at the federal level. Continuing the New York example, some state agencies (such as the Metropolitan Transportation Authority) have established boards to hear disputes, as have some city agencies (such as the New York City Department of Environmental Protection). Accordingly, knowing whether or not there are any specialised courts or other tribunals to resolve construction disputes at the state and municipal level requires inquiry in the particular jurisdiction.

Dispute review boards

25 Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

The use of DRBs is increasing in the US. Major, high-profile projects, such as Boston's 'Big Dig' project and Florida's I-595 PPP project, have used DRBs. Typically, they are used on major infrastructure projects rather than building projects. There is no particular reason for this distinction, other than the manner in which the use of DRBs has developed.

DRBs have succeeded in avoiding substantial post-completion litigation on complex projects. A wealth of data has been assembled by the Dispute Resolution Board Foundation (DRBF) to measure the success of DRBs and is available at www.drb.org. By the end of 2006, over 2,000 projects worldwide, worth over US$100 billion, have used DRBs, and have resulted in the settlement of more than US$90 billion in construction disputes. The worldwide use of DRBs is growing at a rate of in excess of 15 per cent per year with over 200 construction contracts with DRBs, worth over US$7 billion, commencing every year. An estimated 200 disputes are settled each year through the use of DRBs. More importantly, it often is reported that more disputes are avoided by ongoing interaction with the DRB than are actually heard.

Dispute review boards are often referred to as 'real-time' dispute avoidance or resolution. Hearings are typically conducted on the project shortly after the dispute arises and while the construction is ongoing. Relationships are preserved and construction delays are kept to a minimum. The North American experience has been that 58 per cent of the projects were 'dispute-free' (ie, no disputes requiring hearings before the DRB) and 98.7 per cent of the projects were completed without resorting to traditional dispute resolution methods, such as arbitration or litigation.

Like other dispute resolution processes, some DRB participants walk away extolling its virtues, while others decry its failure. However, the data assembled by the DRBF indicates, overall, that DRBs have been hugely successful and appear to be gaining in popularity and acceptance by the construction industry.

Mediation

26 Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

Mediation in the US is defined best as negotiations facilitated by a qualified and trained neutral known as the mediator. It is a voluntary process that relies upon the good-faith commitment and desire of the parties to reach a settlement and the skill of the mediator in guiding the parties to that settlement. Crucial to the effectiveness of mediation is that it is a confidential process, which benefits from the application of legal principles of privilege that protect the parties from the disclosure of what is said during the process.

Mediation has become the most favoured alternative dispute resolution technique in the US. The common perception is that 85 per cent of all disputes that are mediated settle during mediation, which explains the popularity of the process. As a result of that popularity, a significant number of specialised and trained construction-dispute mediators have emerged and are available to assist parties seeking to achieve a settlement of their disputes. The majority of mediators are experienced construction lawyers and other industry members.

Mediation is commonly sought, if not mandated by contract, as a pre-litigation or pre-arbitration process. However, even when the process is mandated, the mediator is not a fact-finder, has no authority to impose his or her views upon the parties and cannot dictate settlement terms. Thus, when some use the term 'binding mediation', it only means that the parties either are obliged to engage in mediation or are 'bound' by the terms of the settlement mutually agreed to during the mediation, which typically is memorialised in a signed memorandum.

Confidentiality in mediation

27 Are statements made in mediation confidential?

Mediation, by necessity, is a confidential process, since it encourages parties to be candid with each other and disclose information that the other party might not otherwise have found out. Thus, the law in most US jurisdictions provides that mediation is confidential and that statements made and documents exchanged in mediation, as well as admissions of

fault or liability, may not be used in an arbitration or judicial proceeding. Nonetheless, parties to mediation are still well advised to enter into a written mediation agreement that clarifies the confidentiality of the process, particularly if they plan to exchange expert reports that support their position.

While neither a party nor a mediator can be compelled to testify in court or arbitration about a disclosure made in mediation, the adversary is free to seek and use the information, data and testimony in arbitration or trial if it is obtained from other independent sources or if it was ordinarily obtainable as part of the binding dispute resolution process. The reason for this exception is to prevent a party from engaging in mediation as a tool to bar the admissibility of evidence that its adversary was likely to discover anyway.

Arbitration of private disputes

28 What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Arbitration is certainly a frequently employed means for resolving construction disputes, but it is not necessarily preferred over in-court litigation. The preference of one process over the other will depend on the facts and circumstances of the dispute. Each procedure has its advantages and disadvantages, and it is important to understand these differences in choosing a particular forum.

One advantage of arbitration is the ability to select one or more arbitrators that are experienced in construction or construction law to decide the merits of the dispute. In traditional litigation, one cannot choose a judge, and it is rare to get a judge (not to mention a juror) with construction experience, whose decision will then be based solely on a battle of the experts. Though arbitration is thought to be cheaper and faster, this is not always the case. It largely depends on the complexity of the dispute. For example, arbitrators are paid by the hour or day. Judges and juries are free. Both forums permit differing levels of pre-hearing or pretrial discovery procedures. Also, it may be difficult to schedule arbitration hearing dates, since the competing schedules of the parties, their attorneys and perhaps three arbitrators must be accommodated, whereas the court simply dictates the trial dates. One often-touted advantage of litigation over arbitration is that the parties have the right to appeal unfavourable rulings, whereas an arbitration award can only be vacated by the courts where there is demonstrable fraud, partiality, mathematical mistake or if the award exceeds the arbitrator's authority, thereby making an arbitrator's decision virtually sacrosanct. However, some arbitration organisations, such as the American Arbitration Association (AAA), have recently issued optional appellate arbitration rules, allowing for a limited right of appeal within the arbitration process, if the parties adopt those rules as part of their contractual dispute resolution process. The ultimate arbitration award, though, still must first be converted to a judgment by a court of competent jurisdiction before it can be legally enforced.

Notwithstanding, contractors generally favour arbitration because of its finality and because of their ability to plead their case to someone who understands construction, while many lawyers prefer litigation, as they perceive that there is greater control, more structure and because it provides a greater comfort zone.

Governing law and arbitration providers

29 If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

The International Chamber of Commerce (ICC) is probably the best known of the international tribunals for construction contract disputes and has been considered by many to be the most favoured provider. However, the International Centre for Dispute Resolution, which is part of the AAA, has gained recognition and acceptance as a reliable entity for arbitration among international parties, if for no other reason than it is less expensive than ICC arbitration. If the project is performed in the US, the foreign contractor should anticipate that US contractors will insist upon arbitration before the AAA pursuant to its Construction Industry Arbitration Rules and often will seek to have the law of a particular state apply to the dispute. This is particularly so if the contract form is derived from one of the familiar standard forms that are generally well understood by US contractors and designed to reflect US legal principles.

The International Federation of Consulting Engineers contract forms are widely used abroad but are rarely used in domestic projects. Further, the US contractor often specifies that the venue for any arbitration be in the US to minimise the cost of the arbitration, since most or all of the necessary witnesses would be located here and the project site would be more readily accessible for a site inspection if that were necessary.

Dispute resolution with government entities

30 May government agencies participate in private arbitration and be bound by the arbitrators' award?

The concept of sovereign immunity applies equally to the arbitration of disputes as it does to suits in court, in that arbitration cannot be commenced against a public entity unless that entity has agreed to arbitration as the procedure for the resolution of disputes. Claims against the federal government are generally brought pursuant to the Contract Disputes Act, which requires that claims be filed before the Civilian Board of Contract Appeals or the United States Court of Federal Claims. However, under certain circumstances the federal government has agreed to arbitration as a means of resolving disputes arising under various treaties, such as the North American Free Trade Agreement (NAFTA) or under one of the many bilateral investment treaties between the US and other sovereign nations. If an investor's rights under the treaty are violated, it may seek recourse against the US by way of an international arbitration. Such disputes are often resolved under the auspices of the International Centre for Settlement of Investment Disputes, rather than suing the host state in its own courts. Individual states and local governments in the US are not subject to such federal treaties and thus, cannot be compelled to arbitrate unless there is a specific state statute that compels or permits arbitration. An example of such a statute is New Jersey's Local Public Contracts Law, which requires that all construction contracts with local governments provide that disputes arising under the contract shall be submitted to a method of alternative dispute resolution practices, such as mediation, binding arbitration or non-binding arbitration. If a state or the federal government has agreed to arbitrate a dispute, any arbitration award entered against them would be enforceable in the United States pursuant to either the Federal Arbitration Act or the analogous state arbitration act.

Arbitral award

31 Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

The US is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which has been incorporated into the Federal Arbitration Act. As such, a US court is obliged to honour and enforce foreign arbitration awards to the same degree, and in the same way, as other signatory countries. However, a US court will not enforce an arbitration award issued by a foreign tribunal where the award was voided by a court of the country under whose law the arbitration was brought, or if, upon a party's assertion, the US court finds that the arbitration award does not meet the standards set forth in article V of the New York Convention, such as for lack of capacity to arbitrate, lack of notice to a party, the issues were outside the scope of the arbitrator's authority or improper appointment of arbitrators.

Limitation periods

32 Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

There generally is no specific limitation period applicable solely to construction disputes; many different statutory limitation periods may apply. Which period applies depends on various factors such as the nature of the legal claim (eg, tort or contract) and the party being sued. Further, there are no uniform limitation periods among all the states, but periods typically range from between two and six years from the accrual of the cause of action. Suits against public entities for breach of contract, such as against the federal government under the Contract Disputes Act, often have a very short limitation period of only one or two years. The consequence of failing to commence a lawsuit or arbitration within the applicable time frame will bar the party's claims.

If a party commences a lawsuit against a design professional for negligence or malpractice, some states also require that the party commencing the action file with the court an affidavit of merit either by, or supported by, an independent professional attesting to the merit of the claims asserted against the designer. The affidavit of merit must usually be filed within a specified period of days after the action is commenced or the designer files its answer. Failure to timely file an affidavit of merit as required will result in a dismissal of the lawsuit, which cannot be cured by refiling the action.

International environmental law

33 Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

The US was a party to the Stockholm Declaration of 1972, but the action plan and common principles it provided were never incorporated into US legislation. Rather, the federal Environmental Protection Agency (EPA) was established to safeguard human health and conserve the natural environment. Today, there are extensive state and federal environmental laws affecting construction projects, although those most typically encountered are those addressing the traditional environmental media: water, soil and air.

Water is a major permitting concern for construction projects. Potential storm water run-off from the site could adversely affect water quality, and thus requires a project to meet either the requirements of the EPA construction general permit, state-specific general storm water permits or site-specific storm water permits. Also, if work must be performed in wetlands or US waters, a Clean Water Act (CWA) section 404 permit is typically required. Recent federal court decisions have led to the development of discharge criteria for storm water at construction sites, as well as revisions to federal wetlands rules and guidance. The goal of the CWA is to protect and maintain the nation's waters by prohibiting the discharge of pollutants into those waters.

During a construction project, solid waste generation (hazardous and non-hazardous) is expected and is regulated by the federal Resource Conservation and Recovery Act and by various state statutes, which establish specific requirements for properly handling, storing, transporting and disposing of the waste. Further, air quality related to construction activities is regulated by the federal Clean Air Act and numerous analogous state statutes. These laws are designed to control the generation of particulate and ozone precursor emissions, such as dust, vehicle emissions, burning debris and release of chlorofluorocarbons (CFCs, which are contained in refrigerators, air conditioners and chiller units) or other ozone-depleting substances. Emissions from heavy equipment are now being regulated at both state and federal levels, with the recent federal stimulus bill providing funds for retrofitting and updating equipment.

There are also specific regulations applicable to asbestos and lead-based paint abatement in buildings being renovated or demolished.

When engaged in a project for a federal agency, a contractor may also be subject to certain constraints under the National Environmental Policy Act, which requires all federal agencies to prepare environmental impact statements assessing the environmental impact of, and alternatives to, construction and post-construction activities, including water quality impacts, wetlands impacts, air quality impacts, endangered species impacts pursuant to the Endangered Species Act and historic resources impacts.

Lastly, the construction industry in the United States has embraced 'green' or sustainable building and development. Many states now have regulatory, permitting and financial incentives that encourage such development. Further, green initiatives and laws are being developed at the federal level that will affect federal projects, as well as non-federal construction.

Local environmental responsibility

34 What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

There are extensive state and federal environmental laws affecting construction projects, though most typically encountered impose duties and liabilities involving the traditional environmental media; water, soil and air. The main federal statutes, which have comparable state statutes, are the Clean Water Act, which protects and maintains the nation's waters by prohibiting the discharge of pollutants into those waters; the Resource Conservation and Recovery Act, which establishes specific requirements for properly handling, storing, transporting, and disposing of hazardous and non-hazardous solid waste; and the Clean Air Act, which is designed to control the generation of particulate and ozone precursor emissions, such as dust, vehicle emissions, burning debris and release of CFCs or other ozone-depleting substances. Also, the Comprehensive, Environmental Response, Compensation, and Liability Act may impose liability on developers and contractors in certain circumstances for cleanup of hazardous waste. Destruction and disturbance of freshwater wetlands also is a significant concern when improving undeveloped land, as they are protected at the federal level by regulations promulgated under the Clean Water Act and by specific statutes in various states. These statutes and regulations are all applicable to construction activities and provide very detailed and exacting obligations on developers and contractors in terms of permitting their construction activities. Violations of these statutes can result in an array of potential liabilities; from a simple fine ranging from a few hundred dollars to several thousands of dollars for each violation and for each day that the statute is violated, to onsite and offsite remediation.

International treaties

35 Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Although there are some restrictions on foreign investment by certain entities in various commercial areas (eg, atomic energy, certain communications services and activities deemed vital to national security), legally made foreign investments are protected as much as domestic investments. There is no federal statutory or regulatory scheme specifically addressing the protection of foreign investments directly related to construction or infrastructure projects, but the US is party to bilateral investment treaties and multilateral treaties, such as NAFTA, which confirm the protection of foreign investments, including companies, shares, bonds, contractual rights, real and personal property, intellectual property, licences and other rights conferred by law.

Tax treaties

36 Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

The US has bilateral income tax treaties with approximately 56 countries. Generally, these treaties do not prevent an individual or company, residing in a treaty jurisdiction, from being subject to US federal income tax on services performed domestically. The same holds true for a US company performing services in a treaty country.

Notwithstanding this, a contractor from a treaty jurisdiction may be exempt from federal taxes on its 'business profits' if it does not have a permanent establishment (PE) in the US. Typically, any kind of office or workshop will constitute a PE. If the contractor has no office or fixed place of business, and its only contact with the US is a construction site of limited duration, treaty protection may be available, but many treaties provide that a building site or construction or installation project will not constitute a PE if it lasts for less than the period of time prescribed in the treaty.

In the event treaty protection is available, a foreign taxpayer is required to file a US tax return to claim the exemption. Significant penalties can be imposed for failure to file a treaty-based return in a timely manner. Nevertheless, while an exemption may be available from federal income taxes, state and local taxing jurisdictions in the US are not bound by tax treaties and therefore may still impose a tax upon the contractor.

Currency controls

37 Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

No.

Removal of revenues, profits and investment

38 Are there any controls or laws that restrict removal of revenues, profits and investments from your jurisdiction?

There are generally no restrictions on the removal of profits and investments from the US. However, there are many reporting requirements relative to the transfer of money and other assets abroad pursuant to the US Patriot Act, other similar statutes and various implementing regulations and protocols established by domestic and international financial institutions. The purpose of these laws and regulations is to halt money laundering and the funding of terrorist groups and activities. If such activities are suspected, the bank may be obliged to freeze the account and the money could be seized by government authorities. Under most circumstances, though, with full disclosure and reporting, as required by the relevant financial institutions and governmental agencies, and payment of federal taxes, the overseas transfer of monies earned on a construction project would not present a problem.

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