

# Good practices and transparency in construction contracts – international perspectives

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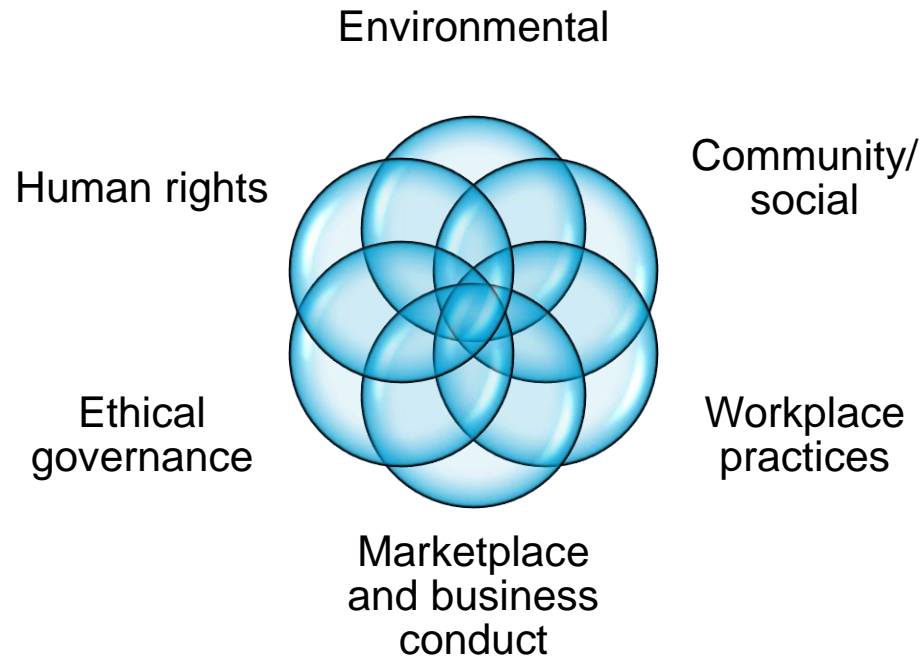
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# Overview

- Context: opportunity for responsible business
- Legislation and guidelines
- Contractual transparency and claims
- The business case for responsible business
- Practical steps

# Good practices – responsible business



# Transparency and good practices

- Construction risks
- Growing body of guidelines and principles and “soft law”
  - ❖ UN Guiding Principles on Business and Human Rights (Protect, Respect, Remedy framework)
  - ❖ OECD Guidelines for Multinational Enterprises
  - ❖ UN Global Compact
  - ❖ IBA Practical Guide on BHR for Business Lawyers (with Reference Annex)
  - ❖ Equator Principles
  - ❖ Industry principles or guidance (ESTI, Voluntary Principles on Security and Human Rights, CoST)

# Transparency – external factors

- ❑ Government initiatives, national legislation (e.g. UK's Modern Slavery Act, California's Transparency in Supply Chains Act, French Duty of Care Act), National Action Plans (Chile 2017), national export credit agencies and national development bank institutions
- ❑ Stock exchanges and market regulators
- ❑ EU Non-financial reporting directive
- ❑ CSR reporting
- ❑ Third party benchmarking (e.g. Transparency International, Aviva's Corporate Human Rights Benchmarking)

# Transparency – contract

- Procurement
- Finance due diligence and project monitoring (e.g. performance standards)
- Audit rights
- Open book accounting
- Standard forms of contract (NEC)
- Disputes (disclosure, IBA Guidelines on the Taking of Evidence in International Commercial Arbitration)

# Bribery and corruption – a worldwide risk

- [Transparency International](#) measures the Construction Sector as having one of the most significant bribery risks
- Construction works take place across the globe, including in all the high-risk jurisdictions
- The [Global Declaration Against Corruption](#) was signed by 43 countries in December 2016, pledging to expose and eradicate corruption, punishing those responsible
- Anti-corruption is one of the areas defined by the OECD in its [Responsible Business Conduct Guidelines](#)
- The [OECD Convention](#) on Combating Bribery of Foreign Public Officials in International Business Transactions forced a number of countries to update and strengthen their anti-bribery laws
- As an example, the UK Bribery Act, extends to any act of bribery, committed anywhere in the world by a person or company with a close connection to the UK. It also penalises such a company for failing to prevent any of its associated parties from committing a bribe on its behalf.
- Any company which engages with a UK company, or one that does business in the UK, needs to be aware that it could be caught by the Bribery Act. This includes joint ventures.

# Benefits of transparency and responsible due diligence

- Greater visibility of risks and potential claims (lower adverse event costs)
- Better management of disputes
- Staff retention
- Access to capital
- Cost of capital reduced
- Lower cost of debt
- Improved reputation and brand value
- Better supplier relationships
- Improved government and civil society relationships
- Lower insurance premiums
- Improved employee productivity
- Enhanced talent acquisition
- Improved employee morale
- Accountability
- Greater market share
- Sources include OECD Report: Quantifying the Costs, Benefits and Risks of Due Diligence for Responsible Business Conduct (2016), and ILO report on sustainable mining practices (2017)



# Practical steps

- Legislation, regulations and guidance
- Contract form and provisions
- Impact assessments: UNGP “cause, contribute or linked” framework
- Internal – training, policies, management

# Legal profession

**American Bar Association** – officially endorsed UNGPs February 2012, aligned with ABA Model Rule 2.1: “Moral and ethical factors impinge on most legal questions and may decisively influence how the law will be applied.”



**International Bar Association** – issued a Guidance on the UNGPs October 2014 recommending bar associations around the world endorse the UNGPs and provides guidance on how to incorporate them into the practice of law.



**Law Society of England and Wales** – has launched a program around business and human rights and will publish a practice note to assist lawyers with implementing the UNGPs into their work



The Law Society  
of England and Wales

**Law Council of Australia** – Published Guidance on the UNGPs January 2016, tracking international and national efforts to implement the United Nations Guiding Principles on Business and Human Rights and applying that to the Australian legal profession



Law Council  
OF AUSTRALIA

# White & Case/ Queen Mary International Arbitration Survey 2018

- Focus on evolution of international arbitration
- Global survey



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- [www.arbitration.qmul.ac.uk/research/2018/index.html](http://www.arbitration.qmul.ac.uk/research/2018/index.html)

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Thank you / Gracias