



# CONSTRULEGAL®

Working Alliance of Construction  
Law Firms For the Americas

www.construlegal.com

AUGUST 2017

NEWSLETTER

## IN THIS ISSUE

- WELCOME MESSAGE
- THE IMPORTANCE OF CONSTRULEGAL AND ITS CONTRIBUTION TO THE CONSTRUCTION INDUSTRY
- THE RISE OF CONSTRUCTION LAW IN LATIN AMERICA AND THE NEED FOR SPECIALIZATION
- IMPORTANCE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS (ADR) IN THE CONSTRUCTION INDUSTRY



## WELCOME MESSAGE

We hope you will enjoy our August 2017 Newsletter, with notes and information we hope will be of interest.

Since the creation of Construlegal, we have strived to achieve one essential goal; to combine the local and regional skills, talents and experience of our members to deliver to our respective clients a higher level of professional construction legal counsel, unique and unparalleled in the legal profession. In the early years we developed a regional practice centered primarily in the United States, Mexico and Peru, but had far bigger ideas. Since then we have matured and blossomed into an alliance of some of the most prominent local law firms throughout the Western Hemisphere serving the construction, infrastructure, public procurement/project finance and energy sectors.

The key to our early success was the fact that we were a small group of firms providing “big firm” quality service, each with its own well-established local and international credentials. The success of our service model has led to our growth to 73 members from 15 countries in the Americas, all striving to provide that same top level of service, that same high quality of work and, most importantly, that same level of “small firm” attention to detail that our clients deserve.

Despite our growth our perspective remains the same; excellence in service, quality and relationships. Just as in 2008 when we started, we each consider every client relationship of every one of our members as our own; both a privilege and obligation to serve no matter how large or small the case or client.

Globalization, technology and similar advances are changing the way our clients do business resulting in new challenges and opportunities. Whatever future brings to our clients and industries, the members of Construlegal is already looking ahead and planning to provide the experienced counsel needed to turn today’s challenges into tomorrow’s successes.

### Your Founding Members



Jerry P. Brodsky



Jaime Gray



Roberto Hernandez





# THE IMPORTANCE OF CONSTRULEGAL AND ITS CONTRIBUTION TO THE CONSTRUCTION INDUSTRY



**By Terencio José García Montenegro**

Regional Managing Partner | García & Bodán | Nicaragua

The idea of a law firm network on construction took a lot of us by surprise!! And what a good surprise!!! Thanks to the vision and dedication of our founders, today we have what I consider the first network of its kind, CONSTRULEGAL.

Construlegal, as its name implies, dedicates itself to the promotion and furtherance of construction law in the Americas and around the world. Such objective could not be more appropriate for many regions of the world, including Latin America, where construction is one, if not the one, of the main areas of business activity. In fact, business activity is oftentimes measured by how much construction is taking place. It is not by coincidence that one of the measurements used by sophisticated institutions dedicated to analyzing development, or used by the simple bystander considering the scenery of a city or country, to determine the level of development or the pace at which development is taking place, is precisely the quantity and quality of construction existing or taking place at a given time. The more construction there is or the higher the quality of the construction in a given place, the more “modern”, “sophisticated”, “advanced”, “high end”, or “developed”, such place is, as considered by most. Simply put, the socio-economic, political and even cultural development of countries, regions, and mankind in general, start with construction.

Based on the significance of construction to the world, it is fair to state that having a network dedicated to construction is of paramount importance, especially in an area such as the Americas. First, Construlegal allows anyone, lawyer or non-lawyer, to find, in one single place, a group of lawyers that are experts in construction law, which should permit easy interaction among those interested in this area of the law. Second, the existence of

*Continued on next page*



Construlegal also allows for rich and in-depth discussion on construction law, which should lead to finding new, more effective and more efficient ways to deal with construction law issues. Third, since the Americas is a region in frank development in its infrastructure, construction becomes even more important; and thus, a network such as Construlegal becomes a necessity, not a luxury. Fourth, Construlegal can be a great liaison between those dedicated to construction (companies, associations, interest groups, ministries, etc.) and the world of law (law firms, legal associations, and most important, legislatures and government regulatory bodies). Fifth, Construlegal, in addition to being a liaison as explained above, can also be a great ally to those dedicated to construction. It can be the “lawyer” of the construction actors, be it in pushing legislation, explaining legal consequences of certain acts or activities, defending private companies, defending governments, etc. In sum, there are sufficient reasons, as we have outlined some of them, the grant Construlegal the adjective of an IMPORTANT network.

So, how can Construlegal, contribute to the construction industry, given its importance and unique position in the world of construction and the world of law? First, in order to make a contribution, Construlegal needs to be known. An unknown entity or institution cannot contribute if it is not known to the world at large. In our case, it is incumbent upon the leaders of the association to make all efforts necessary to let the world know that Construlegal exists and is operating. First, there is the world of multilateral organizations such as the World Bank, the International Finance Corporation, the Interamerican Development Bank, the Inter American Investment Corporation, the Andean Development Corporation and other multilateral development agencies that allocate great percentage of its annual budgets, to infrastructure such as construction of highways, government buildings, energy generation projects, education and health infrastructure, etc. These institutions need to know that Construlegal exists and is there to assist whenever necessary. Our leaders should promote meetings among member law firms and these institutions. We are doing just that at the Central American level!

Second, it is or should be the duty of member law firms to introduce Construlegal in each country where the member is present. Construlegal should be introduced before ministries of construction of each country. I am

sure that public officials would welcome the existence of an institution that solely works on construction law issues and projects.

We could become a strategic partner to the ministries. Additionally, Construlegal should be introduced before the business associations dedicated to construction (usually, the chamber of construction of each country). The business associations are extremely influential in each of the countries where Construlegal is present. Furthermore, Construlegal should also go to Universities, colleges, institutions of higher education in general, to offer its knowledge and expertise to the construction and law faculties of such institutions. Construlegal could cooperate with the education of the future engineers, architects, interior designers, lawyers and paralegals. This activity in itself would be a tremendous contribution of Construlegal to the construction industry.

Third, it is important to be known in those construction sectors of the countries that assist in the development of Latin America. Countries such as Spain, Japan, the United States of America, the European Union countries, do make important donations or soft loans for infrastructure projects in Latin America. In this sense, Construlegal should be known by the ministries and development agencies of those countries. It is, in my opinion, the work of our leaders to reach out to the countries I just mentioned.

Fourth, we need to promote Construlegal through various channels. For example, construction conferences, speaking tours, seminars, post graduate courses, training courses, are only a few examples of what our membership could be doing at the national, regional and international level. While it is true that these activities require capital investments and human resources, it is also true that those recipients of the knowledge provided by Construlegal (associations, private companies, interest groups, etc.) may be in the capacity to pay for the information received.

If we do all the actions here outlined, or even if we do some of them, then Construlegal can start to be noticed. Once noticed, we can make our big contribution, which is to spread the immense knowledge that exists in the network. And it is interesting to reflect on the fact that the more we contribute with our knowledge, the more influence we can gain in the world of construction around the Americas. The more influence we can have, the more we can shape the construction world. //





# THE RISE OF CONSTRUCTION LAW IN LATIN AMERICA AND THE NEED FOR SPECIALIZATION



**By Marcela Radovic**

Regional Managing Partner | Radovic & Asociados | Chile

Construction is a very important industry in most countries, mainly because it is a vehicle for providing the infrastructure for almost everything we do in life.

The Construction Industry is also a source of wealth, often contributing with a significant proportion of the GDP, and employing a large part of the working population in every country.

The diverse and intricate nature of the construction industry reflects the complexity of contemporary society as a whole, leading then to necessary specialization of particular activities in construction.

The term “Construction Law” is not easy to define. At least until the later part of the twentieth century, there was not a branch of the law that identified it self with that name.

For the purpose of this article, we will consider “Construction Law” as all the rules and principles of law that are derived from and applicable to, a diverse range of projects, including what it might be described as typical construction and engineering projects.

Construction Law attorneys are those who cover the specialized needs of clients in the construction and engineering industry, performing every stage of the projects life cycle. Some of the most typical activities that a Construction Law attorney will perform are:

- Reviewing and drafting contractual documents:
- Advising a client in order to identify and follow up the execution of a construction contract and especially regarding to its duties and its rights.
- Supporting a developer, lender, or purchaser to satisfy environmental due diligence requirements.
- Helping a client to select an expert for a construction project or for a construction case, as a witness, or as an expert witness.

*Continued on next page*



- Drafting and elaborating a claim for a client, in coordination with engineers and other specialized experts.
- Representing a client in arbitration or other Alternative Dispute Resolution Mechanism.
- Representing a client at an administrative hearing.
- Representing a party in litigation.

Due to the high level of complexity and the amounts of money involved in construction disputes, every day more and more, in most of Latin American countries the parties prefer to take construction cases to arbitrators rather than to judges. Arbitration will normally be more specialized in construction matters, and also, will solve those cases in a faster and more efficient way.

Another example of specialization, is that owners in Latin American countries have begun to use international standardized model of contracts in their projects, such as FIDIC and NEC, as a way to assure a better risk distribution among the parties, that can lead them to a better understanding during the contract execution.

FIDIC format, for example, is divided in two parts: Part II for Particular Conditions intended to contain project specific amendments and Part I for General Conditions, intended to be the same for all projects.

Employers frequently choose FIDIC's contracts because they want to receive all their benefits, but then they want to modify Part I for their own use. Since FIDIC contracts have been drafted by experts who really understand the interdependency of the clauses and how the redrafting of clauses could affect the original risk allocation proposed by FIDIC, it is crucial for the parties, when working with these formats of contracts, to work with specialized Construction Law attorneys. Otherwise they will risk the balance that FIDIC contracts involve and consequently the benefits that they offer for the project.

In Latin America, the construction industry has experienced considerable growth in the recent years and it all indicates that it will continue to grow and that it will become even more complicated and adversarial than in our days. This rapid growth has not given the legal environment and the law firms market enough time to develop alongside the complexity of the industry itself.

It is because of this everyday growing complexity phenomenon that it is key to count with the support of really specialized and competent attorneys.

Unfortunately, we still can observe that many contractors and employers still hire general law firms who are not specialized in Construction Law and that,

because of that, are not capable to cover their needs properly, becoming more a source of problems than a real contribution to their clients problems.

Some of the main characteristics that a construction attorney should have, in order to be an effective support to his or her client are:

**Real Specialization:** the specialization of a construction attorney implies a variety of complementary activities within the construction industry, such as attending to construction courses, seminars and academic activities regarding construction, not just involving legal aspects, but also technical and economic ones.

Another way of acquiring the required level of specialization is to actively participate in the construction industry activities, for example, in the Construction Law Societies that have been created by the industry in the later years in countries like Perú, Argentina, Mexico and Chile or those focused in Dispute Resolution, as the Dispute Resolution Board Foundation.

All of these organizations give attorneys the opportunity to interact with a wide range of professionals from the construction industry, allowing them to become part of the construction community and to acquire the knowledge that this business requires.

Visiting the site every time it is possible, it is another essential way to become aware of the particularities of a construction project. These visits should be a routine in any construction attorney's work. Going to the site regularly will allow lawyers to really understand the facts, their impact for the project development and maybe, more importantly, the consequences that could be derived from any legal decision made by them.

Visiting the site will also allow attorneys to learn the construction language and to understand its codes and values, so they will be better prepared to interact in a more fluent way with engineers, architects, quantity surveyors and other key professionals that are part of the project team.

*Continued on next page*



**Effective communication skills:** As we all know, miscommunication is one of the main sources of conflict in society and mostly in construction contracts. Consequently, one of the most important skills that a construction attorney should have is to be able to communicate in an effective way.

First of all, the construction attorney must have the capacity to listen in an active way, not just to their client, but also to the opponent and to every stakeholder involved with the construction project he is working in.

Unfortunately, lawyers are trained at law school to speak and to write in order to give the best arguments in order to persuade other people, but very rarely to listen. Listening in an active way implies not only to listen what the other person is saying with words, but also with his or her body language. This capacity will allow attorneys to deeply understand the problem that his or her client is presenting and also to understand how that problem is affecting the client.

Another aspect of this communicational skill is the capacity to be assertive, which means being self-assured and confident without being aggressive, for example, with a client or even with the other party.

In addition, as we know, in any construction project is crucial to leave detailed trace of the main issues that arose during the execution of the contract.

It is very common in the industry to find that contractors and owners are reluctant to leave trace about the problems and obstacles that arise during the contract execution, mainly because they do not want to face a conflict with the other party. Unfortunately, in practice, avoiding discrepancies and differences could lead them to even more difficult and intricate scenarios in the future:

Being assertive, from the beginning of the project's life, will create an environment of trust and transparency; and it will allow the parties to identify future problems and possible solutions for those problems in a timely and cooperative manner.

**Personal and professional integrity:** this is probably the most difficult skill to assess in a construction attorney. For the purpose of this article, we will understand that a person has integrity when he or she is capable of making his own decisions based on his own principles and values and regardless the external circumstances that surround him.

As we all know, corruption is one of the most critical issues that it is currently damaging the construction sector, causing conflicts and generating important losses for the sector.

Conscious about the importance of continue developing the construction industry in the region, a group Latin-American law firms in 2011, decided to created the first alliance of law firms specializing in infrastructure and Construction Law in the Americas called Construlegal.

Each of Construlegal members are highly specialized in Construction Law and responds to the unique, specialized needs of clients in the construction and engineering industry in the Americas, providing legal advice and related services.

Initiatives such as Construlegal are keys for construction sector customers to develop business with the peace and confidence of receiving truly specialized advice and support of quality. This, in turn, will allow them to obtain better economic results and create and maintain more and better contractual links in the Market. //



# IMPORTANCE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS (ADR) IN THE CONSTRUCTION INDUSTRY



**By Christian Díaz Barcia**

LPA Legal & Consulting | Costa Rica

The global construction industry is one of the main engines of the economy. Especially in Latin America, where there is a lag in infrastructure development, such as highways, ports, airports, trains, metros, hospitals, hydroelectric plants, wind towers, etc., the construction industry becomes very relevant.

At the same time, Latin American countries have been characterized by extremely slow judicial systems in relation to the agility required by large infrastructure projects.

In view of this situation, alternative dispute resolution mechanisms (ADRM) are of particular relevance to the industry, which inherently entails differences of criteria between the parties.

The ADRMs are not new tools, since before humanity implemented the tripartite model of division of powers after the French revolution, these mechanisms were present in the handling of differences between the parties. However, it is not until the late twentieth century, that they begin to take special relevance in both trade and construction.

The main mechanisms used by users of the industry are mediation, conciliation, dispute boards, and arbitration, among others.

In mediation and conciliation, a neutral party helps the parties to communicate with each other so that they can together try to find alternatives and solutions to the difference they have between them. In this case, the neutral party does not decide who is right nor does he look for guilt or innocence, this person is simply a facilitator of communication between the parties.

On the other hand, dispute boards, are a method widely used in the construction industry as it helps the contractual parties, on the one hand to try to avoid disputes and, if they arise, to be able to manage and solve them so that the contract continues to be executed and the parties can obtain the best benefits from it. In this case, there are usually three neutrals that form the board, although it is possible that it is only one. These neutrals are usually technical professionals specialized in the subject of the construction contract, and normally they visit the work periodically in order to have a more immediate access to its development and be able to help the parties in the solution of their differences. In the FIDIC contracts we can find in the conflict resolution clauses the figure of the dispute boards.

Finally, arbitration in the construction industry also plays an extremely important role, since it is a way for an Arbitration Tribunal, formed by experts in the construction field, to decide on the dispute between the parties in an expeditious and specialized manner. In international practice it is common to find, in infrastructure contracts, arbitration centers such as the International Chamber of Commerce (ICC) as responsible for nominating specialized arbitrators in the subject.

We see how ADRM play a very important role in the construction industry, among the main advantages there are in using them, there is the immediacy in the solution of differences, the specialization of neutrals, and the great savings for the parts in time and in costs contrary to the ordinary justice.

It is of the utmost importance to make awareness of the benefits of these mechanisms in the different actors of the industry, such as the owner, contractor, sub-contractors, insurers, financiers, etc., so that the staggered clauses are included in the contracts of construction projects so that the parties are obliged to apply them. //

---

**DISCLOSURE** | CONSTRULEGAL® is a strategic alliance of law firms based in the Americas which share a common focus, values and market approach. Members are not affiliated in the joint practice of law; each member firm is an independent law firm and renders professional services on an individual and separate basis, maintaining complete autonomy. When CONSTRULEGAL® members join forces to collaborate on particular matters, each member is individually and separately retained. CONSTRULEGAL® members are not restricted in referring, handling or accepting cases or in joining other professional organizations, and are not affiliated for the joint practice of law.