

An earlier version of this article was published in the Winter 2008 issue of *International Disputes Quarterly*.

Can a Contractor Obtain Compensation for a Radical Increase in its Costs if a Construction Contract Contains No Price Escalation Clause?

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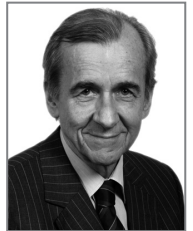
Faced with a drastic increase in the cost of commodities—for example, of steel, or oil—that undermines the economic assumptions of a construction contract, lawyers trained in the common law may believe that, if the contract has no price-escalation clause, the only relief from the contract available is termination on the grounds of frustration, impossibility, or impracticability. In fact, outside the common law countries, it may be possible to obtain other relief, including an increase in the contract price, to take into account changed circumstances after a contract has been signed. Several examples are provided below.

Under the French law theory of *imprévision*, a contractor party to an administrative contract (i.e., a contract involving the state) may be compensated through an increase in the contract price where the circumstances have changed so much that a reasonable person could not have foreseen the new situation. This theory results from the well-known *Compagnie générale d'éclairage de Bordeaux v. Ville de Bordeaux* decision.

Under the concept of *Wegfall der Geschäftsgrundlage* (failure of the basis of the contract), in German law, in the case of a subsequent change in circumstances that results in a “profound alteration of the economic equilibrium of a contract” (as described by one author), which makes

an obligation substantially more onerous to perform, courts are able to adjust the contract’s price terms to the changed situation, without releasing the parties from the contract. Similarly, under the Swiss law concept of *Clausula Rebus Sic Stantibus* (adjustment of the contract to changed circumstances), courts or arbitrators have a choice either to terminate the contract or adjust the contract’s terms where “particularly disruptive extraneous events” (as described by one author) have occurred that alter radically the foundation of the contract.

Similarly, under the laws of many Arab countries, influenced by Islamic law with its emphasis on equity, adjustment of the contract price is possible where the contractor has encountered severe, unforeseeable adverse conditions. Under Egyptian law, as stated in Article 147 of the Egyptian Civil Code, a judge or arbitrator may revise or amend a contract to “reduce to reasonable limits, the obligation that has become excessive” where the occurrence of the changed circumstance is of a “general character,” the events were unpredictable and the events result in exceptionally heavy losses to the contractor. Any agreement to the contrary is void. The codes of several other Arab countries contain similar provisions. For example, Article 48 of the Qatari Civil Code includes essentially the same principle. Under the civil codes of



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the United Arab Emirates (Article 249) and Kuwait (Article 198), where exceptional and unforeseeable circumstances of a general nature make performance of a contract especially onerous, the contractual obligation may be reduced in the interests of justice. Any agreement to the contrary is void. This theory also exists in Algerian law, where Articles 107 and 561 of the Algerian Civil Code extend the concept of *imprévision*, as it exists under French law, to private contracts. Any agreement to the contrary is also void.

Finally, prior to 1999, Chinese contract law allowed for either termination of the contract or an adjustment of the contract price where there had been an extreme change in circumstance. While this provision was removed from the written law in 1999, it is still applied in extraordinary circumstances.

Accordingly, under the laws of a number of civil law countries, even though a contract may not contain a price escalation clause, contractors can, when faced with an unforeseeable and exceptional loss, obtain an adjustment of the contract price.

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