beazley

A&E Reporter

Volume 7, Issue 2 – May 2012

Will New ICC Rules Improve International Disputes Process?

Experts weigh in and also share advice on best methods to deal with international project issues

The long-awaited revisions of the International Chamber of Commerce ("ICC") Rules of Arbitration became effective January 1, 2012, adding greater speed and cost-efficiency to the preferred binding dispute resolution procedure Beazley recommends design professionals pursue for contract disputes on international projects.

For domestic projects, Beazley generally recommends a dispute resolution procedure requiring non-binding mediation as a condition precedent to litigation, and discourages the use of arbitration. (See, the April 2009 edition of the Beazley A&E Reporter feature article titled "Building a Foundation for Successful Mediation"). However, for international projects (if mediation fails to resolve the dispute), we typically recommend submitting disputes to arbitration, rather than litigation. The lack of familiarity with foreign court systems and jurisprudence can leave parties with the perception, rightly or wrongly, of vulnerability to judges with political motivations and juries with insufficient understanding of the construction industry. Due to the backlog of cases in some countries, overseas litigation can take as long as 8-10 years.

Arbitration is not an ideal solution. It may make it difficult to join multiple parties in disputes, and appeals are generally limited to fraud in the decision (as compared to broad rights of appeal in litigation). However, in international projects, these disadvantages are out-weighed by the privacy afforded during arbitration, and the opportunity for specially trained arbitrators to decide disputes.

Although parties have their choice of many different arbitration systems, the ICC International Court of Arbitration (a branch of the ICC) is widely recognized as the world's leading institution for resolving international commercial disputes. "It has become the gold standard," said Joe Moore, a partner with Watt, Tieder, Hoffar & Fitzgerald, L.L.P of San Francisco, California. "Our standard advice to clients, when doing work abroad, is that they put an ICC clause in their contracts." Moore estimates 90% of his clients prefer ICC arbitration for international work.

Moore agrees with Beazley's position that arbitration is on balance preferable in international cases, but suggests that the balance is a fine one. Arbitration was initially devised as an efficient, cost-saving way to resolve disputes but it has become so manipulated in recent years that it can often be more prolonged and costly than litigation, he says.

"Arbitration can be expensive, worse than a trial, because parties don't agree to minimize discovery, the gathering of information for each side," says Richard Viktora, chief legal officer at Skidmore, Owings & Merrill LLP in New York.

Current Developments in A&E Law

Wisconsin Court of Appeals Prohibits Breach of Contract and Negligence Claim based on Statute of Repose and Application of Economic Loss Doctrine

The Court of Appeals of Wisconsin recently affirmed the dismissal of a claim based on its examination of the state's statute of repose for claims for contract damages and the application of the economic loss doctrine in connection with a design-build project. *Kalahari Development, LLC v. Iconica, Inc.*, 2012 WL 569368 (Wis. App. Feb. 23, 2012). In this case, a Resort Owner retained a Design-Builder to provide design and construction services for a luxury resort, which included an indoor water park. Almost ten years after substantial completion, the Resort Owner filed suit against the Design-Builder for breach of contract and negligence due to moisture damage to the water park's walls requiring significant costs to inspect and repair. The circuit court dismissed the complaint pursuant to the Design-Builder's motion for summary judgment and the Resort Owner appealed.

On appeal, the Court addressed two issues: 1. whether the Resort Owner's breach of contract claim was time barred; and 2. whether the Resort Owner's negligence claim was prohibited by the economic loss doctrine ("ELD").

In addressing the first issue, the Court noted that the Resort Owner's breach of contract claim resulted from an "improvement to real property"; therefore, the Resort Owner was required to bring its claim within 10 years after substantial completion pursuant to the statute of repose outlined in Wis. Stat. § 893.89. Notably, although Wis. Stat. § 893.89 imposes a 10-year time limit to bring such lawsuits, the statute does not extend the time for bringing lawsuits that are otherwise time-barred by applicable statutes of limitations. Indeed, subsection (3)(a) of the statute specifically states that if a cause of action is

AECOM Technology Corporation, Chicago, Illinois was involved in a big, complex case in Asia with binding arbitration under ICC rules, where the discovery got "out of hand," says Mike Kolloway, AECOM's corporate vice president and assistant general counsel. "I trusted the (arbitration) process, which is why we chose it, but I don't think we saved much in terms of cost or time in the long run. We have to make it a system where the parties are saving time and money."

The Task Force on the Revision of the ICC Rules of Arbitration, comprising more than 175 members from 41 different countries, was created in October 2008 to rein in the inefficiencies of the rules and tighten up the areas that were prone to abuse.

"The jury is still out as to whether or not they have fulfilled their intentions of making the process more efficient, but I think the modifications they've made are for the right reasons, and make sense," says Moore, who has studied the changes in the 2012 ICC Rules.

Moore has spoken to the American Council of Engineering Companies and the International Bar Association on the changes, and is scheduled to speak to the American Society of Civil Engineers in October.

Moore noted several changes in the 2012 ICC Rules that are likely to improve the speed and cost-efficiency of arbitration:

- Under the previous ICC Rules, the ICC Court had to make a prima facie decision on jurisdiction whenever a jurisdictional objection was raised or no answer was submitted. "When people wanted to delay these things, they would challenge jurisdiction with the ICC Court, which could take months for a decision," Moore says. Under the 2012 ICC Rules, such a decision will be taken only when the Secretary-General refers the matter to the ICC Court, which will happen only exceptionally (e.g., in multi-party and multi-contract cases). "Essentially, they will empanel the arbitrators first and then rule, which is the way the American Arbitration Association does it," Moore says.
- The 2012 Rules also include an obligation for prospective arbitrators to confirm, in their statement of acceptance, that they have sufficient time available to conduct the arbitration, and to indicate the periods during which they will be unavailable during the next 12 to 18 months. "Before, arbitrators would agree to serve and then, when a hearing demanded a multiple-weeks block of time commitment, they would say they wouldn't be available to serve for another two years," Moore says.
- Another change to the rules gives the ICC Court increased power to appoint arbitrators directly instead of acting solely on proposals by national committees. "If you had an arbitration in Singapore, for example, the local ICC entity would recommend using this or that person," Moore says. "Imagine how that would work in an arbitration if you're a U.S. firm with a suit against the Singapore government. Now, in certain instances, when the parties don't agree on the appointment of arbitrators, they can appeal to the ICC Court to pick another person."
- In Article 37.5 of the new rules, Moore says the task force "put some teeth into" its directive to make every effort to conduct the arbitration in an expeditious and cost-effective

time-barred by a statute of limitations before it would be barred under § 893.89, then the shorter statute of limitations applies. In this case, the Court found that the 6-year statute of limitations for breach of contract pursuant to Wis. Stat. § 893.43 applied and, therefore, barred the breach of contract claim since the alleged breach occurred almost 10 years prior to the initiation of the lawsuit.

Turning its analysis to the ELD, the Court explained that Wisconsin courts use the "predominant purpose test" to determine whether a mixed contract for products and services is predominantly a sale of a product (and barred by the ELD), or predominantly a contract for services (and not barred by the ELD). The Court noted that the Wisconsin Supreme Court has concluded that construction contracts involving both construction services and materials were predominantly for a product, i.e., the final structure. The Court's decision that the contract's predominant purpose was for a product was reinforced by its review of the final contract price and finding that the architectural and engineering services comprised only $1 million (or 4%) of the total contract price exceeding $26 million.

The Court's clarification of the interplay between the Wisconsin statute of repose and statute of limitation highlights the importance of understanding the statutes applicable to the law governing design professionals' contracts. Although the "predominant purpose test" suggests that the ELD would likely not apply to prohibit a negligence claim against a professional providing exclusively design services, it is instructive for professionals who take the lead in design-build projects.

Industry conferences

October 14 – 17: American Council of Engineering Companies (ACEC)
2012 Fall Conference
Boca Raton, FL

November 7 – 9: Professional Liability Underwriting Society (PLUS)
2012 International Conference
Chicago, IL

November 11 – 15: International Risk Management Institute, Inc. (IRMI)
32nd Construction Risk Conference
Orlando, FL

Beazley was a sponsor of the ACEC annual convention held in Washington D.C. in April this year. Approximately 700 members attended but only one was lucky enough to win our Kindle give-away. Congratulations to Douglas B. Lee, PE, Vice President of Brown and Caldwell in Honolulu, HI!

manner by allowing arbitrators to decide whether the parties are acting efficiently and to make interim rulings with deadlines and consequences.

- Moore is particularly pleased with a case management change in the new rules, which demands the arbitral tribunal convenes, at an early stage in the proceedings, a case management conference, during which parties will be consulted on procedural measures. "This gets all the parties on the same page early in the process, so they can compare schedules, determine how long the hearing will be, agree on things that are irrelevant, and then craft the terms of reference so they incorporate these things," Moore says.
- Additionally, the 2012 Rules specify that the arbitral tribunal declares the proceedings closed as soon as possible after either the last hearing is conducted or the last authorized submission is filed, and requires the tribunal to inform the ICC Secretariat and the parties to the arbitration of a specific date it expects to submit a draft award to the Court for approval. "In the past, they would leave the proceeding open to buy themselves more time," Moore says. "If nothing else, the new rules give lawyers like me tools to speed up the process."
- Article 7 of the new rules allows for all parties to be joined in arbitration, if each individual party has stipulated the ICC Rules in its contract. This affords the opportunity for all parties – architect, designer, contractor, subs – to come to the table at one time, rather than bear the time and cost of multiple, concurrent lawsuits.

There is, however, one change in the 2012 Rules that may not be an improvement. Moore warns that design professionals should take a hard look at the clauses regarding the emergency arbitrator provision and decline that option. Filing for an emergency arbitrator requires a $40,000 fee and provides only interim relief that is not ultimately binding. This could result in unfavorable rulings that cannot be disputed until the firm has a full-blown hearing with a formal arbitrator, which will actually drive up cost.

We have received several questions lately from firms seeking guidance drafting document retention policies and, specifically, how long they should keep documents. We're pleased to hear firms recognize that a consistently followed document retention policy is an essential part of a comprehensive risk management program!

Some firms propose keeping all documents permanently. Their rationale is that they will have every document if a claim situation arises. While there is some comfort in the "pack rat" mentality, this strategy is problematic because it is not cost effective to maintain an ever increasing amount of documents or for the firm's own legal counsel to review all the documents in the event of a claim.

What's New in the Webinar World?

Beazley conducts quarterly risk management webinars for its insureds. The next topic is **Contract Negotiations**. Please join us on **Thursday, June 14, 2012** for that program. To be added to our invitee list, send your contact information including email to straightanswers@beazley.com.

Ethics

Our March webinar presenters defined engineering and architectural ethics and discussed applicable ACEC and AIA ethical guidelines. Please log on to the risk management site to view the webinar highlight sheet and on-demand presentation.

Risky Business Feedback

Congratulations to Tim Moltz of Catalyst Engineering Group for his prize winning feedback!

We asked what the most important attribute of a successful risk management program is and here is what Tim had to say:

Thank you for your efforts to put out a good newsletter.

I believe that a successful risk management program integrates continued education from many sources that would include webinars, newsletters, articles and professional society involvement in their programs. I just finished reading your newsletter and there were interesting articles there that provided insight into various issues that can occur. Recently, I read the newsletter put out by the Texas Board of Professional Engineers, and it too, included several articles of interest.

I would say that if I had to identify my most preferred tool, it would be that I prefer newsletters, as they are inexpensive to obtain, usually provide quick reading and typically provide website access for more information when necessary.

If firms embrace the concept that they should not keep all documents permanently, the next logical question is how long to keep them. Document retention policies will vary by firm and there is a certain amount of subjectivity involved when drafting and modifying the policy, but all policies should address each type of document, including those in electronic form. Generally speaking, documents can be divided into corporate documents (such as quality assurance / quality control manuals, procedure manuals, records of incorporation, annual reports, finance and accounting documents, and legal documents) and project documents (such as preliminary reports and studies, drawings and specifications, and correspondence). Many, although not necessarily all, corporate documents are often retained permanently. Conversely, most project documents will likely not be kept permanently, although firms many want to keep some project documents permanently (such as final reports, Certificates of Completion, final design drawings, final specifications, and record sets).

The determination of what documents a firm will keep permanently and the timeframe for keeping non-permanent documents is a matter of discretion. However, from a general risk management perspective, consider this rule of thumb: documents that are not kept permanently should be retained for the longer of 10 years after substantial completion of the project or the applicable Statute of Repose or any longer period specified in the firm's professional services agreement.

Notwithstanding any document destruction schedule established by the retention policy, documents should not be destroyed in the event of litigation or anticipated litigation. It is critically important for firms to issue a written instruction to all firm employees to ensure document destruction is suspended during a litigation hold (even if destruction would be warranted under the policy) because a court may sanction, or even issue a judgment against a firm, if a litigation hold is not properly issued and followed.

For more information on drafting and implementing document retention policies, we invite you to listen to our on-demand webinar titled "Document Retention Policies." The webinar is available on the Beazley A&E Risk Management Website under the Library of Webinars section.

Feedback/Contact Information

We welcome your feedback on the *Beazley A&E Reporter*.

Send us your comments, observations or future topic requests.

Colleen Palmer
Beazley Group
141 Tremont Street
Suite 1200
Boston MA 02111
T: (617) 239 2606
F: (617) 239 2659
colleen.palmer@beazley.com
www.beazley.com/A&E

All issues of the *Beazley A&E Reporter* may be accessed on our A&E Risk Management website at www.beazley.com/A&E in the A&E Reporter Library section. The website also contains valuable information regarding the AIA contract documents and our recommended modifications, archived Beazley webinars, state laws affecting A&Es, and other valuable information design professionals need to know.

The *Beazley A&E Reporter* is prepared and edited by Beazley Group. The opinions of the authors are solely those of the authors. The *Beazley A&E Reporter* is published and distributed by Beazley Group with the understanding that neither it nor the editors or authors is responsible for inaccurate information. The information set forth in the *Beazley A&E Reporter* should not be construed or relied upon as legal advice and is not intended as a substitute for consultation with counsel.