

IBA Annual Conference

ICP at Madrid 2009: Around the construction law world in 80 hours

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The IBA's Annual Conference for 2009 was held in Madrid from 4-9 October. For the International Construction Projects Committee (ICP), the conference provided a marvellous opportunity to meet old friends, make new ones and share our experiences of the law and practice of construction in sectors and locations spanning the globe.

Five half-day sessions were presented by the ICP Committee, along with the Committee's annual dinner and a full-day excursion to the World Heritage-listed town of Segovia. All of the ICP working sessions were well attended and tickets for the social events were likewise keenly sought after.



Contract award challenges session (Monday)

Our first session on the Monday, '**Contract award challenges**' involved detailed consideration of a hypothetical tendering scenario for the expansion of the Peace Bridge across the Niagara River between Canada and the US. Panel members represented various bidders: the disgruntled shortlisted tenderers by **Aarta Alkarimi** (for a US consortium), **Andrew Stephenson** (Australia), **Jan Hebly** and **Marco Padovan** (Dutch-Italian joint venture) and **Carlos Umaña Trujillo** and **Mariana Ardizzone** (Argentine-Colombian joint venture). **Cecilia Vidigal Monteiro de Barros** and **Julio Cesar Bueno** acted for a bidder, from Brazil, who was especially disappointed because it was eliminated before the shortlist stage.

Also represented, by **R Bruce Reynolds** and **Duncan W Glaholt**, was the successful



The conference venue – Palacio Municipal, Campo de las Naciones, Madrid.

bidder, a Canadian-US joint venture. Bruce offered one of the most memorable analogies of the week when he likened the complaints being raised by the other bidders as being akin to a beaver seeking to build a dam in the stream of commercial endeavour.

On Monday afternoon, we discussed **nuclear power projects** in a session organised jointly with the Power Law Committee. The scene was set by the chairs of the session, **Tore Wiwen-Nilsson** and **Donald Gavin**, noting that, whilst the current proposals are to almost double the number of reactors around the world, the last new reactor in the US was built more than 30 years ago.

Christopher Seppälä commenced the panel's detailed observations as to the challenges faced in bringing nuclear power projects to fruition, observing, for example, that the sector is heavily regulated, yet there is a lack of consistency in the approaches taken by the various regulators. He also noted that there has been a significant loss of capacity and expertise in relation to nuclear projects in recent decades, due to the dearth of projects with a dwindling in the number of suitably-qualified firms.

Sumeet Kachwaha told us that the long-term vision in India is to reduce dependency on thermal power and increase the use of nuclear power to about 25 per cent of total production. He noted that, whilst India has one of the largest power supply networks in the world, much of the existing infrastructure is wasteful and unreliable. Sumeet also observed that India has, until the recent entering into of the safeguards agreement with the IAEA, had difficulty in obtaining uranium due to its not acceding to the Nuclear Non-proliferation Treaty.

This has led to the use of fast-breeder reactors and investigation into the viability of use of thorium.

Keith Phillips provided an overview of methods of procurement of nuclear plants, including engineer, procure and construct (EPC), split package (for example, nuclear island and conventional island) and multi-package approaches. Christopher Seppälä suggested a fourth category, being a species of 'Build, Own, Operate' methodology which may be supported by the new FIDIC DBO form.

In relation to EPC, Keith cautioned that, whilst the owner is insulated from risk to the maximum extent possible, it ought not only to expect a higher price but also that it will lack the ability to take advantage of knowledge for use in subsequent projects. By reference to the Lungmen Plant commenced in Taiwan in the 1990s (and still not finished), Keith noted that the owner becomes effectively a construction manager; thus, whilst a multiple package approach offers the lowest possible cost and highest hands-on experience for the owner, the owner takes on much greater risk than is the case with the other models. On the other hand, Christopher Seppälä noted as an example of a multi-package approach being used successfully the stream of projects procured by Electricité de France.

Particular issues for consideration were highlighted, including the need for careful documentation of reimbursable aspects in the contract (Donald Gavin), the gap in what is insurable in nuclear projects (Tore Wiwen-Nilsson) and the criticality of anticipating how the spent nuclear fuel will be handled (**Robert Andersen**).

Finally, Sumeet Kachwaha spoke to the complexities of liability in respect of dangerous industries as developed by the Indian Supreme Court in the light of the Bhopal gas leak disaster in 1984. He noted that the Court had laid down the principle that, for such enterprises, liability was to be absolute and damages set on a punitive basis (the larger the undertaking, the greater the damages). Sumeet also noted, however, that the Indian Parliament is currently attempting to strike a balance between this liability position and one which would make power plants viable for international contractors.

Tuesday afternoon saw a multi-part discussion under the umbrella topic 'Construction project dispute resolution'. The first half was chaired by **Clause H Lenz** and **Mauro Rubino-Sammartano** and commenced with an outline of the impact of cultural issues upon the



Construction project dispute resolution session (Tuesday) – Nicholas Gould, Claus Lenz, Rashda Rana and Julio Bueno

handling of mediations, by **Robert Peckar** and **Jerry Brodsky**.

The discussion then turned to arbitration, with **Stefan Osing** highlighting issues relating to the language and place of the arbitration arising from the drafting of construction contracts. He noted that the way in which the *FIDIC Red Book* is drafted avoids issues of disputes relating to choice of language, through its default requirement that the language is to be that of the majority of the words of the contract. In relation to seat, Stefan highlighted the pitfalls of attempting to draft a bespoke arbitration clause by reference to a provision in which disputes purported to be referred to arbitration, but in accordance with 'the law of EEC'; the clause went on to provide that the 'competent courts' were those of Austria!

Robert Knutson talked about issues relating to e-disclosure, including in those arising in the light of the almost limitless possibilities for document creation whether done consciously or generated automatically by computers on parties' behalf. **Rory Kirrane** then identified some of the many complex issues arising in multi-party arbitrations, including discussion of notable recent cases.

Virginie Colaiuta spoke about choice of substantive and procedural law in international arbitration. She focussed upon the possibility that the parties' usual autonomy to choose the seat may, in effect, be overridden by local laws, such as those of France, based in public policy, allowing subcontractors to claim directly against the owner in certain circumstances.

The second half of the session, chaired by **Claus H Lenz**, dealt with disputes boards. **Rashda Rana** gave an overview of the use of such boards in Australia. She noted that

there have been approximately 20 contracts using dispute boards in Australia since 1986, but their use has increased in recent years. Rashda reported that few matters have had to be referred to the boards for decision arising from these contracts and that none has been challenged in the courts. She also noted that, in recent major infrastructure projects, the dispute board has been acting primarily in a conciliatory mode, requiring, for example, joint reports.

Turning, then, to the situation in Brazil, **Julio Cesar Bueno** placed dispute resolution in that country in its context by noting that its arbitration law was only enacted in 1996, but told us that parties are, increasingly, open to the use of disputes boards, especially the binding DAB version. Julio outlined the particular issues arising in large and complex dam projects in Brazil, including the criticality of timely completion due to requirements under related power purchase agreements, objections – often militant – by local communities and nationwide social movements, and the influence of the Equator Principles on financing. In light of these challenges, he proposed that dispute board procedures need to focus upon, on the one hand, integrating all parties and, on the other, ensuring that disputes are ventilated and resolved in the shortest possible time (Julio mentioned that he has been involved in a fast track DB procedure in a private sector project requiring a decision within 65 days).

Nicholas Gould observed that, for most types of construction projects in England, statutory adjudication procedures cut across parties' ability to use dispute board procedures such as those in the FIDIC forms. He noted, however, that various forms, such as the recent iterations of the JCT contracts, provide for dispute board-type procedures which are consistent with the statutory requirements. Nicholas observed also that there has been a great deal of judicial consideration as to the legal status of adjudication decisions, especially in relation to their ability to be enforced. An Australian perspective on this was provided by Doug Jones and Rashda Rana, who noted that, despite the adjudication legislation in NSW and Queensland being similar to that of the UK, public sector entities have taken the view that the legislation should not overtake the parties' ability to use DBs in appropriate circumstances.

Alfonso Iglesia González offered an overview of dispute boards in Spain. He noted that, generally, there remains a lack of confidence in the ability of ADR systems to resolve disputes in our host country – rather, such mechanisms are often regarded simply as an expensive obstacle to accessing traditional forms of dispute resolution.

The session concluded with the panel reflecting upon a case study involving the enforcement of a DAB decision under the FIDIC MDB Harmonised Edition form.



Time and acceleration session (Wednesday) – Stefan Osing, Ian Bailey, His Honour Humphrey Lloyd QC and Doug Jones

Wednesday morning was devoted to a detailed consideration of **Time and acceleration issues affecting international construction contracts, especially concurrent delay**. This was chaired by **His Honour Humphrey Lloyd QC**. Whilst the discussion was highly detailed, it was but the tip of the iceberg compared to the papers prepared by each of the speakers and made available via the conference database.

The session was divided into two halves: the first looking at the legal and contractual framework for delay analysis and the second at ways in which delay is assessed.

Tony Marshall noted that there remains uncertainty in common law systems as to whether an employer is able to retain its right to delay damages where it has delayed the contractor yet the contractor has not complied with the notice provisions for claiming an extension of time. He identified the ancient origins within English case law of the prevention principle and tracked them through to the more modern judgments, including the case of *Gaymark* emanating from the Northern Territory in Australia.

Michael E Schneider provided a civil law perspective on the issue, including by

reference to European standard forms and applicable Codes of obligations. He noted the diversity of approaches within the contracts, including the possibility, enshrined in the ECE provisions, that reductions in the contract price might be applied as a remedy for late completion rather than liquidated damages, in order to avoid penalty issues.

Virginie Colaiuta described the French courts' discretionary power to reduce or increase the amount payable via 'penalty' clauses. Her analysis included discussion of French Civil Code provisions relating to penalties as well as relevant caselaw. Virginie noted that the most usual way in which the power is exercised is to reduce the amount payable – indeed, her research had revealed only one case in which the amount was increased. She also noted that the discretionary power is often exercised by courts to reduce amounts substantially without the need to give reasons for doing so, making it difficult to draw conclusions as to the principles underlying such adjustment.

Donald Gavin's discussion of the ways in which delay is assessed provided a detailed overview of relevant US caselaw, especially that relating to concurrent delay. Noting that it is important to identify an acceptable means of delay analysis in any dispute, he discussed the Time Impact Methodology, Windows Analysis, Collapsed As-Built Analysis and Total Time and 'Like Time' Methodologies. He noted that all but the first two of these have largely fallen from favour.

Andrew Stephenson and **Ian Bailey's** presentation was entitled 'concurrency, causation, commonsense and compensation'. Andrew's primary contention – delivered by way of a critique of the *City Inn* and *Royal Brompton Hospital* cases – was that construction law-based concurrency analysis has failed to take due notice of causation principles as they apply the broader common law. In particular, Andrew pointed to the foundation of causation principles in the 'but for' test and the possibility, supported by caselaw in Australia and the UK, that a common sense approach, as regards the purpose of the exercise, may be appropriate.

Building upon Andrew's analysis, Ian outlined an approach to concurrency based upon the general law principles of concurrency. He also summarised a number of issues which remain for resolution in relation to concurrency and

prevention. These include whether the principal retains a right to general damages where the LDs provision has become unenforceable, and the recent proposition by Doug Jones that, in relation to the obligation to notify claims, a 'bright line' be drawn between neutral and principal-caused delay.

Stefan Osing provided a perspective from Germany. He highlighted the need, in arguing delay cases, to identify with precision the 'concrete hindrance'. He did so by reference to a 1993 Federal High Court case on concurrency which provided that responsibility was to be 'shared according to the respective degree of default and causation' as determined by the Court, noting that there is not a great deal of guidance as to how the Court would undertake this exercise.

On Wednesday evening, the warm and sunny weather of the previous days gave way to a spectacular thunderstorm. There could be no place better for ICP members to take shelter than by enjoying the Committee's **annual dinner** at the Gaztelupe Restaurant.



ICP Committee dinner (Wednesday) – handing over the Co-Chairs' hard hats of office from Doug Jones and Jaya Sharma to Mark Lane and Roberto Hernández García.

In addition to splendid Basque cuisine and great company, members and their partners were treated to the unique ICP ceremony of the 'hand over of the hard hats of office' from Doug Jones and Jaya Sharma to the incoming Co-Chairs, Mark Lane and Roberto Hernández García. In commemoration of Doug and Jaya's tenure, Mark then took on the additional mantle of Poet Laureate, delivering the following composition on the following page to great acclaim:



Excursion to Segovia (Friday)

In line with ICP tradition, our final substantive session, on the Thursday afternoon, combined the Committee's **planning meeting** with a roundup of new developments. It included introductions to the plans being laid regarding the newly-formed Project Establishment, Project Execution and Dispute Resolution subcommittees, and initial discussions amongst Committee members interested in becoming involved in those subcommittees. It was also announced that **Tom Wilson** and **John Wright** are the new Vice-Chairs of the Committee.

The new developments session, chaired by **Doug Jones** and **Jaya Sharma**, commenced with an outline by **Tim Reynolds** of issues for consideration in the current process of redrafting of the FIDIC Contracts, along with ways in which Committee members can provide input into that process. This prompted a lively discussion about the continuing utility of the engineer role under standard forms.

Michael E Schneider then spoke about the 'paper tsunami' faced by arbitrators as they are expected by parties to deal with thousands of pages (or more) of submission material. He referred to possible solutions for reducing the number of documents, including the implementation of an interactive process between the arbitrator and the parties during the document production process, ensuring that files as presented to arbitrators are organized in a user-friendly way, and opportunities presented by developments in information technology.

Nick Henchie spoke to trends in the way in which major infrastructure projects are being procured in the light of the current financial

crisis. He used as a focus for the discussion the way in which the Panama Canal project has been put to the market over the past two years and, in particular, how the risk profile has changed during that time. He reported that the tenderers' positions have shifted from favouring an EPCM risk profile towards the fixed price, lump sum environment sought by the employer. Nick observed that the contractors have focused on preserving cash-flow, including by way of early mobilisation payments, but that they have been prepared to concede higher limitation of liability caps than had originally been proposed.

So, then, to our final day together. On the Friday, approximately 40 ICP members and guests took an **excursion** to the World Heritage-listed city of **Segovia**. Our tour commenced in the shadow of an infrastructure project which had been the town's water source for nearly 2,000 years – the extraordinary Roman aqueduct – and proceeded through the Cathedral to end up at the spectacular Alcázar which had provided the inspiration for the castle in Walt Disney's *Sleeping Beauty*. Whilst the morning's activities worked up something of an appetite among most of us, this was satisfied in the most marvellous manner at the José María restaurant; our meal included the regional speciality of suckling pig which is so tender that it can be – and was – carved with a plate.

All in all, then, our week in Madrid provided a wonderful opportunity for ICP members to share knowledge, collegiality and good times. We look forward to bringing further fruits of the conference to you via *CLInt*. ¡¡ Olé !!



Enjoying the famous cochinitillo (suckling pig) at the José María restaurante, Segovia

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