



TRICKS and TRAPS (TRUCOS y TRAMPAS) That Can Occur in Cross-Border Joint Ventures

By Chip Gehle (Copyright 2019, all rights reserved)

I have been involved in evaluating and in some cases managing many projects, acquisitions, equity investments and joint ventures in Latin America and in other regions. Many were approved and undertaken successfully, many were not approved, and some were approved and then became long-term nightmares. The purpose of this article is to describe one of those nightmares.

As a recently-hired Director of Finance within the engineering, procurement and construction (EPC) division of a large multinational company (years ago), I became aware of disputes arising in joint-ventures in a Latin American country that were formed to construct and/or refurbish offshore oil and gas platforms for the national oil company (NOC). When I heard of the disputes, I volunteered to get involved. I thought I might be able to help to quickly identify and resolve the disputed situations. I had spent the previous 26 years as a corporate banker and independent corporate finance consultant throughout Latin America, and I considered myself to be fairly “street savvy”.

The local partner was a privately-held company with a relatively short history, owned by a politically-connected family. The brother of the owner ran for Governor of the State during that time frame. One of the owner’s sons had been appointed by George W. Bush when he was Governor of Texas, to be the “Honorary Commercial Representative” of the State of Texas in that local State.

The local partner had won five significant EPC projects with the NOC but was in default on all of them, due to its inability to finance and complete the projects. The combined revenues of the five projects were about U.S. \$400 million.

My employer entered the joint ventures by providing “project financing” to allow the contractor(s) to complete the projects. My employer was a 50% partner in two of the projects, and a 33% partner in three projects, along with another Latin American contractor. The joint ventures had been launched under brief “Memoranda of Understanding”, but the definitive agreements were not consistent with those understandings, and signed copies could not be located. I soon determined that the mistrust between the partners had developed for legitimate reasons, on both sides

The following is a true re-count of some of the issues I encountered while I was involved in, and later became responsible for managing these joint ventures on behalf of my employer. I have refrained from identifying the parties and the country involved, to protect ----myself.

By the time I became involved, all the projects were well-into their execution stages. All projects were behind schedule and had delayed and disputed payments outstanding from the NOC. The NOC was also aware of the disputes between the partners, and was able to use that as one of the reasons behind the non-performance. Project meetings with the NOC were always strained and in Spanish, and most of the U.S. participants were at a significant communication disadvantage. We had a few capable bilingual staff on site to manage the daily project work and interface, however, and an experienced and strong Project Director at head office.

Soon after I became involved in negotiations between the parties, my employer went bankrupt quite suddenly, and the team on the ground and the Project Director were precipitously laid off. Surprisingly, I had been retained as a “Key Employee”. The “project team” had been reduced to one experienced Accountant, one experienced Attorney, and me. Since I spoke Spanish fluently and the Accountant and the Attorney had several other fires to fight at the head office, I was the one designated to remain on location with our partners and with the NOC. The basic objectives were to:

- Finish the projects, while minimizing incremental project fundings
- Collect all revenues from the NOC, and,
- Reach an acceptable close-out and settlement between the partners*.

*this involved obtaining repayment of all funds loaned by my employer to the projects, and then distributing the remaining funds per the agreed percentages.

I was able to retain one very young local Civil Engineer/Contractor who was familiar with the technical aspects of the projects and with the “ins and outs” of dealing with the NOC. This person, at quite some personal risk, served as sort of a “double agent” with the local partner. I also worked closely with a local CPA, who managed the joint ventures’ tax filings, and who skillfully helped to keep communications and negotiations flowing with the owner of the local joint venture partner. I trusted these two people generally, but never completely.

On three of the projects, the other 33% partner was an experienced company from another Latin American country. They were good administratively, they understood the local terrain, and they tried to operate correctly. They did not share concerns about FCPA issues, however, and there were many times when I was the sole dissenting voice. All three partners’ signatures were required for all decisions and funds movements. In practice, however, I was only able to control funds movements. Tense late night meetings were normal course of business to get anything formally agreed.

The local partner had initially “won” the contracts, and had the primary interface with the NOC. This proved problematic very frequently, as there was a special “relationship” going on with NOC representatives, and we were easily excluded from certain meetings and communications.

During the next two years, the local partner tried every trick possible to extract funds from the projects, and to extort funds from us. Despite my employer’s bankruptcy, we were allowed by the bankruptcy committee to access ongoing project funding, as there was no other option but to complete the projects in order to be paid by the NOC. I returned to head office quite frequently to present and justify new funding requests to my employer’s Creditors Committee representatives.

I spent the next 2-3 years working primarily on site in a relatively dangerous coastal city under plenty of stress, and keeping a very low profile. The atmosphere, and some of the [Tricks and Traps](#) that I encountered, are described below:

Surveillance cameras, guards, locked gates, and a “Controller”:

The atmosphere in the local partner’s yard and offices was one of tight control. Signs in Spanish described the wrath employees would face if caught stealing or being inefficient. Every employee was monitored by security cameras in the offices, with the monitors streamed into “the Controller’s” office, a woman who was quite close to the owner. If employees were seen to be chatting or wasting time throughout the offices they promptly received a stern call from the Controller. As the foreign “money-partner”, we were always identified when entering the yard, and vehicles were always searched upon exiting. We were also continually blamed by the local partner when payroll was late, or when austerity measures were implemented.

We were “selected” a hotel in the city:

We were, and I was set up at a hotel owned by the owner of the local partner, and the hotel staff all knew who we were. They were not friendly, however, which is very unusual in that country. The hotel was otherwise comfortable, informal and the food was good, so I stayed there for several months. Eventually, however, I became concerned with good reason that the phone and internet were monitored, and I moved to a well-known hotel chain in the city.

Late night, last minute review and payment of urgent invoices:

My first week on site after other staff had been laid off, I was told there were many urgent invoices and bills for me to sign checks, related to the 50%/50% projects we were funding. Early each day during the week I asked to review the invoices and their respective backup, but was told they were still in preparation. At 10:00 p.m. the night before my 7:00 a.m. departing flight that week, the Controller showed up at the hotel with a large stack of checks to be signed.

The first ten or so invoices were easily explained, small, and I signed them, but the next check was for the equivalent of \$700,000, payable to the Social Security administration. I asked to see the supporting records and was told there wasn’t time to prepare those. I knew the payroll was a much smaller amount, that the Social Security due could not be that large an amount. I refused to sign that check without full backup and explanation.

I followed up several times in subsequent weeks but was never provided the backup. I was later told it had been their mistake. About a month later, while reconciling the bank account and bank statements, I found a properly signed check on which the payee and amount had clearly been altered. That check had been paid and cleared in the amount of approximately \$500,000, to the Social Security administration. They apparently had paid a past due amount for Social Security due related to other jobs they were running at the time, through our joint venture account. We had another very angry meeting, but it was too late. I did start holding back funds from other expenses, to recuperate the stolen funds. This became an ongoing and contentious accounting nightmare.

Poorly controlled procurement:

Similarly, it was difficult to track and verify what procurement of equipment and materials we should pay for related to our projects. There was no system for monitoring equipment and supplies purchases relative to project scope and progress.

With the local contract employee's help we installed a system to forecast and then verify payroll, payroll taxes and procurement, prior to the time of check writing. The bill-payment routine was strained every month, however, and frequently, I refused to pay questionable items.

Fortunately, on the three projects where we had a third partner, that partner managed closely most of the monitoring in an organized and transparent way and the process worked more smoothly.

[Access to materials warehouse denied:](#)

We were never granted access to the warehouse, to monitor materials, equipment and steel on hand. This continued to be a contentious issue for many months, but we gained confidence that we only paid for necessary new items by monitoring physical work completed and planned. Certainly they absconded with some materials and equipment, however.

[FCPA affidavit, then bribe funding request:](#)

After the bankruptcy of my employer, the head office attorneys required that all partners and subcontractors sign an affidavit stating that they were familiar with, and in compliance with the Foreign Corrupt Practices Act. This became quite a laughing matter for the local partners, but after some effort I obtained all required signed affidavits.

Ten days later, however, the local partner summoned me to sign an urgent transfer request in the amount of \$125,000, to pay the personal account of an official with the NOC, so that he would help to resolve a payment dispute with the NOC. I refused, and fortunately, after some further delay, the NOC made that disputed payment.

[Further pressure and extortion attempts:](#)

Each time we invoiced the NOC for progress payments, we had to increase the performance bond issued in favor of the NOC, which required immediate payment to the bonding (insurance) company. These were arranged by 3-Party signature, at the bank's offices.

Once, when a large invoice (\$10 million plus) was being issued to the NOC, the local partner refused to sign the payment for the bond, unless we agreed to pay the local contractor an additional \$1 million (extortion payment). This evolved into a shouting match in the bank's lobby, filled with at least 100 customers.

The son of the local partner yelled at me in Spanish in front of the crowd, claiming that the "p--che Gringos" were ripping him off, and swinging his arm near my face. In a similarly loud voice, I told him to put his arm down or I would break it. He was smaller than I, and I was certainly angry enough to be convincing. He put his arm down, and fortunately the other partner calmed me down and we left without completing the payment, which was made the next day without incident.

[Change of payment instructions to an irrevocable trust account at a national development bank:](#)

On one of the 50%/50% projects the local partner convinced the NOC to make a final \$2.2 million payment to an account that they controlled, separate from an irrevocable trust account that had been established for that particular project. By this time I was highly suspicious of everything, and I had contacted the NOC and the bank in advance to verify the funds would be sent to the proper trust account. The NOC would not verify, and the bank had not yet received the funds.

I convinced the bank to verify that the NOC would make the payment properly, and was advised the NOC had received other instructions. I wrote and delivered a formal protest letter to the NOC, and fortunately at my insistence, the bank also intervened and showed the NOC the original irrevocable instructions. The NOC made the payment properly but local partner's owner accused me of staining their "reputation" with the NOC. I became increasingly concerned for my safety.

About that time the owner and his sons summoned me to an office/residence in town, where they told me that if I would not cooperate, they would have me thrown in jail. At the time, under the country's law, an accused person was considered guilty until proven innocent. I stood up, said a few pointed expletives, and walked out to where my driver was waiting and promptly left.

I was quite paranoid and careful after that. I discussed getting bodyguards with my employer, but we decided it would not be effective if they actually decided to retaliate against me. We did retain a fearless young, bilingual and U.S. - educated lawyer from another state, who skillfully had conversations in "high circles", and received assurances that the local partner was personally warned not to do anything rash, because my visible, bankrupt multinational employer would cause an international scandal and subsequent retaliation for them. Still, we had three large projects to close out with our other partner, and we still had to reach a settlement between the parties.

Fraudulent lawsuit, papers never served, judgement and injunction:

Our local CPA, who had been helping us with negotiations and to interface with the local partner, had warned me several times that the local partner was threatening to sue us and the other partner, in order to take possession of all remaining contract proceeds. I asked our out of state lawyer to research all public records in each city in the state concerning our joint venture entity. He did so, thoroughly, and although the entities' records were found, no lawsuits were found.

Nearing the end of the projects, after the NOC had unilaterally decreed a \$30 million negative steel price adjustment, we were preparing to settle and close out the three remaining projects simultaneously. We had successfully repaid all advances made by my employer (miraculously) and only a final \$17 million payment remained to be distributed.

I called the banker to again verify the payment would be made to the irrevocable trust account, and first, asked if he had heard any rumors about a lawsuit against us. He nervously advised that he had just been served with a final judgement against my employer and the other partner, that he had just received the funds from the NOC, and that he had been ordered to pay the funds to the local partner within 24 hours.

I thought it was too late, but I called the trusted lawyer in his city more than an hour's flight away. He said he would draw up a legal injunction against the enforcement of the order, and would file it with the state capital that afternoon. There were no commercial flights within the afternoon, so he chartered a private jet, and I paid for it with my personal credit card, without prior authorization from my bankrupt employer. He filed the injunction successfully, and an official copy was provided to the bank, which held the funds in a non-interest bearing account.

It turns out that the local partner had put a fake sign with my employer's corporate name on a local building we did not occupy, and had the lawsuit papers served to that building's night watchman. Neither we, nor our other partner, were served papers and the lawsuit had been hidden from the public registry through "friendly" local judges or contacts.

Arbitration, devaluation, negotiation, settlement.

At this point, the funds were frozen in a non-interest bearing account in the local currency, and our unsigned agreements called for international arbitration in The Hague. We retained a prominent law firm in London, which after some \$200,000 worth of study, advised us that arbitration outside of the host country would be useless; it would still need to be enforced in the country.

We proceeded to simply try to negotiate a settlement between the three partners, and we proposed what we thought was a generous split for the local partner, to put an end the (miserable) matter.

To make a further long story short, after another 2 years the local currency had devalued and \$3 million of the value of the \$17 million in the account in local currency was lost. We also spent about \$500,000 in additional legal fees, but we did, after many meetings with attorneys, reach a Final Settlement. We also honored an agreement with the local CPA and paid him a success fee of \$350,000 for helping us reach a Final Settlement.

Final "Facilitation Payment":

The CPA filed the Final Settlement Agreement with the court, and during a celebration drink, he casually mentioned to me that he had given an envelope with \$1000 in cash to the local judge, to expedite the filing. I was concerned, and the next day I reviewed the "expediting payment" language in the FCPA, and felt that since the judge did not influence the decision, he had actually just "expedited" the filing of the Settlement. Out of an "abundance of caution", I mentioned this situation to our U.S. attorney who had been involved in the entire case. He was and is a good friend of mine. He became very serious and asked if I had known about the \$1,000 expediting payment in advance, and when I said (honestly) that I had not known, he replied:

"Good, if you had known in advance of that payment you would have been fired". It was decided to do nothing except to write a stern letter to the CPA about the payment, denying any prior knowledge.

I had coordinated another trust agreement through J.P. Morgan to coordinate the final payments under the Final Settlement Agreement. Ultimately, the final payments were properly disbursed. The local partner received about \$3 million less than we had been willing to settle for, two years prior.

I left the local partner's city, planning to never return again, and I was still concerned about possible retaliation against me in Houston.

Somewhat amusingly, I did have to return to that city about three years ago with a different employer, on another project with the same NOC. A completely different local partner insisted on personally driving me to the airport at 5:00 a.m. to catch the same 7:00 a.m. departure from that city, in a very old pickup truck. He warned me that he would not stop at any stop lights, that there had been repeated ambushes on that road. He then told me that we were being followed, and clarified that the (old) car following us contained "his people", who served as a backup, with weapons, in the event we were ambushed at one of the stoplights.

It was good to get back to Houston, once again, and I don't plan on going back to that city!

Lessons learned:

- Don't eagerly jump into project or venture opportunities without proper up-front due diligence.
- Don't get into a project that is already underway, that may have been "won" by corrupt means.
- Know who you are dealing with, check out their reputations with several sources.
- Make sure you have trustworthy staff with "on the ground" experience and language skills.
- Make sure venture agreements are clear, executed, and understood equally by all parties.
- Make sure that clear and agreed procedures, policies and processes are established and agreed in relation to:
 - Internal and external communications
 - Payment authorizations and other decision-making.
 - Procurement and other security controls.
- Trust, once you have reason to trust, but always verify.
- Always allow for significant time and cost contingencies.
- In cities like that one, it may be advisable to not entertain new projects, and in any event, do not stop at stoplights.