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International Arbitration Report

Interview: Albert Bates Jr. and R. Zachary Torres-Fowler Of Troutman Pepper Locke LLP Discuss The 'Industry Unto Itself' Of International Construction Arbitration

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Interview

Interview: Albert Bates Jr. and R. Zachary Torres-Fowler Of Troutman Pepper Locke LLP Discuss The 'Industry Unto Itself' Of International Construction Arbitration

[*Editor's note: Albert Bates Jr. is a Pittsburgh-based partner with Troutman Pepper Locke who helps clients resolve U.S. and international construction disputes, particularly in the areas of power generation, heavy civil and infrastructure works, and industrial refining and process facilities. Albert has counseled clients on more than 15 mega-projects, including projects in the U.S. and internationally, as well as projects with capex in excess of $10 billion. He has also served as an arbitrator on more than 150 U.S. and international construction and commercial disputes. R. Zachary Torres-Fowler is a Philadelphia and New York-based partner in Troutman Pepper's Construction Practice Group. He concentrates his practice on construction-related disputes and focuses on complex domestic and international arbitration proceedings. He has experience before arbitral panels and tribunals under a wide variety of U.S. domestic and international arbitration rules, including the AAA, JAMS, ICDR, ICC, LCIA and ICSID.*]

Mealey's International Arbitration Report spoke with Albert Bates Jr. and R. Zachary Torres-Fowler about their experiences in international construction arbitrations, how the field has evolved over the years, the potential usage of AI and the benefits of dispute boards that resolve disputes concurrent with the progress of construction projects.

Mealey's: How did your career paths lead to your involvement in international arbitration?

Albert Bates Jr.: Zach and I came at it in very different ways. I am a construction lawyer by background and training. I started my career doing construction disputes on large domestic infrastructure and industrial process facilities. Approximately 25 years ago, I began to become involved in large international construction projects. It was a natural transition for me from handling large domestic construction arbitrations to moving into the international construction arbitration space.

I have also served as a construction arbitrator for many years, and a large percentage of my arbitrator matters are in the international construction arbitration space. So, I grew up with a domestic construction arbitration background and have transitioned into doing more international construction project work.

R. Zachary Torres-Fowler: I have been practicing international arbitration my entire career and very much consider my practice to focus on that area more than any other, though I represent clients in connection with U.S. domestic arbitrations with some frequency.

I knew I wanted to do international arbitration while I was in law school and thereafter. My undergraduate education focused on Latin America. I also speak Spanish, and my family is from Ecuador, so an international disputes field was something that naturally piqued my interest. When I graduated from law school, I joined Shearman & Sterling in New York and joined their international arbitration practice when I was a first-year associate. By chance I started my career working on the investor-state matters while at Shearman but gravitated toward the international construction arbitration matters over time. I was involved in several international construction disputes while I was at Shearman and ended up really enjoying that area of practice.

In the international commercial arbitration space, construction and engineering disputes make up a very large segment of the case load for these institutions. And so while my practice was always in the international arbitration space, I developed a unique subspecialty in the construction arena. For personal reasons, my family decided to move to Philadelphia, and I transitioned to Troutman Pepper Locke (then Pepper Hamilton), who had a really established nationwide construction practice and represented a lot of clients that had a need for international arbitration expertise. I was paired with Albert on a lot of those matters and since then continued to develop that practice here.

Mealey's: Given the frequently massive size of evidentiary records in construction arbitrations, has technology in recent years helped streamline the process significantly, whether with AI or better online digital technology in general?

Torres-Fowler: There have been improvements; there have been efficiencies gained here and there. When it comes to AI, in large part we're really just beginning to scratch the surface in terms of what AI can do to help progress these arbitrations. But for the majority of construction cases, given their complexity, technically, factually and legally, I don't know if we're at a stage where technology is going to get us over the hump. That is, just the sheer amount of information that a lawyer, a party and their experts and their witnesses have to digest makes them just inherently complicated such that AI may not always be a perfect tool. So while there are efficiencies, I think it's hard to overcome the pure complexity that some of these arbitration cases bring.

Bates: One thing that has changed over the last 10 years such that it's not novel any longer is that each of these megaprojects cost billions of dollars and last for years, so they each have their own project servers established from the outset of the project. Most of the information used during the project, other than internal communications, is uploaded, and stakeholders are given access to some or all of the information stored on that database. This project control mechanism has streamlined to some degree what information exchange looked like 10 to 15 years ago versus what it looks like now because a significant portion of the project records are retained on the project server.

Consequently, since the contract documents, the engineering reports, drawings and specifications, submittals, test results and daily reports and other basic construction documentation are available on the project server, the focus of information exchange is often internal e-mail communications or other internal types of documents on specific matters at issue. The amount of information on these projects remains extraordinarily large, and counsel must review and assimilate enormous amounts of information. Different practitioners will tell you different things about how that document review process has changed over the last five years with AI and predict where the technology will take us, but most lawyers are still trying to do understand how they can best harness that technology going forward to benefit themselves, their clients and the efficiency of the international arbitration process.

Mealey's: Do you have cases where construction projects are proceeding with dispute adjudication boards (DABs), and are they an effective tool?

Bates: I sit as a dispute board member from time to time, including DABs under the ICC Rules. It can be a very helpful process during the course of the project, especially for disputes that arise on scope of work or cost items. In other words, "Is this something that's required under the terms of contract or is this extra work that you're asking me to do to which I am entitled additional time and/or money?" Often those issues just fester and grow divisive during the project if there is no dispute board or some other interim resolution step in real time during the course of the project.

I think most of the major funding institutions and most forward-thinking lawyers have looked at dispute boards or other interim dispute resolution mechanisms in-project, in real time, as very beneficial to the project. While their precise nature may vary, decisions of the dispute boards can be binding or nonbinding and may or may not be admissible in future arbitration proceedings. In my experience, DABs that are "interim-binding" are very effective. For example, if the DAB finds entitlement, it essentially states, "Yes, this is a change. For now, you're going to pay $XYZ for the change, and the contractors is entitled to ZY additional days of time to complete its work." However, the DAB decision is subject to arbitration if either party chooses to advance the issue to arbitration. But, at least in the interim, the

contractor receives additional money and/or time to perform the additional work, or the contractor knows that it is obligated to do perform the disputed work under the terms of the contract, and at least at this stage, they are obligated to perform the work without additional compensation and without any extension of the project schedule.

Mealey's: Are DABs more popular now than they were or more frequently required by the contracting parties in a construction project as a dispute resolution mechanism?

Bates: In my experience, the U.S. is behind in terms of the use of dispute boards. Some of the public projects and some of the governmental or institutional owners are coming to see that dispute boards actually bring a lot of benefit and create a highly efficient dispute resolution process, but dispute boards are far more prevalent in Europe, Latin America and other parts of the world than they are in the U.S.

Torres-Fowler: We wrote a journal article on dispute boards a few years ago.[1] They've been around for a very long time. The World Bank was one of the first big adopters of dispute boards and was really responsible for promulgating the use of dispute boards in a lot of their foreign projects. They were later picked up as a dispute resolution mechanism by a lot of form agreements, FIDIC [Fédération Internationale des Ingénieurs-Conseils] being the most important one, and the practice has seen a wider proliferation because of the popularity of these form agreements.

In the U.S. where FIDIC is less common and where World Bank financing isn't as prominent, as most World Bank financing is going outside the United States, you don't see dispute boards quite as often — though they exist. You see them occasionally in public procurement-type projects, and some states actually require dispute board and dispute resolution mechanisms. But dispute boards are quite a bit more prevalent outside the United States. It's become a topic of interest for a lot of practitioners within the construction space, I'd say over the last five years, maybe 10 years. We've seen a lot more discussion about dispute boards, a lot more openness to this dispute resolution process. In Latin America, for example, we've seen dispute boards become much more prevalent. But it's still an area where there may be some room for evolution and adoption at a wider scale than where we are right now.

Bates: We've also seen that there are fewer purely domestic U.S. constructors than 10 years ago. There has been a lot of internationalization of the large market construction community over the past 10 years or so. As these large international conglomerates have designed and constructed more projects in the United States, there is growing use of dispute boards on many of the largest public and private projects. As Zach said, some of the public agencies, such as Texas for example, frequently use dispute boards on their large procurement projects. In addition, projects with a public-public private partnership financing structure also tend to consider utilizing dispute boards.

Mealey's: Have you observed any trends of note or strategic importance in terms of international arbitration disputes, such as recent arbitration-related cases before the U.S. Supreme Court?

Torres-Fowler: In terms of cases, usually every year there are one or two cases we're tracking before the Supreme Court and there's always an interest from the Supreme Court in the international arbitration space.

Most recently, there was the CC/Devas [(Mauritius) Ltd. v. Antrix Corp., 145 S. Ct. 1572, 2025 U.S. LEXIS 2195] case. However, and others may disagree, my impression of that case is that it was much more about questions of U.S. federal civil procedure or personal jurisdiction than it was real arbitration-specific issues. The only arbitration connection is that the whole dispute arose out of the enforcement of an arbitration award.

There's also the Spain v. Blasket [Renewable Investments LLC, et al., No. 24-1130, U.S. Sup., *pet'n for cert. currently pending*] case. This is an interesting case as it raises the question over how the U.S. Supreme Court will address questions regarding the enforcement of intra-EU investor treaty disputes. Again, this may be a case to watch.

In truth, there is a bit of a dearth of real weighty international arbitration cases bubbling up through the federal circuits to the Supreme Court as of late. So, when we think of trends, our focus has been much more on, what are the broader practice trends?

What are the areas where we think there are going to be real disputes in the future, particularly for our practices? We've spoken a lot about AI and how that affects international arbitration and the practice, setting aside just what it means for the construction space.

Mealey's: What do you see as the potential impact of AI on construction arbitration?

Bates: It is something that everyone in the international arbitration community is talking about. I don't know that anybody has the answer or the full path forward, but there is a lot of consideration of the topic and even some implementation at the institutional level, where the International Chamber of Commerce, the American Arbitration Association's International Centre for Dispute Resolution and other institutions or others are trying to harness the power of AI to assist in summarizing large volumes of information or facilitating various administrative tasks.

In my view, the actual use of AI in international arbitration is still in its infancy. Some users are further along than others in finding practical applications to enhance efficiency, but everybody seemingly recognizes the importance of AI and its potential going forward and recognizes that you've got to be on the AI train or you're going to be left behind. However, nobody is sure exactly the destination of that train or its arrival time, but everyone is either heading to the train station, waiting on the platform or on the train to the next station without really knowing where the journey will lead.

Mealey's: There are frequently critiques of international arbitration, for example, for lack of transparency. Do you think that construction arbitrations proceed with a sufficient degree of transparency, or would the system work better if there was more public scrutiny and public understanding of these types of cases?

Torres-Fowler: I would view the transparency issues that arise out of the investor-state disputes as different and distinct from the transparency issues that we see in construction arbitration, which is really a subset of commercial arbitration matters.

Transparency can be important if you have some sort of state entity that is a stakeholder in the ultimate project. I can see that being a problem. I see issues where you have construction projects butting up against environmental concerns or human rights concerns; you do see that occasionally. There have been cases in the past where protests in connection with construction projects have actually given rise to real disputes and the terminations of projects. So, you see that, but in terms of the transparency issue — tribunals making decisions of public importance behind closed doors — it's less of a concern.

The bigger concern for construction disputes is just making sure that these cases, given how big they are, can proceed efficiently, that they're not cost-prohibitive and that they don't cause a dispute to actually jeopardize the project itself. And that goes back to what Albert was talking about with dispute boards, which is they're really a mechanism to help parties resolve disputes during the course of a project so they don't actually end up hampering the overall outcome of the enterprise. When it comes to issues that are the biggest, most critical issues for construction, that is much more about making sure disputes can be resolved efficiently and effectively.

Mealey's: It seems much of the public are unaware of large construction projects in general and the fact that there might be big disputes going on concerning the essential infrastructure that they use every day.

Bates: Arbitration is generally private and confidential. Further, the implication of that statement is that the project is completed and operating, with the ancillary disputes being resolved in the background out of public view. The underlying construction disputes typically focus on money — who bears the responsibility for additional costs and time incurred to complete the project — and generally do not affect the use of the project for its ultimate purpose. It is typically a dispute between the private parties that entered the underlying design, procurement and construction contracts pursuant to which the project was built, and whether someone is entitled to more money and/or more time or not. And importantly, the contracting parties chose international arbitration as their final and binding dispute resolution mechanism.

International construction arbitration is similar to international commercial arbitration in that regard.

However, international construction arbitration is also a world unto its own because the subject matter, project structures, the type and depth of issues presented, the technical complexity and engineering, the basic contracting principles and other unique features are fundamentally different from those presented in other industries.

In addition, many projects last for many years — five to 10 years isn't uncommon. There may be hundreds of events during that duration that influence the construction cost and/or construction schedule. The projects often involve people from all over the world with differing cultures, backgrounds and legal traditions. There is a lot of turnover in project personnel during that time period, and the entire process of managing and working to resolve ongoing disputes during the course of a project with that duration is much different than with the disputes that arise in the commercial contexts.

In my view, these are some of the things that make international construction arbitration a unique area of law, including just the size and magnitude of these projects. Some of the things that brilliant and creative people are trying to build on a first-of-its-kind basis truly blow your mind in terms of what can actually be achieved. Some of the engineering designs are amazing, and that's what keeps it fun and interesting for Zach and I and the others that practice in this area. It's a deep, fascinating and complex area, that is by necessity very specialized. It is an area of practice where it is difficult to practice on an occasional basis.

Torres-Fowler: Our practices are really almost exclusively focused on the construction arbitration space. It's a big market when it comes to the international arbitration sector, but it is a level of expertise that I think a lot of people don't always appreciate is unique to the construction bar and construction practitioners and arbitrators. While it does arise oftentimes out of commercial arbitration agreements, it is its own practice in a lot of ways. In terms of understanding how these projects function, and how the contracts are intended to function, it is an industry unto itself that's very different from other sorts of commercial agreements.

This interview has been lightly edited for clarity.

1. *See* Bates Jr., Albert, and R. Zachary Torres-Fowler. "Dispute boards: A different approach to dispute resolution." *Comparative Law Yearbook of International Business* (2020). ■

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