


# Evolution of the treatment of risk allocation and responsibility for subsurface conditions



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IBA ICP

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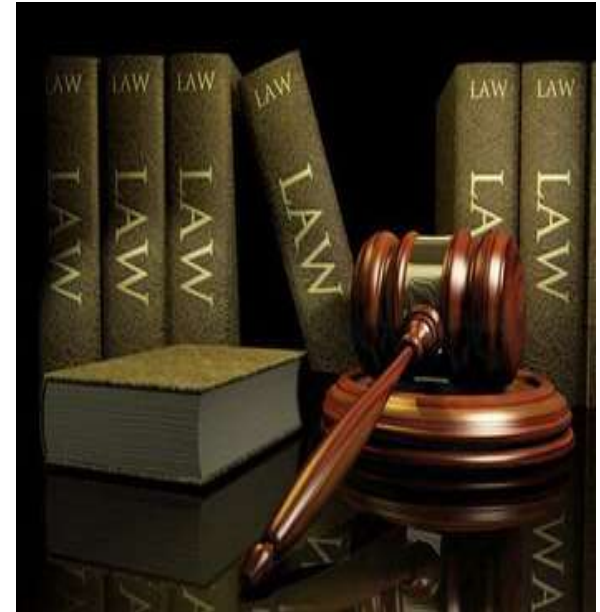
# The Law

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*“It is no excuse for non performance of a contract to build a house or to construct works upon a particular site that the soil thereof has either a latent or patent defect rendering the building or constructing impossible...”*

Halsbury’s Laws of England (2<sup>nd</sup> Edition 1932-41)

Thorn v London County Council (1876) 1 App Cas. 120



# The Law: UAE

- Pacta sunt servanda (agreements must be kept)
- Article 246 UAE Civil Code:
  - “good faith”
  - “The contract shall...also embrace that which is appurtenant to it by virtue of the law custom and the nature of the transaction”



# Investigations

- Contractors expert in assessing risk...
- Limitations of geotechnical investigations
  - Boreholes / inspection pits
  - Ground radar / sonic drilling
- Limited insight
- Coulson J in Allseas UK Ltd



"We've considered every potential risk except the risks of avoiding all risks."



# Not all conditions are adverse

—  
The King v Paradis & Farley Inc [1942] SCR 10.

- Piles to be driven for new pier
- Boring plans and specifications revealed: "sand, gravel, few stones, loose clay, stiff and sticky clay, tough clay,"
- Actual conditions: Hard pan and large boulders: Great expense

*“Expenses incurred for unforeseen difficulties must be considered as being included in the amount of the tender, and the respondent has the legal obligation to execute the contract for the price agreed upon, in the same way as would have been its indisputable right to benefit, if the soil had been more favourable and easier than foreseen.”* Taschereau J

# Shared Risk Clauses (impossibility)



## ICE 4<sup>th</sup> Edition (1955)

- “save in so far as it is legally or physically impossible”
- Physically: Yorkshire Water Authority v McAlpine (1985) 32 Build LR 114
- Legally: Asian government contract; TBMs



# Shared Risk Clauses (foreseeability)



## ADVERSE PHYSICAL CONDITIONS AND ARTIFICIAL OBSTRUCTIONS

**12.** (1) If during the execution of the Works the Contractor shall encounter **physical conditions** (other than weather conditions or conditions due to weather conditions) **or artificial obstructions** which conditions or obstructions he considers could **not reasonably have been foreseen** by an **experienced contractor** and the Contractor is of opinion that **additional cost will be incurred** which would not have been incurred if the physical conditions or artificial obstructions had not been encountered he shall if he intends to make any claim for additional payment give **notice** to the Engineer pursuant to Clause 52 (4) and shall specify in such notice the physical conditions and/or artificial obstructions encountered and with the notice if practicable or as soon as possible thereafter give details of the **anticipated effects** thereof the measures he is taking or is proposing to take and the extent of the anticipated delay in or interference with the execution of the Works.

ICE 5<sup>th</sup> Edition (1973)

# FIDIC Red Book 1999



- 4.12 Unforeseeable Physical Conditions
- "physical conditions" natural physical conditions and man-made and other physical obstructions and pollutants, which the Contractor encounters at the Site when executing the Works, including sub-surface and hydrological conditions but excluding climatic conditions.
- 1.1.6.9 "Unforeseeable" means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender.
- Set off for more favourable conditions; but no reduction
- Notice and other requirements...





# Information supplied clauses

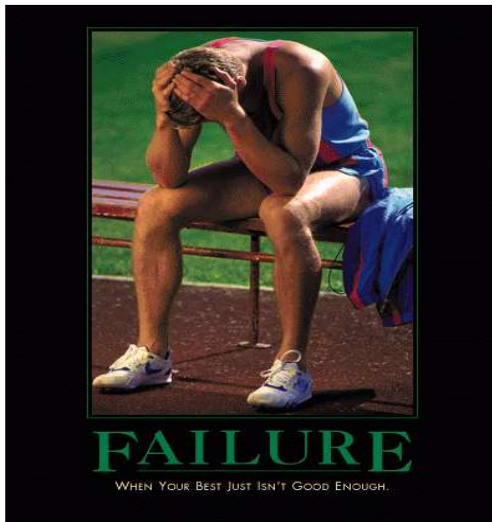
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- Inaccurate or incomplete? Warranty?
- Usual to exclude liability
- FIDIC Red Book 1999: Clause 4.10 Site Data
  - C responsible for interpreting all information provided to it; deemed to have obtained all necessary information as to risks, contingencies and other circumstances
  - Also deemed to have inspected and examined the site including sub-surface conditions as well as hydrological and climatic conditions.

# Failed claims

Obsrascom Huarte Laine SA v Her Majesty's Attorney General for Gibraltar [2015] EWCA Civ.712

Van Oorde UK Limited and Others v Allseas UK 2015 [2015] EWHC 3074 (TCC)



***Coulson J: “In my view it is wrong in principle for a contractor to argue that, merely because in some particular locations, the conditions were different to those set out in the pre Contract information those different conditions must somehow have been unforeseeable.*”**

# Not all contracts...



- Project Finance
- Turnkey: FIDIC silver Book
- Employer's acceptance of greater cost?

**4.12: *by signing the Contract, the Contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the Works;***



# Not all circumstances

- Not all jurisdictions
  - Decennial liability
- Not all liability
  - Heathrow tunnel collapse: HSE prosecution



# Adrian Cole

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- “top 25 construction lawyer in the World” – Whos Who Legal
- Ranked Tier One by Chambers Global and Legal 500
- “He's the kind of guy you want with you rather than against you.” (Chambers Global)
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