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The Development of a Case Law in Construction Disputes Relating to FIDIC Contracts

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I. INTRODUCTION

As I did not choose the topic of my talk, I can only speculate about why, in the context of this conference dealing with "Precedent in International Arbitration," it might have been proposed. The reasons would appear to have included the following:

1. It is well established that construction contracts often give rise to disputes—they are endemic to construction;

2. The contracts published by the *Fédération Internationale des Ingénieurs-Conseils* (the International Federation of Consulting Engineers), commonly known as "FIDIC," are perhaps the best known and most widely used standard forms of international construction contract;

3. Since the first FIDIC standard form of construction contract was published in 1957, more than fifty years ago, they have provided for the final settlement of disputes under the Rules of Arbitration of the International Chamber of Commerce (the "ICC"); and

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4. While international arbitral awards are not regularly or systematically reported, it is well known that a substantial number of ICC arbitrations have involved FIDIC contracts.

For these reasons, one may, very understandably, be led to suppose that if ever there was an area where an arbitration case law should have developed, it would be in relation to the FIDIC contracts.

But what are the facts? How many arbitral awards dealing with the various standard forms of FIDIC contract have been published? How many of the awards that deal with a FIDIC contract interpret that standard form in a way that can be of subsequent value as precedent? Can it be said that a case law relating to FIDIC contracts, made up of arbitral awards, has developed and is given weight by arbitral tribunals in their awards?

II. AWARDS INTERPRETING FIDIC CONTRACTS

It is very difficult to know the exact number of arbitral awards that have been published dealing with the FIDIC contracts as, like other international arbitral awards, they are not published regularly or systematically in any single place. On the contrary, such awards are dispersed in different legal journals and books, published in different countries and, sometimes, even in different languages.

Moreover, often the award itself is not published but only an extract, a digest or a summary is provided. When extracts, digests or summaries are published, there is no way of being sure of their accuracy. If they have been translated into another language as well, this can only enhance the risk of error.

This being said, based on a review of the following sources:

1. collections of ICC awards (4 volumes) (1974-2000);

2. International Council for Commercial Arbitration – Yearbook Commercial Arbitration (1976-2007);

3. ICC International Court of Arbitration Bulletin (issues of June 1991 and May and November 1998);

4. The International Construction Law Review (1983-2007); and

5. other sources (*e.g.*, the ASA Bulletin, Mealey's International Arbitration Report, etc.);

only about 40 arbitral awards interpreting FIDIC contracts were found. Of these, only about 5 cited to prior awards interpreting FIDIC contracts.

40 awards is not a lot, especially when it is appreciated that they relate not to one, but to two quite different forms of FIDIC contract as well as to different editions of these two forms. The two forms and their respective editions are, as follows:

FIDIC Form of Contract	**Editions**
Conditions of Contract for Works of Civil Engineering Construction (the "**Red Book**")	1st (1957) 2nd (1969) 3rd (1977) 4th (1987)
Conditions of Contract for Electrical & Mechanical Conditions (the "**Yellow Book**")	1st (1963) 2nd (1980) 3rd (1987)

Moreover, most of the awards dealt, in whole or in part, with one issue, namely, whether a party had complied with Clause 67 ("Settlement of Disputes – Arbitration") of the FIDIC Red Book, which provided for a "time bar" or time limit within which to preserve the right to arbitrate.

All of the published awards relate to FIDIC contracts which have been published between 1957 and 1987. Since 1987, there have, of course, been new editions of the FIDIC contracts—in fact, an entire new suite of construction contracts was published in 1999—but, to the author's knowledge, no form of FIDIC contract published after 1987 has been the subject of a published arbitral award.

Thus, if by case law relating to FIDIC contracts one is referring exclusively to published arbitral awards, there is really not very much available. Moreover, what exists is unlikely to be very helpful in interpreting the current FIDIC forms of contract, as the current forms published in 1999 constitute not merely new editions of their predecessors but entirely new documents, with a new structure and clause numbering system.

However, Barton Legum has at this conference—quite rightly—defined precedent in international arbitration broadly as "any decisional authority" that may help to provide a reasoned basis for an arbitrator's decision.[1] Applying this broad definition of "precedent," which would include national court decisions, there is, in fact, quite a lot of useful precedent, as well as commentary, relating to FIDIC contracts which may be examined.

[1] *See* Barton Legum, *The Definitions of "Precedent" in International Arbitration*, *supra* at 5.

III. OTHER PRECEDENTS RELATING TO FIDIC CONTRACTS: ENGLISH AND OTHER COMMON LAW COURT PRECEDENTS

As is well known, the first few editions of the FIDIC Red Book were closely modeled on the English ICE (Institution of Civil Engineers) Conditions of Contract and the official and authentic text of the FIDIC contracts has always been the version in the English language. Furthermore, as a practical matter, the FIDIC contracts have always been drafted, and are still drafted, primarily by English engineers. It is, therefore, appropriate to look to English and other common law court precedents to develop an understanding of the FIDIC contracts, their contract procedures and terminology.

English and other common law precedent is relevant in two ways:

1. for a better understanding of the legal principles and contract procedures embodied in the FIDIC contracts (*e.g.*, the role of the independent engineer as an intermediary between the parties or the procedure for variations), and

2. for a better understanding of the intention of the language of the FIDIC contracts.[2]

It is, therefore, not surprising that the main published commentaries, in book form, on the FIDIC contracts, are by British lawyers and engineers, and that they refer primarily to English case law precedent and hardly ever to an arbitral award. As an illustration, the following is a table setting out the main published

[2] English court decisions dealing with issues relevant to FIDIC contracts have been published, notably, in *Building Law Reports* in England, whose index volumes reference the "FIDIC Contract" and indicate the cases which are relevant to particular clauses.

commentaries on the FIDIC Red Book and the precedent (court decisions or awards) that they cite to:

Author	Title (and Year)	English and Other Court Cases
I.N. Duncan Wallace[3]	THE INTERNATIONAL CIVIL ENGINEERING CONTRACT (1974, 1980)	**63** (no awards cited)
E.C. Corbett[4]	FIDIC 4TH – A PRACTICAL LEGAL GUIDE (1991)	**76** (one award cited)
Nael Bunni[5]	THE FIDIC FORMS OF CONTRACT (2005)	**154** (no award cited)
J. Glover & S. Hughes[6]	UNDERSTANDING THE NEW FIDIC RED BOOK: A CLAUSE BY CLAUSE COMMENTARY (2006)	**111** (no award cited)

[3] I.N. DUNCAN WALLACE, THE INTERNATIONAL CIVIL ENGINEERING CONTRACT (Sweet & Maxwell, 1974); I.N. DUNCAN WALLACE, THE INTERNATIONAL CIVIL ENGINEERING CONTRACT: FIRST SUPPLEMENT (Sweet & Maxwell, 1980).

[4] EDWARD C. CORBETT, FIDIC 4TH – A PRACTICAL LEGAL GUIDE (Sweet & Maxwell, 1980).

[5] NAEL BUNNI, THE FIDIC FORMS OF CONTRACT (Blackwell Publishing, 4th ed. 2005).

[6] JEREMY GLOVER AND SIMON HUGHES, UNDERSTANDING THE NEW FIDIC RED BOOK (intro. by C. Thomas, Sweet & Maxwell, 2006).

One may regret that one must have recourse primarily to legal authority from one system of law—that of the common law world—for interpreting what purports to be an international standard form of contract. Indeed, a retired English judge, His Honour Judge Humphrey Lloyd, QC, in his book review of the last book listed above, stated that:

> A legal commentary on the FIDIC Red Book should not be mainly confined to UK law.[7]

But, for the historic and linguistic reasons mentioned above, users seem to have little choice, at least, until there exists a much wider use of the FIDIC contracts internationally or a more developed and sophisticated system of contract law at the international level, except to refer to precedent from the common law world.

IV. USE OF NATIONAL COURT PRECEDENT FROM A DEVELOPED SYSTEM OF LAW TO FILL "GAPS" IN GOVERNING LAW

In the author's experience, an issue of precedent which often arises in relation to FIDIC and other international construction contracts is the following:

An international construction contract typically relates to a large and/or complex project to be carried out at a site in a developing country for an employer residing in that country (the contractor being usually from a developed country). The employer

[7] Humphrey Lloyd, *Book Review (Understanding the New FIDIC Red Book: A Clause-by-Clause Commentary. By Jeremy Glover and Simon Hugues. London: Thompson Sweet & Maxwell, 2006)*, 24 INT'L CONSTR. L. REV. 503, 505 (2007).

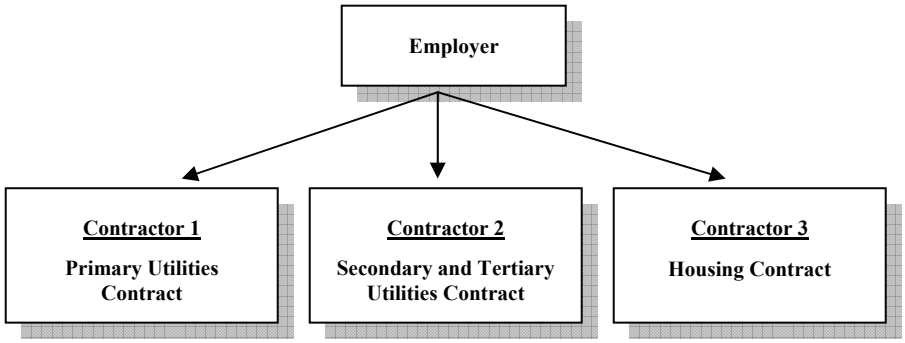
will normally require that the contract be governed by the law of its country, which is also logical as the site will usually be located there. But, typically, there lies the problem because, invariably, the law of that country and, specifically its contract law or law of obligations, which will be the law of principal relevance to the interpretation of the contract, will also be developing—it will likely contain "gaps"—and not provide clear or precise answers to many of the legal issues to which large, complex construction projects can give rise.

On the other hand, the construction contract issues to which such projects typically give rise will often have been analyzed in depth and addressed by courts or legislatures in, for example, the developed countries of Western Europe or the U.S. In those countries, there is often no difficulty in finding answers to those issues.

The author will present below four illustrations of this problem, two taken from actual ICC cases (the first resulting in an award and the second of which was settled before an award) and two taken from international construction disputes which were settled before any arbitration began. In doing so, the author has had necessarily to simplify certain of the facts in these cases so that they can be presented briefly.

The **first example** was a case where the governing law was that of an Arab country with an undeveloped law.

The dispute related to a project to build a town consisting of 3,000 housing units and related utilities and infrastructure on a green field (undeveloped) site in the Arab country concerned. The employer had let the works out to three different contractors under three different main construction contracts (commonly known, at least in the United States, as "multi-prime" construction contracts), as follows:



However, although it might be considered normal practice for the programs or schedules for the works under each of these contracts to be carefully integrated with each other, nothing was specified in any of these contracts or elsewhere on this subject.

This gave rise to the following question: what duty, if any, does an employer owe to its various prime or main contractors in the case of a multi-prime construction project, where no provision is made for coordination of the performance of work under those contracts by the employer?

The Arab law concerned did not address the issue. It provided only that a party must perform a contract in good faith, and provided some rudimentary examples of how this duty should be interpreted by reference mainly to the treatise on civil law of Dr. Al-Sanhouri, the eminent Egyptian legal scholar. It gave no meaningful guidance about how this duty or principle should be construed and applied in the case of a multi-prime construction contract situation.

The absence of law in this area heightened the risk, naturally, that the ICC arbitral tribunal, whose members were not construction specialists, could apply this duty or principle erroneously or inappropriately.

To limit this risk, we, as counsel to the contractor, undertook some research in comparative law and discovered that the law relating to the rights and duties of owners and contractors in multi-prime construction contract situations, though not much developed in Europe (*e.g.*, in England or France), is highly developed in the United States.[8] While U.S. law does not refer to or apply the doctrine that a contract be performed in good faith as did the law of the Arab country (like, indeed, the law of civil law countries generally), the duties which U.S. law imposed on owners in multi-prime contract situations appeared to us to be entirely consonant with this principle.

But what was especially useful and illuminating was that U.S. case law provided precise guidance as to how—consistent, it seemed to us (and to our Arab counsel), with the obligation to perform a contract in good faith, as provided for by the relevant Arab law—an owner should be conducting himself towards his contractors in a multi-prime contract situation. The U.S. case law made clear that even where nothing is specified in the relevant construction contracts, where an owner has entered into multiple prime construction contracts whose performance can impact the performance of others, the owner has an implied affirmative duty to coordinate those contracts and to limit the risk that performance under one will or may prevent or hinder performance under another.

The arbitral tribunal, which consisted of two Arab lawyers (including one from the country of the governing law concerned) and one English barrister, a Queen's Counsel (the Chairman), expressed relief at the hearing that concrete expression had been found as to how the principle that a contract must be performed in

[8] For an excellent, though not recent, article on this subject, see John B. Tieder, Jr., *The Duty to Schedule and Co-Ordinate on Multi-Prime Contractor Projects—The United States Experience*, 3(2) INT'L CONSTR. L. REV. 97 (1986).

good faith, as provided for by the relevant Arab governing law, might be applied to the conduct of an owner in a multi-prime contract situation. In fact, we found one U.S. case presenting almost identical facts to our case, which the tribunal said they found very helpful.[9]

Not only did the tribunal adopt the solution that there had been a violation, in this case, of the principle that a contract be performed in good faith (consistent with U.S. law that there had been a breach of contract), the tribunal cited to passages from the relevant U.S. cases in its award, as follows:

> This conception was also confirmed by American law. Thus, it was held that an employer has an implicit duty to co-ordinate the various contractors in order to prevent unreasonable delays in the project (Born v. Malloy, 381 N.E. 2d. 52, 55 (1978)).
>
> According to the American courts, the employer's inaction in the face of unnecessary and unreasonable delays by one of the contractors would ordinarily evidence that the employer breached its implied duty to co-ordinate (Broadway Maintenance Corp. v. Rutgers, 90 N.J. 253 (1982)).[10] [Emphasis added]

The **second example** concerns a case where the governing law was that of the former People's Republic of Congo (the "**PRC**").

This ICC arbitration, which had its seat in Paris, involved a subcontract for the construction of a road in the PRC. The subcontract contained (like many subcontracts) a clause providing, in essence, that the subcontractor would be paid only if and when,

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[9] Paccon, Inc. v. United States, 399 F.2d. 162 (Ct. Cl. 1968).

[10] ICC Case Nos. 3790/3902/4050/4051/4054 (joined cases), 1984 Final award, at 179 (unpublished).

or as and when, the main contractor was paid by the employer. The employer had effectively gone bankrupt and, thus, the main issue in the case was whether the main contractor was entitled to maintain, based on such "if and when" or "paid when paid" clause (as they are commonly called) in the subcontract, that it was relieved of having ever to pay the subcontractor anything more as it would never be paid by the employer who was bankrupt. To put the issue another way, was the "if and when" or "pay when paid" clause to be interpreted as establishing a condition precedent to the main contractor's obligation to pay the subcontractor (as the main contractor argued) or did such clause only regulate the time for payment, and thus not relieve the main contractor from having ultimately to pay the subcontractor (as the subcontractor argued)?

As there was no law, or very little law, in the PRC to show how such clause was to be interpreted and very little relevant law in France or Belgium from which PRC law may be said, in some measure, to derive (or to which it may be related), both parties in the arbitration cited extensively to the wealth of U.S. case law on the issue of how the particular "if and when" or "pay when paid" clause at issue was to be interpreted (that is, whether it establishes a condition to payment or regulates only the time for payment).[11] While U.S. cases are themselves divided on the question, they contain a great deal of useful analysis which the parties (and later an arbitral tribunal) could draw on for guidance. Thus, this is an example of a case where (as in the case of the first example) resort was made by both parties to case law from a different family of law from that of the governing law (as the same family of law of the governing law contained very little relevant precedent).

[11] As such clauses are in wide-spread use in the United States, there are literally hundreds, if not thousands, of reported U.S. federal court and state court decisions interpreting such clauses.

While this dispute settled before there was an award, there is no doubt that the arbitral tribunal would have been expected to take account of the analysis in such case law when determining, in their award, how PRC law should apply to the issue.[12]

The **third example** involves a case where the governing law was that of former Zaire.

In this case, when drafting a price escalation clause for a public works contract with a foreign contractor, the Zairian public owner (or its consultant) had evidently neglected to take account of the effect of devaluations / re-evaluations of the currencies in which the cost indices in the price escalation clause were denominated (the indices were denominated in three different currencies, as the construction site lay in three different countries). During the performance of the contract, the currency of Zaire was devalued 500 per cent which, as the labor index was denominated in the currency of Zaire and the currencies in which the other indices were denominated did not change in value, had a sudden distorting effect on the operation of the clause, causing an aberrational 50% increase in the contract price from about US$ 50 million to US$ 75 million.

This gave rise to the question of whether, based on a literal and strict application of the price escalation clause, the contractor was entitled to the increased price, as the contractor claimed.

The contract was, as mentioned earlier, governed by the law of Zaire and, as in the previous two examples mentioned, the law of Zaire provided no clear answer to this question.

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[12] ICC Case No. 6158. In presenting comparative law to an arbitral tribunal, an important tactical consideration will be the composition of the arbitral tribunal, as the nationality and legal backgrounds of its members will bear on how receptive it is likely to be to the particular national law or laws being presented.

Based on a brief review of English law (which was certainly irrelevant, but which is nevertheless widely referred to in the case of international construction contracts because they are often based on English forms, as indicated above), it appeared that, under English law, price escalation clauses are ordinarily enforced strictly as they are written and the employer would have been entitled to no relief. The employer would have had to pay the additional amount resulting from strict application of the price escalation clause.

But the law of the former Zaire is derived from Belgian law and, in the case of an administrative (public works) contract, as was the case here, Belgian law or, more precisely, French law to which a Belgian court would look, would provide relief. Under French administrative law, it was (and doubtless still is) well established that if a price escalation clause in an administrative contract gives rise to a result which the parties could not reasonably have intended, then, under the theory of *imprévision*, the court is empowered to adjust the result obtained from a literal application of the price escalation clause to a result which the parties could reasonably have intended.[13] Very arguably, this principle should apply to a public works contract in the former Zaire.

At all events, the solution permitted the parties to overcome the difficulty which derived from the aberrational effect of their price escalation clause and, despite the magnitude of the contractor's claim (US$ 25 million), the case settled without the need for arbitration.

The **fourth example** involved a case where the governing law was that of India.

[13] For information on this subject, see ANDRÉ DE LAUBADÈRE, FRANCK MODERNE AND PIERRE DELVOLVÉ, TRAITÉ DES CONTRATS ADMINISTRATIFS, Vol. 2, ¶ 1365 (LGDJ, 1984).

This case involved a dispute between an Indian owner and a foreign contractor who was building a hydro-electric plant for the owner in India. In the course of constructing the tunnels for such plant, the contractor encountered severe adverse geological conditions which would make it extremely difficult, if not impossible, as a practical matter (in terms of cost and time), for the contractor to complete the hydro-electric plant. This gave rise to the issue of whether the contractor could be released or discharged from the contract, which (as mentioned) was governed by Indian law, by virtue of the common law—and Indian law—doctrine of frustration.

The issue was analyzed extensively under Indian law. While India had (and perhaps still does) its own Contract Act 1872 and doctrine of frustration (provided for in Section 56 of that Act), and there are a number of reported Indian cases applying the doctrine of frustration, nevertheless, fairly extensive use was made also (including by Indian counsel) of well known English cases where the doctrine of frustration has been applied to construction contracts, such as *Davis Contractors v. Fareham U.D.C.*[14]

While the dispute ultimately settled, this case illustrates again the use of case law from a country with a developed system of law in order better to analyze the issues and/or reinforce the solutions provided for by the law of the country that is expressed to govern an international construction contract.

In each of the above four cases (except perhaps the last one), the local governing law—which was relatively undeveloped—had not addressed the specific question at issue. On the other hand, in each of these cases, the questions involved were classic or typical construction law issues, which had been analyzed

[14] Davis Contractors v. Fareham Urban District Council, [1956] A.C. 696.

in courts in the United States, France and England, which had come up with well reasoned and sensible solutions.

In the author's view, where there are gaps in a governing law, that is developing, the analysis and solutions that courts in developed legal systems can provide should not be disregarded. On the contrary, to the extent that they are in harmony with the governing law and provide good solutions, they should be considered by international arbitral tribunals. By virtue of their multi-national composition and international character, international arbitral tribunals are better qualified, and should be more receptive, than national courts, to look to comparative law for solutions.

V. CONCLUSION

In the case of countries with developing legal systems, international legal principles, such as the excellent UNIDROIT Principles 2004, may certainly be useful in filling "gaps" in the relevant national law, where this is appropriate and not inconsistent with such law. But because they are necessarily of a relatively high level of generality and are not addressed specifically to construction contracts, their practical utility may be limited in the case of a construction dispute.

Moreover, the legal issues that arise in international construction disputes (such as those relating to multi-prime construction contracts, "pay when paid" and price escalation clauses and difficulties a contractor may experience in performing the works, referred to above) are often no different from the very same issues that arise in a domestic context and, thus, do not (like some other issues) call for a specifically "international" solution

when they arise in international arbitration.[15] The very same issues will often have arisen and been addressed in domestic construction law, at least in countries with developed legal systems, and therefore there is no reason—provided that this is compatible with the relevant governing law—that they should not be dealt with in the same way in the case of an international dispute.

Therefore, when a "gap" is found in the law governing an international construction contract, a party's counsel may be well advised, in addition to investigating such legal principles of the governing law as may be relevant (for there are always likely to be some, and these must always be respected), to search for relevant court precedent or legal principles in the law of an appropriate developed legal system (which will usually be within the same family of law as the governing law, if not the law of the country, if any, from which the governing law is derived). Thus,

(1) if the governing law is that of a civil law country, and its legal system has historic links to France or Belgium, one may want to begin research with the standard works of, *e.g.*:

(a) de Laubadère, Moderne & Delvolvé (administrative contracts)[16] or Jacques Montmerle (private contracts) in France,[17] or

(b) Maurice-André Flamme in Belgium, or

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[15] The need for an "international" solution (as opposed to one provided by a country's domestic law) is a commonly invoked rationale for the development of *lex mercatoria*. *See* ALAN REDFERN AND MARTIN HUNTER WITH NIGEL BLACKABY AND CONSTANTINE PARTASIDES, LAW AND PRACTICE OF INTERNATIONAL ARBITRATION 109 (Sweet & Maxwell, 4th ed. 2004).

[16] DE LAUBADÈRE, MODERNE AND DELVOLVÉ, *supra* note 13.

[17] JACQUES MONTMERLE, ALBERT CASTON, MARC CABOUCHE, LAURENT DE GABRIELLI AND MICHEL HUET, PASSATION ET EXÉCUTION DES MARCHÉS DE TRAVAUX PRIVÉS (Le Moniteur, 5th ed. 2006).

(2) if the governing law is that of a common law country, and its legal system has historic links to England, one may want to begin research with the standard works of, *e.g.*, *Hudson's Building and Engineering Contracts*[18] and *Keating On Construction Contracts*[19] in England. The works of Mr. Justin Sweet[20] and *Bruner & O'Connor on Construction Law*[21] in the United States might also be consulted.

Provided it is compatible with the governing law and can be justified as reflecting how a court of the country of the governing law would likely decide the question if it were submitted to it, then a court decision on similar facts, or a relevant legal principle, from a developed system of law may help to provide a better grounded, more precise and convincing means of filling a "gap" than an attempt to do so by resorting merely to the general principles of the governing law and then attempting to reason from there. In short, why re-invent the wheel, given the wealth of analysis and wisdom that judicious use of comparative law can provide?

Under this proposal, arbitrators are not to disregard the governing law, as Lord Asquith reportedly did in his 1951 award in the well known *Petroleum Development Ltd. v. The Sheikh of Abu Dhabi* case.[22] On the contrary, they must faithfully apply the

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[18] HUDSON'S BUILDING AND ENGINEERING CONTRACTS (I.D. Wallace ed., Sweet & Maxwell, 11th ed. 2003).

[19] KEATING ON CONSTRUCTION CONTRACTS (V. Ramsey and S. Furst eds., Sweet & Maxwell, 8th ed. 2006).

[20] JUSTIN SWEET AND JONATHAN J. SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS (Aspen Publishers, 4th ed. 2007).

[21] PHILLIP L. BRUNER AND PATRICK J. O'CONNOR, BRUNER & O'CONNOR ON CONSTRUCTION LAW (Thomson West, 2002).

[22] In the Matter of an Arbitration between Petroleum Dev. (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi, Award, Aug. 28, 1951, 1 INT'L & COMP. L.Q. 247 (1952). In that case, Lord Asquith disregarded the law of Abu Dhabi

relevant legal principles, to the extent they may exist, of the governing law.

But, where there is a gap, they should also take account of the best reasoning and experience from any other relevant legal system or systems and, specifically, a developed system within the same family of law as the governing law (if not the law of the country, if any, from which the governing law is derived), so long as, and to the extent that, that reasoning and experience is wholly compatible with the governing law. At the least, where there is a gap, the solutions, reasoning and experience of a relevant developed system of law can point the arbitrators in the right direction, even if they might prefer not to refer to such other system of law in their award.

In conclusion, counsel (especially, as arbitrators depend upon them) and arbitrators should make more use—but judicious use, for it must always be the governing law that is finally applied—of the immense resources of comparative law when considering a governing law that is developing.[23] As a practical matter, a limitation on their ability or willingness to do so may be

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which was referred to in the contract as not sufficiently sophisticated to provide a solution to the relevant dispute and applied instead English law insofar as it reflected universal legal principles. *See* FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 842–45 (E. Gaillard & J. Savage eds., Kluwer, 1999).

[23] Note that often the problem, as a practical matter, is not merely that the law is developing but that what law may exist is poorly reported—when reported at all—or difficult to access for various reasons. This is a familiar problem to lawyers working with the laws of developing countries. Indeed, it is the subject of an express provision of the 1999 FIDIC Red Book, Sub-Clause 2.2, providing: "The Employer shall (where he is in a position to do so) provide reasonable assistance to the Contractor at the request of the Contractor: (a) by obtaining copies of the Laws of the Country [defined as the country where the site is located] which are relevant to the Contract but are not readily available . . . ."

their insufficient knowledge or familiarity with foreign and comparative law. But with the steady increase in world trade and the concomitant increase in the number of lawyers (at least practising international arbitration) who are qualified in two or more (ideally, common law and civil law) jurisdictions, this should, hopefully, be becoming less of a problem.