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Unilateral Arbitration Clauses: What Are They And Can They Be Enforced?

by Keith C. Phillips, Senior Partner

Construction contracts and subcontracts, both domestically and internationally, have widely opted for arbitration as a dispute resolution mechanism over litigation. An increasing number of contracts contain so-called "unilateral" or "one-sided" arbitration clauses that permit one of the contracting parties to opt for either arbitration or litigation as it sees fit. These clauses seek to preserve the advantages of arbitration and litigation in the empowered party after the dispute has arisen, and thus enables the party to select the forum that will best fit its needs in the present dispute. Some of the key comparative advantages of arbitration include less procedural complexity, quicker disposition, less (or at least more tailored) discovery, and consequently, usually lesser costs. In addition, under the 1958 New York Convention, an arbitral award can be readily enforced in the 156 signatory countries. Litigation in national courts, however, may permit a default or summary judgment (thus shortening the proceedings and lowering costs), and has the ability to join multiple parties.

The one-sided nature of unilateral arbitration clauses calls into question enforceability. Such clauses have been subject to attack as lacking in mutuality or as unconscionable. The law is continuing to evolve on this question, and this Article seeks to provide a primer on the current status of unilateral arbitration clauses in the United States and in certain foreign jurisdictions that have addressed the issue.

Unilateral Arbitration Clauses In The United States

The United States is widely known as a very arbitration-friendly jurisdiction. In the Federal Arbitration Act ("FAA") Congress pronounced "a liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "The FAA was designed to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate, and to place such agreements upon the same footing as other contracts." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (citations omitted).

The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. "This savings clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011). The determination of the validity of arbitration clauses is thus a matter of state law regarding enforceability of contracts.

As a general matter, the environment in the United States as to the enforceability of unilateral arbitration clauses is quite permissive. While many states have questioned the enforceability of such clauses in the context of employment contracts or contracts of adhesion, finding that they may be unconscionable, most jurisdictions have found them valid and enforceable in commercial contracts.

Courts in several states have, however, questioned the enforceability of unilateral arbitration clauses in commercial contracts. Maryland appears to be at the forefront of the pushback against unilateral arbitration clauses. In *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 378 Md. 139 (2003), the Maryland Court of Appeals held that an arbitration provision in a contract is treated as a severable provision that must be supported by separate consideration on its own. Subsequently, the United States Court of Appeals for the Fourth Circuit, applying Maryland law and relying on *Cheek*, found a unilateral arbitration clause in a home building contract to be unenforceable because it lacked mutuality of consideration. *Noohi v. Toll Bros., Inc.* 708 F.3d 599 (2013), *cert. dismissed*, 134 S. Ct. 48. In *Noohi*, the court rejected Toll Brothers' argument that the unilateral arbitration clause was supported by

consideration underlying the entire contract, finding that Maryland law required the arbitration provision to be supported by its own consideration (i.e., mutuality) in order to be enforceable.

The United States District Court for the District of Maryland later found that a unilateral arbitration clause in a construction subcontract was unenforceable in *U.S. ex rel. Birckhead Elec., Inc. v. James W. Ancel, Inc.*, 2014 WL 2574529 (D. Md. June 5, 2014). In *Birckhead*, the arbitration clause provided that "All disputes . . . at the Contractor's sole option, be resolved by arbitration . . ." and that "any such arbitration proceedings shall, at the Contractor's sole option, be consolidated with any arbitration proceedings between the Contractor and any other party." When Birckhead, the subcontractor, filed suit against Ancel in the District Court for breach of contract and violation of the Miller Act, Ancel filed a motion to dismiss or a motion to stay pending arbitration. The court found that the arbitration agreement was not supported by mutual consideration, as it did not create an obligation for the contractor, only the subcontractor. The court thus denied the contractor's motion and permitted the lawsuit to proceed.

A handful of other states have carefully scrutinized unilateral arbitration clauses. In *Global Client Solutions, LLC v. Ossello*, 382 Mont. 345 (2016), the Supreme Court of Montana stated that "[s]uch one-sided arbitration clauses do not serve the objectives of the FAA" and found the clause unenforceable because it was unconscionable. The Supreme Court of Tennessee has adopted a "flexible, case-by-case approach" to determining whether unilateral arbitration clauses are unconscionable. *Berent v. CMH Homes, Inc.*, 466 S.W.3d 740 (Tenn. 2015) (finding that the unilateral arbitration clause in the particular home building contract was not unconscionable). Other states that have adopted the flexible approach include Ohio, Missouri and Oregon, although not yet in commercial contract settings.

While unilateral arbitration clauses are mostly enforceable in the commercial arena in the United States, contracting parties should look carefully at the particular state's jurisprudence to determine the validity of such provisions.

Treatment Of Unilateral Arbitration Clauses Internationally

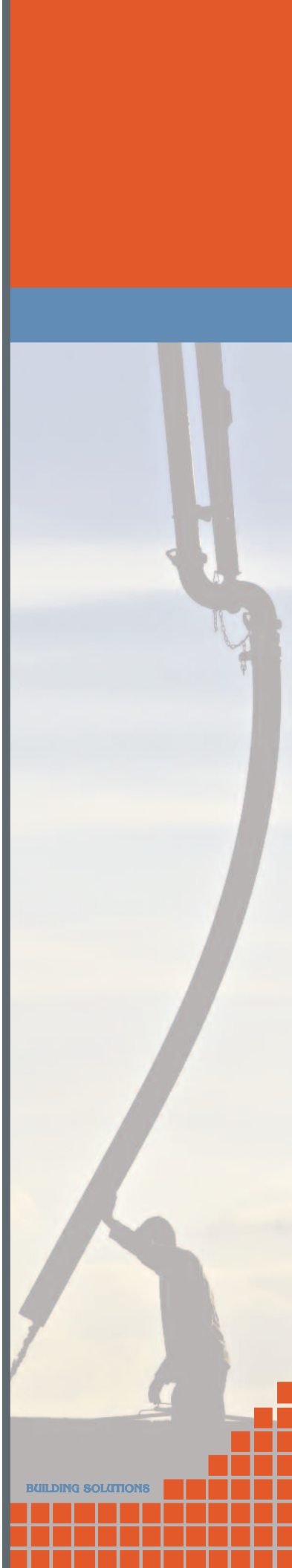
In the international arena, as in the United States, unilateral arbitration clauses are generally enforceable. In the English courts, it is well-settled that such clauses are valid and binding. *Mauritius Commercial Bank Ltd. v. Hestia Holding Ltd.*, 2 Lloyds Rep. 121 (2013). Similarly, in Australia, the courts have long upheld unilateral arbitration clauses. *PMT Partners Pty Ltd. v. Australian National Parks & Wildlife Service* (184 CLR 301) (1995). Courts in Spain have recently concurred with this position. *Camimalaga S.A.U. v. DAF Vehiculos Industriales, S.A.* (Provincial Court of Appeal, Madrid, October 18, 2013).

In the past several years, however, cases from France and Russia have called into question the validity of unilateral arbitration provisions. The Presidium of the Supreme Arbitration Court of the Russian Federation found that a unilateral option to litigate was invalid as it placed one of the parties in a privileged position and violated the principle of equality between the parties. *CJSC Russian Telephone Co. v. Sony Ericsson Mobile Telecommunications Russia LLC.*, Case No. 1831/12 (June 19, 2012).

In the French case, the disputes clause provided for exclusive jurisdiction in the Luxembourg courts and a unilateral option to litigate in another jurisdiction. The clause was invalidated by the Cour de cassation, France's highest court, as "potestative" under the French Civil Code. *Mme X v. Bank Privée Edmond de Rothshild*, Case No. 11-26.022 (Sept. 26, 2012). The concept of a potestative condition is defined in the French Civil Code as when the fulfillment of the agreement is entirely within the power of one party. The court found the unilateral jurisdiction clause to run afoul of this provision and invalidated the disputes clause. *See also* Cour de cassation Case No. 13-27.264 (Mar. 25, 2015) (striking down an asymmetrical jurisdiction clause similar to the *Rothchild* case). While these French decisions involve one party being permitted to select from different courts, they may have application to unilateral arbitration provisions as well.

Conclusion

While unilateral arbitration clauses offer advantages to the empowered party and are generally enforceable, parties must be cautious when including such clauses in their contracts. At a minimum, the parties should consider the laws applicable to the contract, the seat of the arbitration, and where any award is likely to be enforced. If the laws of any of the jurisdictions are unclear, the parties must consider the possibility that the arbitration may be enjoined by the local courts, or that any resulting award may not be enforced in a jurisdiction that disfavors unilateral arbitration clauses. This is particularly important in the international context, where many jurisdictions have provided little or no guidance on the issue.



How The Law Is Adapting The Venerable Implied Warranty Of Design To Modern Project Delivery Methods

by Adam M. Tuckman, Partner

Introduction

Almost one hundred years ago, the United States Supreme Court announced one of the most prominent doctrines in construction law. Bearing the name of the Supreme Court case in which it was established (*United States v. Spearin*, 248 U.S. 132 (1918)), the "Spearin Doctrine" holds that an owner impliedly warrants the adequacy of design specifications that it requires the contractor to follow when building the construction project. Under the Spearin Doctrine, the owner is responsible for additional costs incurred by the contract as a result of defective plans and specifications. While the Spearin Doctrine does not apply to all projects and in every circumstance where the owner furnishes plans and specifications to the contractor, the Spearin Doctrine has guided risk allocation in construction contracting across the country for decades.

The Spearin Doctrine was decided in the context of a conventional design-bid-build project. Since the Spearin Doctrine became law, however, project delivery methods have continued to evolve. The industry has frequently employed new combinations of contracting methods that blend design and construction functions, favoring partnering and sharing in the risks and rewards of a project. Nevertheless, disputes regarding design constructability can occur among project participants even when an alternative project delivery method has been implemented. As the law catches up with the industry, the courts are now addressing if and how the Spearin Doctrine applies to projects that are built through alternative contracting methods. This article highlights *Coghlin Electr. Contractors, Inc. v. Gilbane Building Co.*, 36 N.E.3d 505 (2015), a recent decision from the highest court in Massachusetts in which a court for the first time considered whether a Construction Manager At-Risk ("CMAR") who participates to some extent in the pre-construction design phase could rely upon the Spearin Doctrine to recover costs from the public owner as a result of design errors.

The Project At Issue In *Coghlin*

In 2005, Massachusetts law was amended so that state agencies could employ design-build and construction management at risk delivery methods for certain construction projects. The amended law authorized CMAR projects for "construction, reconstruction, installation, demolition, maintenance or repair of any building estimated to cost not less than $5,000,000." Mass. Gen. Laws ch. 149A §§ 1-3. For qualifying projects, the agency enters into separate contracts, one with the designer and one with the CMAR. The agency may contract with the CMAR in the pre-construction design phase and involve the CMAR in a range of services, including cost estimation, design, coordination of bid packages, scheduling, cost control, and value engineering.

Pursuant to the foregoing statutory authority, the Massachusetts Division of Capital Asset Management and Maintenance ("DCAM") employed the CMAR delivery method to build a psychiatric facility ("Project"). When the Project was in design, DCAM entered into a contract with Gilbane Building Co. to serve as the CMAR ("CMAR Contract"). The CMAR Contract delegated certain design-related tasks to the CMAR, such as recommending design modifications and alternatives when the design details affected construction feasibility, schedules, cost or quality. However, the CMAR Contract also emphasized that the CMAR's recommendations would be made without assuming responsibility for the design and that DCAM and its separately-hired designer maintained authority and control over the Project design.

During the course of the Project, the CMAR's electrical subcontractor, Coghlin Electrical Contractors, Inc. ("Coghlin") claimed that various design discrepancies and changes affected its performance, causing substantially increased labor costs. Unsatisfied with the response to the claim, Coghlin filed suit against Gilbane for breach of their subcontract. In turn, Gilbane brought DCAM into the lawsuit seeking to pass through Coghlin's design claim.

The *Coghlin* Litigation

The primary issue in the lawsuit was whether the implied warranty of the design applies when the construction project is not a traditional design-bid-build in which the owner prepares the plans and specifications without any involvement from the contractor. The trial court concluded that the implied warranty of design should not apply in a CMAR project because of material changes in the roles and responsibilities of the parties. As such, the trial court dismissed Coghlin's pass-through claim. The case proceeded on appeal to the Supreme Judicial Court of Massachusetts, the highest court in the state.

Reviewing the trial court's ruling that no implied warranty of design is found in a CMAR contract, the Supreme Judicial Court reached a contrary conclusion. The dispositive factor in the Supreme Judicial Court's decision to overturn the dismissal of the case was that the CMAR did not have control of and responsibility for the design. While the CMAR under the Massachusetts statute may consult in the design phase to some degree, the court reasoned that the owner and its designer ultimately controlled the design and did not have an obligation to accept the CMAR's input regarding design-related matters unless the particular contract between the parties stated otherwise. Thus, unlike the trial court, the Supreme Judicial Court concluded that the CMAR's participation in the design phase, but not as the designer, did not warrant shifting the risk of a defective design from the owner and its third-party designer.

Although the Supreme Judicial Court found the implied warranty of design applicable to CMAR contracts, it developed a sliding scale test for lower courts to determine when damages for a defective design are recoverable. The court stated that the CMAR may recover damages caused by the breach of the design warranty only if it proves that its reliance on the defective plans and specifications was reasonable and in good faith. When weighing the reasonableness of the CMAR's reliance on the design, the court explained that the fact finder should consider the CMAR's level of participation in the design phase and the extent to which the contract delegates design responsibility to the CMAR. As the court noted, the greater the CMAR's design responsibilities, the more difficult it will be for the CMAR to establish that its reliance on the defective design was both reasonable and in good faith. But if the CMAR could satisfy its burden under the reasonableness inquiry, it will be entitled to recover damages from the owner in the event that defects in the design result in additional costs.

Conclusion

The Supreme Judicial Court's opinion in *Coghlin* was the first of its kind to address whether the Spearin Doctrine applies in the context of a project performed by a Construction Manager At-Risk. As the application of the Spearin Doctrine to similar projects is addressed in other states, time will tell whether the Massachusetts court's reasonableness test gains a foothold in other jurisdictions. For now, it is significant that the process of adapting longstanding construction law doctrines to modern projects is underway.

In Florida, Four-Year Statute of Limitations a Viable Defense for Unlicensed Contractors

by Mariela Malfeld, Associate

A recent Florida appellate court decision explored whether a limitations statute applied to an unlicensed contractor when the language of the statute only made reference to a licensed contractor. In Florida, "an action founded on the design, planning, or construction of an improvement to real property . . . between the professional engineer, registered architect, or *licensed contractor*" is subject to a four-year limitations period. Fla. Stat. Ann. § 95.11(3)(c)(emphasis supplied). For breach of contract claims outside the scope of section 95.11(3)(c), a five-year limitations period generally applies. Fla. Stat. Ann. § 95.11(2)(b).

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Pursuant to the recent decision in *Brock v. Garner Window & Door Sales, Inc.*, the four-year limitations period also applies to an action against an *unlicensed contractor*. 187 So.3d 294 (Fla. 5th DCA 2016). In *Brock*, the homeowner's cause of action against Garner Window & Door Sales had accrued more than four, but fewer than five, years before the homeowners filed suit. As such, which limitations period applied was critical to whether the homeowners could proceed. Garner, an unlicensed contractor, contended that the four-year limitations period time-barred the homeowners' claim. Conversely, the homeowners argued that, according to the plain language of section 95.11(3)(c), the four-year period applied only to *licensed* contractors, and that therefore, the five-year limitations period of § 95.11(2)(b) applied.

The court first rejected the homeowners' argument that the more general five-year limitations period of section 95.11(2)(b) applied since Florida courts have long refused its application to actions involving the improvement or construction of real property. In so holding, the court noted that the preamble to section 95.11 (3)(c) states that its intent was to limit the exposure of liability to architects, engineers and contractors.

Additionally, while the dissent in *Brock* argued that section 95.11(3)(c) makes specific reference to a *licensed* contractor and that courts must begin with the "actual language used in the statute," the two-judge majority disagreed. They reasoned that the reference to "licensed contractor" is contained within the portion of the statute that addresses *when* the statute commences to run, not the types of actions to which it applies. As such, even an unlicensed contractor can raise the four-year statute of limitations as an affirmative defense to claims arising out of the contractor's work.

Finally, the homeowners asserted that section 489.128 of the Florida Statutes precludes an unlicensed contractor from enforcing a contract. The court found that this statute does not preclude an unlicensed contractor from defending against an action to enforce a contract by the owner.

Though the argument in *Brock* supporting application of the five-year limitations period was at first-blush, perhaps, a winning argument, the Fifth District Court of Appeal's opinion further solidified that this section will not only be strictly enforced, but that counsel should consider the section as seminal in determining the appropriate time to bring an action founded on construction.

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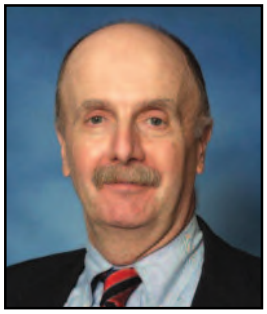

ICC Arbitration – A Primer

by John B. Tieder, Jr., Senior Partner

Over the past year, Watt Tieder has received several inquiries regarding ICC arbitrations. This has resulted in an outline of the ICC process which we regularly provide. We thought it might be interesting to a broader audience so we have expanded it into this Primer, which addresses typical two-party arbitration. Issues related to multiple parties, joinder, consolidation, jurisdiction, etc., have too many variables for an introductory explanation. If, of course, more detailed questions arise as to these or other issues, please contact us.

In summary, International Chamber of Commerce (ICC) arbitration sounds somewhat exotic, but differs very little from other forms of administered arbitration, *e.g.*, the American Arbitration Association (AAA) or its international counterparts: the International Centre for Dispute Resolution (ICDR); the London Court of International Arbitration (LCIA); or the Singapore International Arbitration Centre (SIAC). The major differences will be noted below.

1. What Is The ICC?

The International Chamber of Commerce (ICC) is a private organization that promotes sound international business practices. It functions on a worldwide basis in a fashion similar to other Chambers of Commerce. Its best known service is the International Court of Arbitration of the ICC (ICC Court). Its headquarters are in Paris, France, with several other branches around the world. It also has established national committees in many countries, which

can provide the names of potential arbitrators from their jurisdictions.

The ICC Court is not a judicial court and is not authorized to function as a court by any statute or international agreement; rather, it is a private body which administers arbitration. The reason for its prevalence in international arbitration is its long experience in the field, and its now well known procedures, which are a blend of civil and common law dispute resolution processes. Like other arbitral administrative bodies, its authority can only be invoked by agreement of the parties. It is funded by fees paid by the parties who invoke its use.

2. Invoking The ICC Rules

As with any other reference to arbitration, the ICC's administration of a dispute is invoked by the parties' agreement either in the contract under which the dispute arises or by a separate agreement reached after a dispute has arisen. The current procedures are governed by the ICC Arbitration and ADR Rules in effect as of January 1, 2012 (the "ICC Rules"). They are readily available online at arb@iccwbo.org. The agreement to arbitrate can be quite simple, *e.g.*,: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with such Rules."

In practice, an arbitration agreement is typically more detailed setting forth the place of the arbitration, number of arbitrators, applicable law, etc. For purposes of this introduction, however, it will be assumed that the clause simply involves the ICC Rules without elaboration.

3. When Is The Arbitration Commenced?

Like most other arbitration rules, the ICC Rules do not address when an arbitration can be commenced. Most commercial contracts address an event or time period, *e.g.*, at the conclusion of the contract, after certain other dispute resolution procedures such as negotiation or mediation have been exhausted, the project engineer has reached a decision on an issue, etc., which must occur before the arbitration can be commenced. If the underlying contract does not set forth the outside deadline for filing, the limit is the applicable statute of limitations.

The arbitration is deemed commenced on the date the Request for Arbitration is received by the ICC Secretariat. (See Section 4 below, Rule 4(2)).

4. Commencing The Arbitration

The arbitration is commenced by submitting a Request for Arbitration to the Secretariat of the ICC Court of Arbitration at one of its offices, although most parties send it to the head office in Paris, France along with an initial filing fee of USD 3,000 (Rule 4(2)).

The contents of the Request for Arbitration are quite simple:

- Name and contact details of all parties;
- Name and contact details of party representatives;
- Brief description of the matter in dispute;
- Statement of relief sought;
- Copy of the arbitration clause or separate agreement to arbitrate;
- Proposal regarding the number of arbitrator(s) and the process for their selection; and
- Proposal regarding the place, applicable law, and language of the arbitration.

(Rule 4(3)).

A party is free to provide full details and supporting evidence of its position in the Request for Arbitration, but it is not necessary.

The number of copies includes one for the ICC, one for each party, and one for each arbitrator. (Rule 3(1)). Even with a single adverse party and three arbitrators, five copies are needed. It is also common practice to provide the adverse party and/or its representative with a courtesy copy although no obligation to respond is imposed, nor is the arbitration deemed commenced, until the copy of the Request for Arbitration is received by the Respondent from the ICC.

Before the arbitration will be actively administered, the parties must deposit with the ICC an administrative fee and the projected fees of the arbitrator(s). (Rule 36). These fees are based on the amount in dispute and can be calculated from Appendix III to the ICC Rules. In general, ICC fees are higher than other arbitral administrative entities.

5. Answer To Request For Arbitration

Upon receipt of the Request for Arbitration from the ICC, the Respondent must file an Answer and any Counterclaim within 30 days. The Answer and Counterclaim must address the claims of the Claimant and if a Counterclaim is filed, it must contain the same information as

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the Request for Arbitration (Rule 5(1) through (5)). A reply to the Counterclaim must be filed within thirty (30) days. (Rule 5(6)).

6. Selection Of Arbitrator(s)

One of the "myths" of ICC Arbitration is that its pool of arbitrators is significantly different from those available from other administrative entities. The true part of this myth is that the ICC does have access to a more diverse panel of potential arbitrators, but this is due to the fact that the ICC administers arbitrations from many different countries with many different languages. This is actually quite beneficial to parties who do not have access to or knowledge of experienced arbitrators from different countries. The untrue part of the myth is that by agreeing to ICC Arbitration, a party is somehow limited to this group and is not free to pick its own arbitrator.

If the arbitration clause is silent as to the method of selecting the arbitrator(s), the ICC Court will appoint a single arbitrator, or in substantial cases, direct that the matter be heard by a panel of three arbitrators. (Rule 12). In practice, and unless the matter is quite small in terms of the monetary relief sought, the ICC will direct that a panel of three be appointed. In a typical case, the Claimant will be given fifteen (15) days to appoint an arbitrator. (Rule 12(2)). The Respondent has fifteen (15) days after appointment of the Claimant's arbitrator to appoint its arbitrator. (Rule 12(2)). If either party fails to appoint an arbitrator within the allotted time, the ICC Court will make the appointment. (Rule 12(2)). The ICC will also appoint the President (Chair). (Rule 12(5)). Unless otherwise agreed by the parties, the President cannot be of the same nationality as either party. (Rule 13(5)).

The ICC does not circulate lists of potential arbitrators and seek the parties' input, but appoints from a list maintained internally or after consultation with the ICC national committees. (Rules 13(3) and (4)).

Most arbitration clauses provide that each party selects its own arbitrator and the two party selected arbitrators then agree upon the third or the "President" (Rule 13). It is only in cases where the parties have not agreed to appoint arbitrators or if they have failed to do so that the ICC will make appointments.

As long as the parties reserve to themselves the right to name their arbitrator, it makes little difference which organization is administering the arbitration. A party can appoint any qualified person and the appointment is almost always confirmed.

The ICC Rules regarding arbitrator impartiality, disclosure of potential conflicts and any other potentially disqualifying information are much the same as any other arbitration. A useful resource is the "IBA Guidelines on Conflicts of Interest in International Arbitration" (2004).

7. Determination Of Jurisdiction

Challenges to the jurisdiction of the Tribunal are passed on by the ICC Court in the first instance. (Rule 6(4)). The ultimate decision as to jurisdiction, however, is decided by the Tribunal (Rule 6(5)). If the Tribunal determines it has jurisdiction of the dispute, it will hear the case regardless of allegations that the underlying contract is invalid. (Rule 6(9)). This is consistent with virtually all arbitration proceedings.

8. Terms Of Reference

A unique aspect of the ICC Rules is the preparation of the Terms of Reference. (Rule 23). The Terms of Reference are prepared by the Tribunal in conjunction with the parties. It is required to be completed within two months of the transmission of the file to the Tribunal from the ICC. The transmission to the Tribunal takes place as soon as the full Tribunal is constituted.

The Terms of Reference set forth the details of the arbitration, i.e., names and contact information of the parties and their representatives, a summary of the claims and counterclaims, the place of the hearing and usually a summary of the issues to be resolved. Its significance is that once it is concluded, no new claims can be asserted without the permission of the Tribunal.

In addition to the Terms of Reference, Rule 24 requires an early meeting of the parties with the Tribunal to establish a Procedural Order. The Procedural Order sets forth the details of the proceeding such as dates for the exchange of pleadings, the exchange of documents, location and date of the hearing and related administrative issues. This is much the same as the ICDR's requirement for an early case management conference.

The signing of the Terms of Reference is also significant because the Award in the matter must be issued within six months of the date of the last signature on the Terms of Reference. (Rule 30). The ICC Court has the authority to extend their time and in complicated cases, this regularly occurs.

9. Discovery (Disclosure)

The ICC Rules do not specifically provide for discovery, not even the exchange of documents. Rather, Rule 25 gives the Tribunal the authority to establish the facts of the case by "all appropriate means." This has been interpreted to provide for limited exchange of documents. A party seeking documents must describe them with particularity, state why they are necessary to support its claim or defense, and state whether it has access to the requested information from any other source. The Tribunal often requires the preparation of a "Redfern Schedule." A Redfern Schedule lists the documents requested, the reason they are needed, and their lack of availability from other sources. The party to whom the request is directed replies and states whether it will provide the requested information. The Tribunal uses this information to decide which requests will be allowed. The rigor of this process has proven quite useful in forcing parties to limit discovery requests to essential materials.

Discovery in the form of depositions, interrogatories, or requests for admission are virtually unknown. On a construction project, site visits are not uncommon and typically include the Tribunal.

10. Statements Of Claim, Defense, And Counterclaim

Although not specifically required by the ICC Rules, it is common practice for each party to submit a detailed statement of its claim, counterclaim, and defense in advance of the hearing. These statements should include all documents, witness statements, expert opinions and legal authority in support of a party's case.

In general, it is recommended that the Original Request for Arbitration, Statement of Defense, and Counterclaim be as detailed as possible. This makes the preparation of the subsequent Statements much easier.

11. Hearing

With the filing of the detailed Statements addressed in paragraph 10 above, the actual hearing can be quite efficient. The key factor is that all direct witness testimony is presented in the form of detailed witness statements. This process is derived from English court practice. A direct witness presents all of his or her testimony in a Statement with reference to the documents or other evidence upon which he/she relies. This is, of course, read in advance by the Tribunal and opposing counsel. At the hearing, the witness does not present any direct testimony, but is immediately subject to cross-examination and questioning by the Tribunal and opposing counsel.

Although witness statements are not mandatory pursuant to the ICC Rules, they are a common feature of not only the ICC, but most international arbitrations. Many U.S. trial litigators react negatively to this concept because they are accustomed to "their witnesses telling their story." Assuming that the Arbitral Tribunal is experienced in the subject matter of the dispute, there is little to be gained by direct testimony. Indeed, it is easier for most witnesses to set forth their "story" in writing and without the pressure of a hearing.

Another presentation technique which is common in international arbitration is the "hot-tubbing" of experts. Opposing experts on the same subject appear before the Tribunal at the same time. The Tribunal then questions them simultaneously on each point in contention between them. Counsel for the parties are then given an opportunity to question. The technique has proven quite successful in at least narrowing the issues in dispute between the experts. Indeed, it is being regularly adopted in domestic U.S. arbitration.

Both the witness statement and the "hot-tubbing" techniques significantly reduce the length of the actual hearing. This, in turn, makes the scheduling of the hearing easier because fewer schedules have to be coordinated. It also reduces the expenses of the hearing. It probably does not reduce the overall cost of the arbitration because the time saved at the hearing is transferred to preparation time.

12. The Award

As set forth above, pursuant to Rule 30, the Award is to be completed within six months of the conclusion of the Terms of Reference. The award is reasoned, i.e., it sets forth the bases of the Tribunal's decision much like a court decision. It is submitted in draft to the ICC Court for "scrutiny." (Rule 33). The ICC Court does not and cannot modify the decisions of the Tribunal, but it does assure that it is in the proper form, correctly calculates all monetary amounts, and other non-substantive details. After any corrections required by this process, the Award is issued to the parties by the ICC Court.

13. Costs And Legal Fees

Pursuant to Rule 37, the Tribunal is authorized to allocate the costs of the arbitration. Cases include the ICC administrative fees, the

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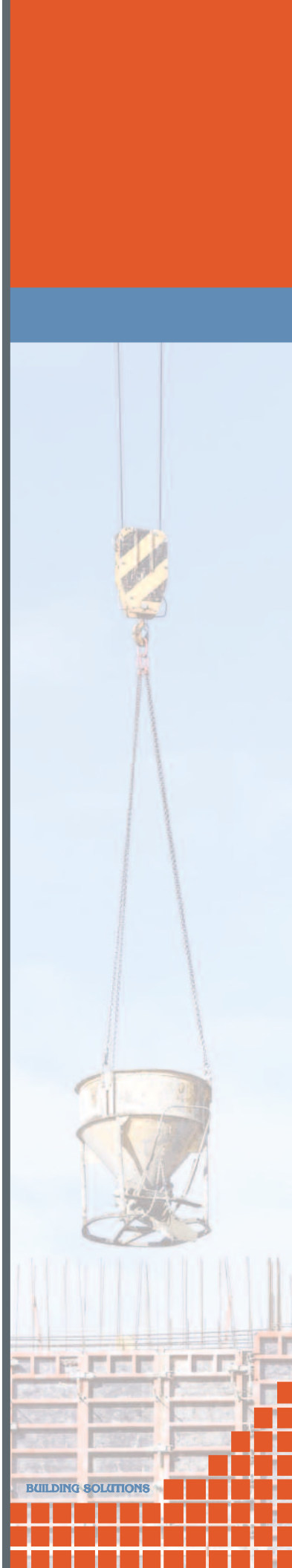


Tribunal's fee, Tribunal experts, and legal fees and expenses incurred by the parties. The costs are allocated based on the relative success of the parties in the arbitration and the Tribunal's assessment of whether a party caused unnecessary expenses to be incurred during the process, *e.g.*, by filing frivolous motions.

14. Challenges To Award

ICC Arbitrations are typically held between parties of different nationalities. This means that legal actions to challenge or enforce the award are pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The grounds for challenge are as follows:

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
   (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
   (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

These are very similar to the grounds for challenging domestic awards under the Federal Arbitration Act, 9 USC § 1 *et seq*. or any of the U.S. State Arbitration Acts.

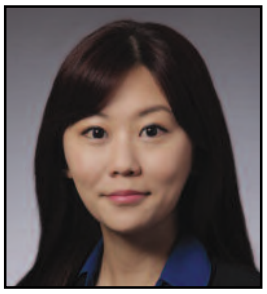
The New York Convention has been signed by more than 160 countries. Thus, enforcement proceedings can be instituted in virtually any commercially active jurisdiction.

15. Conclusion

Arbitration proceedings, whether foreign or domestic can, of course, be subject to a variety of complexities. The purpose of this Primer, however, is to demonstrate that, although there are differences from other arbitration rules, there is nothing particularly unusual or exotic about the ICC. Companies should not be concerned if a foreign party insists on its use. Of much greater importance is to draft an arbitration clause which, regardless of the arbitral administrative entity, gives as many decisions as possible to the parties, *e.g.*, the applicable law, place of arbitration, language, selection of arbitrators, extent, if any, of discovery, etc. These decisions are contract specific and need to be addressed on a case-by-case basis.

Lessons From Abroad: Republic Of Korea

Edward J. Parrott



Christine Lee

by Edward J. Parrott, Senior Partner and Christine Lee, Associate

As a construction law firm with diverse international clients and projects, Watt Tieder's attorneys work in countries all over the globe. This article is but one of a continuing series of articles attempting to relate lessons—both professional and cultural—that Watt Tieder derives from its travel.

Introduction

Over the past three years Watt Tieder's presence in Asia as a top-tier international construction law firm blossomed, particularly in the Republic of Korea ("ROK"). Watt Tieder represents several global contractors based in Korea and enjoys valuable opportunities working with and learning from these companies both in Seoul as well as at project sites throughout the ROK. Most recently, the authors spent several weeks in the Republic of Korea, primarily at a project site and at a small family owned hotel in Pyeongtaek. Suffice to say the authors found the ROK and its citizens impressive.

The Three "E"s: Efficiency, Economy, And Environment

The ROK is a small mountainous peninsula nation with an area of 38,691 mi^2 – about 1/5 the size of California. Yet the ROK has a population of over 51 million, with over 25 million people in the Seoul metropolitan area alone. ROK's population density is 505 people per square kilometer (1,308 people per square mile), ten times the global average. South Korea is the most developed country in East Asia according to the Human Development Index, has the world's eighth highest median household income (highest in Asia), and is one of the most ethnically homogenous societies in the world (99% of the population is of Korean descent). These environmental, economic, and cultural factors eddy throughout Korean society. The effects can be seen in the emphasis throughout Korean society on: 1) efficiency and economy; 2) the environment; and 3) a deep sense of collectivism, unity and teamwork. Senior Partner Ned Parrott and Associate Christine Lee experienced these characteristics of day-to-day Korean life firsthand during their work trips to Korea, particularly in Pyeongtaek.

Everyone Is A Farmer

The Korean commitment to efficiency, economy, and the environment can first be seen in the efficient use of all available land, whether public or private, for crops and gardens. During our trips to Pyeongtaek, we were struck by the city's efficient use of public land, as well as residents' use of private land, to grow produce. Nearly all arable land is plotted as a productive vegetable garden. Median strips are filled with rows of corn. Private homeowners use their yards as vegetable gardens growing everything from tomatoes, leafy lettuce, parilla leaves (similar to the Japanese herb called shiso), zucchini, peppers and more. The use of arable land for a grass lawn, as is typical in some parts of the world, is practically non-existent. Ornamental plants and flowers are shunned in favor of peppers and squash.

The emphasis on personal vegetable gardens stems from the fact that only 22% of the land in

...continued on page 12

South Korea is arable, due largely to the mountainous terrain throughout much of the country. The scarcity of arable land combined with the nation's large population (relative to the physical size of the country) and high population density requires maximizing the efficient use of available land - even if such "farming" takes place on a tiny plot of personal land. Why drive to a grocery store to buy imported vegetables when they are available at arm's reach? Everyone is a farmer.

Koreans Are Conservative

Don't worry . . . we're not talking politics! Rather, we are referring to Korea's devotion to efficiency, economy, and the environment. These attributes are on display both at the Pyeongtaek Project site, as well as the small family hotel where the authors stayed. The hotel, for example, provides drinking water to guests by a single water filtration tank located on each floor. Guests fill steel containers for limitless and free cold clean water. This obviates the manufacture, shipping, and disposal of plastic bottles so common in other countries. The hotel also employs the functional equivalent of a movement sensor in each guest room to activate the power supply. Place your room key in the slot and power is available. No key means no power (electricity) in the room. This system makes it impossible for lights, television, air conditioner, etc. to be left on while the guest is away. This simple system has proved very effective in conserving energy use. Another interesting characteristic of the hotel is its supply of a single iron and a single microwave in the common area of each floor (next to the water cooler) for the guests' use. For this small family owned hotel the logic was obvious. Why buy 30 microwaves and irons when 3 will suffice?

Another example of Korean efficiency and commitment to the environment is evident at the project site cafeteria. It is typical in Korea for employers to provide workers with three meals a day as part of their compensation package. The cafeteria provided three nutritious meals - breakfast, lunch, and dinner - daily to all of the contractor's employees on site. Zero time and resources were expended in traveling to remote sites. The use of all re-usable items for serving meals, such as metal bowls, cups, dishes, and utensils and overall very minimal packaging or waste further reflects environmental awareness. Koreans are conservative.

We Are Family

Korea is a culturally homogeneous and collectivist society placing great emphasis on unity and teamwork. The authors were impressed by the use of consensus based decision making. Much debate and many voices are heard before an important decision is made. The hospitality shown throughout the company gives all associated with the company efforts a sense of family. The authors were personally ferried to and from the site and airport (and in one instance to the doctor) by project management. Daily meals in the company cafeteria also foster camaraderie, unity, and teamwork. Finally, all employees are encouraged to take a one-hour break or nap directly after lunch. We felt like family.

Conclusion

While the ROK has not cornered the market they certainly put to great use the maxim: "Less is more."

Also notable was the daily power nap that the employees typically enjoyed at their desks immediately after consuming lunch. Upon observing firsthand the ability of such naps to recharge the employees, thereby increasing overall productivity, Ned has been considering lobbying the firm to institute a firm-wide midday power nap policy.

Karila Société d'Avocats

Established since 1963, Karila is a renowned French law firm specializing in Construction and Insurance Law. Karila offers its services to a wide array of clients including insurers, construction companies, developers, occasional and financial contracting authorities, syndicates of co-ownership, property managers, public institutions and local authorities.

The firm's dedicated approach to construction and insurance law, and real estate law, allows its clients to benefit from an immediate awareness of the difficulties encountered throughout the construction and insurance process, and allows the firm to provide wider and more creative legal advice from the initial inception to the completion of the construction work.

Karila is recognized by Chambers and Partners France: "Its strengths are its savoir-faire, recognized expertise, involvement and professionalism," and also by the Legal 500 which states that Karila has "in-depth knowledge of the construction and insurance field."

The firm's networks of national and international lawyers allow them to ensure the most appropriate representation of their clients.

Laurent Karila

The Critical Role Of Judicial Experts In Construction Litigation And Arbitration In France (Abridged)

by Marc Frilet and Laurent Karila

In order to understand the major role played by a special body of 'judicial experts' in litigation and, to a certain extent, in arbitration in France and several civil law countries having the same judicial tradition, it is first important to outline four key features of the judiciary.

First, most judges in France and the civil law systems influenced by France typically have no particular expertise in construction matters. They are professional judges whose professional career often begins at the age of 25 as court assistants. They are highly qualified in general law and procedure but they are not specialists in construction law. Indeed, only a few leading courts in France have a special department for construction matters.

Secondly, it is exceptional for hearings in even the most complex cases to last more than a few hours. This is due, inter alia, to a substantial difference with the common law world in producing evidence. Even where the Code of Civil Procedure permits witness evidence, it is highly exceptional to see witnesses in the court room and the inquisitorial procedures of witness examination and cross examination in the common law sense are not permitted.

Thirdly, common law discovery procedures are not allowed. The rules of evidence are organized in a very precise manner. Although it may be possible to obtain an order from the court directing a party to produce a particular document, if the document is not produced, the court will simply take this lack of evidence into account in its final judgment.

Fourthly, it is essential for judges both to have the benefit of external expertise and to ensure that their reliance upon this expertise is the result of a process that is fair to the parties involved. Although nothing prevents a party from being assisted by its own technical expert, the judges generally do not rely on party-appointed experts since there is a specific institution dedicated to identifying highly qualified professionals: the judicial expert system.

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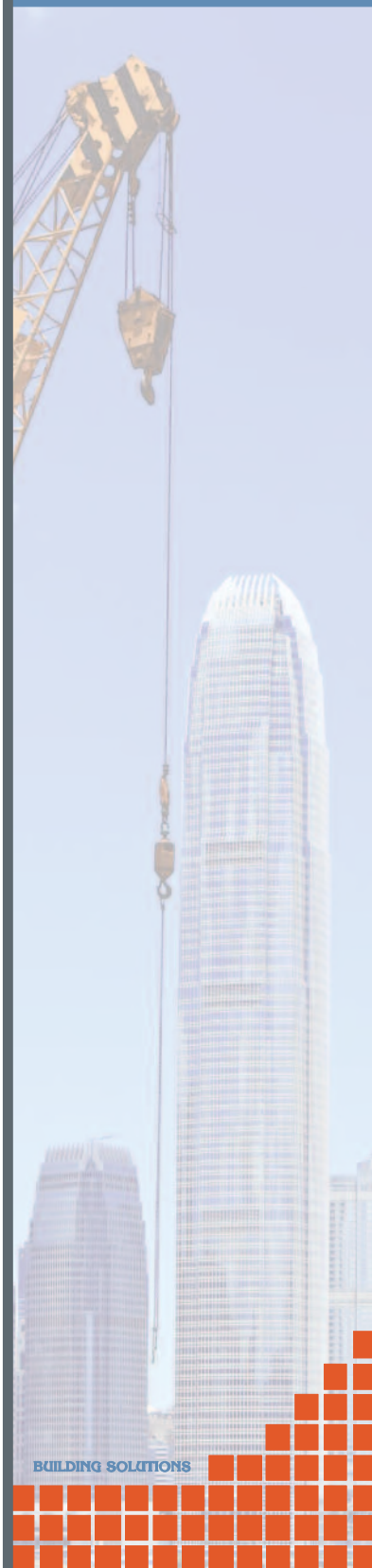


The judicial expert must be a highly experienced and well-recognized professional who, after many years of practice, may apply for the status of judicial expert. This status is very strictly regulated at various levels, in order to ensure professionalism, objectivity and fairness in the judicial process, as the judicial expert plays a leading role in court decisions in the vast majority of construction disputes in France.

As a practical matter, the judicial expert organizes meetings with the parties as well as site and other visits, requests documents from the parties, and drafts a detailed report for the tribunal, including exhibits. Although the judicial expert has no authority to advise the judge as to the ultimate outcome of the case, his or her influence on the decision is critical since, at the request of the judge, he or she will have identified all the relevant facts and given his or her technical opinion; this is usually the basis for assessing both liability and quantum.

When the judge receives the judicial expert's report, he or she cannot amend it, and the expert is very rarely examined during the hearing. However, this does not prevent a party from interpreting the expert's report or challenging facts contained within it, but it is for the party's lawyer to make all the arguments during the hearing. That judges largely defer to the expert is confirmed by the fact that, in most cases, the judge will simply confirm the conclusion of the expert's report, even though the report is not, strictly speaking, binding upon the judge.

Nonetheless, the judge is not powerless if he or she has doubts regarding the performance of the judicial expert, and in some cases the judge participates in the expert's investigation. For instance, the judge may attend meetings organized by the expert and request explanations. In addition, the judge may, if he or she considers it useful, hear evidence from a witness upon the request of the judicial expert or any party. The expert may also request a hearing by the judge. Lastly, the judge may always request that the expert complete, clarify or explain the content of his or her report and its conclusions in writing or at the hearing. If the judge believes that the report lacks clarity, he or she may hear the expert, the parties being resent or summoned.

However, the system of judicial experts is not without its critics, especially regarding the method for producing evidence and avoidance of conflicts of interest. In this respect, the French system could learn from the common law world. For instance, the following improvements are often advocated:

- a party should be authorized to request the hearing of a witness to facilitate the judge's understanding of important technical aspects in complex cases.
- the judicial expert should transmit his or her draft report to the judge and the parties… in preparation for the hearing; and
- a party-appointed expert should be permitted to comment in writing on the final report of the judicial expert before the hearing.

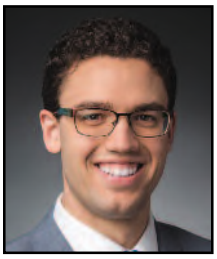
In conclusion, in the French legal system, which has influenced several other civil law countries, the judicial expert often plays a leading role in the judge's decision. While not without its critics, the system is one that lawyers from other jurisdictions – particularly common law countries – need to understand when advising clients with disputes pending in civil law countries or before arbitrators with civil law backgrounds.

This article was published in Construction Law International*, Volume 8 Issue 2, June 2013. To read the full article along with cites and notes, please visit the GcilA Knowledge Center at www.gcila.org/knowledge-center.*

Watt Tieder Launches Updated 50 State Survey

Watt Tieder is proud to introduce our updated 50 State Survey Of Key Issues Related To Construction & Engineering Contracts, which addresses major issues that arise in all aspects of contracting in all 50 states. The 50 State Survey is an interactive website available at your desktop as well as on all mobile devices. To learn more, visit us at www.watttieder.com.

Watt Tieder Welcomes New Associate



James ("Jim") Ogorzalek joins the McLean, Virginia office. Jim focuses his practice in the areas of construction, litigation, government contracts, and suretyship. Jim has experience in representing contractors and developers in all aspects of construction litigation. He joined Watt Tieder as a second-year associate after having clerked for the Honorable Judge Sally D. Adkins of the Court of Appeals of Maryland - the state's supreme court - and worked as a staff attorney for the judges of the Court of Special Appeals of Maryland - the state's intermediate appellate court. During law school, Jim competed as a member of and served as Chief Justice of the William & Mary National Moot Court Team, winning recognition at multiple national tournaments. For these efforts, he was selected a National Member of the Order of Barristers. Jim also completed judicial internships with the Honorable Deborah K. Chasanow of the United States District Court for the District of Maryland, and with the Honorable Leroy F. Millette, Jr. of the Supreme Court of Virginia. He was also a member of the William & Mary Appellate and Supreme Court Clinic and argued a successful appeal before the United States Court of Appeals for the Third Circuit.

Appointment

Shelly L. Ewald has been appointed to the American College of Construction Lawyer's Board of Governors.

Recent and Upcoming Events

Center for International Legal Studies, 2016 International Arbitration Symposium, June 3-4, 2016; Salzburg, Austria; **John B. Tieder, Jr.** to speak on multi- tiered dispute resolution procedures under the FIDIC Conditions of contract.

International Construction Law Association, Comparative Construction Law Conference, June 24, 2016; Paris, France; **John B. Tieder, Jr.** and **Christopher Wright** to speak on U.S. construction law principles.

International Bar Association, 2016 Annual Conference, September 18-23, 2016; Washington, D.C.; **Shelly L. Ewald** to speak on September 20 regarding the legal and practical issues encountered on Design-Build/EPC contracts.

Publications

Christopher J. Brasco and **Adam M. Tuckman**, *et al.*, "Understanding Ethical Limits on Attorney Behavior in Settlement Negotiations;" published in **American Bar Association, Tort Trial & Insurance Practice Section's The Brief**, Spring 2016 (Cover Story).

Diane C. Utz, "Recent Realization that Allowable DBE Allocations for Certain Services are not Consistent with Washington State Retail Sales Tax Rules;" published in **Construction Law, Construction Law Section, Washington State Bar Association**, May 2016.

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The Watt, Tieder, Hoffar & Fitzgerald newsletter is published quarterly and is designed to provide information on general legal issues that are of interest to our friends and clients. For specific questions and concerns, the advice of legal counsel should be obtained. Any opinions expressed herein are solely those of the individual author.

Special Thanks to Editors, **Robert G. Barbour, Keith C. Phillips, William Groscup** and **Heather Stangle**.

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