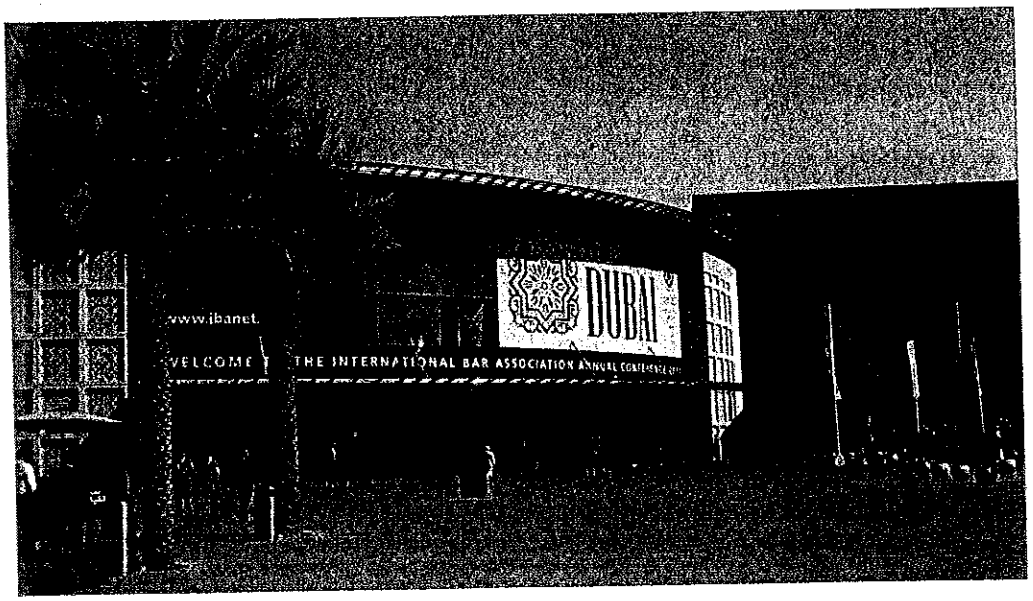

Towering visions in the Middle East: ICP at Dubai 2011

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Watched over by the soaring architectural and engineering vision that is the Burj Khalifa, the IBA's Annual Conference for 2011 was held in Dubai from 30 October to 4 November. The Conference provided a marvellous opportunity for members of the International Construction Projects Committee (ICP) to meet old friends, make new ones and share our experiences of the law and practice of construction in sectors and locations spanning the globe.

Five half-day sessions were presented along with the Committee's annual dinner and a full-day excursion to Abu Dhabi. The Committee also participated in a workshop on Arab foreign direct investment in Latin America and a session examining the legal fall-out from the Fukushima nuclear disaster of March 2011. All of the ICP working sessions were well attended and tickets for the social events were likewise keenly sought after.

Our first session on the **Monday, 'As tears go by: the impact of fundamental changes on long-term contracts'**, involved detailed consideration of a hypothetical project scenario. As Chair of the session, **Bruce Reynolds** outlined the scenario: though the stated jurisdiction was said to be 'Erehwon' and the project included scarcely plausible elements such as a 'Lane-Hernandez Bridge', aspects would resonate with participants' experience on public infrastructure projects around the world.

The scenario introduced four elements: exceptional and unforeseeable increase in cost claims, change of law, insolvency and force majeure. Each of these was covered by the members of the panel in the following order. **Christopher Seppälä** dealt with bases for potential claim by the concessionaire under various legal systems (there not being any contractual relief available under the

concession agreement). Christopher noted that English law was highly unlikely to provide a ground for compensation via the doctrine of frustration, owing to the threshold difficulties that increases in cost will not of themselves trigger frustration, and, in any case, frustration will lead to discharge of the contract, not recovery of increased costs. He noted that the doctrine of 'impracticability', as applicable in various US jurisdictions, may – if the relevant elements were satisfied – lead to relief from contractual relations, however, not recovery of additional costs.

Turning then to the civil law, Christopher noted the key distinction under private and administrative law in France. Under the former, the traditional approach – that the law will not intervene into freely agreed commercial terms – broadly remains and would deny the concessionaire a remedy here. However, administrative law remedies may provide remedies including a form of indemnification against extra costs. This would be subject to the various applicable requirements, such as – in the case of *imprévision* (which, in some Arab countries, applies in the private law sphere) and *sujétions imprévues* – the contractor not having suspended work.

'...English law was highly unlikely to provide a ground for compensation via the doctrine of frustration...'

Helmut Johannsen then looked at changes in the law, based primarily on his experience in P3/PPP projects in Canada. He noted that local laws cannot be relied on appropriately to address this key risk, hence his focus on outlining how concession agreements typically deal with a change in the law. Helmut's discussion included the important distinctions in approach between 'discriminatory', 'specific' and 'general' changes in law. He noted that some concession agreements are now going as far as including 'regime change' provisions, contemplating that a subsequent government might wish to terminate the concession, subject naturally to appropriate relief to the concessionaire.

Steven Stein kindly stepped in to speak about insolvency issues, based on material provided by **Andrew Stephenson** who unfortunately was unable to be with us in Dubai. Steven noted that, while insolvency of concessionaires tends to be rare in PPPs, the risk remains real for reasons including overestimation of tolling revenues for road projects. Insights that Steven provided included that insolvency during the operating period may have markedly different consequences depending on the type of asset: for example, whereas ownership and operation of a road could be resumed by the government relatively easily, the loss of a concessionaire operating a hospital may cause a significant impact on its operation.

Cecilia Vidigal told us how force majeure claims are dealt with in practice under the civil law, based on her experience, primarily from Brazil. She noted that the definition under the contract will be crucial and may be wide or narrow as to the matters that might constitute force majeure and the consequences if those events occur. Furthermore, under the Brazilian Civil Code, the potential for proving force majeure is limited and would not, for example, include unforeseen impact owing to inflation. Opportunities remain – for example, via the concept of 'maxi-devaluation' – but they are exceptional both in their scope and actual enforceability via the courts.

A fascinating discussion then ensued, with colleagues providing insights from around the world. Christopher noted, in response to a question from **Edward Corbett**, that the concept of force majeure can sometimes result in confusion owing to parties not appreciating the distinction between the concept as dealt with under, for example, the French Civil Code and the contractual definition. In turn, Christopher noted, FIDIC is considering expanding the use of the Gold Book term 'exceptional risk' in the next edition of its standard forms.

Colleagues then gathered around three tables to prepare, and then put forward, submissions from the point of view of the concessionaire and government, and an award by arbitrators. The forum then reconstituted itself as a commission of enquiry (with Edward granted intervener status on behalf of taxpayers) seeking to distil lessons from the project for the future of public infrastructure delivery in the land of Erehwon. It is testament to the collegiality and expertise of our committee that each table – though numbering well over a dozen lawyers – was able to produce

a comprehensive and coherent response in under ten minutes!

Our **Monday afternoon session**, entitled **'Construction contracts in the Middle East – expect the unexpected'** could not have been more timely given the significant changes that have swept the region in the wake of the Arab Spring. In her opening remarks, the Chair of the session, **Aisha Nadar**, reminded us that the Middle East has a long history of construction regulation, exemplified by the first recorded construction code having been promulgated by the Babylonian king, Hammurabi.

The session reflected the project life cycle and commenced with **Ellis Baker** discussing procurement issues in EPC/EPCM contracting in the Middle East. He noted that, while EPC contracting can often be regarded as having fairly standard features, in practice there are many variations in approach. These might include, for example, having multiple EPC packages as a way of spreading risk across a number of contractors with the expectation of a lower overall contract price or (as in the case of on-shore/offshore arrangements) for taxation reasons. He also pointed out that the risk of the process is sometimes taken by EPC contractors and sometimes not, depending on the practice of the industry (among other reasons). Moreover, while EPCM contracts may appear similar to EPC, they are in fact quite different, especially as to risk assumption by the contractor (in EPCM, the contractor's key obligation is to *manage* the various packages rather than take overall liability).

'...the Middle East has a long history of construction regulation, exemplified by the first recorded construction code having been promulgated by the Babylonian king, Hammurabi.'

Aarta Alkarimi informed us that the ripples of the global financial crisis took some time to reach the UAE but, when they did, it led to many projects being put on hold as finance ran out – dispute resolution became the order of the day. At the same time, the legal market in the UAE has been made significantly more competitive by the influx of international firms, resulting in a rise in fixed-fee billing. She observed that, while the FIDIC forms of contract remain widely used, other forms – such as those of the NEC and the FIDIC-based form promulgated by the Abu Dhabi Government – are also being used. Overall, she emphasised the importance of local knowledge in navigating the regulatory and cultural challenges of delivering projects in the region.

The discussion then turned to project execution. **Raid Abu-Manneh** echoed Aarta's advice, noting that, as English law is rarely acceptable as the governing law, lawyers based abroad need to understand the local laws. For example, there is effectively now a common contract code across Arab jurisdictions and, where Shari'a law applies, the contractual procedures will be balanced against overriding concepts including good faith and certainty. Other pitfalls for the unwary include that liquidated damages may, under applicable contract codes, be varied to reflect actual loss and may be increased in the event of fraud or gross mistake. Raid also noted that, culturally, it tends to be preferred to resolve disputes amicably rather than being overly contentious.

Dr Mohamed Abdel Wahab continued the theme of the importance of cultural understanding in the execution of construction projects, speaking to the 'glocalisation' of PFI projects in the Middle East. He identified construction risk, limitations of liability, liquidated damages, the relationship throughout the contractual chain, force majeure and – recently – political risk as key areas giving rise to disputes.

Dr Nael Bunni spoke to expectation of the unexpected in dispute resolution, focusing on arbitration. He focused, as a key reason for uncertainty of outcomes, on the inconsistent manner of adoption of the UNCITRAL Model Law across the region. Dr Bunni identified a number of these variations, including the inability to have witnesses and experts sworn in Egypt.

Finally, **Dr Mark Hoyle** exhorted colleagues to 'hope for the best and prepare for the worst'. He observed that lawyers based outside the Arab world should not be surprised that there are variations between jurisdictions in the region; rather, the differences are a function of countries in the region having long-established codes and other legal measures dealing with contracts and other matters. He also sought to dispel myths including that local UAE courts are antagonistic towards arbitration.

On **Tuesday afternoon**, the topic was **'Dispute boards – effects, defects and side effects'**, chaired by **Lyda Bier** and **Oscar Aitken**. The first speaker, **Doug Jones**, introduced the key features of dispute boards, noting that there are three main species: dispute adjudication boards (DABs) (which provide interim binding decisions), dispute review boards (DRBs) (the recommendations of which are non-binding but likely to be influential) and combined dispute boards (determinations of which may be binding or non-binding).

Turning then to the experience in Australia, Doug noted that the more than 20 projects that have used dispute boards since 1987 tend to be ad hoc – that is, the subject of bespoke terms rather than the classic DRB/DAB models. They have been 100 per cent successful in the sense that no disputes have progressed beyond the dispute boards. Doug noted that the Australian model – which is, in effect, a project facilitation body – has relied for its success on the choice of suitably qualified, respected panel members. Doug also addressed the particular issue as to whether dispute boards are precluded by adjudication legislation in place in the UK, Australia and elsewhere. He noted that dispute boards can be compatible with such legislation so long as the mechanism does not purport to exclude the right to take matters to adjudication if the dispute board process does not resolve the issue before it becomes a fully blown dispute.

'...myths includ[e] that local UAE courts are antagonistic towards arbitration.'

Philip Jeyaretnam SC informed colleagues in relation to the *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* cases, in which the High Court and Court of Appeal in Singapore dealt with a dispute that had been the subject of a ruling by a DAB under a modified form of the FIDIC Red Book (1999 version). Ultimately, enforcement of the ruling was refused. The case prompted a spirited debate among colleagues, including **Christopher Seppälä**, who referred us to his recent article ((2011) 6(3) *CLInt* 17) as to why, in his opinion, the decisions fell into error and **Claus Lenz**, who supported the Court of Appeal's findings.

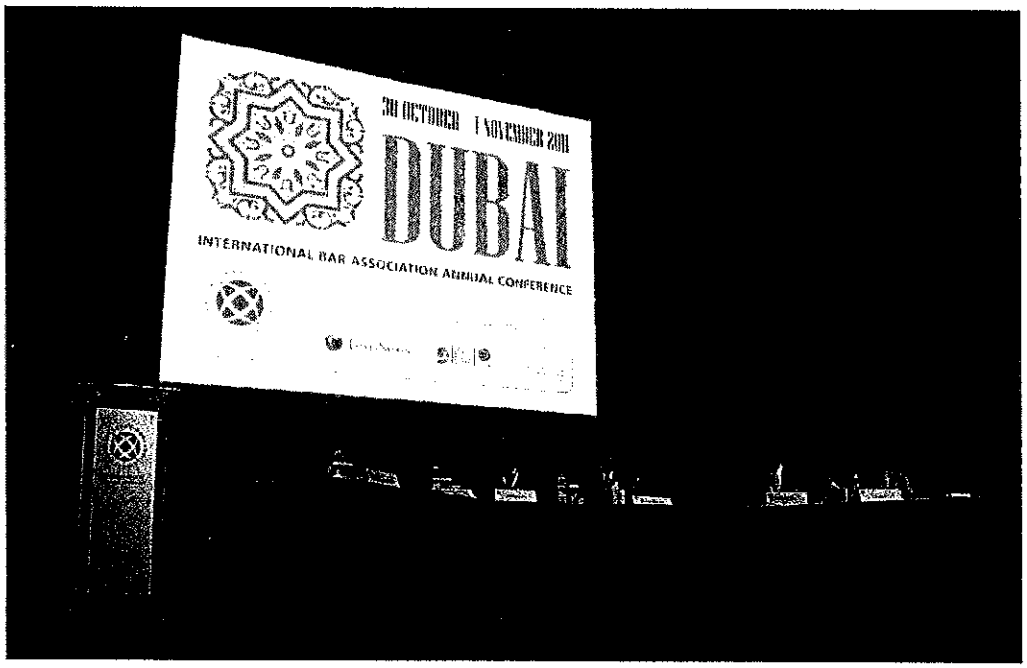
Jaime Gray informed us about the use of dispute boards in Latin America. He noted that dispute boards have a long history of use in the region, dating back to the dam project at El Cajón, Honduras in the early 1980s. He outlined a number of projects, mainly in the hydro-electric sector, using dispute boards across several countries. Jaime discussed a number of cultural and practical issues that come into play, and noted that misunderstandings as to the efficacy and features of dispute boards can sometimes lead to their not being used, or to the model being modified inappropriately.

Thomas Stickler told us that dispute boards have, until recently, been close to unheard of in the German domestic construction market. They have, however, been part of the landscape in international contracting, and the *Deutscher Baugerichtstag*, in 2008 and 2010, proposed a new statute requiring referral to adjudication where initiated by a party to a construction contract. Under that proposed law, decisions would be preliminary but able to be enforced by a court. Thomas told us that the issues being considered in relation to the proposed law include whether compulsory adjudication contravenes the constitutional requirements of a fair hearing.

Suchitra Chitale gave us a perspective from India. She noted that FIDIC-style DABs are not used; rather, infrastructure projects tend to use independent engineers or technical advisers. By reference to several case studies, Suchitra told us that DRB decisions tend to be appealed through arbitration and the courts, yet often these tribunals reach the same decision: in other words, dispute boards may be regarded as something of a dress rehearsal. Suchitra identified the lack of a legislative framework for enforceability as the primary reason why take-up of dispute boards has not been as successful in India as it might have been.

Steven Stein then led a working session in which colleagues acted as a DRB, DAB or combined dispute board (albeit each board comprised more than a dozen members rather than the usual one or three). The scenario considered by the boards involved a tunnelling project with complex and interesting delay and variations issues. This gave the members of these panels an opportunity to discuss how they should resolve the case in accordance with their respective legal systems.

On **Wednesday morning**, the topic was **'Anti-corruption measures in infrastructure projects: moving from preaching to practice'**, chaired by **Ramesh K Vaidyanathan**. He noted



The panel at the Wednesday morning session, 'Anti-corruption measures in infrastructure projects: moving from preaching to practice'

that the session was to cover a number of topics, including practical measures that can be taken by companies both to avoid corrupt practices and deal with them if they occur, and that a focus was to be provided by a case study.

Scott Marrah spoke to preventive measures, emphasising the importance of both having a clearly defined code of conduct and ensuring that employees and executives are adequately trained in relation to it. He noted also that due diligence on potential partners is becoming increasingly important. **Rashda Rana** gave a perspective from Australia, noting especially the impact of UN and OECD measures against corruption that are enshrined within domestic legislation. She noted that criminalised conduct may extend to that committed by intermediaries, resulting in potential exposure via companies' agents.

Sumeet Kachwaha identified a number of potential ambiguities in the anti-corruption guidance produced by Transparency International, which make for difficulties in providing advice in practice.

Marco Padovan informed us of the impact of measures required by the Multilateral Development Banks (MDBs) (including the World Bank Group), including the protocol on prohibited practices adopted in 2006. Within this uniform framework, companies that breach the protocol may face the catastrophic prospect of debarment from all MDB work. He noted as a particular pitfall that the standard of proof for sanctions is on a 'more likely than not' basis, meaning that companies might be debarred despite the conduct not having been proved 'beyond reasonable doubt' as might be expected to apply under domestic criminal codes.

Rupert Choat observed that, to construction companies operating around the world, each country's anti-corruption legislation may appear as a head of a hydra. He focused on the Bribery Act 2010 of the UK, which has recently come into force. Rupert noted that this head of the hydra has, as a particular 'bite', failure of commercial organisations to prevent bribery, a strict liability offence. In turn, companies need to put in place 'adequate procedures', which might include easily accessed whistle-blowing procedures.

Scott spoke about recent developments in relation to the US Foreign Corrupt Practices Act. He noted that whistle-blowing measures, recently enacted in the US via the Dodd-Frank Act, may mean that employees are more likely to report corrupt conduct directly to regulatory agencies; thus, employees should be incentivised by companies to raise issues internally. Rashda noted that Australia has a draft standard for the management of whistle-blowing within companies and Sumeet spoke about recent freedom of information legislation in India, which has a wide reach. Potentially, where the public interest test is

satisfied, it might require construction firms undertaking public sector work to provide to members of the public designs and other matters, which might include commercially confidential material.

The discussion then turned to how companies should react to suspected breaches. Scott commented that, in undertaking investigations, compliance with local law should be a primary consideration, often requiring advice from local lawyers. In particular, issues of waiver of privilege will need to be considered. Rashda noted that rapid action – effectively, a crisis management approach – can be essential. Actions that will be critical include record keeping with a view to mounting a defence to prosecution.

Turning then to the issue of voluntary disclosure, Scott opened the discussion by noting that, in the US, the conventional wisdom remains for companies to disclose the matter to the relevant agency in the hope of receiving a more lenient penalty. Rupert noted, by reference to two recent construction-related prosecutions, that settlements with agencies may include the imposition of monitors. Marco observed that, in Italy, companies may be excused from liability where a code of conduct is in place but the relevant executive or employee has acted significantly outside it. Sumeet spoke about administrative law challenges to black-listing of companies in India.

'...the highlight being the handover of the hardhats of office of the ICP Chairs from Mark Lane and Roberto Hernández to Tom Wilson and John Wright.'

Rashda gave a perspective on the role of in-house counsel in preventing and dealing with corruption. She noted that the logical starting point is putting in place policies and procedures for risk assessment in respect of particular projects and to maintain awareness of regulatory requirements in the jurisdictions where the company operates. Scott cautioned colleagues that legal counsel should not coach employees in relation to their testimony; moreover, in the US, destruction of documents where a prosecution is contemplated may result in felony prosecution. This can, for example, pose problems where emails are automatically deleted on a periodic basis.

The panel also dealt briefly with business-to-business issues. As the session closed, colleagues considered whether, in fact, the cost of compliance with anti-corruption requirements is justified by the benefits to be obtained. On a positive note, and while recognising that comprehensive regulation is in relative infancy, the answer seemed to be a qualified 'yes'.

On **Wednesday evening**, ICP colleagues and their guests gathered at the Capanna Nuovo restaurant, within the spectacular outdoor setting of the Dubai Marine Beach Resort, for the **ICP Annual Dinner**. A wonderful night was enjoyed, with the highlight being the handover of the hardhats of office of the ICP Chairs from Mark Lane and Roberto Hernández to Tom Wilson and John Wright.

In line with ICP tradition, our final working session, on the **Thursday afternoon**, was entitled **'Latest developments in construction'**. It commenced with two short debates, in which ICP colleagues demonstrated their ability to argue both sides of the following contentious yet important issues:

- 'This House believes that the influence and competitiveness of the West in global projects is dead', with **Pamela Jack** and **Charles Laubach** on the positive side of the ledger, opposed by **Wanda Ternau** and **Claus Lenz**; and
- 'This House believes that parties to a large infrastructure project should spend less on lawyers and put the savings into a "no fault" risk management fund', proposed by **Nick Henchie** and **Timur Bondaryev** and opposed by **Tuomas Lehtinen** and **Alfonso Iglesia**.

In the first debate, Pamela noted the relative decline in economic influence in recent years of the US and Europe and rise of China. In reply, Wandau argued that developed companies still have the most substantial economies and construction firms and will continue to prosper because of developing countries such as China expanding their infrastructure. Charles, in rebuttal, noted that, if looked at trend-wise rather than as a snap-shot, the statistics cited by Wanda in fact supported his side's view that the West's competitiveness and influence are declining precipitously. Claus pointed to the West continuing to have an advantage in its established expertise. After some further contributions from the floor and the panel, the vote from large and enthusiastic audience

indicated that the West's influence is not yet quite dead!

In the second debate, Nick advocated that, instead of spending fees on predictable forms of position-saving legal letters, parties should sign up to a no-fault fund in return for waiving the right to raise claims during the project. Tuomas asserted that such a fund would not work in practice for myriad legal reasons, including its tending to oust the courts' jurisdiction. Timur, drawing on his experience in Ukraine, noted that money spent on managing legal risk in a traditional way does not always reap dividends. Alfonso said that the focus for clients should be on using the legal spend more efficiently, through using lawyers with specialist expertise. Despite there being a sizeable number of members of the audience in favour of the motion, including those with experience of alliancing, the motion was not carried.

ICP tradition was carried on after the break, with the announcement of the host city for the 2012 Working Weekend: Melbourne, Australia, from 11 to 13 May. **Edward Corbett** then reported on the continuing development of *CLInt* and encouraged colleagues to contribute.

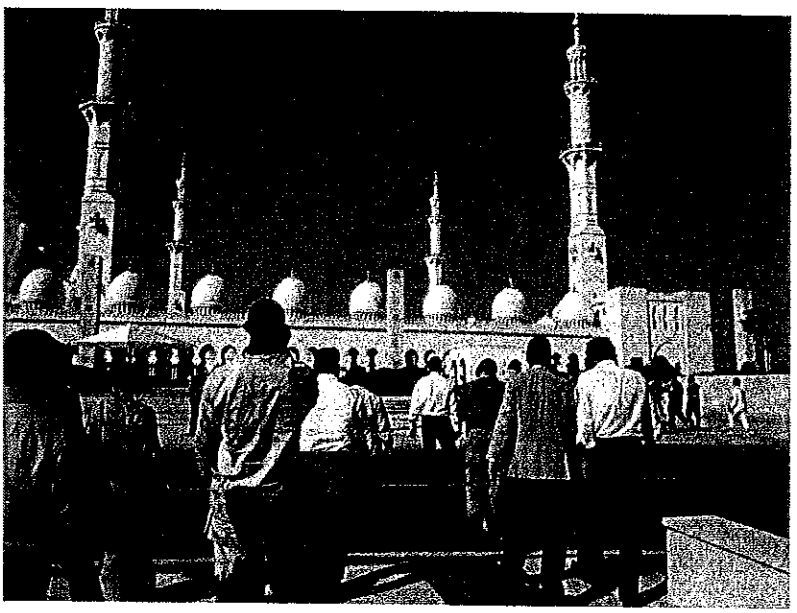
'...the announcement of the host city for the 2012 Working Weekend: Melbourne, Australia, from 11 to 13 May.'

Updates were then provided:

- **Aisha Nadar** noted that the development of the new edition of the FIDIC suite is continuing, with a test edition of the Yellow Book planned for release in 2012 and the full suite to be published in 2013 (the centenary of the foundation of FIDIC). Revisions being considered include a softening of the time bar, adoption of the Gold Book's approach to clause 20.7 and clarifying the roles of the engineer and the DAB (including the possibility of a standing DAB).
- **Joe Moore** gave an update from the USA, noting that many states now have PPP legislation in place, the use of integrated project delivery with contingency funds, the trend towards general contractors obtaining 'sub-guard' insurance products to protect against subcontractor insolvency in lieu of surety bonds and a change in indemnity laws in California.
- **Alfonso Iglesia** told us that, in Spain, the infrastructure and housing market has not yet recovered from the effects of the global financial crisis, and that the outlook for the domestic market in the next couple of years remains bleak. However, Spanish companies are leveraging the skills gained during the infrastructure boom to provide services internationally.
- **Phillip Greenham** informed us that there have been significant reforms in Australia's legislative framework in recent years, especially in relation to harmonisation of various state-based regimes. There is now a uniform approach to consumer protection law, the domestic arbitration legislation has been refreshed and moves are afoot to harmonise proportionate liability regimes. Phillip noted that the Australian courts remain strong supporters of arbitration and, at the same time, are streamlining their own processes. He told us that disputes boards are the subject of rising interest and, on the project delivery side, PPPs continue to be the order of the day for public infrastructure delivery. On the other hand, alliancing – while still actively used – is evolving towards other models, including 'early contractor involvement'.
- **Oscar Aitken**, reporting from Chile, told us that the market remains buoyant, despite the devastation of the earthquake and tsunami in early 2010. Chile's building codes have been revised, including to require compulsory earthquake insurance for apartments and reforms in respect of liability for defects.

On **Friday**, our **ICP excursion** took us first to the desert resort of Bab al Shams, where we enjoyed a demonstration of falconry and a delicious lunch. We then travelled to the neighbouring Emirate of Abu Dhabi and visited what must surely be one of the wonders of the modern world, the Sheikh Zayed Grand Mosque. Not only were we able to marvel at its scale and beauty, we were also given a tour providing splendid insights into the cultural, architectural and construction aspects of the mosque. It was truly an inspiring way in which to conclude another wonderful week of ICP collegiality!

Matthew Bell is a co-editor of CLInt; a Senior Lecturer and Co-Director of Studies for Construction Law at the University of Melbourne, Australia and a Professional Support Lawyer at Clayton Utz, based in Melbourne. Matthew acknowledges with thanks the assistance of Edward Corbett and Jaime Gray in the preparation of this report.



Top: Robert Hernández and Mark Lane pass the Co-Chairs' hard hats to Tom Wilson and John Wright

Middle: ICP excursion to Bab al Shams

Bottom: Sheikh Zayed Grand Mosque, Abu Dhabi

Photographs by Matthew Bell, Leendert van den Berg and John Wright