

SCL Conference 2016
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Gala Dinner Keynote Address

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It is indeed an honour to be invited to speak at this Sixth Society of Construction Law International Biennial Conference, and an even greater honour to be asked to give this Keynote address at the Gala Dinner. I must also say what a pleasure it is to be introduced by my old friend Carlos.

These Biennial SCL International Conferences are events to which we all look forward. The opportunity personally to have attended and spoken at each of the Conferences in London, Singapore, Hong Kong, Melbourne and Kuala Lumpur have been personal highlights for me. The International Construction Community is, in my view, unique amongst professional cohorts. The friendships made between colleagues, and the free-sharing of ideas and personal intellectual property, makes it a community which members of many other professional groups would wish to have the opportunity to join.

Amongst the professional organisations making up the international construction community, the SCL stands out in a number of respects.

It has achieved strong local membership and influence in each of the jurisdictions in which SCL's have been created.

It brings together many of the professional disciplines involved in domestic and international construction, thus enriching its members through its cross disciplinary engagement.

When the Societies of Construction Law combine together at these biennial conferences, the multi-disciplinary discussions cross the range of project issues providing the opportunity of a rich learning experience from around the world.

I'm sure you would all agree that this conference has brought learning experiences to a new level touching as it has the teaching of construction law, the latest developments in BIM, corporate counsel perspectives, the challenges of cost effective dispute resolution, developments in construction law regionally and comparatively, ethics compliance, to name but a few of the subjects we have had the benefit of exploring in plenary and workshop sessions.

It is not for me to highlight any particular session. To do so would be an injustice to those not mentioned. And in the time available there is no adequate way to do justice to all of the learning to which we have had exposure. Suffice it to say that from the perspective of subject matter we will all leave this conference with many ideas and inspirations that will resonate over the next two years.

I would however like to briefly reflect upon a particular aspect of these biennial international conferences by illustrating the aspect I have in mind by this event.

It is fair to observe that the founders of the UK Society of Construction Law would have been hard pressed at the time of formation to predict that a Biennial Conference of Societies of Construction Law would have its opening ceremony conducted in Portuguese in South America. If told of that possibility at the time they would I suspect have been both pleased and a bit disconcerted. During an era where the use of English in international construction has been so dominant, this brought home to me the fact that in both domestic and international construction, billions of dollars' worth of projects are designed, constructed, commissioned and operated by businesspersons and professionals with no connections whatever with the UK. In an international contracting environment where a common law conceived standard form of contract continues to be used in jurisdictions in which it can be legally ill-suited, the mechanisms of construction and the personnel involved in it are driven by service providers, contractors, and purchasers of construction services from the great emerging economies of the world. It is a vibrant new world!

And it is critical therefore for all of us involved in construction, domestically and internationally, to reach out and seize the opportunity to learn from the experiences and lessons available in the many regions of the world to which the Societies of Construction Law take their biennial conferences. We learn from each other but it is absolutely clear to me both from my career as a transactional and disputes lawyer, and now as an international arbitrator, that no one particular geographic region or economy has any mortgage on best practice.

We meet for this superb event in an important emerging economy of the world. We do so at a time when Brazil, and other countries in this region, are facing significant challenges. The challenges include the need to build infrastructure consistent with rapidly growing economies, political challenges, and ethical best practice challenges critical to effective economic growth.

I should pause at this point to observe that the emerging economies of the world are not alone in facing significant challenges and challenges of a like

kind. You would all immediately accept that the political challenges facing Europe, the United States, and many other countries including my own, are also significant. There is no room for any of us to be complacent – we must all seek to learn from and support one another.

But let me return to Brazil in particular and what I believe there is for us to learn at this Conference from the opportunity of meeting here at this Sixth Biennial SCL Conference.

Firstly, Brazil has emerged successfully from two massive events which each alone have proved challenges to many other economies: the 2014 Soccer World Cup and the 2016 Summer Olympics, Both events were great successes, the first at a time of rapid economic growth, and the second carrying through a period of less rapid growth. There is much for us to learn from this Brazilian experience. These are lessons on a major project scale.

However, there are lessons from Brazil that although not of such a massive scale, represent reforms in legal structure, and processes, of value to all of us in the construction community.

The first is Arbitration. From a virtual standing start at the end of the last century, Brazil has moved to a position where domestic and international arbitration is flourishing as a method of dispute resolution. The major sponsorship of this Conference by CAM - CCBC is an indication of how far arbitration, and construction arbitration, has come in a very short time. For those of us from jurisdictions where arbitration has been part of the legal fabric for a long time, there are very valuable lessons to be learnt from the process of creation and innovation in a jurisdiction where it is new and vibrant. As an example, Brazil is one of the few, if not the only, country in the world whose domestic Arbitration Act expressly includes bad faith conduct of parties as a material factor in cost allocation for tribunals. Those of us in other jurisdiction leave that to the discretion of tribunals to consider, creating no formal impetus for parties to behave during the arbitration process.

The second is Mediation. Hardly part of the legal and commercial culture of Brazil a few years ago, it now enjoys legislative recognition, and increasingly wide acceptance by the legal and commercial community. Again, reform and practice of mediation in Brazil is worthy of close study particularly because a number of other jurisdictions both common law and civil law are finding the acceptance and practice of mediation an issue of some difficulty.

The third area of innovation and from which we can all learn, is the embrace by Brazil of Dispute Boards.

The Brazil Federal Justice Council just last month approved 3 proposals which formally achieve 3 purposes. Firstly, to recognise Dispute Boards as a consensual conflict prevention and resolution method in line with the Civil Procedural Code; secondly, to accept the binding nature of Dispute Board decisions until challenged by the Courts of Justice or an Arbitration Panel; and thirdly, to recommend the adoption of Dispute Boards within construction and infrastructure contracts as the immediate dispute resolution process. These are fascinating developments which may well leapfrog Brazil to the effective use of Dispute Boards beyond that which is available in a number of jurisdictions, particularly those where the enforceability of Dispute Board decisions made on an interim basis is less than clear. Indeed, there are insights to be gained - lessons to be learnt with these developments that go towards overcoming the challenges that come with historically prioritising the interests of project owners and Public Administration.

Finally, we have learnt during this Conference that there are innovations in Brazil in the teaching of construction law, particularly in an interdisciplinary way, which provides valuable food for thought for those of us interested in the teaching of Construction Law in other jurisdictions.

I'm sure that there are many other aspects of project and construction activities in Brazil and other South American countries from which we can all learn. My thesis simply is this: the opportunities created by these international conferences of the Societies of Construction Law to benefit from the locations in which the conferences are held are immense. I gather we will have the opportunity next year to absorb the lessons available in another huge emerging economy, India.

So without in any way diminishing the other immensely valuable learning experiences which are available at this and other conferences in the future, I would like to take this opportunity of thanking our hosts at this Conference for providing the opportunity to learn from them. And to thank them all for what has been an amazing event.

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