Recent Trends in ADR

Illustration: Chad Crowe
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**Volume 40 Number 2, Spring 2020**

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An index to past issues of this journal appears in the Forum’s website (under Publications). Copies of past articles may be obtained through Westlaw and LexisNexis. Westlaw contains selected articles from 1987, and its searchable database identifier is CONSALAW. The toll-free help line for Westlaw is 1-800-ref-atty. The Lexis database goes back to 2001; its library is ABA and the file is CONSTL. The toll-free help line for Lexis is 1-800-543-6862.

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[www.ambar.org/constructionlaw](http://www.ambar.org/constructionlaw)
In Defense of Arbitration

There is a growing hostility to arbitration in the court of public opinion. Most commentators believe this arose from the #MeToo movement, where the notion of confidential adjudication is in stark contradiction with the movement’s belief that sunlight is the best disinfectant. From there the ire spread to public-interest law groups such as the Pipeline Parity Project, launched at Harvard Law School as “a grassroots campaign of law students fighting to end forced arbitration, stop workplace discrimination, and unrig the legal system.” These groups believe that “[f]orced arbitration effectively operates as a secretive, privatized justice system that is stacked in favor of big corporations.” They cite Economic Policy Institute studies and others that estimate that plaintiffs prevail less often in arbitrations and recover fewer damages when they do.

This movement against what is referred to as “forced arbitration” has had real legal, political, and legislative consequences. In California, Governor Gavin Newsome signed a law banning forced arbitration in the workplace, although a federal district court has temporarily halted enforcement of that law for potentially violating the Federal Arbitration Act and Supreme Court precedent. Far more significant is a piece of federal legislation called the Forced Arbitration Injustice Repeal Act (FAIR Act), which passed the House by a vote of 225 to 186 on September 20, 2019. The bill, currently before the Senate, has attracted 34 cosponsors and seeks to amend the FAA to “prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes.” Although it is also not expected to pass the Republican-controlled Senate (all 34 cosponsors are Democratic or Independent), it is another harbinger of changing attitudes toward arbitration.

For construction lawyers, this growing hostility toward arbitration is cause for concern. While the FAIR Act would not apply to commercial construction contracts because of the bill’s definition of “consumer disputes,” the overall shift in public opinion can affect how judges respond to motions to compel arbitration. The U.S. Supreme Court long ago said that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,” yet I and many lawyers I know complain that courts have begun denying arbitration in situations where that would have been unthinkable ten years ago. It is hard to believe that the political assault on forced arbitration in the employment and consumer contexts has not had collateral damage in the field of construction arbitration, which is unfortunate. Construction contracts do not share the adhesionary nature of employment and consumer contracts, and there is no evidence to suggest that construction arbitrations are biased in favor of any one particular stakeholder. It is our duty as construction lawyers to make sure that the legislature and the courts understand the benefits of arbitration in the context of commercial construction disputes.

This Spring 2020 issue of The Construction Lawyer collects several fascinating articles on the topic of alternative dispute resolution. An article by Jim O’Connor, past chair of the Forum, draws from the work of Israeli psychologists Daniel Kahneman and Amos Tversky, whose studies on heuristics in decision making demonstrated common errors of human judgment, and applies their teaching to the mediation of construction disputes. Another article by former editor of The Construction Lawyer and past chair of the Forum Adrian Bastianelli III, along with co-authors Wayne DeFlaminis and Samarth Barot, provides thoughtful guidance on how to manage nationality and cultural differences during construction mediations and negotiations, relying in part on the model of cultural dimensions outlined by sociologist Geert Hofstede. Next, Albert Bates and R. Zachary Torres-Fowler provide an excellent summary and commentary on the 2019 Queen Mary University of London International Arbitration Survey. Finally, Garth Snider applies the theories of Plato and Kant to help interpret the elusive concept of “quality” in construction contracts.

Endnotes

1. See, e.g., Alexia Fernández Campbell & Alvin Chang, There’s a Good Chance You’ve Waived the Right to Sue Your Boss and You Probably Agreed to It Without Knowing, Vox, Sept. 7, 2018.
3. Id.
Making a Difference with Civility

By Kristine A. Kubes

“That’s different.” “That makes no difference.” “Look what a positive difference that makes!” “I see it differently.” “We all can’t be the same!” “Let’s hear an alternate viewpoint.” “We don’t think the same—this isn’t going to work.” “We don’t think the same—we complement one another!” Differences are part of life.

In some contexts, differences are problematic—they lead to disputes, breakdowns in communications, broken relationships, hurt feelings, lawsuits, people excluded. In other contexts, differences are celebrated and essential. Companies tout the unique qualities of their products to distinguish themselves and improve their position in the marketplace. Candidates for office or for a job identify differences that separate them from their peers and demonstrate fitness for service. Or consider teamwork, where inclusion of contrasting perspectives leads members to view a situation from different angles and develop a stronger solution.

For lawyers, differences make the world go ‘round. Litigators distinguish the facts as they argue their cases. Most construction lawyers spend their professional lives helping parties work out their differences—be it formally in mediation or litigation or when handling day-to-day scenarios like building consensus in multiparty cases, navigating discovery disputes, negotiating contracts, or working with difficult people. With ethical obligations for civility, respect, and professionalism, lawyers are uniquely qualified to bring those attributes into any process where people are trying to work out their differences.

These ethical obligations keep civility and professionalism evergreen topics for lawyers. The Forum on Construction Law is focusing on professional practice this bar year, highlighting ways that we as lawyers can make a positive difference in our respective practices and environments through civility, professionalism, and inclusion—one person, one interaction at a time.

I raise these points in this issue focused on ADR because the need for civility and professionalism now is profound—not only in construction litigation and ADR but wherever disputes and differences arise.

We as lawyers must bring civility and professionalism to our cases and to service in the civic arena. Consider the venues that could benefit from an infusion of civility—government, neighborhood, school, charity, or family. Whenever two or more parties are gathered, differing viewpoints and a critical need for help in understanding one another may arise. Lawyers have the unique opportunity to make a positive difference by infusing civility and respect into the process, helping people be heard.

The Forum models ways to find common ground and overcome differences to work for the common good. It is the world’s largest organization of construction lawyers, with members from every type of firm and affiliation, from large firm lawyer to solo practitioner; in-house counsel to private firm member; government lawyers to international lawyers. Moreover, the Forum has 14 Divisions that represent every aspect of construction and design—from owners to lenders to government entities, from general contractors to subs/suppliers or design professionals, and from domestic to international interests.

These same lawyers find a way to put their common interests before all else—to work together to educate colleagues on construction law developments across the board. We do not favor issues important to one corner of the nation over another. Nor do we favor one market sector over another. The Forum intentionally does not get into the fray of political issues but rather fosters the common ground that unites the profession and the industry. In this way, the Forum models how lawyers and their clients with differing interests and viewpoints can work together effectively toward a common goal.

I invite you to consider how you as a lawyer can make a positive difference in the Forum, the profession, and your community. The Forum is “Building the Best Construction Lawyers” so we can uphold the Constitution, support the rule of law, and serve as role models for ethical and civil practitioners. We carry these responsibilities with us always, on construction sites, in offices and courtrooms, or at community events.

Consider the positive impact that all Forum members could have if we stood for respect, civility, and inclusion every day when helping people work out their differences. The Forum’s impact for the good would be remarkable—one conflict, one interaction, one community at a time. Please join me in this effort to make a difference. #inclusionstartswithi #wethepeople #civility 📚

Kristine A. Kubes is a principal and mediator with Kubes Law Office in Minneapolis and chair of the Forum. Connect with her on LinkedIn, Twitter, kubeslaw.com, and Facebook.
Each One of Us Needs to “Be That One Guy”

By Nicholas K. Holmes

On February 14, 2017, Outi Hicks, a 32-year-old carpenter apprentice and single mother of three, was bludgeoned to death with a metal pipe by a co-worker at a construction site in Fresno, California. Site workers did not know that the assailant had been taunting and harassing Ms. Hicks for days before he killed her.

The incident resonated for Vicki O’Leary, an ironworker with more than thirty years’ experience. During her career, she had been harassed and she had seen the damage done to other women in the industry. Vicki and other union women questioned why there wasn’t “that one guy” who could have stepped in to stop harassment or abuse. Her concern led her to create the pilot program “Be That One Guy” to help empower other ironworkers to speak up and take action when a tough situation arises on a job site.

Vicki was the keynote speaker at the Midwinter Meeting's Diversity and Inclusion Breakfast in Tucson. She shared her journey from legal secretary to veteran ironworker. She also shared the story of her accomplishments in the three years since Ms. Hicks’s death. Her “Be That One Guy” program earned the support of the Ironworkers International Union president and has been rolled out to all 130,000 Union members. In March 2019, Vicki received Engineering News-Record’s 2019 Award of Excellence for her work.

On my flight home, I found myself reflecting about times I may have failed to “be that one guy” and stood by quietly when a co-worker or colleague was mistreated. The Forum is a wonderful organization, but we can do better to make it more welcoming and inclusive. We all need to strive to be that one guy who stands up for others. Here are three concrete actions you can take.

1. Attend the Diversity and Inclusion Breakfasts.

Friday morning can come early, but attend the Diversity and Inclusion Breakfasts held at each national meeting. First, they are an opportunity to learn from incredible speakers. For example, those who attended the 2015 Annual Meeting in Boca Raton will never forget the presentation by Fred Gray, a civil rights lawyer who worked alongside Martin Luther King Jr. on voting rights and school integration, and defended Rosa Parks after her refusal to give up her seat on a Montgomery city bus. Just attending the Diversity and Inclusion Breakfasts demonstrates that diversity and inclusion are core Forum values and reminds us of the work that still needs to be done.

2. Sponsor a Diverse First-Time Attendee.

If you are a Forum member attending one of the Forum’s three national meetings with a diverse first-timer, the Forum will waive the registration fee for both of you. We created this program to encourage Forum members to recruit diverse lawyers to attend their first national meeting. It is available to the first 10 Forum members who register for a national Forum meeting and who also register and bring along a diverse lawyer—their registration fee will also be waived. Bring a young associate from your office or a lawyer on the other side of a case. More information is available on the Forum’s website.


Despite all the advances that our profession and our organization have made to become more diverse and inclusive, bad things still happen. People are marginalized because of their status, rude and insensitive comments are made “in jest,” and people are excluded. Commit to speaking up the next time an incident happens and extending a hand to the person slighted or attacked.

At its January meeting, the Governing Committee of the Forum voted unanimously to adopt a strategic plan that prioritizes specific action items we will take to implement the recommendations of our diversity consultant. During the coming months, you will hear more as these new initiatives fall into place.

While the Forum’s policies and programs are important, the goal of becoming a more inclusive organization will be achieved on a person-to-person basis. Whether it is at a national meeting of the Forum, in the construction bar where you practice, or even within your own firm, reach out to newcomers and welcome them. Experience has shown that this simple act can be the most effective way of helping people feel accepted and included. Please join me as we work towards that goal. 🌐
Uncertainty pervades every construction dispute. There is no such thing as a “sure bet” in any litigated matter. Any case can be won or lost based on facts and circumstances both within and outside of the control of the litigants. Indeed, the same case can be won and lost multiple times, such that many lawyers describe their view of the “likelihood of success on the merits” in terms of percentages: e.g., “eight times out of ten I ought to win this case,” which is intended to communicate to the client an “80 percent” chance of winning. And, too many times, the opposing counsel may advise his or her client using the same phrase. There is no escaping the fact that every construction dispute is a gamble. As a consequence, the biases that the litigants bring to bear on the mental processes of prediction, judgments, and decision making inevitably influence the outcome of a construction mediation. This article addresses the fundamental function of uncertainty in the parties’ competing decision-making processes and proposes a set of rules intended to undo the biases that complicate the finding of a joint resolution of construction disputes.

Uncertainty and Doubt
Uncertainty is simply a natural state of affairs, and doubt is a tool that helps us voyage carefully through it. There are many other tools we use every day to navigate spheres of uncertainty. Most of them we consider essential to decision making. But doubt is the tool we instinctively resist. This article emphasizes the importance of doubt in decision making. That tool can be the most important in the box because it instructs us how to safely use all the others, especially those that we feel we have mastered. Doubt helps us rethink how we make decisions under circumstances of uncertainty. Doubt is especially helpful in discerning biases in our thinking that can muddle our decision making. In this paper, doubt is the captain in a journey of unlearning, and the first rule of unlearning is to embrace the notion that there is no certainty in the universe of construction disputes.

The Uncertainty Principle is a good place to start the process of embracing uncertainty and the power of doubt. The history of science at the beginning of the twentieth century was all about physics. Ernest Rutherford, a hero of the atomic age, famously remarked, “All science is either physics or stamp collecting.”1 Physicists at this time were steeped in the Newtonian view of the Universe, and only coming to grips with the idea that Time and Space were equivalents, and similarly influenced by forces such as gravity. But even Einstein, who single-handedly turned the whole study of physics on its head with his theories of Relativity, was stuck on the idea that science can “certainly” fathom and measure the physical Universe. The alternative was unthinkable.2

But even that need for certainty was about to change. Rutherford and other like-minded physicists of his age were especially blessed by the liberation of brilliance from “old-thinking.” The physicists of the atomic age were engaged in an entirely new kind of thinking, where open-mindedness, novelty, daring, and even humor opened the door to quantum theory, quantum mechanics, and the impracticability of prediction and precise measurement in a random nuclear universe. At the heart of quantum mechanics rests the belief that uncertainty is a normal state of affairs, so get used to it.

Niels Bohr, a fellow scientist working with Rutherford, was obsessed with determining the atom’s structure. Of course, the thing is too small to observe, so he sought to determine its structure by observing how it behaved when he taunted it. He followed Rutherford’s thinking that electrons somehow traveled around a nucleus of protons and neutrons, but what explained why electrons didn’t simply fall into the atom’s dense nucleus? He posited the idea that they could only occupy certain well-defined orbits, so that an electron moving between orbits would disappear from one and appear in another instantaneously without traveling through the space between. This behavior gave the field of study its name and became known as the “quantum leap.”3

European physicists were fascinated with the weirdness of the electron. Sometimes it behaved like a particle, and sometimes it behaved like a wave. They lined up on either side of the issue, all rejecting the idea that an electron...
could do both. In 1926, Werner Heisenberg developed a celebrated compromise. At the heart of his explanation was Heisenberg's Uncertainty Principle, which postulates that an electron is a particle that can fairly be described in terms of a wave. He reasoned that one can precisely predict the “path” of an electron but never know exactly where it is on the path. Alternatively, he opined that the precise location of the electron could be located at any given instant, but its path could not be known. You can’t know both simultaneously. Thus, scientists must make peace with the idea that certainty is impossible in the prediction of the atom’s behavior because its electrons must be regarded as being everywhere and nowhere at the same time. Still, he argued, there is real merit and progress in predicting the “probabilities” of that behavior—just don’t obsess about the fact of uncertainty. Still, the notion drove many traditional physicists nuts.

The history of quantum mechanics over the last ninety years has been driven by the notion that crazy is good—the crazier the better. Nobel Laureate Richard Feynman advocated throughout his career about the importance of uncertainty and the role of doubt in the advancement of human thinking. What he had to say in the last century about physics applies equally to what we are up to today in the mediation of construction disputes.

- “Uncertainty should not frighten us. It is simply one factor out of many that influence how we make decisions. The fear is that we seek certainty . . . here is where we make mistakes.”
- “Freedom to doubt was born out of a struggle against authority . . . a struggle to allow us as a people to question—doubt—be not sure.”
- “Our connection to Galileo is our ability to doubt.”
- “The first principle is that you must not fool yourself—and you are the easiest person to fool.”
- “Science is the belief in the ignorance of experts.”
- “The human condition is a long history of learning how to fool ourselves.”

Decades later, Amos Tversky and Daniel Kahneman would champion the same ideas in their instrumental study of decision making under circumstances of uncertainty. Kahneman too would be rewarded with a Nobel Prize for his work on the subject. Tversky also would have received the award but for the fact that it is not awarded posthumously. The next section of this article addresses their work and explains why it is so important to take their work into consideration in the mediation of construction disputes.

Tversky & Kahneman’s Undoing Project
Daniel Kahneman is a descendant of Lithuanian Jews who was displaced by the German occupation of Paris and after World War II relocated to the newly declared Jewish state of Israel just in time for the first Arab-Israeli War. Questions about human behavior infused his professional and personal development throughout his life. He became a psychologist in order to do philosophy, “to understand the world by understanding why people . . . see it as they do.” Amos Tversky’s parents fled Russia to escape pervasive anti-Semitism in the 1920s and became pioneers in the building of a Jewish state. His mother was a member of the first Israeli Parliament and several that followed. His father was a veterinarian who declared to Amos that “animals experienced more pain than people and complained a lot less.” Amos dedicated his PhD dissertation to his father, who he said, “taught me to wonder.”

These two very different, and yet oddly similar, people embarked on an exploration about how people make decisions. Their journey took them from Israeli universities to U.S. universities, to British universities, to Canadian universities, and back again, where both studied under giants in the field of the psychology of decision making. Time, in time, they would become the giants. Together their journey veered from traditional thinking about decision making to a very radical realization that our decision-making faculties were so influenced by biases, intuitions, emotions, dramatic narratives, confirming descriptors, minimal evidentiary support, and often downright “fast and slow” lazy thinking, that many of our most important decisions were fundamentally flawed and risky in the extreme. Their research and writings initially generated a tidal wave of professional resistance, until it became so apparent that it replaced the traditional thinking itself, culminating in a Nobel Prize for the surviving Daniel Kahneman.

Kahneman and Tversky uncovered many obstacles to reasonable decision making across myriad fields of study that impacted all aspects of human behavior. For example, we “frame” our decision making around our mental comparisons of things. We decide differently when we are faced with an array of different choices—and the way the choices are presented to us greatly influence our selections. Often the comparison of choices is really “ideals” of choices, and we favor those choices that are similar to concepts of the ideal. These “similarity judgments” often lead to wrongheaded decision making. How? We categorize things to make them appear more similar, and what can make a thing more similar is nearly boundless: scents, memories, emotions, stereotypes, even the color of the day. These kinds of biases are widespread and difficult to assess in our decision-making process. We don’t just identify with what we know; we trust it. We bend our thinking about uncertain circumstances to make them conform to what we know is certain—regardless of the reality of the circumstances.

People leap from very little information to very big conclusions. It is so prevalent in our decision-making processes that Kahneman coined an acronym to help us resist the mistake: WYSIATI = What You See Is All There Is. Our decision-making process defaults to an associative machine that retrieves confirming data that conforms
People often make decisions based on their association of the subject matter of the decision with completely irrelevant data. This is called “anchoring.”16 We can be anchored to information that is totally irrelevant to the problem we are trying to solve. These anchors can adjust how we apply our predictive modeling as we think through a problem. Anchors can be economic, psychological, or environmental and can be greatly influenced by emotions, hubris, need, or regret. We also are biased by what we currently know, such that we resist new facts that are contrary to what we want to understand. We also base our predictions on what we know, ignoring “new knowledge.”17 Our biases are greatly influenced by “how” a similarity is presented to us. The more interesting the story, the more influential it becomes in adjusting how we make predictions and decisions. And once we adopt a particular hypothesis or interpretation, we grossly exaggerate the likelihood of that hypothesis or the importance of that interpretation, such that it becomes difficult to see things any other way.

If options are presented to us with “positive” outcomes, we are more willing to accept risks attached to the options. We often are talked into accepting risky options simply by the manner in which it is offered to us. “Can’t lose/sure thing” narratives are invitations to lose wrapped in alluring illusions. Kahneman and Tversky referred to this as “framing.” Framing is when you present an option in a way that influences the party to accept or reject it. If you emphasize gain, the risk appears acceptable. When you emphasize its loss potential, the option is viewed as less acceptable. The scary reality of our decision-making process is that we do not choose between things; we choose between descriptions of things.18

Our minds automatically make associations that bias how we make judgments and decisions. Words, ideas, images, sounds, and scents all generate associations for us—some good, some not so good. Being aware of how these associations bear upon our decision-making process is easier said than done.19 Illusions are not just visual. They are also mental. Predictable illusions occur if a judgment is based upon cognitive ease. The easier the association, the more biased we are to accept it and act upon it when making a decision. A reliable way to make someone believe a falsehood is through frequent repetition. Familiarity is not easily distinguished from truth.20 An unfortunate source of “falsehood by familiarity” is from so-called experts who market and sell them to the public as though they were commodities.21

Finally, we often substitute easier questions for hard questions when it comes to making decisions. If we cannot find a satisfactory answer to the harder question, we substitute an easier question and accept its answer as the answer to the harder question. Q: Is Joe competent? A: I like Joe. He’s friendly. He makes me feel comfortable and welcome. So, yes, Joe is competent. We make mistakes like this in our decision making frequently.22 We substitute questions, notions, and suggestions to assess risks, make predictions, and act on judgments. This kind of substitution can skew our judgment about making important decisions under uncertain circumstances. We even substitute “feelings of happiness/good will” for evaluative study of important data in our decision-making processes.23

Rules of Unlearning in the Mediation of Construction Disputes

Mediation is an essential process in the resolution of construction disputes. But it is only effective when the parties and their counsel approach it reasonably and with the joint plan of finding an end to the dispute. Unfortunately, mediation is often treated as an extension of litigation, where posturing replaces compromise and obstruction trumps responsible advocacy. All too often today, construction mediations have become mini-trials, where the parties square off to prove they are “right,” and their opponent must “lose.” Generations of American construction lawyers have been trained to “win” the mediation. They have been taught to demonstrate utmost confidence in their position, to show no fear, and, above all, to come back victorious. All sides to the dispute show up with their exhibits and experts planning to bludgeon the other side into capitulation. And when that doesn’t work, they ask the mediator to “declare a winner” through the mechanism of a mediator’s proposal. The mediation should not be treated as a ring for delivering body blows in advance of the bigger show that follows. We as construction lawyers ought to “unlearn” a few things in order to facilitate a successful mediation. Consider the following Rules of Unlearning.

1. **Distrust declarations of certainty.** “I can’t lose this case.” “It’s a slam-dunk.” Such braggadocio
assertions are fabrications. They are an indication of dangerous overconfidence. The demand for overconfidence can just as easily come from the client. Manage that expectation before the mediation. Doubt is a more powerful tool than confidence when it comes to managing risk in a mediation.

2. **Use doubt to challenge your assumptions.** Actively eschew confirmation bias in the evaluation of your own case. Advocate against your position in advance of the mediation. Know your weaknesses, not how to deflect them.

3. **Investigate how you have “framed” your outcomes and options.** Are your alternatives described in only positive terms, negating any consideration of failure? Identify potential obstacles to success over which you have little or no control. Express the possible outcomes/options negatively and explore whether the client has a different view about settlement.

4. **Beware of the Law of Small Numbers.** The universe of construction disputes is not data rich. Conclusions are drawn from “similar” cases, and what constitutes a similar matter is often biased in the extreme. Case evaluations are often highly subjective: the collection of facts, the priorities of applicable factors, the association of percentages of likelihood of success and damage estimates; these are little more than cues that influence the litigator’s “intuition.” But intuition isn’t subject to testing. In the end, all that supports the decision to refuse to compromise is guesswork hinged to untested rules of thumb. Are the expressed bases of the strength of your case numerically few: e.g., the statute of repose/limitation, a single witness, a handful of admissions in discovery? Explore whether the “story” of your case is more dramatic than it is compelling. Is it the client’s story or is it the lawyer’s telling of that story?

5. **Look for randomness.** Identify as many obstacles to success as you can over which you have no control: unknown decision makers, choice of law, differing perceptions of success/failure, black swans, etc. Apply numeric importance to each and recalculate your intuited percentage likelihood of success on the merits of the dispute.

6. **Don’t answer the wrong question.** Q: Why do you refuse to compromise? A: I hate that smug jerk, and I’ll show him what’s what! Conflict often drives intuitive reactions, which have little or nothing to do with the strength or weakness of a claim or defense. Q: Is the strength of the claim stronger than the other side’s defense to it? A: I need the money to bankroll an acquisition. Or I really like the way our expert explains why we couldn’t reach substantial completion. Both statements answer the wrong question. What is the answer to the right question? Or is it possible that there are multiple answers? How does that influence the decision to settle?

7. **Scout out surprises.** Nothing makes us take a second look at things more than the element of surprise. The capacity for surprise is an essential aspect of life. It keeps us alive and alert. We passively expect our normal models of thought to maintain us until something shakes our faith in them. So, shake things up. Put doubt to work. Ask the “what if” questions that can shake your faith in the strength of the claim. What if our expert tanks? What if the arbitrator doesn’t enforce the statute of repose to bar the claim? What if . . . ?

8. **Discipline intuition.** We intuitively associate data with beliefs and act upon the intuition. We do it so instinctively that we don’t see ourselves doing it. As a result, we often demonstrate an excessive willingness to predict the occurrence of unlikely events based only on an intuitive expectation. And to complicate matters, we often are insensitive to the quality of evidence we use to form the intuitive instinct. What You See Is All There Is (WYSIATI). The combination of WYSIATI and associative coherence tends to make us believe the stories we tell ourselves. So, discipline your intuition. Anchor your judgment of success on the merits of a claim to plausible and testable data and question the strength of your evidence.

9. **Kill all the experts.** Do your experts provide you anything more than the illusion of validity? Their subjective confidence is not a reasoned evaluation of the probability that their judgment is correct. Do they do anything more than tell a good story? If the strength of your case hinges on the telling of a story, you ought to rethink your settlement strategy.

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Mediation should not be treated as a ring for delivering body blows in advance of the bigger show.

10. **Never pretend.** When faced with making important decisions under circumstances of uncertainty, don’t pretend to know what you don’t. The unforgivable sin is to chart a false path for the client.

Construction lawyers, especially litigators, are hard wired to overcome uncertainty, as though it were a foe, a virus, an obstacle to winning, a barrier to success. We’ve dressed the term in soiled vocabulary. It’s unreliability, inconstancy, fickleness, caprice. We won’t touch it with a ten-foot restraining order. We think it infects us with equivocation, hesitancy, vacillation, disquiet. You don’t see those words in our website bios. To the contrary, construction lawyers in mediated disputes are typically quick to articulate a most confident sense of definiteness, assuredness, irrefutability, and certainty.
Both sides. If it comes time to strap on the armor and do battle, then, by all means, go to war with all the confidence necessary to survive it. But mediation is not the time for battles. It is a time for thoughtful testing of intuitions and assumptions, for challenging presumed strengths and weaknesses. It’s a great time to pull doubt out of the toolbox and let it tinker with your brain.

Endnotes
2. Einstein famously criticized quantum mechanics as a viable explanation of the behavior of atomic particles because at its heart is the notion that randomness permeates atomic behavior, making “certain” measurements impossible and irrelevant. To this Einstein is said to have remarked: “God does not play dice with the Universe.” Rutherford started the party in 1910, when he shot alpha particles (ionized helium atoms) at a sheet of gold foil. Surprisingly, some of the particles bounced back when he shot alpha particles (ionized helium atoms) at a sheet of gold foil. Surprisingly, some of the particles bounced back at him as others penetrated the foil. He concluded from this that the particles that bounced back had to be striking something dense, at the heart of the atom, while all the rest traveled through what had to be empty space, thus demonstrating that the atom was mostly empty space, composed of a dense nucleus. The only problem with that conclusion was that it controverted all of the conventional laws of physics. The old thinking said atoms like that shouldn’t exist.
3. See Bryson, supra note 1, at 142–43. Bohr’s novel theory explained that the reason that electrons didn’t collide catastrophically into the atom’s nucleus was because electrons could only exist in orbits that did not collide with the nucleus.
4. See id. at 144.
5. Schrodinger’s famous thought experiment captured the nutty aspect of the Principle. He said to think of a cat in a box that also contained an atom of a radioactive substance attached to a vial of hydrocyanic acid. If the particle degraded, it would break the vial, and the acid would kill the cat. If not, the cat would live. Of course, he said, you couldn’t know for certain which would be the case, so the quantum scientist must regard the cat both dead and alive at the same time.
6. Bohr is said to have cautioned that if you were not outraged by the idea of quantum theory, then you weren’t listening. When Heisenberg was asked how to describe the behavior of atoms, he said, “Don’t try.” Bryson, supra note 1, at 144–45.
9. Id. at 88.
10. Id.
11. Id. at 110.
12. Id. People filter a lot of noise from the sounds that they want to hear. They hear what they want to hear. This has come to be called “The Cocktail Party Effect.” This kind of selective listening and filtering of data is a strong bias that can cloud reasonable decision making. Id. at 135–37.
13. Id. at 148.
14. Daniel Kahneman, Thinking Fast and Slow 85–88 (Farrar, Straus, & Giroux 2011) [hereinafter Kahneman, Thinking Fast]. See also id. at 103, 114, 127, 154, 201, 209, 269, 336, 345, 402–06, 411, 417. We often intuit that we are fully informed about the circumstances surrounding our decision making. We fool ourselves into concluding that what we see is all there is (WYSIATI), when, in fact, there is so much more we don’t see.
15. Id. at 109–18. See also Amos Tversky & Daniel Kahneman, Belief in the Law of Small Numbers, 76 PSYCH. BULL. 105 (1971).
17. Lewis, supra note 8, at 197. Kahneman and Tversky dedicated much of their research to the subject of prediction. To them, judgment and prediction are equivalents. A judgment implies a prediction, just as a prediction implies judgment. However, a prediction is a judgment that involves uncertainty. Thus, prediction equals judgment “times” uncertainty: P = JU. The more biases play upon one’s judgment of similarities, the more uncertain is one’s judgment and the more doubtful the prediction.
18. Id. at 278. We choose what we most want, not what we can most likely acquire. And when what we want is presented to us as an alluring option, we accept the risks associated with it. See also Kahneman, Thinking Fast, supra note 14, at 87–88.
20. Id. at 62–70. We are “primed” to draw false conclusions about certain risks because they resonate with us more than actual facts. Id. at 137.
21. Kahneman is particularly wary of pundits and experts. “What supports the illusions of skill and validity?” Id. at 216–21. The answer is nothing. Indeed, their presentation of skill and training has a “halo effect” on their opinions, priming us to take what they say as Gospel truth. It isn’t their fault, really; it’s just that the world is difficult. Id. at 220. “The question is not whether these experts are well trained. It is whether their world is predictable.” Id. at 221.
22. Id. at 97. In this way, we generate intuitive opinions on complex matters and act on them in risky situations.
23. Id. at 98–105.
Strategies for Successfully Navigating Cultural Differences in Construction Negotiation and Mediation

By Adrian L. Bastianelli III, Wayne DeFlaminis, and Samarth Barot

Technology, transportation, and education continue to cause the United States and international marketplaces to grow, and, thereby, shrink the world. At the same time, immigration is diversifying the workforce and population throughout the United States and the rest of the world. Internationalization of the construction industry is growing rapidly.¹ As a result, construction lawyers, even those who practice in remote areas of the country, likely will be involved in more negotiation and mediation with companies or persons from other parts of the world or of differing cultures. Recognizing the cultural differences and how to respond to those differences in negotiation of contracts, change orders, and disputes will be increasingly critical to the construction lawyer’s success in tomorrow’s world. This article is focused on cultural differences between persons of different ethnic backgrounds and national origins. It is aimed at assisting the construction lawyer in understanding and effectively dealing with these differences in negotiation of contracts and change orders and resolution of disputes between culturally different parties.

However, cultural differences go far beyond differences in ethnicity and nationality. For example, every construction lawyer understands that there is a cultural difference between a construction contractor and a design professional. A lawyer negotiates differently than a businessperson, a CEO differently than a jobsite foreman, a federal government representative differently than a private sector representative, and an insurance claims representative differently than anyone else. On an even more basic level, there are cultural differences between men and women and millennials and baby boomers that affect how each group negotiates. It is not possible to address all types of cultural differences in this article; however, the principles and solutions suggested herein apply in very much the same way to all cultural differences.

Warning No. 1: Do Not Stereotype!

This article treats the citizens of each culture or country as having one homogenous personality. Of course, everyone knows that is not true. A native of New York City who works on Wall Street is likely to be culturally different than a West Virginian from a small coal mining town or a Nebraskan from a farming community despite all being from the same country. Even within families there may be cultural differences: People may be culturally different from their spouses, and children different from their parents. The youth of today certainly are culturally different than their forebearers. And finally, even people of the same cultural background may act differently from their counterparts.

While there always are differences in individuals within a single culture, the so-called dominant trait is a trait exhibited by a majority of the individuals within the group, which provides a basis for assigning the group a characteristic in this article. However, it is imperative not to stereotype groups because individual personalities within a group always vary. As a result, one must be extremely careful in generalizing based on country of origin, ethnic background, or any other grouping, and one needs to recognize that the person with whom she is negotiating may not have the traits typical of her country, region,
race, society, occupation, or religion. Still, understanding and considering the dominant traits of the group from which the person with whom the construction lawyer is negotiating originates may provide the lawyer with helpful insights into that person and how to structure a successful negotiation or mediation. But heed the warning: These are only guides, and one should always avoid assumptions that may be offensive.

Warning No. 2: One's Cultural Beliefs Are Not Right or Wrong in Comparison to Another's

Most individuals assume that their cultural beliefs are right or, at a minimum, better than another group’s cultural beliefs. However, it is not possible to fairly make such a judgment without having been raised in the other’s culture and understanding the reasons for the beliefs. In most cases, there is no right or wrong answer; the cultures are just different. Judging or trying to change the beliefs of a negotiating partner will make the negotiation much harder and could well sink it. For example, China’s cultural beliefs date back 2,500 years to Confucius. If a negotiator thinks she is going to change those beliefs in a single negotiation, she likely is wrong. Thus, the negotiator should accept the other’s cultural beliefs and try to work within them.

What Is Culture?

Culture is defined as “customary beliefs, social norms, and material traits of a racial, religious, or social group; also: the characteristic features of everyday existence (as diversions or a way of life) shared by people in a place or time.”2 “Culture consists of the socially transmitted behavior patterns, attitudes, norms, and values of a given community.”3 It is the “social adhesive that binds a group of people together and gives them a distinct identity as a community.”4

Human nature, culture, and personality form a pyramid that defines the person.5 At the base of the pyramid is human nature, which is composed of common human traits that are inherited and common to most humans, such as love, joy, sadness, anger, and fear. Almost everyone loves, laughs, cries, and feels fear. The middle level is culture, which is the knowledge that the individual has collectively learned from the environment in which he or she was raised. Culture is learned, not inherited. At the top of the pyramid is personality, which is a combination of inherited traits, culture, and life experiences.

Culture is a set of characteristics shared by the members of one group that those outside the group do not necessarily share. “Culture relates to the symbolic aspects of our lives, those places where we are constantly making meaning and composing our identities.”6 Every human being belongs to multiple cultures. That is, every human being belongs to various “groups connected by generation, socioeconomic class, race, sexual orientation, ability and disability, political and religious affiliation, language, gender, and discipline or work role.” 7

Culture is in the mind and is always changing. More importantly, it can be changed through discussion and education. A person who moves to the United States in midlife from Japan may maintain many of the cultural habits ingrained in her from birth, but the U.S. culture will begin to erode some of those habits and change her.

The classification of individuals into groups in this article is not meant to discern or debate which group is right or wrong, but to identify the groups so that negotiators understand the cultures for the purpose of developing negotiation strategies and procedures.

The failure to recognize and allow for cultural differences can cause disaster in negotiation or mediation; it is seldom a help to settlement.8 Thus, when negotiating or mediating with a person of a different culture, it generally behooves the construction lawyer to spend the time to assure that both negotiators understand the other’s cultural background, traits, and thought process.

One author referred to culture as the “silent language” that people are speaking in addition to the words that are said aloud,9 another as the “invisible differences” between people,10 and another as “a powerful underground river that shapes expectations, understandings, and actions . . .”11 How does the construction lawyer effectively negotiate with others who are speaking a “silent language” and have “invisible differences” with her? The following attempts to answer this question.

Hofstede’s Study and Others Identify Common International Cultural Differences

Several academics, most importantly Geert Hofstede, have studied, researched, analyzed, and written extensively on the impact of cultural differences.12 These authors generally use several dimensions to compare different cultures. Some of these dimensions discussed below include:

- small versus large power distance;
- weak versus strong uncertainty avoidance;
- individualism versus collectivism; and
- time: monochronic versus polychronic.

Understanding how a construction lawyer’s negotiating partner fits into these dimensions can be important to the success of the negotiation or mediation.

Low versus High Power Distance

Power distance is defined as the extent to which the less powerful members of organizations and institutions accept and expect that power is distributed equally (small or low power distance) or unequally (large or high power distance).13 This equality/inequality is defined from the people at the lower level, not from above. It suggests that a society’s level of inequality is endorsed by the followers as much as by the leaders.14

In a low power distance culture, those having power tend to minimize the differences between themselves and their subordinates and delegate and share power to the
maximum extent possible. Discussion and consultation are desirable.10 Decisions of the leaders may be challenged or criticized by those below them. In a high power distance culture, decision making is generally concentrated at the top.11 Criticism and disagreement with upper management are undesirable and unacceptable.

If a construction lawyer is negotiating with a company from a low power distance culture, she needs to educate and negotiate with the lower-level representatives and use them to help bring their superiors to the negotiated solution. Leaving the lower tier out of the negotiation process could allow them to sabotage the deal. For a company in a high power distance culture, her primary focus should be on the leaders or final decision makers.

Eastern European, Latin, Asian, and African countries generally have high power distance ratings, whereas German and English-speaking Western countries tend more towards lower power distance ratings.12 The United States falls in the low to middle range.13

Low versus High Uncertainty Avoidance
Uncertainty avoidance deals with a society’s tolerance for unstructured situations.14 It indicates the extent to which a culture programs its members to feel either uncomfortable (strong or high uncertainty avoidance) or comfortable (weak or low uncertainty avoidance) in unstructured situations.15 Unstructured situations are novel, unknown, surprising, and different from usual or normal. However, it is not a measure of the society’s risk aversion characteristics.16

High uncertainty avoidance cultures need predictability, and their members try to avoid or at least minimize the possibility of uncertainty by strict behavioral codes, laws, and rules.20 Unpredictability brings stress and anxiety. Structure is sought. Conflict and change are viewed as threatening.21 Novelty and rapid change will not be received favorably.

When negotiating or mediating with members of a high uncertainty avoidance culture, early preparation is key. Negotiators need to take enough time to establish a schedule that both parties can abide by throughout the negotiation or mediation. Negotiators also should provide an early exchange of information and a method for identification of issues before the negotiation or mediation commences. It also is important to follow the procedures that have been established. Expecting the other party in the negotiation or mediation to deal with unpredictability or deviation from the plan likely will be a mistake.

On the other hand, in a low uncertainty avoidance culture, innovation is good, tradition is not valued for its own sake, and different is interesting. Conflict is not a problem but is rather viewed as potentially positive.24 Negotiators should take a significantly different approach in negotiating or mediating with a party from a low uncertainty avoidance culture than one from a high uncertainty avoidance culture. Innovative approaches to negotiation or mediation and the ability to change directions in midstream are now at a premium. A more aggressive approach that might involve conflict may result in a more positive outcome and likely will not derail the negotiation or mediation.

There is another significant difference between low and high uncertainty avoidance cultures, and that is how the culture understands truth. In high uncertainty avoidance cultures, there is a general belief in absolute truth; there can only be one truth.25 Someone from a culture with high uncertainty avoidance, such as Mexico, might say, “the truth is the truth,”26 whereas in low uncertainty avoidance cultures, members are more comfortable with ambiguity and chaos. To them there is no universal truth.27 Someone from China might say: “truth is in the eye of the beholder.” This difference in culture may dramatically change a construction lawyer’s approach to negotiating or mediating with persons of low versus high uncertainty avoidance cultures.

Eastern and Central European countries, Latin countries, German-speaking countries, and Japan are cultures with high uncertainty avoidance, whereas English-speaking and Nordic countries have low uncertainty avoidance cultures.28 The United States is on the low end but not the extreme low end.29

Individualism versus Collectivism
Individualism and collectivism are different sides of the same coin. They represent the degree to which individuals in a society are integrated into groups. In an individualist culture, the ties between individuals are loose; that is, everyone is expected to look after herself. The word “I” is indispensable. A collectivist culture is one in which people are integrated into strong, cohesive in-groups that continue protecting them in exchange for unquestioning loyalty and opposition to other in-groups. People are “we” conscious, not “I” conscious, and internal relationships are more important than the immediate task.30

In a collectivist society, members of an in-group perceive a common fate and highly value loyalty to the group.31 Decisions are made by the group for the group. Relationships are more important than tasks.32 A party may have the low price or best value, but if it has not established the right relationship with the other, it may not win the contract.33 Recognition of whether a negotiator is acting more for her own self-interest or is solely dedicated to the company’s interests is critical to success in the negotiation.

If a U.S. construction company is negotiating with a company from a collectivist society, it must be very careful in selecting its negotiator, particularly if it expects a long-term negotiation. Success in the negotiation likely will be dependent on the relationship developed between the two negotiators. It is important not to change negotiators in midstream after relationships have been developed. In contrast, in an individualist culture, the relationship is not nearly as important as the performance of the negotiator, and substituting a better or more informed negotiator often will help, not hurt, the negotiation.
In addition, it is important to determine whether the company is negotiating with one person who will make all the decisions or a group who will make a collective decision. People from the United States prefer the one-person-in-charge approach, whereas the French tend towards consensus decision-making. But interestingly, one study indicates that this is an area where men and women disagree. In the study, which focused on people from the United States, 78 percent of the males preferred one-person team leaders making the decisions, whereas only 35 percent of the females preferred that approach. The construction lawyer needs to consider which approach her counterparty is likely to follow. It may have a significant effect on her strategy and negotiating procedures.

Two-thirds of the individuals in the world live in collectivist societies. The United States is a highly individualistic country, falling to the extreme end of the individualism-collectivism scale. Individualism tends to prevail in developed and Western cultures, while collectivism tends to prevail in less developed and Eastern countries. Japan takes a middle position.

**Time: Monochronic versus Polychronic**

Understanding the other’s perception of time is critical to a successful negotiation. In a monochronic culture, like the United States, time is linear, quantifiable, and in limited supply. If it is not used, it is lost forever. It is important for people to use time efficiently, there is a sense of urgency, establishing and adhering to schedules is important, and tasks are best performed uninterrupted in sequential order. “Time is money” is an oft-repeated phrase in monochronic countries. The efficient use of time is more important than the task itself; thus, the task is often adjusted to fit the time available to perform it.

Conversely, in a polychronic culture, time is limitless (there is always more time), being is more important than doing, one task does not have to be completed before another is started, and tasks can be performed simultaneously. The performance of the task is not changed to fit the time available to perform it; instead, the time is expanded to fit the time needed to perform the task. The start time for a meeting is an aspiration, not a requirement. People should take time to “stop and smell the roses” and not always be in a rush. Patience is a virtue.

If an American construction lawyer is negotiating or mediating with an individual from a polychronic culture, she needs to understand that the negotiation may not start on time; there may be no rush to reach the actual negotiating phase; there likely will be a preliminary discussion of family, friends, colleagues, and vacation; and once the parties reach the negotiation phase, the other negotiator likely will be in no hurry to start negotiation or reach a settlement and may spend immense amounts of time dealing with what the construction lawyer considers to be irrelevant issues. If the negotiator doesn’t understand what is happening and have the patience to deal with it, it may frustrate both parties and stymie any agreements.

The United States is extremely monochronic. Latin, African, and Middle Eastern countries and Italy all tend to be polychronic countries.

**Cultural Differences in Negotiating and Mediating**

While Hofstede focused on the cultural differences in all aspects of society and life, there are more specific cultural differences in negotiating styles and philosophies that are discussed below.

**Win-Win versus Win-Lose**

One of the major questions a construction lawyer should consider in a cross-culture negotiation is whether her counterpart’s culture perceives a negotiation as a win-lose process, also known as competitive negotiation, or a win-win process, also known as collaborative negotiation. The United States used to be a country with primarily a win-lose culture. Then, a book by two Harvard professors, Roger Fisher and William Ury, titled *Getting to Yes,* was published in 1981. This book promoted the concept of win-win or collaborative negotiation—negotiation that focuses on interests, not positions. As a result, today, most negotiators in the United States understand the difference between positions and interests and normally are looking to find a win-win solution in negotiation.

A win-win negotiation strategy generally works well for negotiation of a construction contract, where there are ways to provide a party with a significant benefit without the other party having to incur a high cost. But in negotiation of construction disputes, it can be harder to achieve a win-win outcome because such disputes are often only about the money, i.e., when one party gets money, the other must provide that money out of its pocket. This does not, however, mean that a construction lawyer should ever give up looking for interests, such as consideration of the long-term relationship between the two parties, that will allow it to achieve a win-win solution. In any event, a construction lawyer should try to understand if her counterpart is looking for a win-win solution or is out to win the negotiation or mediation at all cost, including at the expense of the other.

As might be expected, different cultures view whether negotiations are win-win or win-lose propositions in dissimilar ways. Generally, Japanese negotiators view negotiation as a win-win process, whereas most individuals from Spain view it as a win-lose situation. The United States falls in the middle.

**Opening Offers**

Another cultural difference that construction lawyers should consider when negotiating or mediating with a person from another culture is the amount of, and how to frame, the opening offer. Opening offers are generally more important in an international negotiation than in a domestic negotiation in which all parties understand what the negotiator is saying through her opening offer. For example, in the United States, it is not unusual to begin
negotiation, particularly negotiation of a claim or dispute, with an unreasonably high offer made in an aggressive fashion, blaming the other for all of the problems, and demanding complete relief, if not more—referred to by one author as the “blame and claim game.” An American construction lawyer expects, or at least should not be surprised by and should understand such tactics. Another example is Saudi Arabia, where the negotiators are likely to engage in and anticipate aggressive bargaining, requiring that each start with a high opening demand. In contrast, the Japanese are likely to start with an offer that is very close to or at their final goal, and may be offended by a “blame and claim game” or aggressive bargaining. Thus, the negotiation could be over after the opening offer if the parties do not understand each other’s culture and the reasons for the other’s opening offer.

Another example of the effect of cultural impacts on opening offers results from the fact that some cultures emphasize agreeing first on the general overarching principals of the deal and then filling in the details, while other cultures start by negotiating the details such as price, delivery date, and quality, which then become the agreement. People from the United States typically come to the table with a long list of details to negotiate. French negotiators are more likely to start by negotiating the essence of the contract, which will dictate the path of further negotiations. This emphasizes the greater importance of the opening offer and preliminary meetings in international negotiation.

**Contract Terms or Relationships**

As discussed above, in high uncertainty avoidance cultures, relationships are often more important than the terms of the deal. People from the United States (a culture with lower uncertainty avoidance) tend to focus on closing the contract terms as fast as possible. Once the terms are in writing, they are inviolate—“a deal is a deal.” Other cultures often are more focused on developing the relationship and see the contract simply as an expression of the relationship during performance. They view the relationship as the essence of the deal. Therefore, it is important to understand whether the construction lawyer is negotiating with someone focused on establishing the terms of a contract to be enforced in court or for the purpose of establishing a relationship to assist the parties in the future construction of the project. Being blind to how the negotiating partner sees the process and the resulting product can be devastating.

**Formal or Informal**

Even if the negotiator has not met any of the representatives on the other side of the table, does she start a negotiation using first names, patting her counterpart on the back or even hugging her? What about discussing personal issues, like children, dogs, and vacation? Should she take off her coat and roll up her sleeves in an effort to develop an immediate friendly informal mood with the others at the negotiating table? Many people from the United States do. However, negotiators from many other countries would find this approach offensive. Germans and Japanese likely would be far more formal, using official titles, avoiding personal anecdotes, speaking in a very structured manner, maintaining distance, and avoiding touching. They would never give the other a hug or remove their coats and roll up their sleeves.

Cultures differ in the amount of touching that is deemed permissible. Some frown on cross-gender touching. In the United States, touching is generally acceptable, including cross-gender touching, although this may be less acceptable in today’s world. In Japan women often hold hands, but not men. Mediterranean men tend to touch and hug each other. Eye contact differs by culture. In the United States and Canada, direct eye contact is a sign of reliability and trustworthiness. In Japan, looking down is an indication of respect.

The formality of the other negotiator might transmit a lack of a desire to reach a deal, but it also might not. Similarly, a lack of eye contact may indicate a lack of resolve, confidence, or fortitude in some cultures but not others. The construction lawyer must understand this, or she could make a major mistake in the negotiation or mediation. A construction lawyer must know the formality and physical restraints that the other party expects in order to avoid offending the other party and to ensure that her actions are not misinterpreted.

In addition, people from some cultures are very direct in communicating their positions, while individuals from other cultures tend to avoid confrontation and direct communication. One example of the difference in direct and indirect communication styles can be seen in the Camp David negotiations that led to a treaty between Israel and Egypt. At first, the Egyptians viewed the Israelis’ direct communication as a form of aggression and an insult, whereas the Israelis viewed the Egyptians’ indirect communication with impatience and suspected them of insincerity. Avoiding these inaccurate perceptions may be key to reaching a settlement.

**Sensitivity to Time**

“It is said that Germans are always punctual, Latins are habitually late, Japanese negotiate slowly, and people from the United States are quick to make a deal.” Similarly, it is often said that Indians perceive themselves as insensitive to time and Italians take their time and are in no rush in negotiations. Stereotypes aside, all cultures tend to view time differently, and each party must understand the other’s view of time. One party who is always punctual must understand that the other party is not necessarily showing disrespect or a lack of interest in reaching a deal by being tardy; the party may simply see the start time as an aspiration, not a requirement.

Patience is an attribute of all good negotiators, but many negotiators from the United States do not have it. They want to close on the deal as quickly as possible. This
weakness will be a more serious detriment in negotiation with someone from a polychronic culture. So, the American construction lawyer must understand if the other negotiator hails from a society where time is limitless and must develop her strategy and approach accordingly.

**Recommendations for Cross-Cultural Negotiation and Mediation**

**The Starting Point—Know Your and the Other Negotiator’s Cultural Dimensions**

Cross-culture negotiation and mediation should start with an assessment of the construction lawyer’s own cultural values. She cannot address the cultural differences with her negotiating partner and plan her strategy without first understanding where she comes from and what her hidden dimensions are.

Enrique Zaldivar, a professor at American University who teaches on cultural differences, published a book entitled *My Unique Cultural Lens: A Guide to Cultural Competence*. It includes a test that forces the reader to go back to her grandparents’ beliefs and then move through their life, stopping at key points including grade school, high school, college, work positions, and city changes, and ending today, answering questions to help identify the reader’s beliefs and biases at each step along the way. At the end, he provides a process to summarize the reader’s hidden cultural biases today. Few people go through this test and arrive at the answer they thought they would.

Once the construction lawyer understands her cultural characteristics, it is important that she also understand how her negotiating partner may perceive her. The other negotiator may be setting or adjusting her negotiating strategy based on her perception of the construction lawyer’s culture.

After the construction lawyer has this basic understanding of herself and her negotiating partner’s likely perception of her, she can move to the next step, i.e., understanding the culture of the other. The discussion above provides the construction lawyer with a list of traits that she should analyze in evaluating her counterpart before she begins the negotiation or mediation process. *Getting to Yes* provides an additional list of differences, some overlapping, that should be considered in cross cultural negotiations and mediations:

- Pacing: fast or slow?
- Formality: high or low?
- Physical proximity while talking: close or distant?
- Oral or written agreements: which are more binding and inclusive?
- Bluntness of communication: direct or indirect?
- Time frame: short term or longer?
- Scope of relationship: business only or all encompassing?
- The expected place of doing business: private or public?
- Who negotiates: equals in status or the most competent people for the task?
- Rigidity of commitments: written in stone or meant to be flexible?

So, how does a construction lawyer go about discovering the cultural traits of her negotiating partner? A good starting point is *Kiss, Bow, or Shake Hands*, which provides a cultural overview, tips for doing business, negotiating strategies, and protocols for more than sixty countries. A more recent edition, entitled *Kiss, Bow, or Shake Hands: Courtrooms to Corporate Counsels*, addresses the legal system in fifty countries and provides tips on cross-culture negotiations.

More importantly, most people want to discuss their cultural beliefs and are willing to explain why they are different from the beliefs of the other’s culture. Many negotiators, however, are unwilling to ask the questions because they view the other culture’s beliefs as strange or inferior. The key is to remember Warning No. 2 above—in most cases, the other culture is not wrong; it is just different. Probing questions, particularly if asked in a nonjudgmental manner, generally will be welcomed by the other and result in the elimination of basic misunderstandings.

When developing a profile of the other party, do not forget that the other negotiator may not fit the stereotype of his culture. So, try to look beyond the surface.

**The Pre-negotiation Phase**

As discussed above, most negotiators from the United States are monochronic. They want to breeze through the pre-negotiation phase and move quickly to resolve the key issues in negotiation and close the deal. In most cross-culture negotiations, that is a mistake. The pre-negotiation or pre-mediation phase is critical to the success of the actual negotiation and mediation.

The pre-negotiation and pre-mediation phases serve multiple purposes. During the pre-negotiation or pre-mediation conference, the parties should tackle the cultural issues head-on and educate each other regarding the “invisible differences” between the two societies from which the parties come. Of course, one party’s culture may make it difficult for that party to even make such disclosures in a direct and forthright manner. For example, negotiators from the United States need to understand that the Japanese company’s opening offer will not be inflated for negotiation, that the aggressive “blame and claim” tactics of the American company will offend the Japanese, and that the decision making of the Japanese lies almost exclusively with the president of the company. The failure of the American company to recognize these factors could result in a loss of the deal.

The pre-negotiation or pre-mediation discussions by the parties of their cultures allows each party to educate the other regarding its own traits and how to understand and interpret its actions during the negotiation or mediation. This in turn allows each to develop its negotiating
strategy, but more importantly it minimizes the chance of misunderstanding and misinterpretation of the other’s actions during negotiation or mediation.

In the pre-negotiation or pre-mediation phase, the parties also begin to develop a relationship with and trust of each other. If one of the individuals is from a collectivist culture, where relationships are more important than the task, developing a relationship with her counterpart is mandatory, and the pre-negotiation or pre-mediation phase is a good starting point.

The pre-negotiation or pre-mediation phase should be used to establish a plan to reach a settlement that fits both parties’ cultures. However, where there are two conflicting cultures, that may not be possible. In that case, the party not being required to adapt to the other’s culture must appreciate that it is getting its way and recognize that it may need to bend a little, or at least acknowledge the cultural differences. Both parties must remain open throughout the negotiation or mediation to reinitiate discussion of the cultural differences and address cultural problems.

When cultural issues impact a negotiation or a mediation, each party typically retreats to its corner and blames the other party’s culture for poisoning the water. In most cases, both parties believe even more strongly than before that the other’s culture is simply wrong or bad, which blinds the negotiators to the other’s points, arguments, and interests. Seldom do the parties try to see and understand the other’s perspective. Thus, in the pre-negotiation or pre-mediation phase, the parties should anticipate cultural difficulties in the negotiation or mediation and establish a mechanism to address those issues if a dispute or impasse arises that has cultural overtones.

One common concern in all negotiations and mediations is the fear of being taken advantage of in the negotiations. A lack of familiarity with the other’s culture often increases this apprehension. Most negotiators, while wanting to achieve a good deal benefitting themselves, would be satisfied if they were assured of a fair and reasonable agreement. The inner fear of a bad deal drives many negotiator’s strategies and actions. Thus, it is important to develop a negotiating structure to allay those fears.

The more a party knows, the less likely it is to feel that it is being taken advantage of. If the party has enough information to assess the risk and benefits of the deal to both sides, both parties have a better ability to be comfortable in judging the fairness of the deal. Thus, it is even more important in a cross-culture negotiation or mediation that the negotiation or mediation plan contain provision for an honest and extensive exchange of information.

In the pre-negotiation or pre-mediation phase, the parties should always address the starting point of the negotiation or mediation. Getting off on the wrong foot can make negotiation or mediation very difficult, if not destroy the process before it gets underway. And styles of starting the negotiation or mediation vary widely across cultures, from high opening offers with harsh rhetoric to offers with no fat delivered with a dignified apology.

Possibly the greatest barrier to successful cross-culture negotiation or mediation is language. If parties do not understand the words being spoken by the other, there is little chance they will understand the nuances of the negotiation resulting from the “silent language” or “hidden differences.” As a result, the language barrier should be one of the first issues addressed in a cross-culture negotiation or mediation. The right interpreter needs to be selected.

Negotiating with a Different Culture
As indicated previously, culture is what gives a group of people a distinct identity and makes them different than other groups. So, how does a construction lawyer negotiate with a person of a different culture? Does the lawyer try to force the other to adapt to her culture, believing that this provides her the upper hand in negotiation? This could easily make the other uncomfortable and unwilling to openly negotiate. Does she adapt to the other’s culture, believing this will allow her to make the other feel more comfortable and willing to reach an agreement? This could result in missteps because she does not understand the nuances, subtleties, and silent language of the other’s culture. Or does she combine elements of each party’s culture, believing this to be the start of a compromise? This approach, of course, has the possibility of a disaster because no one knows what is real.

The parties should develop a strategy and approach based on the circumstances of each negotiation and the parties involved. Under all circumstances, being sensitive to and understanding the other culture’s traits and processes is a good policy. Further, education by both parties to ensure that each understands the other’s culture is almost always beneficial to the negotiation. However, it is probably best for each party to follow its own cultural norms while being sensitive to, and educating the other on, what it is doing.

If the construction lawyer elects to adapt to the other’s culture in the negotiation, she needs to let the other know of that decision or confusion could reign. Using the example from above, if an American company known for high opening offers and a “blame and claim” approach to negotiation decides to adopt its Japanese counterpart’s approach to negotiation and make an opening offer that reflects its final goal and is very respectful in doing so, the Japanese company may read the offer to mean that there is considerable room for movement and that the American company does not feel strongly about its position, when that is not the case. Again, education and forthright discussion in the pre-negotiation phase can help avoid this problem.

Cross-Culture Mediation
The use and perception of mediation differ from country to country. For example, in China mediation is a natural extension of Confucian ethics and has a long-standing
tradition.62 While the process differs, in the United States construction mediation became in vogue in the late 1980s and is embedded in the U.S. dispute resolution processes in construction today. In other countries, mediation is viewed with some skepticism, often due to a lack of knowledge and training on mediation. However, it is fair to say that in the twenty-first century, mediation has established a firm place in the processes for resolving international construction disputes.63

Generally, there are two styles of mediation: facilitative and evaluative.64 Many mediators in the United States use both styles at different points in the mediation. In some countries, courts order mediation. The evaluative and court-ordered mediations generally have some of the same characteristics. In evaluative mediation or court-ordered mediation, the claims of each party generally are evaluated in an effort to assess the likelihood of success or the risk of failure.65 The mediation operates in the “shadow of the law.”66 In contrast, the facilitative approach tends to focus on the parties’ interests and a reasonable result for both parties with little regard for who is legally right or wrong.67 Evaluative mediation is generally preferred in individualist, monochronic, high power distance, and high uncertainty avoidance societies.68 The parties need to understand how their mediator approaches mediation, and the mediator needs to understand what the parties expect and want.

One concern that often arises in cross-culture mediation occurs when the mediator meets privately in caucus sessions with each party, during which meetings the mediator agrees not to disclose information provided to the mediator in confidence. A party not experienced in mediation may not trust the mediator, particularly if she comes from a different culture. If a party does not trust the mediator, the party is unlikely to be open and honest with the mediator. Thus, when a party comes from a culture that does not regularly engage in evaluative mediation, the parties may want to select a facilitative mediator and avoid caucus sessions and ex parte conversations as much as possible.

As with other cultural issues, education is key when mediating with a party from a country that does not regularly use mediation. Even in those countries that use mediation, the process may be different, a fact that all should understand. This dictates an open discussion of the process and concerns by the parties and the mediators. In addition, few mediators have cultural training and may not see the cultural issues.69 It is important to vet the mediator and make sure she is sensitive to and understands the cultural issues likely to impact the mediation.

**Use of a Neutral Third Party to Overcome Cultural Differences in Negotiation**

If the negotiation is large enough to warrant the expenditure, the use of a third-party neutral, such as a mediator, to assist the parties in negotiation can be a tremendous benefit to overcoming cultural differences in the negotiations. However, in selecting the neutral and structuring the arrangement, the parties must be mindful of the widely divergent perceptions by different cultures of processes like mediation.70

Bob Peckar, of Peckar & Abramson, P.C., advocates a process similar to a dispute review board (DRB)71 when establishing cross-culture joint ventures between companies of different countries to procure and perform large international construction projects. A third-party neutral who speaks the language, understands the “hidden differences” and “silent language,” and is acceptable to both JV partners is engaged to assist in the negotiation of the joint venture agreement and the bidding of the project. However, the neutral and the parties should also continue to meet regularly throughout the performance of the contract to avoid tensions and head off disputes and issues resulting from cultural differences.

**Ensuring Diversity on the Negotiating Team**

In today’s increasingly diverse and globalized construction economy, companies and individuals need to understand changing demographics to remain competitive. The need for diversity and inclusion is more than just moral and political—all cultures stand to benefit through engagement, discussion, and education. For instance, studies have shown that heterogeneous teams (teams that are comprised of diverse individuals) tend to be more creative, harder working, and higher performing as team members expect to hear new information and differing viewpoints, and, therefore, are better prepared for discussion and consensus-building.72

Diversity is the range of human differences, including but not limited to race, ethnicity, gender, gender identity, sexual orientation, age, social class, physical ability or attributes, religious or ethical values system, national origin, and political beliefs. Diversity can be further subdivided into two parts: (a) inherent diversity, which includes traits that you are born with, such as gender, ethnicity, and sexual orientation, and (b) acquired diversity, which includes traits that are gained from experience, such as awareness of and increased sensitivity to gender differences.73 Inclusion is involvement and empowerment, where the inherent worth and dignity of all people are recognized.74

Including at least one member on the negotiating team who understands the culture of the other side of the negotiating table can be an effective strategy. One study found that a team that has at least one member who shares a client’s ethnicity is 152 percent more likely to understand that client than a team without a member who shares that client’s ethnicity.75 Teams should also strive to adopt a more inclusive culture in which all employees feel free to contribute ideas.

When faced with a cross-culture negotiation and mediation, a construction lawyer needs to understand that it is not business as usual. The other negotiator likely will have different values, traits, attitudes, and beliefs developed over centuries of time that are ingrained in the negotiator’s basic human fabric. The construction lawyer needs to understand her culture and the other’s culture and address the differences in a robust pre-negotiation phase. Fortright discussions and
education of each other’s culture are key. Developing a relationship with the other before the negotiation or mediation starts is always beneficial. The construction lawyer needs to give more consideration to the amount and structure of the opening offer. Where there is a possibility of distrust between the parties, the construction lawyer needs to open up and exchange more information with the other than she might normally provide. She may want to consider engaging a third-party neutral or including members on her negotiation team who are familiar with the other’s culture, to assist in avoiding problems with the cultural differences. Tomorrow will inevitably bring a construction lawyer more interesting and stimulating encounters with people from different cultures, which will present new challenges and require an understanding of cross-culture negotiation to be successful.

Endnotes
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continued on page 39
The Intersection of International Arbitration and Construction Disputes: A Review of the 2019 Queen Mary University of London International Arbitration Survey

By Albert Bates Jr. and R. Zachary Torres-Fowler

Over the past decade, the annual Queen Mary University of London International Arbitration Survey (QMUL Survey) has become an invaluable resource for practitioners and academics in the field of international arbitration. Because international arbitrations are almost always confidential, surveys like the QMUL Survey pull back the curtain and offer insight into a field that is commonly misunderstood. Most recently, in November 2019, the Queen Mary University of London School of International Arbitration, in partnership with the U.K.-based law firm Pinsent Masons LLP, released its ninth annual international arbitration survey (2019 QMUL Survey), titled Driving Efficiency in International Construction Disputes—How Can International Construction Disputes Be Resolved More Efficiently Whilst Maintaining Fairness and Access to Justice?1 As the title indicates, the 2019 QMUL Survey holds particular significance for the construction sector (and therefore the readers of The Construction Lawyer) because this year’s edition focused exclusively on the field of international construction disputes. As a nod to the significance the construction industry plays in the field of international arbitration, the 2019 QMUL Survey marks the largest industry-specific survey the Queen Mary University of London School of International Arbitration has ever conducted.2

Given the 2019 QMUL Survey’s importance to both the international arbitration community and the construction industry, the authors intend to introduce this very important resource to a U.S.-based audience. This article does not, however, seek to repackage the analysis provided in the survey’s accompanying report authored by the Queen Mary University of London School of International Arbitration and Pinsent Masons (the Survey Report). Instead, the authors plan to highlight and contextualize the most significant features of the survey results—especially those that a U.S.-based audience will find the most interesting.

As explained below, the 2019 QMUL Survey confirms that international construction arbitration is a unique discipline that straddles the international arbitration and construction dispute fields.3 In fact, among the survey’s key findings is that respondents place high value on counsel and arbitrators with significant experience in international arbitration and the construction disputes sector.4 Some of the other most interesting results are listed below.

- International arbitration was the most common dispute-resolution process for international construction disputes among respondents. However, the results also indicated that international arbitration was viewed as an economically viable dispute resolution method only for disputes above a certain threshold amount.5 Because respondents also gave mixed reviews for other pre-arbitration/litigation alternative dispute resolution methods (such as mediation or dispute boards), the survey suggests that the international construction disputes sector lacks a reliable/effective method for resolving low-value construction disputes.6
- While respondents identified substantive experience in both construction disputes and international arbitration as critical criteria in arbitrator selection, respondents raised concerns over arbitrators’ ability to manage construction arbitrations efficiently and expressed a strong desire that arbitrators

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have scheduling availability, issue awards within reasonable periods of time, and retain strong case-management skills.7

- Respondents indicated a greater willingness to accept arbitrators who take a proactive role in managing the arbitral proceedings, suggesting a preference for a more heavy-handed approach than what might currently be anticipated by U.S. construction practitioners.8

- The majority of respondents believe that cost awards (i.e., awards where the panel allocates a party's attorney fees, costs, and other expenses associated with the arbitration to the other party) can be used to create more efficient proceedings—a departure from standard practice in the United States.9

The 2019 QMUL Survey should not, however, be immune from criticism. While the 2019 QMUL Survey is an invaluable resource to the construction industry, it was, in some ways, a missed opportunity. The survey’s focus on efficiency in international arbitration—a near perennial issue of debate in the international arbitration field—limited the ability of the survey to capture the nuanced differences between international commercial arbitration generally and international construction arbitrations. International construction arbitration demands deep understanding of the technical, substantive, and legal issues unique to the construction industry, as well as expertise in international arbitration. By focusing on efficiency in international arbitration, many of the results in the 2019 QMUL Survey reflect results that would be common across non-industry-specific international arbitration surveys and limit the study of the industry-specific issues encountered in international construction arbitration matters. The authors raise this critique not to downplay the significance of the 2019 QMUL Survey—again, it is an invaluable resource to the construction sector. Instead, as explained below, the survey results should be viewed as building blocks and not the definitive authority on the unique features of international construction arbitration.

This article first describes the methodology the survey utilized and explains how that methodology affected the survey results. Second, the article sets out the key features of international construction arbitration as provided by the survey results. Third, the article explains the efficiency concerns that respondents raised in connection with the survey. Fourth, the article describes some of the solutions that respondents identified in the survey to combat the problems of efficiency in international construction arbitrations.

Methodology
To better understand and interpret the results of the 2019 QMUL Survey, readers must appreciate the methodology that researchers used to conduct the study. Specifically, as explained below, the methodology demonstrated something of a U.K./European skew, which appears to have affected some of the results. First, the research principally appears to have been conducted by persons based in, or with specific legal training from, the United Kingdom. The 2019 QMUL Survey was managed by the School of International Arbitration at Queen Mary University of London with the assistance of various attorneys from the U.K.-based law firm of Pinsent Masons.10 Further, researchers worked with an external focus group made up of “senior in-house counsel, private practitioners, arbitrators, technical experts, and third-party funders” from various geographic regions.11 However, many (though not all) of the individuals included in the focus group appear to have formal legal training in or other connections to the United Kingdom.

Second, the collection of information associated with the survey was broken into two phases. The initial phase involved an online questionnaire that was completed by 646 respondents12 in the period between May 31, 2019, and July 26, 2019.13 The Survey Report does not disclose how the online questionnaire was circulated; however, it is clear that a key resource for the survey authors was international arbitral institutions and prominent industry groups of construction lawyers, who circulated the questionnaire among their user bases.14 The latter phase involved 66 face-to-face or telephone interviews with certain respondents who expressed a willingness in the survey to discuss the questionnaire in greater detail.15 The interviews ranged from 10 minutes to 83 minutes and drew on respondents from all major geographic regions.16

Third, and maybe most importantly, is the makeup of the respondents themselves. Of the 646 respondents:

- Most were private practitioners (approximately 27%), followed by dual-arbitrators/counsel (approximately 15%), arbitrators (approximately 12%), expert witnesses (approximately 11 percent), and in-house counsel (approximately 10%);
- 42% were from civil law legal traditions, 40% were from common law legal systems; and 15% were from “mixed legal systems”;
- 33% were from Europe, 26% were from the Middle East, 13% were from the Asia-Pacific region, 9% were from North America, 8 percent were from Latin America, 4 percent were from Sub-Saharan Africa, and 4 percent were from “other”; and
- 51% had experience with transportation project
disputes, 31% had experience with process plant disputes, 28% had experience with pipeline disputes, 27% had experience with renewable energy disputes, 25% had experience with nonrenewable energy disputes, and 24% had experience with upstream oil and gas (other than pipelines).17

The lack of North American respondents18 is noteworthy given the robust nature of the U.S. construction industry and legal field. However, the results may serve as a reflection that prominent U.S. practitioners make up a relatively small segment of the international construction disputes field. As a result, many of the results in the 2019 QMUL Survey reflect practices or views that are not entirely familiar to U.S. construction attorneys or arbitrators.

Key Features of International Construction Arbitrations

An initial series of questions associated with the 2019 QMUL Survey were intended to define the contours of international construction disputes and identify the key features of international construction arbitrations. Although something of a self-fulfilling prophecy given the focus of the survey, the results emphasize that international construction arbitration is a unique discipline that raises issues not commonly seen in other commercial disputes. We discuss those initial results below.

International Construction Arbitration as the Preferred Dispute Resolution Method for International Construction Disputes

Based on the survey results, international arbitration is viewed as the most common form of dispute resolution for international construction disputes.19 Other forms of alternative dispute resolution, including domestic construction arbitration, mandatory senior representative meetings, mediation, litigation, and even dispute boards, were dwarfed by international construction arbitration.20 The survey also tried to identify some of the distinct features of an international construction arbitration. When asked, “[w]hat distinguishes international construction arbitration from other forms of international arbitration,” the three most common responses were “factual/technical complexity” (75%); “large amounts of evidence” (66%); and “multiple claims/multiple parties” (49%).21 Notably, issues concerning the enforceability of international arbitration awards—a highly prominent issue in the international commercial arbitration field22—were among the least common responses at 14%.23 Thus, notwithstanding the importance of award enforcement, respondents did not perceive the issues surrounding the enforcement of international construction arbitration awards as being materially different from the enforcement of international commercial arbitration awards. Further, the survey also highlighted that the most common causes of international construction disputes included (i) late performance (68%), (ii) poor contract management (63%), and (iii) poor contract drafting (63%).24 These results suggest that there is commonality in the causes of construction disputes around the world.

Arbitrator and Counsel Selection in International Construction Arbitrations

Some of the most interesting survey results concerning the features of international construction arbitration involved the need to select arbitrators and counsel with substantive construction experience.25 In response to a question concerning the preferred characteristics of an arbitrator for an international construction arbitration, “experience in international construction arbitration” (76%), “balance of legal and technical expertise” (60%), and “construction industry experience” (57%), were the top three responses.26 As the Survey Report authors pointed out, this result “echoes the survey’s findings that factual and technical complexity are defining features of international arbitration in the construction sector.”27 That said, despite the desire for technical expertise, the survey also indicated a general consensus (62%) that purely technical experts were not commonly utilized as arbitrators among respondents—though a substantial minority of respondents said otherwise.28 Thus, the need for substantive legal training, in addition to significant experience in the construction disputes field, appears to be an important characteristic for arbitrators serving in an international construction arbitration.

The results of the 2019 QMUL Survey concerning the use of technical experts as arbitrators are also interesting because, despite the infrequency of nonlawyer arbitrator appointments, respondents indicated a general willingness to consider technical experts as arbitrators under certain circumstances—if the principal matter in dispute was technical in nature (53%); if the technical expert had legal qualifications (41%); if the tribunal was composed of three arbitrators (33%); or if there was a balance with lawyers on the panel (24%). Taken together, the QMUL Survey results demonstrate that, while respondents remain open to the appointment of technical experts as arbitrators, in practice, parties are often reluctant to do so. The results of the 2019 QMUL Survey mirror the results of a 2018 industry survey related to U.S.-domestic construction arbitration published in the Journal of the American College of Construction Lawyers where 48.1% of industry respondents (e.g., counsel and arbitrators) preferred to use nonlawyers as arbitrators on an arbitration panel, but a majority of arbitrator respondents stated that nonlawyers were appointed to serve on their arbitration panel less than 10 percent of the time.29

Apart from the discussion concerning preferred arbitrator qualities, the results are also noteworthy in that, when respondents were asked to identify the most important characteristics of efficient counsel, 60% of respondents ranked “technical knowledge of and experience with international arbitration” and “technical knowledge and experience with construction” among the most significant qualities.30 The only two higher-ranking responses related to the ability for counsel to “focus on key issues to win the case, rather than every point” (63%) and the
ability to distill complex facts into digestible submissions (61%). The responses indicate that while general advocacy skills remain significant, respondents place a higher value on experience in the international and construction fields and equate experience in those two fields with more efficient arbitration outcomes.

Anomalies Concerning International Arbitration Seat and Rules
Notwithstanding the above, there were a few responses related to the survey questions that appeared somewhat anomalous, especially from the perspective of a U.S. audience, concerning the preferred international arbitration seats and rules. Specifically, the survey authors included questions concerning the preferred arbitral seat and institutional rules. Interestingly, the most common seats were London (46%), Paris (35%), Dubai (26%), and Singapore (22%).31 Notably, those seats are distinct from past QMUL Surveys, which, aside from London, Paris, and Singapore, include other cities, such as New York, Hong Kong, Geneva, and Stockholm, as the most preferred arbitral seats.32 The exclusion of New York and the inclusion of Dubai as key arbitral seats in the 2019 QMUL Survey speak to the influence that the Middle East is perceived to have on the international construction arbitration sector.33 Similarly, the survey authors also asked the respondents to identify the most commonly used arbitral institutions, and the two highest-ranking institutions were the ICC (71%) and the LCIA (32%).34 The ICC’s prominence is consistent with past surveys concerning preferred arbitral institutions and is not surprising given that the ICC Arbitration Rules are the default arbitration rules for many prominent standard form construction contracts, including the International Federation of Consulting Engineers (FIDIC) suite of contracts.35 Indeed, according to the ICC’s own statistics from 2018, the construction/engineering sector generated 224 cases in 2018—the biggest contributor of cases for the ICC, accounting for approximately 40% of its new 2018 caseload.36

The prominence of the LCIA—instead of institutions like the AAA/ICDR, which oversees a significant number of international construction disputes37—is somewhat surprising and may reflect the demographics of the survey respondents. Despite the number of respondents that identified the LCIA as one of the most common institutions for international construction arbitrations, according to the LCIA’s most recent caseload statistics from 2018, the LCIA had only been referred approximately 32 construction arbitration disputes. By way of comparison, according to the ICDR’s 2018 case statistics, the ICDR administered 113 new international construction arbitrations in 2018.38

Efficiency Concerns in International Construction Arbitration and Construction Disputes
Efficiency in international construction arbitration was the survey’s principal focus. The survey authors sought to identify whether efficiency (mostly time and cost concerns) was a prominent concern among respondents and how concerns of efficiency created incentives for and against the use of international arbitration in the construction sector. Somewhat surprisingly, given the survey’s focus, a majority of respondents (67%) indicated that efficiency concerns rarely influenced their decision to utilize international arbitration.39 Instead, respondents appear to believe that other features of international arbitration (e.g., flexibility, finality) outweigh the perceived inefficiencies.40 As the survey results indicated, the ability to avoid national courts, select arbitrators, ensure confidentiality, avoid local political pressure, and secure enforcement were among the reasons respondents often selected international arbitration to resolve construction disputes. In some ways, given the complexities involved in international construction arbitration, it may not be entirely surprising that respondents were more willing to deemphasize efficiency over other most substantive concerns such as the need to select arbitrators with both technical and legal expertise and the need to avoid rigid local court rules/regulations.

The survey results seem to suggest that international arbitration is the only reliable dispute resolution mechanism for international construction disputes given that other alternative dispute resolution methods received decidedly mixed reviews.41 For example, when asked how often parties voluntarily comply with pre-arbitral decisions rendered by entities such as dispute boards, the plurality of respondents, at 41% said infrequently while 31% said about half of the time and only 28% said frequently.42 As a result, the ability to enforce international arbitration awards, and ultimately coerce a party to comply, appears to be a highly significant reason why international arbitration appears to be the preferred dispute resolution model for the international construction sector. In that vein, it is telling that a majority of respondents (67%) showed support for mandatory compliance with pre-arbitral decisions as a pre-condition to arbitration.43

The survey results concerning pre-arbitration dispute resolution methods comes in contrast to methods more commonly used in North America. For example, notwithstanding the 2019 QMUL Survey results, nonbinding pre-arbitration dispute resolution methods—such as mediation or nonbinding dispute resolution methods such as nonbinding dispute boards tend to be the norm among U.K-centric projects, nonbinding dispute review boards tend to be the preferred dispute board method in North America. In many ways, the variations between the North American approach to pre-arbitration dispute resolution and the approaches reflected in the 2019 QMUL Survey indicate that the usefulness of pre-arbitration dispute resolution methods depend heavily on the cultural backgrounds of the parties.44

The lack of effective alternative dispute resolution...
methods other than international arbitration underscores another key finding by the 2019 QMUL Survey. Specifically, respondents were asked to identify “the minimum amount in dispute which you consider to be commercially sensible to pursue in an international construction arbitration.”45 Most respondents (42%) indicated that between $1 and $10 million would be a reasonable value.46 Only 11% of respondents indicated that a dispute valued below $1 million would justify an international arbitration.47 Interestingly, as the Survey Report pointed out, when just examining the responses of in-house counsel, 43% of respondents considered the minimum amount to be between $11 and $25 million.48 The take away is that while international arbitration remains the dominant dispute resolution method for most international construction disputes, given the decidedly mixed reviews associated with other pre-arbitral dispute resolution methods, there seem to be relatively few effective alternative dispute resolution methods for low-value disputes associated with international construction projects.

Noticeably absent from the 2019 QMUL Survey, however, were questions concerning the effectiveness of expedited arbitration procedures that many arbitral centers have implemented in recent years to resolve low-value disputes through international arbitration. The authors question whether these expedited procedural rules may assuage respondents’ concerns over a lack of effective alternatives for the resolution of low-value disputes.

Resolving Efficiency and Other Concerns Involving International Construction Arbitration

Although overall time and cost efficiencies ranked low among respondents’ concerns, there was a general consensus among respondents that inefficiencies in international construction arbitrations nevertheless existed. Specifically, when asked to identify factors that commonly make international construction arbitration inefficient, respondents selected the following top reasons: party tactics (53%); poor case management by arbitrators (51%), large amounts of evidence (42%), and arbitrators/counsel inexperienced in handling construction disputes (42%).49 In light of these apparent concerns, the 2019 QMUL Survey sought to identify how respondents believed those inefficiencies could be best combatted. We discuss the results below in the context of how (i) specific actors (e.g., arbitrators) can improve efficiencies and (ii) what specific procedures parties can implement to improve efficiencies.50

Efficient Actors in International Construction Arbitrations

Under the heading “Efficient Actors in International Construction Arbitration,” the 2019 QMUL Survey raised questions concerning the behaviors of the key players in international arbitrations—arbitrators, clients, counsel, experts, and arbitral institutions—to identify how those individuals/entities might improve overall efficiencies within an arbitration.51 While not all of the findings associated with this series of questions were noteworthy, some are a reflection of ongoing trends in international arbitration. Below we review the more interesting ways in which respondents believe that actors in international construction arbitrations can improve efficiencies.

Arbitrators

On the topic of arbitrators, respondents were offered twelve different options and asked to identify the key characteristics of an efficient international construction arbitrator. The top four responses were (i) issues award within a reasonable period of time (70%); (ii) willing to make difficult decisions (68%); (iii) possessing case and counsel management skills (68%); and (iv) having technical knowledge of construction (63%).52 While the fourth characteristic, “having technical knowledge of construction,” is consistent with the broader theme that technical expertise in construction arbitration is critical, the other responses merit further discussion.

Arbitrators—Delays to the Issuance of Awards

The need for arbitrators to issue awards within a reasonable time has been a topic of significant debate in international arbitration circles.53 This has been particularly true for international arbitrations governed by the ICC rules, which, as mentioned above, tends to be the most common set of international arbitration rules used in international construction arbitrations.54 Much like the AAA/ICDR rules, the ICC rules require a tribunal to issue an award within a set period following the closure of the final substantive merits hearing in the case.55 The time limit in the case of the AAA/ICDR rules is 30/60 days, respectively, from the final merits hearing, and the ICC gives sole-arbitrator and three-arbitral tribunals six and two to three months, respectively, to complete an initial draft award. However, although statistics are sparse,56 anecdotally, it was common for an ICC arbitral tribunal to require up to a year to prepare an arbitration award after the closing of the final substantive hearing. Although the ICC’s institutional procedures and guidelines contribute to the delays (i.e., for the scrutiny of the award), a fact of which the ICC itself is aware and has sought to address, as discussed below,57 the 2019 QMUL Survey indicates that there is a common perception that the arbitrators themselves greatly influence this problem. Arbitrator delays to the issuance of awards speak to broader concerns about procedures and practices common to international arbitration as a whole. International arbitration awards, especially in the context of ICC arbitrations, differ substantially from U.S.-domestic arbitration awards in that they frequently require hundreds of pages of factual and legal analysis aimed at ensuring that the award itself remains enforceable under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (aka New York Convention).58 This process requires a significant investment of time and can be a difficult balancing act when
an arbitrator is required to juggle multiple complex international arbitrations at once.

Delays to the issuance of international arbitration awards is made worse by, at least anecdotally, the fact that a relatively small set of international arbitrators are involved in a substantial number of prominent international arbitrations. Unlike U.S. domestic arbitrations, which most often use the list method, the most common method of arbitrator selection tends to be the direct party appointment method, where each party selects an arbitrator and the two party-appointed arbitrators select a chair. The party-appointment method creates an incentive for parties to choose arbitrators who are the most well-known and, as a result, arbitrators who often have the least available time. Thus, although the 2019 QMUL Survey respondents link delays associated with preparation of awards to the qualifications of individual arbitrators, the problem, in many ways, may be tied to a structural issue concerning the approach to drafting international arbitration awards and the arbitrator selection process.

**Arbitrators—Decisiveness and Managerial Skills**

The 2019 QMUL Survey’s questions concerning the characteristics of efficient arbitrators also indicated that respondents believed that arbitrators must be willing to make “difficult decisions” (68%) and have significant case and counsel management skills (63%). This feature of the 2019 QMUL Survey appears, in part, to speak to concerns over inefficiencies caused by “party tactics” and “poor case management by arbitrators,” which were the two most commonly cited causes of inefficiencies. As the survey report authors indicated, several interviewees raised concerns over a development in international arbitration circles known as “due process paranoia”—the theory that arbitrators are overly deferential to parties’ due process concerns at the expense of efficiency. Another factor respondents identified is that counsel and parties who are not experienced in international construction disputes may cause greater inefficiencies in the process. In either case, respondents indicate a greater willingness to select and accept arbitrators who exercise a higher degree of control over the arbitration proceedings and arbitration counsel (e.g., summary disposal of claims, cost orders).

At first glance, such a preference may not necessarily appear significant; however, this issue, at least in part, highlights a fundamental divide between common law and civil law traditions in international arbitration and suggests that common law practitioners may be more willing to accept features of civil law practice. Specifically, the common law and civil law legal traditions view the role of the judge/arbitrator in fundamentally distinct ways. To common law practitioners, the arbitrator/judge is more often viewed as a referee who controls the proceedings but generally permits the parties to present their case in the manner each party sees fit. By contrast, civil law practitioners see judges/arbitrators as more proactive entities who assert greater control over the proceedings. While this is not to suggest that common law practitioners are ready to accept civil law traditions, the respondents’ willingness to accept slightly more heavy-handed approaches by arbitrators—instead of an overly deferential approach—might be interpreted as a subtle shift among the preferences of common law practitioners.

**Clients/Users**

The 2019 QMUL Survey also asked respondents to identify how clients or users could best improve efficiency in international construction arbitration. The top three responses were (i) focus on resolving the dispute, rather than leaving “no stone unturned” (62%); (ii) approach settlement with an open mind (52%); and (iii) participate in the case (46%). Although stated in more ways than one, the results suggest that respondents believe that the most effective way for clients/users to improve efficiency is for those clients to try to settle the dispute, whether in whole or in part, and thus avoid the added expense associated with prolonged arbitration proceedings. The results also indicate that active participation by clients in the proceedings enables clients to better understand how the arbitration is being managed and how best to serve as the intermediary between outside counsel and internal management (in particular as it concerns document collection and witness testimony).

**Counsel**

The 2019 QMUL Survey similarly asked respondents to identify the key characteristics of efficient counsel. As mentioned above, respondents indicated that efficient counsel must (i) focus on key issues of the case, rather than every point (63%); (ii) distill complex facts, including technical issues, into digestible, pithy submissions (61%); (iii) retain technical knowledge of and experience with international arbitration (60%); and (iv) retain technical knowledge and experience with construction (60%). The results in this specific case are not surprising. Overarching advocacy and case management skills combined with technical subject matter expertise are key criteria. Interestingly, among the less important features of efficient counsel identified by the results was that counsel “does not allege breach of due process, unless it exists or is significantly probable.” In other words, respondents placed less priority on the need for counsel to refrain from raising due process concerns in its submissions and, thus, seem to take the position that the party responsible for curbing the effects of “due process paranoia” falls more to the arbitrators than counsel.

**Experts**

On the topic of experts, respondents chose from a list of eight potential characteristics of an efficient technical expert. The top four of those characteristics all related to how experts identify and explain the critical issues in the arbitration: (i) clearly and simply address technical
issues (81 percent); (ii) focus on key issues (74 percent); (iii) identify areas of agreement/disagreement with other experts (65 percent); and (iv) ability to distill issues (64 percent).30 While the results are not controversial, they may take on slightly added significance in the context of international arbitration. International arbitrations commonly require the parties to set out each of their cases in writing well in advance of the arbitration hearing. As a result, at the time of the hearing, the disputed issues in the case should, in theory, be clear to everyone involved. Doing so aids counsel and the tribunal by focusing their efforts and testing the evidence as it relates solely to the real issues in dispute. Party-appointed experts play a key role in this process. Specifically, expert reports, especially in construction cases where complex technical disputes require expert evidence, are often critical to enabling the parties and arbitrators to crystallize the key dispositive issues in the case. The failure of an expert to carefully set out his or her opinion inevitably leads to confusion and may risk causing the party to fall short in proving its claim or defense. By contrast, it is commonly the case that the parties do not entirely understand each other’s precise positions until pre-hearing submissions or later in a U.S. domestic arbitration. This approach, to some degree, may complicate the expert’s ability to distill and concisely present the material issues in dispute.

Arbitral Institutions

The most prominent characteristics of an efficient arbitral institution identified by respondents to the 2019 QMUL Survey all related to the institution’s ability/willingness to proactively manage the proceedings. The top five characteristics of an efficient arbitral institution were (i) “responsive” (57%); (ii) “actively monitors efficiency of the arbitration” (53%); (iii) “recommend/selects specialized arbitrators” (48%); (iv) sets “time limits for tribunal to submit award after final procedural step” (47%); and (v) “evaluates arbitrator performance, with feedback from counsel” (approximately 45%).71 The latter two responses, time limits for awards and arbitrator performance evaluations, are of note because they reflect many of the themes discussed above regarding arbitrator efficiency and represent specific areas that arbitral institutions have actively sought to improve over recent years.

Given the concerns over delays to the issuance of arbitration awards, arbitral institutions have modified their internal guidelines to avoid delays associated with the finalization of arbitration awards.72 In the case of the ICC in 2019, the arbitral institution modified its internal guidelines to require sole arbitrators and three-arbitrator tribunals to prepare draft awards for review by the ICC Court of Arbitration within two and three months, respectively, of the closing of the final substantive evidentiary hearing.73 The ICC guidelines also provided that the failure to timely draft an arbitration award could result in penalties for the presiding arbitrators.74 Although the ICC continues to battle the issue of untimely arbitration awards, the ICC’s statistics suggest that these modifications (in addition to others) have helped to curtail delays over recent years.75 Separately, concerns over the lack of public information about arbitrators and concerns over arbitrator availability have caused some arbitral institutions to actively solicit feedback about arbitrator performance following the close of a case (and led other third-party entities to develop robust databases of arbitrators).76 These efforts are aimed at identifying those arbitrators that, for whatever reason, cannot satisfy the demands required to oversee an international arbitration proceeding.

Apart from the above, it was noteworthy that a relatively small number of respondents believed that “[limited scrutiny of awards]” (approximately 21%) and no review of a tribunal award at all (approximately 11%) would improve efficiency. The “scrutiny of awards” refers to a time-intensive review process that arbitral institutions like the ICC follow to quality check each tribunal award to ensure it is accurate and enforceable.77 The 2019 QMUL Survey results indicate that, notwithstanding the delays associated with scrutiny under the ICC, respondents see value in having awards carefully checked by the arbitral institutions.

Efficient Procedures in International Construction Arbitration

In addition to the 2019 QMUL Survey’s questions concerning how specific actors in international construction arbitration could improve efficiencies, respondents were also asked to identify specific procedures that might be utilized to improve efficiencies. We discuss those findings below.

Streamlined Procedures

Based on a list of eight items, respondents were asked to identify which specific arbitration practices they would be willing to forgo for the sake of improved efficiencies despite the potential impact on the ability of a party to prosecute a claim or mount a defense. At least three of the top four responses do not appear to be entirely controversial: uncapped written submissions (41%); multiple rounds of submissions (40%); and oral closing arguments (38%). Indeed, for U.S. practitioners, page limits, limits on the number of submissions, and limited closing arguments in arbitration proceedings are fairly common. The response that is likely to contrast the most with those preferences of U.S. practitioners is that 38% of respondents were willing to do away with the uncapped cross-examination of witnesses.78 The use of a “chess clock” approach to managing hearing time, thus imposing limits on the ability of a party to examine a witness, is a fairly common practice in international arbitration proceedings. Therefore, it is no surprise that respondents felt comfortable doing away with uncapped cross-examination. The concept of chess clock is, however, less well accepted in the United States. Despite the benefits of a chess clock, according to a recent survey of U.S.-based construction arbitrators and advocates, the majority of arbitrators and advocates indicated...
that they preferred to seldom, if ever, utilize a chess-clock approach.

In addition to the above, 33% of respondents were prepared to forgo document production or disclosure for the sake of efficiency. What makes the result notable is that the authors would have expected a higher number given that 42% of respondents came from civil law backgrounds, where document exchange practices are not common. Moreover, while there is general impression by many practitioners in international construction arbitrations that at least some amount of limited disclosure should take place, as a technical matter, there is no immediate right to document exchange in international arbitration. Thus, although document exchange in international arbitration does not even remotely approach the extent of document discovery often seen in U.S. domestic arbitrations and litigation, the fact that more respondents did not indicate a willingness to give up document disclosure in international arbitration suggests that many civil law–trained practitioners, who might not otherwise view document disclosure favorably, see some value in the practice (even if on a limited basis).

**Summary Disposal of Unmeritorious Claims**

The 2019 QMUL Survey placed special emphasis on understanding how respondents viewed the use of procedures that permitted the summary dismissal of unmeritorious claims early in the process. Specifically, the summary dismissal of unmeritorious claims was the most commonly selected procedural initiative that respondents believed could improve efficiency (44%). When asked a follow-up question to identify how unmeritorious claims should be addressed at an early stage in the proceedings, the most favored approach (59%) was for the parties to petition the arbitrators to dismiss the claims altogether—as opposed to the imposition of punitive costs on the party who brought the unmeritorious claim (50%) or the use of institutional rules that required/encouraged arbitrators to strike claims on their own volition (49% and 45%, respectively).

While it is not uncommon for some panels to resolve certain sets of claims “on paper” (i.e., without the need for evidentiary hearings), the responses concerning the summary disposal of unmeritorious claims is reflective of the fact that there is no universally accepted procedure in international arbitrations to quickly address such claims. Instead, as the responses seem to indicate, there is a common concern that arbitrators too often allow large numbers of claims to proceed to the arbitration hearing, even if many claims lack merit on their face. In this respect, the U.S. perspective concerning the use of pre-hearing motions in U.S. domestic arbitrations is instructive and may serve as a model for international construction arbitration practitioners. While the use of pre-hearing motions received criticism by some within the U.S. domestic arbitration bar, survey results show that arbitrators and advocates generally find the practice helpful. Given that international arbitration proceedings commonly require substantial pre-hearing submissions as a matter of course (such as memorials), the application of a standard akin to a motion to dismiss standard or summary judgment standard may not be terribly difficult to apply in an international arbitration context.

**Arbitrator Appointment Method**

The 2019 QMUL Survey also raised questions concerning how respondents believed the arbitrator appointment process could be made more efficient. The most preferred approach, a “list of specialised construction arbitrators” (55%), underscores the common theme that arbitrators must have experience within the international arbitration and construction dispute field. However, the response is interesting for a number of other reasons. First, the responses suggest that the list method for arbitrator selection (used in the AAA and ICDR rules) may be the most conducive arbitrator selection method for construction arbitrations. However, the list method is not the common arbitrator appointment method under most international arbitration rules. Instead, as mentioned above, the most common method is the party-appointment method, where each party selects an arbitrator (without reference to a specific list) and the two party-appointed arbitrators select the third arbitrator to serve as chair. While arbitral institutions are certainly capable of providing (and often do provide) parties with lists of potential arbitrators, the list method utilized under the AAA/ICDR rules streamlines the process.

Second, the need for a specialized list of construction arbitrators speaks to a broader problem concerning the lack of publicly available information concerning specialist arbitrators in general. Indeed, even today, the most common method for identifying potential party-appointed arbitrator candidates is through internal private networks of individuals. The informational asymmetry associated with the current party-appointment methods means that clients and counsel rarely receive complete information about potential candidates or the total universe of options. Recently, third-party entities are attempting to utilize sophisticated database platforms to help parties to identify potential candidates, but much remains to be seen if these third-party databases will be successful.

**Hearing and Submissions Management**

In response to the question “[w]hat would improve the efficiency of hearings and submissions in international construction arbitrations,” the top three choices were (i) “arbitrators to identify issues to be covered in advance” (55%); (ii) “parties present agreed statements of facts/chronologies” (53%); and (iii) “time capped opening and/or closing submissions.” On their face, the responses are not terribly revealing and, once again, emphasize the perception that arbitrators should take a more active role in the proceedings. However, the number of civil law practitioners within the pool of respondents may have driven these results. Given the proactive role of the judge/arbitrator in
civil law traditions, civil law practitioners may expect arbitrators to issue their views on the disputed issues in the case well before the hearing.82 While the advanced identification of disputed issues is not a novel concept, the notion that the arbitrators, and not the parties, should identify the key issues to be covered in advance of hearing is a practice that many common law practitioners may feel somewhat disinclined to accept. While best practices would call on arbitrators to consult with the parties to develop a list of issues, permitting an arbitrator to decide which issues he or she believes should be covered at the hearing, while helpful for purposes of focusing the parties’ efforts, may also limit a party’s ability to present evidence that an arbitrator may not have fully considered.83

Cost Orders
In the United States, cost orders (or awards) for attorney fees are rare, and the American rule, that each party pays his or her way, typically rules the day. However, given the influence of other legal traditions in international arbitration, international arbitration proceedings commonly take a different approach and cost orders are far more common. Indeed, the 2019 QMUL Survey demonstrated broad support for the use of cost awards/orders, with only seven percent of respondents who stated that cost orders should not be used to improve efficiency and only 15 percent who stated that parties should bear their own costs and evenly split the fees.84

While respondents maintained a variety of views on how cost awards could be used to improve efficiencies, the largest consensus revolved around a process in which (i) a tribunal informs the parties in advance that cost orders will be used to improve efficiencies (46%); (ii) cost orders are issued on an interim basis before the conclusion of the proceeding (41%); and (iii) cost orders hinge on the overall outcome of a dispute (38%).85 Interestingly, although the third-most-common group of respondents favored an approach that allocated costs based on the overall outcome of the case, it is unclear how those respondents believed that such a cost allocation would improve efficiencies. It is not hard to envision a scenario where the prevailing party was also the party responsible for creating inefficiencies in the process. While contractual provisions that award costs/attorney fees to a prevailing party are common, the inconsistency in the 2019 QMUL Survey responses could have been the product of confusion among respondents.

Conclusion
In conclusion, the QMUL Survey should be viewed as an important resource for practitioners operating in the construction disputes field. While the survey’s results may be skewed toward U.K. and European practitioners, the results provide the U.S. construction lawyers with insight into how construction practitioners from around the world view and address very similar problems. Further, although the survey may not have, in some respects, captured some of the more nuanced topics involving international construction disputes, its relevance to the industry should not be discounted. Given that confidential arbitrations continue to be the overwhelmingly preferred method for resolving construction disputes, the information and research developed in the 2019 QMUL Survey is highly valued. As a result, the authors applaud the 2019 QMUL Survey’s authors for their efforts and hope that the 2019 QMUL Survey will serve as a building block for future efforts.

Endnotes
2. Id. at 4 (“In fact, it is the largest sector-specific empirical study we have ever conducted in international arbitration.”).
3. See generally id. at 7–17.
4. Id. at 12–13, 32–33.
5. A plurality of respondents concluded that the minimum commercially sensible amount in dispute to justify an international arbitration was between $1 and $10 million, whereas most in-house counsel respondents considered the minimum amount to be in the $11 to $25 million range. Id. at 15–16.
6. Although the 2019 QMUL Survey did not raise questions concerning recent efforts by various arbitral centers to implement expedited procedures to their arbitration rules, the authors point out that, although still relatively novel, these expedited procedural rules could be an effective mechanism for resolving low-value construction disputes. See, e.g., Int’l Chamber of Commerce, Arbitration Rules, art. 30, app. VI (Mar. 1, 2017); Int’l Ctr. for Dispute Resolution, International Dispute Resolution Rules, International Expedited Procedures, rr. E-1 to E-10 (June 1, 2014).
7. SURVEY REPORT, supra note 1, at 12–13, 32–33.
8. Id. at 27–28, 30–31, 38–40; Albert Bates Jr., Controlling Time and Cost in Arbitration: Actively Managing the Process and “Right-Sizing” Discovery, 67 DISP. RESOL. J. 313, 318 (2012) (“The role the arbitrator plays in arbitration should not be that of a dictator nor a referee. While respecting the principle of party autonomy, arbitrators have the authority and the obligation to be active managers of the arbitration process.”).
9. SURVEY REPORT, supra note 1, at 38–40.
10. Id. at 43, 46.
11. Id.
12. Respondents who disclosed that they had no experience with international construction disputes were excluded from the survey results—although it is unclear if those respondents are counted among the 646 respondents that completed the questionnaire. Id. at 43.
13. Id.
14. The International Centre for Dispute Resolution and American College of Construction Lawyers were among the organizations that circulated the questionnaire to their constituencies.
15. Survey Report, supra note 1, at 43.
16. Id.
17. Id.
18. Which ostensibly would include practitioners from Canada and Mexico—both with their own distinct legal practices.
20. In response to the question, “In the last five years, which dispute resolution procedures have you had experience with in the context of international construction disputes,” the top five responses were (i) international arbitration (71 percent), (ii) domestic commercial arbitration (39 percent), (iii) negotiation/senior representative meeting (34 percent), (iv) mediation (32 percent), and (v) dispute boards (22 percent). Id. at 9.
21. Id. at 10–11.
24. Id. at 7–8.
25. See id. at 12–14, 30–33.
26. Id. at 12–13.
27. Id. at 12.
28. Id. at 13–14.
29. See Survey Report, supra note 1, at 14, and Dean B. Thomson & Jesse R. Orman, Inside the “Black Box”: The Preferences, Practices, and Rule Interpretations of Construction Arbitrators, 12 J. Am. C. Construction Law. 37, 44 (2018) (noting that in response to the question “[d]o you prefer that your arbitration panels include non-lawyers,” 28.0 percent said always, 20.1 percent said often, 34.2 percent said sometimes, 10.6 percent said rarely, and 7.0 percent said never). That said, when the American College of Construction Lawyers survey asked arbitrators specifically, “[a]pproximately what percentage of your arbitration panels include non-lawyers,” the majority of respondents said less than 10 percent of the time. Id. at 45.
30. Survey Report, supra note 1, at 32–33.
31. Id. at 11.
34. Survey Report, supra note 1, at 11–12.
35. 2018 QMUL Survey, supra note 22, at 13; see also Survey Report, supra note 1, at 11–12.
37. See, e.g., Int’l Ctr. for Dispute Resolution, 2018 ICDR Case Data Infographic (2019).
38. See, e.g., id.
40. Id. at 22–24.
41. Id. at 18–21. Again, the authors note that expedited procedural rules prepared by many arbitral centers could represent a solution to this problem.
42. Id. at 18.
43. Id. at 19.
44. Id. at 18.
45. Id. at 15–16.
46. Id.
47. Id.
48. Id.
49. Id. at 24–25.
50. Among the series of questions that the 2019 QMUL Survey sought to explore the ways in which efficiencies could be improved in international construction arbitration were questions concerning technology, arbitrator/counsel fee structure, and third-party funding. The results from those questions are not particularly revealing and, thus, are not covered in this article. Id. at 36–38, 40–42.
51. Id. at 30–35.
52. Id. at 30–31.
55. See, e.g., Int’l Centre for Dispute Resolution, International Dispute Resolution Procedures, International Arbitration Rules, art. 30(1), at 28 (June 1, 2014); Am. Arbitration Ass’n, Construction Industry Arbitration Rules, r. R-46, at 32 (July 1, 2015); Int’l Chamber of Commerce, Arbitration Rules, art. 31(1), at 36 (Mar. 1, 2017).
56. According to ICC caseload statistics, the average duration of an international arbitration governed by the ICC rules in 2018 was two years four months—the longest duration of any of the most common international arbitration rules. 2018 ICC Statistics, supra note 33, at 15.
60. Am. Arbitration Ass’n, Construction Industry Arbitration Rules, r. R-14, at 20 (July 1, 2015); JAMS, Comprehensive Arbitration Rules & Procedures, r. 15 (July 1, 2014).
63. Id. at 25–26.
Arbitral Tribunals on the Conduct of the Arbitration Under the ICC

Abuse of Due Process in International Arbitration: Is Due Process

ICC Note to the

Rules of Arbitration

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Paranoia Irrational

Dispute Avoidance and Resolution: The Construction Industry

as the Cutting Edge of Evolution

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Spring 2020

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Notes from the editor

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construction arbitration practice.


Survey Report, supra note 1, at 28–29.

Int’l Ctr. for Dispute Resolution, International Dispute

Resolution Procedures, International Arbitration Rules, art. 12, at

20 (June 1, 2014); Am. Arbitration Ass’n, Construction Industry

Arbitration Rules, r. R-14, at 20 (July 1, 2015).


In addition to the list method, the AAA/ICDR offers parties

the Enhanced Arbitrator Selection Process, which provides access
to the AAA/ICDR’s entire roster of construction arbitrators or
specialized arbitrator panels such as the AAA MegaProject Construc-
tion Panels and allows parties to attempt to agree upon one or
more arbitrators without the necessity of the list and strike process.

See, e.g., Arb. Intelligence, supra note 76; Arb. Intelligence, supra note 76; Arb. Intelligence, supra note 76;

Arbitrator Research Tool, supra note 76.

Survey Report, supra note 1, at 29.


Thomson & Orman, supra note 66, at 24.

Survey Report, supra note 1, at 38–39.

Id. at 38–39.

most arbitrations they have participated in over the past ten years.

Survey Report, supra note 1, at 26–27.

exchange, such as the International Bar Association’s Rules on the Taking of Evidence in International Arbitration, are well-
accepted and attempt to strike the balance between civil law and
common law traditions. Int’l Bar Ass’n, IBA Rules on the Taking
of Evidence in International Arbitration (2010).


Id. at 27–28.

It is often said that arbitrators in domestic U.S. construction arbitration matters are reluctant to grant summary
disposition, except in exceedingly rare circumstances, out of
concerns for due process and the protection of the award. While
anecdotal evidence suggests that more arbitrators are becoming
more willing to dispose of unambiguous contractual or statutory
issues through summary procedures and otherwise actively
manage arbitrations, these issues also persist in U.S. domestic
construction arbitration practice.


Survey Report, supra note 1, at 28–29.

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Id. at 38–39.
Inherent in every construction contract is the concept of the delivery of a quality project. Quality is presumed at some level in every contract irrespective of whether it is stated or not. At its most basic level, quality is a measure of the builder’s ability to conform its idea of quality with the owner’s idea of quality, and the closer these two ideas are together, the less likely there will be a dispute or disagreement. The notion of quality might be expressly stated in the contract or it might be implied. But make no mistake: the idea of quality is in every construction contract.

In *Jacobellis v. Ohio*, Justice Potter Stewart famously wrote “I know it when I see it” when referring to obscenity.¹ The concept of quality is similarly elusive when it comes to a commonly agreed-upon and workable legal definition. In *Miller v. California*, the Supreme Court eventually decided upon a three-part test to decide what constituted obscenity.² Like obscenity, the idea of quality is both subjective and dependent upon an anchor concept that provides the basis for the parameters of the word. Each party to a construction contract expects quality construction to be provided. Yet it is very difficult to find a precise definition of quality that everyone in the construction industry can agree upon unless quality is expressly defined in the contract. Moreover, quality is often determined on a gradient—less quality to better quality. Payment for services rendered is based on the expected level of quality being provided. For example, the cost of level-three drywall finishing is less than that of level-five drywall finishing. Inherent in each level of finishing is a pseudo-empirical idea of quality for that particular finish level. But that notion of quality is anchored to a larger, more universal concept of quality.

Even the contracts that use the term *quality* rarely define that term. For example, the American Institute of Architect’s (AIA’s) Document A201 uses the term *quality* in at least three places but does not define quality. In those instances where quality is used to describe a requirement that a contractor must satisfy, then one must look to extra-contractual standards and definitions to interpret and ultimately enforce the quality requirement. Even if the term *quality* is not expressly stated in the contract, the concept or the idea of quality can and many times does provide the basis for a claim for breach of the warranty of workmanship (express or implied) or some similar legal doctrine. The problem lies in the fact that these legal doctrines can be merely another way of phrasing or positing a claim that really is about quality. This article will detail the inherent hermeneutical challenges with the term *quality* as it applies to construction contracts by using Plato’s universal Ideas and Kant’s distinction between common understanding and common sense.

Quality Exists as a Universal Idea

If quality is capable of providing meaning by its usage in a contract, then it must be a concept that has some type of universal acceptance. Quality can be explained or defined as an example of a universal form or idea. The ancient Greeks called this an Idea. With and through this idea, all hold to and agree to, at least insofar as a touchstone conceptualization is concerned, the universal elements or characteristics of the Idea. Ideas are just the sum and substance of the human mind. Ideas are, by definition, nascent; they are the nascent primordial substance that gives birth to all forms of thought in us and that are given at birth. In this context, the idea of quality, as will be explained below, is analogous to common sense. The idea of quality permits a meaningful conception of quality to be devised that allows, in turn, the explication of the common understanding by and through the use of our common sense. First, however, one must determine whether two or more people can read or hear the word *quality* and arrive at the same concept of quality *a priori*.

The conception of the universal Ideas was first explored in great detail by the ancient Greeks. In *The Republic*, Plato uses the example of a bed to help explain what an Idea is.³ He states that the bed was an idea created by God and was constructed by the bed-maker, but it could be painted by someone who did not see the bed but could conceive of the idea of the bed that was constructed.⁴ Plato states, “Beds, then, are of three kinds, and there are three artists who superintend them: God, the maker of the bed, and the painter.”⁵ Thus, the bed-maker and painter could conceive of the idea of a bed, as God has “allowed” such to occur *a priori.*
Plato states in *Timeaus* and *Politics* that the quantitative determinations of the phenomena of the object are of intellection only, whereas the Ideas behind the phenomena give the objects their identity and make them knowable in the first instance. In *The Theaetetus*, Socrates states that “neither the agent nor the patient have any absolute existence, but when they come together and generate sensations and their objects, the one becomes a thing of a certain quality and the other a perceiving.” All people have Ideas, but not all Ideas are of the same grade. Therefore, there may exist phenomena that we cannot perceive because we do not have the proper foundational Ideas that would allow them to be perceived. Moreover, one’s experience can alter slightly the recognition of the Ideas within one’s mind, but never does an Idea become unrecognizable from how it was first conceived. All subsequent changes in one’s perception of an Idea are simply variations on the theme that was imputed at conception.

We have evidence of the universality of Plato’s Ideas in other cultures as well, namely Buddhism. The universal Ideas are the “truth” as set forth by the Buddha in *The Diamond Sutra*, wherein he said that “truth is uncontainable and inexpressible. It neither is nor is not.” Later in *The Diamond Sutra*, Buddha states that we should develop a pure and lucid mind not depending on sound, flavor, touch, odor, or any quality. The Buddha is talking about universal Ideas and forms. The ability to function without recourse to phenomenological experience insofar as we are given sufficient universal Ideas at birth allows us to interpret our senses appropriately. Quality as a universal Idea is the subconscious touchstone for all things excellent and is rendered accessible by our minds at conception. Quality is thus a linguistic abstraction that gives meaning to something that is without any inherent phenomenal characteristics.

**“Quality” in the Text of a Contract**

If the term *quality* is specifically defined in the contract, then it is, in theory, much easier to enforce the contract. Similarly, if the work to which the quality concept is subjected is a specific item in the work that has a very specific and universally accepted standard, then it may be said to be of sufficient quality. But if neither of the two is present, then one is left to extrapolate from various sources an acceptable meaning of the term *quality* as it applies to the particular work, as well as to understand what the parties meant by using the term. Unlike obscenity, there are no commonly accepted tests for what constitutes quality in a construction contract. Consequently, one is left with either applying universally accepted definitions of quality or determining quality by comparing it to a universal Idea of quality. If the former is attempted, recourse to commonly held definitions fails to give an easy answer to a commonly understood and agreed-upon meaning of the word *quality*. For instance, *Merriam-Webster’s Dictionary* gives a definition of both a noun and an adjectival form of quality. It defines the noun “quality” as (1) a peculiar and essential character, (2) a distinguishing characteristic, and (3) degree of excellence or superiority in kind. *Merriam-Webster’s* defines the adjective “quality” as “being of high quality.”

In the AIA Document A201, perhaps the most widely used standardized construction contract in America, the term *quality* is used in two sections: the warranty provision in section 3.5 and the payment certification provision in section 9.4. From a hermeneutic perspective, it is problematic that in both these sections the word *quality* seems to carry two separate *Merriam-Webster’s* meanings. For example, here is section 3.5:

§ 3.5 WARRANTY

The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good *quality* and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the *quality* of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor’s warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and *quality* of materials and equipment.

Notice in the first sentence that the conjunction “and” is used to connect the terms *new* and of *good quality*. The term *new* in this context modifies the terms *materials and equipment*, in which case, “new” is commonly regarded as being superior to materials and equipment that are “used.” Therefore, the use of “quality” in the first sentence would be most closely related to the dictionary definition of “a degree of excellence and superior kind.” Stated differently, with the adjective “good” appended to “quality,” the drafters are intending the definition of quality to be of something “superior.” But in the next sentence “quality” expressly does not have to mean superior, as it can have “defects” if those “defects” are “inherent in the quality of the work.” Thus, in section 3.5, there can be faults that are inherent in the work that are of sufficient quality. The work can be free from faults but still not be of good quality. The converse is also true.

When the drafters of the AIA A201 utilize the term *quality of the Work*, the term seems to carry the meaning given by *Merriam-Webster’s* as more of a “characteristic.” Under *Merriam-Webster’s* definitions, the peculiar character of the work and/or the distinguishing characteristic of the work is separate from the notion of a
degree of excellence or being superior—separate, however, but not necessarily independent. The notion of what is considered to be quality—specifically, the idea of something being excellent or superior—is really just an intuited feeling about an Idea’s constituent parts aggregating to form what is subjectively the universal Idea of quality. And herein lies the greatest challenge to defining quality because the Idea of quality that is defined as being superior must contain within it the definition of peculiar characteristics. To put this into a syllogism, a quality product must contain elements of quality, but quality elements do not a quality product make.

Section 3.5 of the AIA A201 goes on to further state that “if required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.”13 “Kind and quality” implies that there are different types of quality materials that can be supplied. It does not state that evidence is supplied for quality materials, but rather the kind and quality of the materials. Clearly, quality in this context is used not as a standard of excellence but as a characteristic. The AIA A201 drafters could just as easily have used the term kind and characteristic and conveyed the same meaning. But in using the term quality, which has another meaning—one that is more universally associated with excellence—the drafters made the meaning of quality less clear, and thus less meaningful.

Looking to another source for a written definition of quality, the American Society for Quality (ASQ), a knowledge-based global community of quality professionals, defines quality as a subjective term for which each person or sector has its own definition. In technical usage, quality can have two meanings: (1) the characteristics of a product or service that bear on its ability to satisfy stated or implied needs and (2) a product or service free of deficiencies.14 The problem with defining quality in this manner is immediately apparent as the definition itself states that quality is subjective, which completely vitiates the use of an express, written definition. Notwithstanding its lack of usefulness in expressly defining what quality is, it does point to the fact that quality is a difficult word to define and, thus, arguably causes more confusion when used than when it is included in a contract.

Understanding “Quality”

If we cannot define quality, perhaps it is because “quality” is a word incapable of exact expression and, as such, is not a word that is dependent on anything and defines, rather than is defined by, anything. If quality exists from birth and is interpretable by the human mind instantaneously at birth, then by definition it is not dependent on language. Thus, we find ourselves in this epistemological cul-de-sac when it comes to defining quality in a contract. Confusion arises over whether quality is comprised of quantitative elements that aggregate to form quality. Or whether quality is a singular idea capable of definition. The answer is both. Quality is relative to time and space as far as the perception of quality changes along the time-space continuum. The subject uses the Idea of quality to intercept the object of quality along this continuum. But the object does not change the Idea of quality; rather, the perception of quality changes relative in time and space. The touchstone of the Idea of quality never changes. In the same way that one can devise mathematical formulas to arrive at the number 100, while the number itself is unchanged by the route to which it was achieved, so too can the perceptions of quality change, but the Idea of quality remains constant.

The time and space element of quality is critical to understanding quality in construction contracts. Specifically, it is the concepts of durability, value, and price that more than anything inform our beliefs as to what the concept of quality is and what the use of the term quality in a contract likely means. Durability is a concept interpreted through the lenses of quality. There is a direct linear relationship between durability and quality. Very few times will someone claim that a product is of high quality when the product is not durable. Of course, that begs the question of how long a product must hold its initial form of quality to be considered durable. Q.E.D., quality is a concept that is relative in both time and space.

To understand this better, consider a formal dining room table. It is given a value based on its perceived quality—call it Q1. That value is, among other things, a function of Q1’s relation to other pieces of furniture that fall within the penumbra of furniture in general and a dining room table in particular. The dining room table is given a Q1 score upon its perception by both the maker of the furniture and the purchaser of the furniture. For this example, assume that Q1 was high, as both parties perceived great quality in the piece. If after two years the table loses a leg, then Q1 has changed, at least from the perspective of the purchaser. The lack of durability has altered the perception of quality. So quality is relative to both time and space. What this example demonstrates is that value is a function of durability and price, and the idea of quality is informed by value.

Common Sense versus Common Understanding of “Quality”

Given that quality is assumed in a construction contract irrespective of whether it was expressly stated or not, how does one determine what quality was agreed upon? In Critique of Judgement, Kant made a distinction between common sense and common understanding.15 Common sense differs from common understanding insofar as common understanding is a judgment, not by feeling, “but always one by concepts.”16 “[C]ommon sense is a mere ideal norm.”17 “This indeterminate norm of a common sense is, as a matter of fact, presupposed by us, as is shown by our presuming to lay down judgments of taste.”18 When we assert common sense, it is not that everyone will agree with our judgment, but that everyone ought to agree with it.19

Importing these Kantian concepts into the analysis of
quality, common sense is then the collection of Ideas with which one is born. Common understanding is the application of those Ideas to life. We give examples to reason to the Ideas of common sense, and in so doing we seek common understanding. When one refers to quality, one is referring to common sense through the use of the universal Idea of quality. The use of the term quality in a contract perforse raises the universal Idea of quality. Even if the term quality is not used in the contract, quality is expressly assumed by the parties and, by extension, the universal Idea of quality is assumed. But when there are no precise standards or descriptions set forth in the contract—i.e., common understanding—, then the parties are forced to fall back on common sense.

It is this distinction and interplay between common sense and common understanding that is the key to contractual disputes, for many times what one party thinks is common understanding is sometimes to the other really just common sense. The two concepts are not synonymous; rather, common understanding is subsumed into common sense. Common understanding of the Idea of quality is not the same for every person and therefore cannot be assumed without precise definition in a contract. Thus, if we wish to avoid contractual disputes as to what constitutes quality, we must attempt to describe the characteristics of the constituent items in the contract. The more complex the project, however, the more improbable it will be that one can make a comprehensive description for each item as to the appropriate quality standard.

Consequently, one must include in the contract a commonsense definition of “quality” through the Idea of quality, with its constituent elements of value, durability, and price. One way to do this is a warranty provision. By inserting a warranty provision in the contract, the parties are agreeing to a temporal floor on durability. Because quality is relative to time and space, the parties are agreeing to the quality of the project (and all its parts) under contract. Similarly, price is also a function of determining quality. Along with a warranty, what is needed in a contract is a clause that states that the price paid is related to the quality of the product delivered unless otherwise qualified in the contract documents. Once again, the more the contract can set forth specific characteristics of the item to be delivered, the better, but as stated above, complete descriptions are rarely possible. So expressing what quality is relative to value, durability, and price assists in making the contract more intelligible to all parties.

In a construction contract, quality is very difficult to define. Describing quality by reference to its specific constituent elements and characteristics that aggregate to its objective whole is the best way to define quality in a contract. By doing so, a common understanding is achieved as to the nature of the object to which the idea of quality is being subjected. The problem is that it is very difficult to describe every element and characteristic. Consequently, the use of the term quality in the AIA A201, and likely in all written contracts, is most times mere surplusage if the common understanding, as accomplished by precise description of its constituent characteristics, is not precisely set forth. Quality is still presumed in every contract, however, so including clauses in the contract that reference the common understanding of durability, value, and price achieves the goal of allowing the parties to agree on the commonsense Idea of quality.

Endnotes
4. Id.
5. Id.
9. Id. at 28.
11. Id.
13. Id.
16. Id.
17. Id. § 22.
18. Id.
Court of Federal Claims Rules That Government’s Default Termination Was Improper

Default termination cases are among the most hotly contested construction disputes. In a recent decision from the U.S. Court of Federal Claims, the court addressed the reasonableness of a contracting officer’s determination that a contractor was unable to timely complete a project.

In 2014, the government and Alutiiq Manufacturing Contractors, LLC (AMC) entered into a fixed-price contract for the performance of certain repair works at Buckley Air Force Base in Aurora, CO. AMC commenced work in September 2014 and encountered some initial delays brought on by AMC’s failure to timely provide certain submittals as required by the contract. While these matters did cause some delay, the court determined that “[w]hile there were clear deficiencies in AMC’s contract performance, those deficiencies would not have been fatal to completion of the contract within thirty days or less of the 400-day performance deadline.”

Owing to AMC’s performance failures, the government issued a letter of concern and, then, on March 24, 2015, issued a Cure Notice. In the Cure Notice, the government identified AMC’s problems with submittals and criticized AMC’s construction schedules. The government demanded that AMC cure the problems and warned that the government may terminate the contract for default. In the weeks following the Cure Notice, AMC responded to the notice, made several personnel changes, and submitted a revised baseline schedule that was approved by the government.

Despite these changes and schedule approval, on May 1, 2015, the government issued a Revised Cure Notice that cited additional AMC failures in scheduling and managing the work. In response to the Revised Cure Notice, AMC made some additional personnel changes and submitted a letter wherein AMC complained that unforeseen subsurface conditions and change orders had impaired its scheduling practices. AMC also prepared and submitted a recovery schedule that projected timely completion of the project.

The government performed a “curious” review of AMC’s recovery schedule but did not perform a detailed or critical path analysis of the schedule. Nevertheless, on June 8, 2015, the government issued a termination for default notice to AMC, citing, among other things, AMC’s alleged failure to “prosecute the construction project with the diligence that will ensure its completion within the time specified in the contract.” The government also cited to the “belief of the onsite government personnel that the project is now at least 10% behind schedule.”

AMC filed a complaint with the Court of Federal Claims seeking, among other things, that the default termination be overturned and converted to a termination for convenience. Following discovery, AMC filed a motion for summary judgment on the matter of the default termination, but the court held that issues of fact precluded summary adjudication prior to trial. Following a trial on the merits and post-trial submissions, the court took up the issue of the propriety of the default termination.

The court ruled that the government’s default termination was improper and that it would be converted to a convenience termination. The court principally relied on the standard set out in Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987). The Lisbon case concerned a default termination based on schedule-related issues. In that case, the Federal Circuit ruled that in order to sustain a default termination, the government must demonstrate a “reasonable belief on the part of the contracting officer that there was no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for contract performance.” The AMC court also identified several factors that should be considered in making such a determination, including: (i) percentage of work completed versus time remaining for performance; (ii) failure to achieve milestones; (iii) problems with subcontractors or suppliers; and (iv) other pertinent performance factors. The Lisbon court also noted the FAR provisions governing default terminations, including the government’s duty to review the “specific failure of the contractor and the excuses for the failure.”
Applying the *Lisbon* and FAR standards, the AMC court ruled that the government’s default termination was improper. Specifically, the court ruled that the government failed to perform a proper analysis of potential excusable delay that impacted AMC performance and did not “seriously consider” AMC’s recovery schedule. The court also held that remaining alleged breaches of contract—including personnel and submittal issues—were “insufficient on their own to justify that the contracting officer’s belief regarding AMC’s inability to complete on time was reasonable.”

**Authors’ Comments:** Determining the propriety of a default termination typically requires an intensive factual analysis. The *AMC* ruling reminds owners that a decision to terminate should be made after a careful review of the facts and circumstances surrounding the alleged default. Courts may find that a “cursory” review of performance is insufficient to justify a default termination.


**Subcontractors’ Follow-on Work Sufficient for Mechanic’s Lien Filing Deadline**

Construction law practitioners know that mechanic’s lien statutes vary from state to state, and that such statutes require strict adherence to timing and procedural steps. The Court of Appeals of Oregon recently took on the issue of whether a subcontractor’s follow-on work served to revive its lien rights that existed for its original work scope.

The facts of the case were undisputed. Bethlehem Construction, Inc. (Bethlehem), was a subcontractor to Abeinsa Abener Teyma General Partnership (Abeinsa) in connection with the construction of the Carty Generating Station, a power plant in Oregon owned by Portland General Electric Company (PGE). Bethlehem supplied precast concrete panels to Abeinsa and completed its work in April 2015; this supply work was pursuant to a $122,851 subcontract. In December 2015, Abeinsa contacted Bethlehem to perform some additional engineering work, which Bethlehem performed. The engineering work was issued as a $587.13 change order to the original subcontract.

Bethlehem filed suit on its mechanic’s lien and the parties filed cross-motions for summary judgment. The trial court ruled that Bethlehem did not “cease to provide labor or furnish materials” until it performed the additional work requested by Abeinsa in December 2015 pursuant to the first subcontract change order. Accordingly, the trial court held that Bethlehem’s lien filed in January 2016 was timely.

PGE appealed to the Court of Appeals of Oregon, alleging that Bethlehem’s additional work in December 2015 did not renew its lien rights, such rights having expired against the April 2015 date for completion of the original subcontract scope. PGE contended that: (i) the work under the original subcontract was complete in April 2015, and the earlier work and the later work took place under separate contracts; and (ii) the December 2015 work was minimal, which, under Oregon law, was insufficient to revive Bethlehem’s lien rights.

The court first turned to Oregon’s mechanic’s lien statute, which states that “the date on which the 75-day [recording] period begins to run is the date on which the person’s contribution of the project is ‘substantially complete’.” The court then addressed each of PGE’s arguments.

The court rejected PGE’s contention that Bethlehem’s work was performed under two separate contracts, which would have rendered the portion of the mechanic’s lien for the original work scope untimely. The court noted that the change order executed between Abeinsa and Bethlehem referenced the original subcontract’s name and number and specified the “scope of change” with respect to work scope. The court ruled that the change order “evidences Abeinsa and Bethlehem’s shared intention that the later work and the earlier work comprised two parts of one single contract.”

The court next addressed PGE’s contention that the change order work was de minimis. The court identified that, in Oregon, “A contractor does not extend the time to file a lien by returning to a job to perform some trifling work or a few odds and ends after apparently completing the job and removing its equipment.” Bethlehem alleged that the engineering work it performed in December 2015 was not trivial because the work was added to the original contract as a new scope and was unlike the “odds and ends” type work alleged by PGE.

The court held that regardless of whether the work in question was added via change order, the engineering work from December 2015 was not trivial. Holding that “cost alone does not determine if work is trifling,” the court found that the December 2015 work was significant because the engineering opinion was necessary to permit Abeinsa to rely on the structural integrity of the panels.

The court concluded that Bethlehem’s recording of its lien in January 2016 was therefore within the 75 days it “ceased to provide labor, rent equipment or furnish materials” to the project.

**Authors’ Comments:** State mechanic’s lien statutes

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The court stated that the elements of an unabsorbed home office overhead claim are fact-intensive.

In late December 2015, PGE terminated its contract with Abeinsa. In January 2016, Bethlehem recorded a mechanic’s lien seeking payment for work performed under both the original concrete supply panel subcontract and the engineering change order (Abeinsa had failed to make final payment on the original scope of work and had failed to pay the change order).
The U.S. Court of Federal Claims recently ruled on a contractor’s claim for unabsorbed home office overhead incurred during a government-directed suspension.

In September 2009, the government awarded Kudsk Construction, Inc. (Kudsk), a contract for the renovation of barracks at an Army Reserve Training Area. Approximately ten days after the award, the government told Kudsk to suspend work pending the resolution of a bid protest. The protest was unsuccessful and on December 1, 2009, the government lifted the suspension and informed Kudsk that work could proceed.

Kudsk filed a claim against the government for recovery of home office “administrative and overhead” costs incurred during the several-month suspension period, which was denied by the government. Kudsk filed suit at the U.S. Court of Federal Claims, where the government sought dismissal of the claim for home office overhead costs.

The Kudsk court first stated that the elements of an unabsorbed home-office overhead claim are fact-intensive. Specifically, the court thoroughly analyzed the Federal Circuit’s decision in Nicon, Inc. v. United States, 331 F.3d 878 (Fed. Cir. 2003), which resulted in denial of a contractor’s claim for unabsorbed home office overhead damages. In Nicon, the Federal Circuit held that the following prerequisites are necessary to recover unabsorbed home office overhead: (i) “there must have been a government-caused delay of uncertain duration”; (ii) “[t]he contractor must also show that the delay extended the original time for performance or that, even though the contract was finished within the required time period, the contractor incurred additional costs because he had planned to finish earlier”; and (iii) “the contractor must have been on standby and unable to take on other work during the delay period.”

The court held that whether these prerequisites exist is likely a factual issue that may not be appropriate for summary adjudication, let alone the government’s motion to dismiss. With that procedural posture as a backdrop, the court then turned to the details surrounding Kudsk’s unabsorbed home office overhead claim.

In the case of Kudsk, the government alleged that Kudsk’s unabsorbed home office overhead claim was barred because: (i) such damages were not recoverable for delays occurring prior to the issuance of a Notice to Proceed; (ii) any calculation of unabsorbed home office overhead damages other than the Eichleay formula were only permissible in convenience termination settings; and (iii) Kudsk was unable to establish a factual predicate to meet the strict requirements for unabsorbed home-office overhead recovery.

As to the government’s first contention, the court noted precedent in which contractors were not permitted to recover unabsorbed home office overhead calculated pursuant to the Eichleay formula for delays that occurred prior to Notice to Proceed. The court held, however, that while the Nicon decision limited the use of the Eichleay formula to delays occurring after Notice to Proceed, Nicon did not serve as a “categorical bar” to recovery of unabsorbed home office overhead damages by Kudsk.

The court then addressed the government’s contention that Nicon served to bar any alternative formulas to Eichleay. The government argued that in Nicon, alternative formulas to Eichleay were only approved where pre-performance delay was later followed by a pre-performance termination for convenience. The court held, however, that Nicon and its progeny did not serve as a categorical bar to recovery of unabsorbed home office overhead costs during a pre-performance delay, and the court left open the possibility of damage calculation via an alternative method.

The court finally turned to the government’s argument that Kudsk had failed to establish the necessary Nicon factual predicate for recovery of unabsorbed home office overhead. On this issue, the court found that Kudsk’s complaint contained “a plausible unabsorbed home office overhead claim” that should survive a motion to dismiss. The court held open the possibility, however, of later adjudicating the claim via a summary judgment motion.

In addition to the unabsorbed home office overhead portion of the court’s ruling, the court also declined to apply the Christian doctrine to certain reporting requirements made necessary by the American Recovery and Reinvestment Act of 2009 (ARRA). The court noted that the terms of Kudsk’s contract were unclear with respect to funding by the ARRA, and that the government did not inform Kudsk that the contract may have been funded by the ARRA. The court also found that the specific ARRA reporting requirements were not a “deeply ingrained public policy,” in part because the ARRA reporting requirements were only in place for a five-year period and were in response to a specific economic downturn.

Authors’ Comments: The court denied the government’s motion to dismiss because the plaintiff had articulated sufficient grounds to state a claim. However, the court’s ruling highlighted the specific requirements necessary for maintaining an unabsorbed home office overhead claim and emphasized that these should be heeded by contractors seeking recovery of such costs.
CONSTRUCTION BILLS: RECENT CHANGES TO CONSTRUCTION LAWS

By Asha A. Echeverria and Brian R. Zimmerman

Federal Legislation and California Law May Limit Arbitration Agreements

Federal Forced Arbitration Injustice Repeal Act
On September 20, 2019, the U.S. House of Representatives passed the Forced Arbitration Injustice Repeal (FAIR) Act, which, if enacted, would invalidate pre-dispute arbitration agreements for employment, consumer, antitrust, and civil rights disputes. The bill is currently pending before the Senate Judiciary Committee and is opposed by the Trump administration.

Under the FAIR Act, an agreement to arbitrate a dispute that has not yet arisen involving one of these categories would be invalid and unenforceable.

While the employment category (and potentially, to a lesser extent, the antitrust and civil rights dispute categories) would impact the construction industry, the inclusion of consumer disputes poses a significant change to residential construction, where contractors often require arbitration through builder or remodeler trade groups.

The definition of “consumer disputes” is broad and applies to disputes between

(A) one or more individuals who seek or acquire real or personal property, services (including services related to digital technology), securities or other investments, money, or credit for personal, family, or household purposes including an individual or individuals who seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law; and
(B) (i) the seller or provider of such property, services, securities or other investments, money, or credit; or
(ii) a third party involved in the selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit.

Accordingly, the FAIR Act would effectively preclude pre-dispute arbitration clauses in contracts involving an individual related to the construction, remodeling, or other services associated with a personal residence or otherwise involving personal, family, or household purposes.

The FAIR Act passed the House 225 to 186, largely along party lines with two Republicans joining the Democrats in support. It was then referred to the Senate Judiciary Committee. In the Senate, the FAIR Act received 34 cosponsors, only one of which was a Republican, Rep. Matt Gaetz of Florida. Although the legislation has not garnered broader bipartisan support, some Republicans have shown an interest in addressing arbitration of disputes involving individuals. In a hearing titled “American Arbitration” before the Senate Judiciary Committee on April 2, 2019 (prior to the House’s passage of the bill), the chair, Senator Lindsey Graham (R-SC), expressed an interest in addressing mandatory arbitration clauses: “It bothers me that when you sign up for a product or service you are giving away your rights. For the rest of this year this Committee will take a long and hard look at how arbitration can be improved. We will try to find some middle ground. We will find a way forward. . . . There have to be fairness standards.”

On September 17, 2019, the White House issued a formal Statement of Administration Policy opposing the FAIR Act: “These blanket prohibitions will increase litigation, costs, and inefficiency, including by exposing the vast majority of businesses to even more unnecessary litigation. As written, the FAIR Act disregards the benefits of resolving disputes through arbitration, including lower costs, faster resolution, and reduced burden on the judiciary. By limiting contractual options, this bill would hurt businesses and the very consumers and employees it seeks to protect.”

The White House confirmed that “[i]f H.R. 1423 were presented to the President in its current form, his advisors would recommend that he veto the bill.”

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California Law Limits Forced Arbitration of Discrimination and Labor Code Claims

California’s governor signed Assembly Bill 51 (AB 51) into law on October 10, 2019. The law was scheduled to go into effect January 1, 2020, but instead is currently subject to a preliminary injunction as the courts review whether the state law is preempted by the Federal Arbitration Act (FAA).

AB 51 prohibits a person from requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or other specific statutes governing employment as a condition of employment, continued employment, or the receipt of any employment-related benefit. The law also prohibits an employer from threatening, retaliating or discriminating against, or terminating any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of specific statutes governing employment.

The law provides an enforcement mechanism for violations through the state’s Department of Fair Employment and Housing, including allowing the Department to bring a civil action or issue a right-to-sue notice to the complainant. The law further makes violations of the prohibitions on forced arbitration a crime and a violation of the FEHA.

The law was to apply only to contracts “entered into, modified, or extended” on or after January 1, 2020.

Prior to passage, many observers noted the likelihood of challenge to the law as preempted by the FAA. The U.S. Supreme Court has held that the FAA preempts and invalidates state laws that are more restrictive on arbitration. AB 51 was drafted with the FAA in mind and included a clause stating that it is not “intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act.”

In a challenge seeking to have the law declared preempted by the FAA, a group of business organizations filed a lawsuit on December 9, 2019, prior to the law going into effect, and on December 30, 2019, received a temporary restraining order blocking enforcement of AB 51. On January 31, 2020, the U.S. District Court for the Eastern District of California granted the request for preliminary injunction enjoining enforcement of AB 51, and on February 7, 2020, the court issued its written decision explaining its reasoning for the order. The preliminary injunction will remain in place pending final resolution of the case.

Conclusion

Although neither AB 51 nor the FAIR Act is yet an enforceable law, both demonstrate legislative support for limiting the role of arbitration in disputes involving individuals versus those between businesses. A particular focus of these efforts is in the employment context, where individuals may have unequal bargaining power in accepting jobs and where arbitration of abuse or misconduct claims may result in lack of adequate remedies or injustice. However, arbitration of consumer, and thereby residential, construction claims may also be curtailed based on lack of bargaining power or lack of knowledge of the legal process.

Endnotes

2. The legislation does not invalidate arbitration clauses in collective bargaining agreements between an employer and a labor organization or between labor organizations.
3. FAIR Act, § 401(3).
6. Id.

Cross-Cultural Strategies

(Continued from page 19)

63. JOHN W. HINCEY & TROY L. HARRIS, 1 INTERNATIONAL CONSTRUCTION ARBITRATION HANDBOOK § 1:9, at 30 (2014) [hereinafter INTERNATIONAL CONSTRUCTION ARBITRATION].
64. ADR Through a Cultural Lens, supra note 5, at 310.
65. Id. at 314–17.
66. Id. at 303.
67. Id. at 310–14.
68. Id. at 316–17.
69. Windows on Diversity, supra note 6, at 466–71; Mediation and Culture, supra note 41, at 11.
70. ADR Through a Cultural Lens, supra note 5, at 309–17.
71. See INTERNATIONAL CONSTRUCTION ARBITRATION, supra note 63, at 32–33.
74. Id.
75. Id.
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