



Litigating or arbitrating a construction project with a state

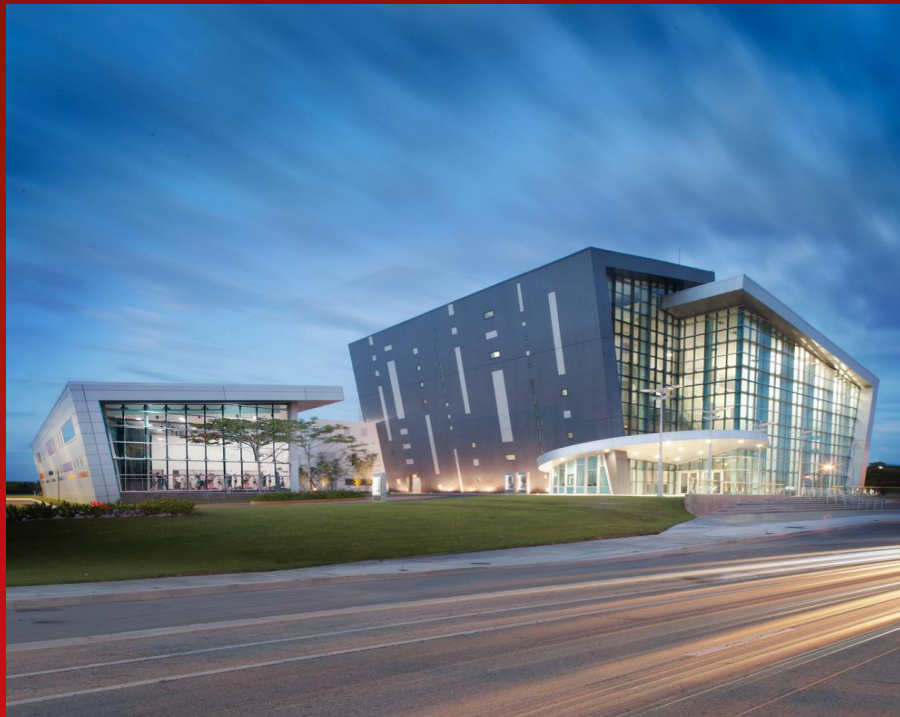
Some war stories

8th April, 2017 - Lausanne

Jason Kellogg
Miami, Florida

Case 1: South Miami Dade Cultural Arts Center

- Construction of performing arts center in Miami-Dade County
- Contract project cost ~ **\$US38 million**



Brief Facts

- Charged political atmosphere: larger downtown performing arts center (Arsht Center) hundreds of millions over budget, creating bad press for county and its politicians
- SMDCAC had a 26-month completion date
- Quickly went over budget and riddled with delays
- Relationship between contractor and county representatives extremely strained
- Scathing public report

Florida Sunshine Law

- Contractor bought out by Spanish multinational, which had to navigate the strained relationship in the context of Florida's Sunshine Laws
- All communications must be public

Options

- Litigate
- Communicate in the “sunshine”

Result



Case Two: Pemex

- Contract with Mexican subsidiary of U.S. contractor to construct natural gas platform
- Mexican law applies
- 2005: Pemex files arbitration in Mexico City
- In interim, Mexico creates special court to address such rescissionary cases with government; reduces the statute of limitation from 10 years to 45 days

Competing Orders

- Panel awards the contractor US\$300 million
- Contractor immediately moves to confirm award in US federal court under New York Convention
- Pemex successfully moves to nullify award in new Mexican court
- U.S. court rejects nullification, increases award to US\$465 million

Precedential Value

- First time a U.S. Court has confirmed a nullified foreign award
- U.S. court cited its “considerable discretion” to do so
- Possible far reaching connotations
- But: somewhat unique underlying facts may limit it
 - State breached contract, seized project then passed laws and created special court to retroactively avoid arbitration

Thank you

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AIJA Seminar in Lausanne, 8 April 2017

Dr Bernd Ehle, LL.M. FCIArb

Case 1: Document collection nightmare

- ICC arbitration: Construction company from Middle East vs. Eastern European State-held railway company
- Construction of a railway/highway bridge



Case 1: Document collection nightmare

- Claimant awarded parts of its US\$35 million claim for outstanding payments and lost profits
- Zurich-seated arbitral tribunal
- Co-arbitrator for State-held party appointed by ICC
 - Recurring problem: insufficient time for State to conduct tender for retaining legal counsel

Case 1: Document collection nightmare

- Collection of documents challenging:
 - Documents located with different authorities
 - “Political games” between different state bodies
 - Different levels of confidentiality and state secrets
(Art. 9(2)(f) IBA Rules)
 - Arbitral tribunal set short time limits

Case 2: The clueless Minister

- ICSID arbitration: real estate and development company vs. State in the Middle East
- Residential and commercial real estate projects



Case 2: The clueless Minister

- ICSID tribunal found that investment under the relevant BIT, but that real estate investment trust's actions could not be attributed to the State
- Choice of arbitrators: solid understanding of technical aspects and public international law

Case 2: The clueless Minister

- State has knowledge, but on operative level
- Giving testimony considered as “prestigious”: done by high-ranking official
- Testifying Minister has no clue:
 - Hardly involved; overseeing many projects
 - Unprepared and difficult to reach
 - “Loose cannon” and not used to being challenged

Thank you

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Some war stories

8th April, 2017 - Lausanne

Dhruv Kakar
New Delhi, India

Brief Facts

- Construction of 200K Sq.m. Convention Centre Complex for a state government on Engineering-Procurement-Construction model
- Contract project cost ~ **USD 135 million**
- Detailed schematic & designs presented in Phase 1, approved
- Govt. cut the CAPEX without notice, instructed client to redo designs. No payment made for past completed works or Variation Claim

Brief Facts (cont.)

- Work stopped for 18 months, with no amicable resolution
- Attempt by state to engage third party for completion of design and construction, illegal
- Client refers the dispute to arbitration, requesting injunction against any further work/construction on our IP (design)
- Claim of fees due to client under the contract, interest on delayed payment, and damages (loss of revenue)

Peculiarities

- Retendering process tedious for state
- Officers involved drunk on power, not accustomed to being challenged by private corps
- State chiefs not in the loop, unaware of developments till much later stage
- State communication shabby, contradictory, not legally vetted
- Fear of claimant of being blacklisted by bureaucracy

Laws applicable

- Contract Act
- Code of Civil Procedure
- Right to Information
- Intellectual Property Rights
- Arbitration and Conciliation Act

Thank you

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