Workshop 301B
Laissez Les Bons Temps Rouler? – What You Need to Know About Contracting Outside of the United States

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I. INTRODUCTION

While the domestic construction market within the United States remains healthy, U.S.-based companies continue to pursue construction projects in overseas markets as a source of revenue. These projects range from private developments, to contracts for foreign governments, and projects for the United States Government (including, but not limited to, projects for the State Department and the Department of Defense). Work in overseas markets comes with specific and significant risks for contractors, and such risks are inherent, both in the pursuit / bidding stage of projects, to compliance with United States laws and regulations, and even where disputes arise during the construction works themselves. This paper sets out an overview of some of the most critical considerations for contractors seeking work outside of the United States and approaches these considerations from both legal and practical perspectives.

II. RISK ASSESSMENTS AND PLANNING BY COMPANIES FOR OVERSEAS WORK

Prior to making the decision to pursue work in an overseas market, companies typically take significant steps to test local market conditions and learn about the laws, codes, and customs that apply to construction works in the subject country. A number of these considerations blur the lines between legal and business considerations, including tax matters and the crucial question of the overall stability of the legal market in the country where business is being pursued.

A. Local Laws and Customs

In many developing countries, local laws and customs criminalize what are otherwise typical commercial/business decisions. For example, in Indonesia, employees of multinational corporations have been criminally prosecuted for making decisions such as selecting one bidder over another. It is important to understand the political climate in developing countries and business cases must account for geo-political risks.
B. **Use of Liaisons to Obtain Information**

In developing countries, it is essential to establish a local network to make connections and provide information. It is incumbent on companies to have an “emergency preparedness” plan in place. For example, who is the contact you first call if you find out your offices are being raided by the local police/agency?

C. **Assessments of In-Country Legal Structure**

Countries frequently have laws that make it necessary to have local service providers on the project team. This is especially true of local legal requirements for lawyers in certain countries. For example, in Nigeria, if the contract clause specifies Nigerian law and seat of arbitration in Nigeria, only Nigerian-qualified attorneys may do oral advocacy.

D. **Government Stability**

In certain sectors of the world, the stability of government regimes must also be taken into account when considering overseas construction works. In most developing countries, large-scale construction projects require some partnering with country government. These can be very difficult relationships, especially when there is turn-over in government. During election years, there can be paralysis of decision-making where no critical project-related decisions will be made by government.

**III. THE FOREIGN CORRUPT PRACTICES ACT**

In recent years, the United States Government has devoted significant attention to prosecute contractors for alleged violations of the Foreign Corrupt Practices Act (“FCPA”). Enacted by Congress in 1977, the FCPA contains both anti-bribery and accounting provisions. The anti-bribery provisions prohibit U.S. persons and businesses from making payments to foreign officials in order to obtain or retain business. The accounting practices require that public
businesses maintain adequate and traceable accounting controls and prohibit the knowing falsification of books and records and/or circumvention of rules that otherwise would have provided for proper internal controls.\textsuperscript{ii}

The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share FCPA enforcement authority. The DOJ maintains criminal enforcement authority over “issuers” (public companies) and those companies’ officers and employees acting on the issuer’s behalf. Practically, an “issuer” is any company with a class of securities listed on a national securities exchange in the United States, or any company with over-the-counter listed securities that needs to file periodic reports with the SEC.\textsuperscript{iii} DOJ also maintains enforcement authority over “domestic concerns,” which include U.S. citizens and U.S. businesses (and their officers and employees acting on their behalf).\textsuperscript{iv} The SEC maintains civil enforcement authority over issuers (and officers and employees acting on the issuer’s behalf) and is also the agency principally tasked with investigation of potential FCPA violations.\textsuperscript{v}

While a historical review of the FCPA is beyond the scope of this paper, notably, in 1998, the FCPA was amended to conform with the Convention on Combating Bribery of Foreign Officials in International Business Transactions (the “Anti-Bribery Convention”), a treaty negotiated among the member nations of the Organisation for Economic Co-operation and Development (OECD). Among other changes, the 1998 amendment expanded the FCPA’s scope to include payments to secure any “improper advantage” and expanded the reach of the FCPA to certain foreign persons who committed an act in furtherance of a foreign bribe while located in the United States.\textsuperscript{vi}

A. Anti-Bribery Provisions
The FCPA’s anti-bribery provisions apply to conduct both inside and outside of the United States.\textsuperscript{vii} Issuers and domestic concerns may be prosecuted for using any means to bribe a foreign official “in order to assist . . . in obtaining or retaining business for or with, or directing business to, any person.”\textsuperscript{viii}

Under the FCPA, a bribe is broadly defined as an “offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to a foreign official.”\textsuperscript{ix} Moreover, the FCPA defines “foreign official” as:

Any officer or employee of a foreign government or any department, agency, instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.\textsuperscript{x}

As explained below, the U.S. Government has sought prosecutions for various actions and has typically taken a liberal approach towards what constitutes a bribe. Accordingly, construction companies performing overseas work must be on heightened alert to monitor any expenses or payments that could even approach those forbidden by the FCPA.

1. The Business Purpose Test

The most significant factor in determining if an FCPA violation has occurred is whether an alleged improper payment is intended to influence a foreign official to use his or her position to “assist” in the retention or obtaining of business, or to direct business to any person. In other words, was the payment in question a bribe to influence the obtaining or retention of business? This test is defined as the “business purpose” test and is intended to be broadly interpreted.
A seminal decision regarding the interpretation of a “business purpose” under the FCPA is
*United States v. Kay.* In *Kay*, the U.S. Court of Appeals for the Fifth Circuit reversed a lower
court’s granting of the appellees’ motion to dismiss. The Appeals Court held that payments made
to Haitian government officials were potentially within the FCPA’s prohibition against payments
to obtain or retain business.

The *Kay* defendants-appellees were originally indicted for actions including, but not
limited to, the alleged orchestration of bribes to Haitian customs officials to accept false bills of
lading that underreported the amount of goods being imported into the country, which had the
resulting effect of significantly reducing customs duties and other taxes that would otherwise have
been payable. The trial court held that the bribes in question were not sufficiently tied to the
FCPA’s prohibition against such bribes to assist in the “obtaining or retaining” of business,
because it was not made clear how the bribes actually obtained or retained business.

The Appeals Court reversed the trial court’s ruling. Following a thorough review of the
legislative history of the FCPA, the Circuit Court held that courts cannot “hold as a matter of law
that Congress meant to limit the FCPA’s applicability to cover only bribes that lead directly to the
award or renewal of a contract.” The Court further explained its understanding of Congress’s
intent:

> [W]e hold that Congress intended for the FCPA to apply broadly to
> payments intended to assist the payor, either directly or indirectly,
> in obtaining or retaining business for some person, and that bribes
> paid to foreign tax officials to secure illegally reduced customs and
> tax liability constitute a type of payment that can fall within this
> broad coverage.

In the wake of *Kay*, courts have continued to liberally construe the scope of the FCPA’s
bribery restrictions to extend beyond simply a payment that results in a direct award of a contract.
2. **Affirmative Defenses**

The FCPA notes two specific affirmative defenses to its anti-bribery provisions, each of which must be established by the defendant if applicable. These affirmative defenses are: (i) that the local law of the country where the payment took place specifically classified the payment as lawful; and (ii) that the expenditure in question was in fact not a bribe, but a reasonable bona fide business expense.

In order for the first affirmative defense—local lawfulness—to succeed, it is not enough for a defendant to establish that the country where the bribe took place does not specifically prohibit such bribes. Rather, the defendant must establish that the payment in question is specifically permitted by law (in other words, the omission of any criminal penalty is insufficient and the defendant must show that the bribe is actually defined as a legal payment). In practice, this is a very difficult standard to meet.

In *United States v. Kozeny*, the U.S. District Court for the Southern District of New York provided guidance on the “local lawfulness” affirmative defense. The defendant was charged with bribing Azerbaijan officials to encourage the privatization of the State Oil Company of the Azerbaijan Republic. The defendant argued that the payments to officials should not be considered bribes under the FCPA because the defendant might not be found criminally liable for the payments under the law of the foreign country. The Court disagreed and ruled that the FCPA’s focus is on the payment, not the individual payor. The Court held that, “an individual may be prosecuted under the FCPA for a payment that violates foreign law even if the individual is relieved of criminal responsibility for his actions by a provision of the foreign law.” Again, the defense in question must establish that the payment is specifically permitted—not that prosecution is unlikely.
The second affirmative defense available to alleged FCPA violators is the “bona fide business expense” defense. Specifically, the FCPA permits companies and/or persons to provide reasonable travel and lodging expenses for a foreign official and where the expenses are to explain the services that a company may provide or how a company explains its proposed performance under a contract for services.\textsuperscript{xix} The DOJ has routinely opined that expenditures for foreign officials to visit companies or operations or to view demonstrations of products or services do not violate the FCPA.\textsuperscript{xx}

B.\hspace{1em} Accounting Provisions

The second key prong of the FCPA is commonly known as the “accounting provisions,” which is designed to ensure that companies maintain proper books and records that do not conceal improper payments or other expenditures that could violate the FCPA.

The accounting provisions are applicable to issuers that have a class of securities registered under Section 12 of the Exchange Act or otherwise need to file reports under the Exchange Act.\textsuperscript{xxi} Unlike the anti-bribery provisions, the accounting provisions do not apply to private companies.

The accounting provisions have two primary components: (i) the “books and records” requirement, which requires that companies maintain their accounts in sufficient detail so as to be transparent and accurately reflect the nature of transactions; and (ii) the “internal controls” requirement, which mandates that companies maintain sufficient internal systems and checks to ensure that proper accounting of transactions is carried out.

The “books and records” requirement demands that companies “[m]ake and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”\textsuperscript{xxii} The term “reasonable” was adopted in order to avoid a
standard of “perfection” and to promote the overall goal of the books and records provision to “effectively prevent off-the-books slush funds and payments of bribes.”

The “internal controls” requirement insists that companies maintain internal accounting procedures such that:

(i) Transactions are executed in accordance with management’s general or specific authorization;

(ii) Transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statement, and (II) to maintain accountability for assets;

(iii) Access to assets is permitted only in accordance with management’s general or specific authorization; and

(iv) The recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

In general, while the FCPA does not prescribe specific controls that must be adopted, companies must adopt sufficient checks and balances to ensure that their particular operation is maintained in accordance with the FCPA’s requirements.

C. The Yates Memo

In recent years, the Government has intensely focused on prosecuting companies and persons engaged in bribery or other schemes designed to improperly secure contracts, including under the FCPA. Additionally, from 1999-2015, DOJ has issued several pronouncements emphasizing the Government’s insistence on cooperation from companies under investigation for misconduct and the Government’s focus on prosecution of individual persons to hold them liable for misconduct. The most recent of these memos was issued on September 9, 2015 by Deputy Attorney General Sally Quillian Yates. This memo set out directives that are of import to contractors engaged in overseas construction and that perform internal investigations to protect against violations of the FCPA.
The Yates Memo set out two significant updates to DOJ policy in prosecuting companies for corporate misconduct (including conduct that would be in violation of the FCPA). First, the Yates Memo required that, “in order to qualify for any cooperation credit, corporations must provide to [DOJ] all relevant facts relating to the individuals responsible for the misconduct.”xxvii The Yates Memo clarified that companies cannot “pick and choose which facts to disclose” and that companies must identify “all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority.”xxviii This insistence on complete cooperation signaled a shift in DOJ policy, which previously had weighed a company’s provision of information concerning individual misconduct as one factor among many when making a determination on cooperation credit.

Second, the Yates Memo directed that, “both criminal and civil corporate investigations should focus on individuals from the inception of the investigation” and instructed civil attorneys to “consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.”xxix While individual misconduct was always a component of DOJ investigations, the Yates Memo strengthened the focus on individual misconduct and stressed the import of seeking deterrence value through civil suits against individuals. In other words, the likelihood of monetary recovery in a civil suit is of reduced import when weighed against other factors such as the nature and duration of the misconduct.

While the long-term effects of the Yates Memo’s emphases are yet to be determined, companies are cautioned to provide complete assistance during investigations of FCPA violations in order to reduce any potential penalties.
D. Penalties

Penalties under the FCPA vary for violations of the anti-bribery provisions and the accounting provisions. Moreover, penalties for issuers / domestic concerns differ from those that are assessed against individuals.

For each criminal violation of the anti-bribery provisions, the FCPA provides that corporations / business entities be subject to a fine of up to $2,000,000; individuals (including officers and directors of companies) are subject to fines of up to $250,000 and imprisonment of up to five years. For each criminal violation of the accounting provisions, corporations / business entities are subject to a fine of up to $25,000,000; individuals are subject to fines of up to $5,000,000 and imprisonment of up to 20 years. The Department of Justice has the sole authority to pursue criminal actions.xxx

Violations of the FCPA also can result in civil penalties, which are enforced by either the Department of Justice or the SEC, depending on the nature of the offender. The Department of Justice can pursue civil actions for anti-bribery violations against domestic concerns (non-public companies) and foreign nationals and companies, while the SEC maintains authority over public companies. Violations by companies carry a penalty of up to $16,000 per violation and violations be individuals are also subject to $16,000 penalties, which may not be paid by the individual’s employer on behalf of the individual.

The SEC maintains jurisdiction over civil enforcement of the accounting provisions, and the penalties vary depending on the amount of the monetary gain by the defendant. Specified monetary penalties are also available, ranging between $7,500 to $150,000 for an individual and $75,000 to $715,000 for a company.xxxi
In addition to monetary civil penalties, an individual or company that violates the FCPA may also be subject to debarment. The decision to debar a person or company is discretionary and rests with the authorities within the contracting agencies themselves (i.e., not with the DOJ or the SEC). Under the Federal Acquisition Regulations (FAR), debarment is to be considered upon conviction of or civil judgment for bribery, making false statements, destruction of records, or the commission of “any other offense indicating a lack of business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.”

IV. INTERNATIONAL DISPUTE RESOLUTION

Contractors working overseas must have a sound understanding of dispute resolution forums favored by contracting partners. This section focuses on some of the most common aspects of dispute resolution with overseas subcontractors or developers, and some of the critical decisions facing parties embroiled in such a dispute.

A. International Arbitration: An Overview

Typically, for work performed in the United States, prime and subcontracts call for disputes to be resolved in the state or federal court, or through arbitration in accordance with commonly-adopted rules, such as those from the America Arbitration Association (AAA). For overseas work, however, it is presumed that U.S. contractors would prefer that disputes not be resolved by foreign courts. Similarly, U.S. contractors’ contracting partners will likely be unfamiliar with American arbitration rules.

In such cases, a likely forum for dispute resolution will be through international arbitration. In general, disputes adjudicated through international arbitration share many similarities with dispute resolution via domestic litigation and arbitration. Contractors and practitioners, however, are advised to develop a familiarity with the key differences between international arbitration and
more traditional litigation in the United States. The following are some specific characteristics
more popular in international arbitration:

**Use of Pre-Filed testimony.** Most international arbitrations rely on the submission of
written testimony, via affidavit or some similar form, in order to establish the factual record of the
case. The use of “live” direct testimony is atypical and witnesses who are called to testify at the
main hearing typically affirm their previously-filed written testimony and are then immediately
subject to cross-examination. In other words, the witness does not submit additional “direct” oral
evidence beyond that already included within his or her pre-filed testimony.xxxiii

**Limits on Discovery.** Arbitral tribunals presiding over international arbitrations are
imbued with significant discretion in regard to pre-hearing discovery. While approaches can vary,
it is a hallmark of international arbitration that pre-hearing discovery is more limited as compared
to domestic arbitration and litigation, and pre-hearing deposition testimony is rarely permitted.
Even document discovery requests are more likely to be carefully scrutinized to ensure that the
requests are specifically focused on an assertion by the opposing party.xxxiv

**Expert Conferencing.** In domestic litigation and arbitration, expert witnesses typically
testify as part of a party’s affirmative or defensive case. In international arbitration, it is more
common for expert witness testimony at the main hearing to be bifurcated from the fact witnesses’
oral evidence. Experts of like discipline can also be expected to testify at the same time during
which they face questions from counsel and the Tribunal. This process is frequently known as
expert conferencing or “hot tubbing.”xxxv

**B. Drafting an Arbitration Clause**

Consistent with any arbitration clause, an arbitration clause calling for international
arbitration is first and foremost a creature of contract / agreement between the parties.
Accordingly, the parties can—by agreement—dictate the length of an evidentiary hearing, the amount of discovery that would be permissible in any arbitral dispute, or the time frame within which a dispute must be heard. But in addition to these case process issues, arbitration clauses that call for international arbitration should also specifically address the administrative body overseeing the dispute and the seat of the arbitration.

1. Administrative Bodies

Like arbitrations in the United States, which are frequently administered by bodies such as the AAA or JAMS, international arbitrations are also typically administered by organizations with their own sets of rules and procedures. There are a myriad of organizations that administer international arbitration and the locale of the work in question may influence the choice of a particular administrative body.

One of the most popular administrative bodies is the International Court of Arbitration of the International Chamber of Commerce (“ICC”).xxxvi Indeed, the ICC and use of the ICC Rules of Arbitration are the “default” options in the dispute resolution clause in the contract suite published by the International Federation of Consulting Engineers (“FIDIC”), a popular contracting vehicle for overseas construction projects.xxxvii Moreover, and consistent with prior years, construction and engineering disputes are the most frequent types of disputes submitted to the ICC. As recently as 2015, construction and engineering disputes accounted for 25 percent of all types of disputes submitted to the ICC.xxxviii Moreover, recent reporting data from the ICC indicate that the overall number of arbitration disputes filed has increased from 767 disputes filed in 2013 to 801 disputes filed in 2015.xxxix

While the ICC is perhaps the most frequently chosen administrative body for international arbitration, several other arbitration bodies—such as the London Court of International Arbitration
(
“LCIA”), the Singapore International Arbitration Centre (‘‘SIAC’’), and the Hong Kong
International Arbitration Centre (‘‘HKIAC’’) – have begun to garner popularity in recent years.
Most of these major institutions have similar rules, but there remain some significant differences.
Indeed, the ICC operates solely on its own set of rules. Yet, the LCIA, SIAC, and HKIAC all
operate duly under their own respective rules, or the United Nations Commission on International
Trade Law (‘‘UNCITRAL’’) Rules, whichever the parties choose.

As further example, the rules of the ICC do not contain any express confidentiality
provisions. By contrast, the LCIA rules provide that the deliberations of the Arbitral Tribunal,
materials created during and for the purpose of the arbitration, and the arbitration award are all
kept confidential. The extent to which awards are scrutinized also varies significantly, as awards
made by ICC arbitrators are scrutinized and approved by the ICC court. However, the LCIA does
not scrutinize awards.

Like the LCIA, the SIAC has specific provisions regarding confidentiality, providing that
all matter relating to the proceedings and the award are confidential. Further, although the ICC
Court allows for certain deposits to be paid in an ICC arbitration, the parties in a SIAC arbitration
must pay deposits, while separate advances on costs may be fixed for the parties when a counter-
claim is filed.

In the absence of an agreement, the ICC Court will appoint the arbitrators. However, the
HKIAC may confirm, but does not appoint the arbitral tribunal. Another key difference concerns
the selection of the forum’s seat. In absence of agreement between the parties, the ICC Court will
choose the seat on the basis of neutrality, convenience, and to ensure the likelihood that the award
will be enforced. In dealing with the HKIAC, by contrast, if the parties have not chosen a seat
for their arbitration, the rules state that Hong Kong will be the presumed seat of the arbitration.
Considering the importance of specific aspects of the arbitration proceeding, such as the seat, it is imperative that the rules of each tribunal be considered and studied by counsel.

2. *Choice of Law and Seat*

The importance of an arbitration clause’s choice of law and seat cannot be understated. While the United States, along with Singapore, Australia, and England, practice common law, countries such as France, China, Germany, and Spain are run by a civil law system. Although modern international commercial arbitration practice has to a great degree synthesized the historically divergent common law and civil law traditions into a process that is flexible and adaptable to the nature of a construction dispute, there still exist key differences between the systems of which counsel should be aware.\(^{xlviii}\)

One example concerns the pleading process. While pleading in the United States has been characterized by “notice pleading” or summary statements of claims and defenses, in the civil law world, “fact pleading” has been the norm.\(^{xlix}\) The involvement of the tribunal also differs. In general, common law jurisdictions take an adversarial approach to arbitration, with arbitral tribunals playing the role of impartial finder of fact.\(^{lv}\) By contrast, civil law jurisdictions use the inquisitorial method, where arbitral tribunals actively elicit the facts and law from counsel and witnesses, placing the tribunals in complete charge of questioning the witnesses.\(^{li}\)

Another central issue in international arbitration proceedings is the arbitral seat. The seat of arbitration is the place where an arbitration must be located as a matter of law.\(^{lii}\) In international arbitration, there may be a difference between the seat of the arbitration and the physical location of the arbitral proceeding, as well as between the arbitral tribunal and parties.\(^{liii}\) The seat of the arbitration is the jurisdiction whose laws govern the arbitration proceedings, even though the proceedings themselves may not physically take place there.\(^{liv}\) The law of the choice of seat
typically governs any procedural issues not governed by the arbitration agreement, any applicable arbitration rules agreed to by the parties, the level of judicial involvement with the arbitration, and confirming or vacating the award.\textsuperscript{iv}

One of the most important details of the seat of an international arbitration is the prevailing party’s ability to enforce the award in accordance with the seat of arbitration jurisdiction. Before seeking confirmation of a non-U.S. arbitration award (this can be done by filing a petition or motion, depending on the jurisdiction), it is necessary to determine which law governs the enforcement procedure.\textsuperscript{lv} More likely than not, the award will be covered by the New York Convention. If it is not, the award will almost always be covered by the Domestic Arbitration Provisions of the Federal Arbitration Act (“FAA”). On the rare occasion that an award is not covered by either the New York Convention of FAA, it will be covered by state arbitration law.\textsuperscript{lvii}

The United States, along with other countries such as London, Singapore, and China, are parties to the New York Convention, which applies to arbitration awards of a commercial nature when at least one party to the arbitration is not a citizen of the United States, or all parties are U.S. citizens, but there is some reasonable relation with one or more foreign states.\textsuperscript{lviii} The United States applies the New York Convention only to foreign arbitration awards that are commercial in nature and rendered by arbitral tribunals in other countries that are also parties to the New York Convention.\textsuperscript{lix}

The formal requirements necessary for a party to enforce an arbitration award under Article IV of the New York Convention are minimal by design.\textsuperscript{lx} Pursuant to Article IV, the party applying for enforcement of an award must supply the authenticated original award or certified copy and the original agreement or a certified copy. If the award is not made in English, the party applying for recognition must submit a transcript of the award.\textsuperscript{lxi} The importance of the seat of law comes
into effect as the U.S. Court of Appeals has held that the country in which the award is issued has “primary” jurisdiction over the award, while all other countries have secondary. As such, courts of secondary jurisdiction have no jurisdiction to annul the award.\textsuperscript{xiii}

Under the New York Convention, proceedings to set aside or suspend an award are proper only in “the country in which, or under the law of which, that award was made.”\textsuperscript{lxiii} Where the seat of arbitration is outside the United States, pursuant to § 207 of the FAA, a federal court shall confirm the award, unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in Article V of the New York Convention.\textsuperscript{lxiv} Further, although the grounds for non-enforcement set forth in Article V(1) are to be presented to the authority where enforcement is sought, one ground for non-enforcement is that the award has been set aside or suspended in the country “in which, or under the law of which,” the award was made.\textsuperscript{lxv} Thus, as the procedural law of the seat of arbitration will generally dictate the procedural framework for the arbitration, the seat is not a detail that can be overlooked or underemphasized by counsel.

C. Evidentiary Hearing Issues

Like domestic arbitrations, the culmination of international arbitrations typically occurs via a main evidentiary hearing where fact and expert witnesses provide in-person evidence to the arbitrators. The structure and tenor of these hearings, however, traditionally differ from those of a domestic arbitration and require some specific consideration for case preservation and presentment.

1. Structure of Hearings

As explained above, one of the starkest differences between traditional domestic arbitration and international arbitration is that international arbitration hearings do not typically feature “direct examination” where counsel elicits testimony and introduces documents through live examination.
of a witness. Rather, the witnesses’ “direct” evidence is contained within pre-filed witness statements with references to the evidentiary record. The questioning at the hearing is dedicated almost entirely to cross-examination of witnesses, frequently making use of the pre-filed witness statements as guides for the cross-examination.

Another typical difference in international arbitration concerns the treatment of expert evidence (although domestic arbitrations are picking up certain aspects of these trends on a more frequent basis). Among other items common to international arbitrations, “opposing” expert witnesses of like disciplines are often expected to conference prior to the main evidentiary hearing to prepare a report that sets out (in summary fashion) their areas of agreement and disagreement. The same expert witnesses are also often expected to provide testimony in a joint conferencing session (often referred to as “hot tubbing”) following their individual testimonies. These joint conference sessions are typically led by the Tribunal and seek to elicit specific testimony on points of differences between the experts. Further, expert evidence is typically provided at the conclusion of fact evidence from both the claimant and the respondent, rather than as part of each side’s individual case; in other words, expert evidence is traditionally provided at the end of the main evidentiary hearing after all of the fact witnesses have provided their evidence.

2. **Cultural and Language Considerations**

Because international arbitrations frequently involve witness testimony from persons of different cultural or ethnic backgrounds, attorneys may need to adjust their questioning or other advocacy styles in order to illicit the most useful testimony from witnesses. Of course, interpreters will also frequently be used in the typical case where the arbitration clause specifies the official language of the arbitration.

3. **Arbitrator Availability and Selection**
There are differences in how recent former judges and professional arbitrators will conduct international arbitrations. Former judges tend to run arbitrations like court trials where pleadings are more akin to notice pleadings. Generally, however, for large-scale international construction disputes, parties tend to select “professional” arbitrators versus recent former jurists, with the majority of such cases presided over by a three-person tribunal. These professional arbitrators are well-versed in managing large-scale arbitrations and can “right-size” the amount and nature of arbitral discovery, the length of the hearing, and can often (subtly or otherwise) nudge the parties in specific directions on which the arbitrators seek to hear more evidence. However, a downside of these arbitrators is availability – they are all extremely busy and arbitration scheduling can be prolonged.

D. Retention of Counsel

Due to the specific nature of international arbitrations and stylistic / cultural considerations summarized above, retention of the “right” counsel team must be undertaken with care.

1. Use of QCs / SCs versus Solicitors and Law Firms

Based on established English tradition of dividing the profession into solicitors and barristers, companies involved in international arbitration (especially those based on English or Australian law) frequently utilize barristers/QCs as part of their legal team. Barristers/QCs are advocacy specialists (akin to trial lawyers or appellate specialists in the United States). One of the benefits of using a QC on large-scale international arbitrations could be their familiarity with one or more of the arbitrators, given that most of the well-known / highly used arbitrators and QCs work on many of same disputes.

When using QCs, it is important to ensure that the law firm / solicitor relationship is sound. This is particularly important when the law firm is U.S.-based or not familiar with the custom and
practice of QCs. As with law firm partners, some QCs are more traditional, while others are more flexible and “client-friendly.” However, more law firms, especially English firms, are doing their own advocacy and not relying on QCs. They either have barristers who are partners or have solicitor partners who regularly manage and advocate in international arbitrations.

2. Style of Advocacy

Makeup of the panel is key to establishing the outside counsel team and use of QCs. U.S. “trial-lawyer” style of advocating is a stark contrast to advocacy in most other jurisdictions. If the panel is made of non-U.S. members, clients must consider the ideal style of advocacy and brief writing skills in an outside counsel team.

3. Ethics Rules and Considerations

Ethical rules for lawyers in international jurisdictions can differ from those in the United States. For example, in England, lawyers are not supposed to perform mock cross-examinations of witnesses on the actual facts of the case, only on hypothetical facts. Practicing mock cross-examination in England is considered “witness coaching.” The English courts have held that a witness should convey his or her own evidence uninfluenced by others, which would be in direct conflict with the American practice of fact-based mock cross-examinations.

Courts in countries such as France, Italy, and Switzerland have gone as far as to prohibit all pre-hearing contact with witnesses. Yet, countries such as these have implemented specific provisions to their national ethics code in order to adapt to international arbitration proceedings. For example, French courts do not allow counsel to discuss the case with a witness prior to the hearing. However, the Paris Bar passed a resolution in 2008 allowing members of the Bar to prepare witnesses in international arbitrations. These region-specific issues must also be considered before hiring an outside counsel team.
4. **Virtual Law Firm Concept**

With the size and scale of international disputes, more companies are employing a virtual law firm approach to tackle some of the issues raised above. For example, as part of a team, a company may want U.S.-based counsel who would be free to mock-cross and prepare witnesses for examination in a manner unavailable to their international counterparts. Moreover, companies may consider supplementing their team with solicitors who are comfortable working with the chosen QC in order to properly preserve and service that relationship.

V. **CONCLUSION**

Overseas contracting presents unique practical and legal considerations for contractors. Up-front planning and training of personnel for the inherent and specific risks is a task that in-house legal departments must continue to attend to, especially where actions can carry criminal and civil penalties. Where disputes on construction projects arise on overseas projects, in-house and outside counsel should be prepared to address the aspects of international arbitration that may result in strategic decisions in alignment with the agreements / customs of international dispute resolution.

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ii Id.

iii Id. at 11.

iv Id. at 4. Within the DOJ, FCPA matters are typically handled by the Fraud Section of the Criminal Division, which works with U.S. Attorneys’ Offices throughout the world.

v Id. at 4-5

vi Id. at 4.

vii Id. at 11.


ix Section 30A(a), 15 U.S.C. §78dd-1(a); 15 U.S.C. §§78dd-2(s), 78dd-3(a). While the term “anything of value” is not specifically defined by the FCPA, U.S. courts have liberally interpreted the same phraseology when determining liability under the domestic bribery statute. See, e.g., United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986) (finding that a promise of future employment is a thing of value); United States v. Franco, 632 F.3d 880 (5th Cir. 2011) (affirming conviction of an inmate that made a payment of $325 to a corrections officer for food and other items). Importantly, however, items of nominal value which may be considered to be expressions of gratitude or respect (such as reasonable meals and entertainment expenses or company promotional items) do not typically result in enforcement
by DOJ or the SEC under the FCPA. But see Complaint, SEC v. ABB Ltd, No. 04-cv-1141 (D.D.C. July 6, 2004) (prosecution where a defendant’s conduct went beyond token gifts and included an automobile, a country club membership, and a generator).


Id. at 741.

Id. at 741-42.

Id. at 755.

See S.E.C. v. Jackson, 908 F. Supp. 2d 834 (S.D. Tex. 2012) (defendants charged with violating FCPA via the use of “special handling fees” as part of customs payments) and United States v. Duperval, 777 F.3d 1324 (11th Cir. 2015) (upholding a conviction of a defendant engaged in money laundering schemes found to be in violation of the FCPA). The alleged criminal misconduct must also be performed “willfully”, such that the person accused took action with an intent to conduct a “bad purpose.” See United States v. Bryan, 524 U.S. 184 (1999) (holding that a conviction for “willfully” violating a statute requires a showing that the defendant knew his conduct was unlawful, not that he was aware of any one particular requirement of a statute).


Id. at 539


See Memorandum from Eric H. Holder, Jr., Deputy Attorney General, U.S. Dep’t of Justice, to All Component Heads and United States Attorneys (June 1, 1999); Memorandum from Mark Filip, Deputy Attorney General, U.S. Dep’t of Justice, to Heads of Department Components and United States Attorneys (May 20, 2003); Memorandum from Mark Filip, Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components and United States Attorneys (August 8, 2008).


Yates Memo, supra note 58, at 2.

Id. at 3.

Id. at 4, 6.


Id. §§ 8.33 – 8.37.


The ICC was created in the 1919, with the International Court of Arbitration (the “Court”) established in 1923. The Court has administered over 18,500 cases, frequently of parties from different nationalities, language, and


*See* LCIA Arbitration Rules, Article 30.


*See id.*

*See SIAC Arbitration Rules, Rule 39.*

*A quick guide to the rules of the leading arbitral institutions*, Practical Law UK Practice Note 3-381-8450, Thomson Reuters 2017; *See also id.*, Rule 34.2.


*See id.*

*See id.*


Id.


*See id.*


Id.


*See id.*

*See id.*

*See id.*


New York Convention, Article IV.

*See Hinchey and Harris, §12:4; See also Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004).*

Hinchey and Harris, §12:4, *See also New York Convention, Article V(1)(e).*

Hinchey and Harris, §12:4, *See also § 207 FAA.*

Hinchey and Harris, §12-4, *See also New York Convention, Article V(1)(e).*


*See id.*

*See id.*

*See id.*