Law & Risk Mitigation Today II

Purposeful Collaboration & Resolution

Experts offer insight and advice about contracts, clauses and finding common ground

By Vicki Speed

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Voices of Construction Law

Advice and Insights From Legal Experts

Industry experts weigh in on trends and challenges in contract terms in today's more collaborative environment.

How are industry perspectives changing with regard to dispute resolution, and is there an optimal approach in today's more collaborative environment?

William M. Hill. Co-Chair, Construction Law Practice, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, and Former Chair, ABA Forum on Construction Law: Our clients—both contractors and owners—are well aware that disputes are not like fine wine; they do not age well. They want to get them resolved as quickly as possible, and they're not interested in the 'great victory' that spans years to move from filing to award or judgment. Increasingly, our clients want a problem resolved in one or two quarters at most.

Eric L. Nelson, Partner, Smith, Currie & Hancock: Companies are making more concerted efforts to resolve disputes early—but with mixed success. Although the contractual mechanisms exist to handle early dispute resolution, there is still a tendency for some project participants to push dealing with disputes to the end of jobs.

Michael A. Marra, Vice President, Construction Division, American Arbitration Association: Those parties choosing to include collaboration and efficiencies in their projects also want these opportunities in their dispute-resolution processes. Mediation continues to be an effective method of collaboratively resolving a dispute and now is required on all construction cases filed with the AAA. Another trend to more efficiently manage the process is selecting one arbitrator instead of three, which can reduce arbitrator compensation costs by as much as 79% and decrease the time to award. In fact, more than half of the parties with large construction disputes select a single arbitrator.

John Marshall Cook, Member, Smith Pachter McWhorter: The shift to more collaborative project delivery has forced an evolution in the resolution process. There are more opportunities for disputes among parties on the same "team," which allows for some creativity in defining the process. There are more opportunities, particularly on large projects, to use dispute review boards and other real-time neutral dispute resolution—which I believe are the wave of the future. Having an expert neutral to evaluate issues in real time is invaluable and certainly saves time and money down the road.

Are you seeing more use of alternative dispute-resolution methods?

Nelson: Dispute-resolution boards and early neutral evaluation can be very effective, assuming both sides embrace the process. Success is often contingent on including subcontractors in the owner-contractor dispute-resolution board or early neutral proceedings.

Cook: While the dispute review boards are still limited to mega projects, we are seeing use of the process on those projects expand to disputes between joint-venture partners and contractor/subcontractor disputes, as opposed to the traditional owner/contractor disputes. I'd like to see the concept filter down in some form to the medium and large projects as well. However, right now, the requirement for a board or neutral can be costly so contractors are reluctant to use it, particularly when margins are thin.

Is arbitration still an efficient dispute-resolution solution?

Denis Ducran, Senior Counsel, Peckar & Abramson: Construction industry veterans are well aware that arbitration offers limited opportunity for appeals. Some prefer this because it offers finality and can avoid years of appeals. However, finality should come with a word of caution: as arbitration continues to gain preference, our common law may be suffering. Indeed, less appeals involving construction disputes means less court-made law and reported decisions governing the construction industry. Arbitration awards are private, unpublished decisions that don't help us interpret statutes or common contract provisions. Due to the combination of well-settled fundamental law and the fact that many construction projects, contracts and disputes are unique, this has been less of a challenge for the construction industry. However, as time passes and new issues arise, the long-term implications may become warranted.

Hill: Arbitration is plagued with misconceptions and, in some cases, abuse. Its success depends on a strong arbitrator and construction lawyers who resist their natural inclination to know everything. Many want to uncover every stone, and that gets expensive. However, if handled appropriately, arbitration is very effective.

Marra: Yes, and we continue to work to develop ways to reduce time and cost. In addition to time and cost efficiencies, we've introduced new arbitration rules that require parties

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AIA Contract Documents used: A101-Owner/Contractor-Stipulated Sum, A201-General Conditions, B101-Owner/Architect, C106-Digital Data Licensing, C401-Architect/Consultant plus associated administrative G-forms.

Learn more about the Ace Hotel project at aiacontracts.org/enr

Photography ©Timothy Hursley

to identify a company executive or in-house counsel as the designated employee to be included on all communications, allowing for a more collaborative process.

Nelson: I still generally prefer arbitration over litigation, but the arbitration process needs to be better controlled to assure the full benefits of a supposed quick and cost-effective resolution. Contract provisions need to be more specific and resolute on limiting the process, and arbitrators need to be more willing to enforce the contractual limitations. Arbitrators are often reluctant to place too many restrictions on the process due to the fear that their award may be vacated. But in most instances, the likelihood of a court vacating an award is remote, especially in a commercial setting.

Cook: For a long time, the industry viewed arbitration as a more affordable alternative to litigation. But the cost difference has become minimal due in part to the unfortunate reluctance among some arbitrators to exclude irrelevant evidence. Allowing traditionally inadmissible evidence into the proceedings can create longer, more complex arbitrations. Defining fixed time and cost limits for the arbitration could be an answer, but from what we've seen, those stipulations haven't caught on in arbitration documents to date.

What's the state of no-damage-for-delay clauses in contracts?

Ducran: For contractors seeking to avoid no damage for delay (NDFD) clauses, the first source of relief from owners arises during contract negotiations. Contractors should not regard all NDFD clauses as standard or nonnegotiable. In fact, standard form agreements often do not contain such clauses. However, if negotiations are unsuccessful, relief is increasingly found in the courts and legislatures. Several state statutes prohibit enforcement of NDFD clauses altogether by public owners, while many courts recognize exceptions to enforcement in both public and private contracts. These jurisdictions recognize the impropriety of enforcing a NDFD when the delay is caused by the active interference of the owner or a cause the contractor could not have reasonably anticipated.

What are causes for concern in today's contracts, and what's your advice moving forward?

Brian Perlberg, Senior Counsel, Construction Law and Contracts, AGC of America: The most progressive contract documents will focus more attention on creating a structure that encourages direct and positive owner/project team communication in the field and in real time, rather than conventional practices that might limit and funnel those conversations for fear of losing traction in the dispute.

Hill: Too often, both sides neglect to craft customized contract documents with a tailored dispute-resolution approach that works for their specific project. Avoid cherry picking favorite clauses in isolation. Many projects have unique drivers—contract documents should pick up on them. Also, principals should pick up the phone or meet face-to-face as contracts get drafted for important projects. The relationship between an owner and project team is cemented during contract formation of a promising new project.

Nelson: More time should be spent developing contract provisions with detailed dispute-resolution provisions that consider all project participants and attempt to resolve claims early with a cost-effective and consolidated approach. Stricter limits on discovery and timing and length of hearings need to be contractually mandated, with the ability to make adjustments depending on the size and nature of the dispute. ◆

Teaming Agreement Tip: Beware of "Agreement to Agree"

By **John Marshall Cook** and **Daniel D. Rounds**, Smith Pachter McWhorter

Teaming agreements are currently commonplace in construction. Along with establishing terms by which the parties will accomplish pre-award tasks, they often feature agreements to negotiate a later contract to govern the parties' post-award relationship.

Depending on the jurisdiction, this requirement may not prevent a teammate from contracting with someone else for project performance. For example, in *CGI Federal Inc. v. FCi Federal Inc.*, No. 170617 (June 7, 2018) the Virginia Supreme Court reaffirmed that agreements to negotiate future contracts are "too vague or too indefinite" to be enforceable. The Maryland Court of Special Appeals has similarly held that "agreements to agree" are not enforceable when material terms of the future contract remain subject to negotiation.

If the teaming agreement requires future negotiation or leaves uncertain whether the parties will enter into a subsequent contract, a court may find an unenforceable agreement to agree. Parties concerned about a teammate looking elsewhere should consider including an exclusivity clause. ◆

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BIM and the Digital Practice: Streamline Your Project With Building Information Modeling Contracts

By **Caitlin Sweeney**, Specialist, Global Innovation Marketing & Education, AIA

The increased dependence on building information modeling (BIM) continues to change how projects are designed and executed. Beyond moving from 2D to 3D visualization, the technology also promises the creator the opportunity to streamline shop drawings and shop ticket processes. Overall, the benefits of BIM include risk reduction and quality and efficiency improvements.

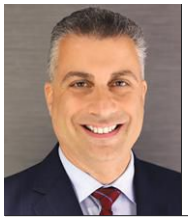
Initially, BIM's impact was characteristically realized on the design side, where it permitted architects to visualize and design a project in exciting innovative ways. However, BIM efficiencies were recognized by the other major members of the construction industry. Most notably, contractors now use BIM to more accurately estimate, schedule and execute the construction of a project.

When using innovative technologies like BIM, it's crucial that all project participants understand their roles and responsibilities. AIA Contract Documents offers BIM and digital practice documents that establish expectations for the use and transmission of digital data. The BIM and related digital practice documents help create a guideline for working with BIM and other digital practices. They address any issues that may arise throughout a project and reduce barriers that often hinder BIM adoption.

AIA contract document BIM and digital practice documents include:

- C106-2013: Digital Data Licensing Agreement
- E203-2013: Building Information Modeling and Digital Data Exhibit
- G201-2013: Project Digital Data Protocol
- G202-2013: Project Building Information Modeling Protocol Form

Free Samples of AIA Contract Documents can be found at acdpages.aia.org/2018-ENR-SC-Fall2017Release.html. ◆



Managing Arbitration Procedures in Today's Collaborative Contracts

By **Michael A. Marra**, Vice President, Construction Division, American Arbitration Association

The American Arbitration Association (AAA) continues to revise its rules and procedures to provide a more time- and cost-effective dispute-resolution processes that incorporate today's more collaborative project agreements.

Parties now have the option of including the AAA Supplementary rules for Fixed Time and Cost Construction Arbitration. The supplementary rules are intended to provide more cost and time certainty to the arbitration process. The Rules inform the parties in advance of the maximum fees for the arbitrator and for the AAA's administration, and further, how long the arbitration will take from filing the claim through receiving the award.

We're also seeing a trend for some parties to use one arbitrator instead of three to more efficiently manage the arbitration process. For cases that do proceed with three arbitrators, the parties are encouraged to consider implementing procedures that would limit the participation of the full panel where it is not necessary. In response to industry needs, the AAA recently introduced the Streamlined Three Person Panel option, which calls for a sole arbitrator to manage the early stages of the case, decide issues related to the exchange of information and resolve other procedural matters.

> The supplementary rules are intended to provide more cost and time certainty to the arbitration process.

The full panel of three arbitrators will still convene for the hearing and ultimately decide the award. However, appointing a sole arbitrator to handle initial procedural matters can be a much more cost-effective way to manage an arbitration. ◆

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Catching Lightning in a Bottle

The Challenge of Using Technology to Improve (Not Impede) Effective Communication, Project Execution and Dispute Avoidance & Resolution

By **Philip E. Beck**, Partner, Smith, Currie & Hancock

In 1974—the year I graduated from high school—one of my favorite singers and songwriters (both then and now), Jimmy Buffett, released the song "A Pirate Looks at Forty" on his album A1A (not to be confused with AIA). After almost 40 years as a construction lawyer, I sometimes feel like that pirate.

Much has changed in the construction industry over the past four decades, and change continues to accelerate at an exponential pace. Both as an industry and as the professionals serving that industry, we must accept and embrace that change. As General Eric Shinseki said, "If you don't like change, you're going to like irrelevance even less."

The challenge with which the industry struggles is how to use change and the new technology it brings as a powerful tool rather than an insurmountable roadblock.

Communication

One thing my almost four decades as a construction lawyer have taught me is that the root cause of most construction disputes is—to borrow part of a line from a Clint Eastwood movie—"a failure to communicate."

Early in my career (before laptops, email, cell phones and internet), there was relatively little written communication on most construction projects. In fact, you could generally tell which days it rained on a project by looking at when notice letters were written (because those were the days project managers had time to write letters). Today, many of us receive more than 100 emails each day. Is that effective communication?

It has become cost prohibitive to litigate or arbitrate most construction disputes due to the high cost of dealing with electronically stored information (ESI). Even in very large dollar disputes, the parties' attorneys cannot look at all of the potentially relevant electronic project documents because they are so voluminous. Yet, most construction disputes still include the assertion of a lack-of-notice defense. If the project participants are not writing about the things that materially impact the project time and costs, what are they discussing in those emails?

Project Execution

Exciting advances in technology and project execution tools and techniques are also revolutionizing the way construction projects are designed and built, and they could facilitate major, long-overdue strides in construction productivity, speed, economy and quality.

In order to realize their full potential, tools and techniques such as integrated project delivery (IPD), building information modeling (BIM), modular construction, 3D printing, virtual imaging, barcoding, laser scanning, robotics, drones, and other autonomous vehicles and equipment must be used wisely.

Ironically, unleashing these tools' full potential may require that they be harnessed to a degree. This will also require that the contracts, procedures and protocols governing and allocating the roles, responsibilities, risks and expectations of the various project participants evolve rapidly to reflect how the parties actually intend to design and construct their projects.

Dispute Avoidance and Resolution

I have lived my entire legal career in Atlanta, the slogan of which is "The City Too Busy to Hate." But Atlanta has never been a city too busy to litigate—and there are probably more construction lawyers in Atlanta than in any other city in the world, with the possible exception of Washington, D.C.

Litigation is not, however, an efficient means of resolving disputes in the fast-paced, technology-enhanced world of construction. One of the great ironies of modern-day life is that the advent of time-saving technology causes us to have less free time, not more.

The industry needs a better, faster, less-expensive way of avoiding and resolving construction disputes. Admittedly, that's a tall order. But 40 years of perspective suggests that accomplishing that will entail improving communication, harnessing technology and encouraging individual behavior that benefits the project and all participants as a whole. Industry professionals who learn how to accomplish those daring feats truly will have caught lightning in a bottle. ◆

One of the great ironies of modern-day life is that the advent of time-saving technology causes us to have less free time, not more.

Four Keys to a Successful CIP

By **Clint Provost**, Senior Vice President, Construction Risk Services Division, McGriff, Seibels & Williams

An owner- or contractor-controlled insurance program (CIP) assures comprehensive coverage on a project for all participants—though not all CIPs are the same.

The four elements of a successful CIP program include:

Efficient, effective and constant communication. The best CIPs are collaborative efforts among all parties: broker, carrier, CIP sponsor, general contractor and subcontractors. For an OCIP, engage the general contractor, who will often have had equal or broader coverage on past projects and long-term relationships with carriers that could provide better pricing and coverage.

Defined safety and claims protocols. Every CIP should outline reporting requirements in the event of loss or injury for workers compensation and general liability coverage.

> The best CIPs are collaborative efforts among all parties.

Benchmarked best-in-class terms. Whether coverage terms, claims handling, carriers, rates or deductibles, rely on experience and carrier relationships in your specific market sector.

A robust CIP software solution. The CIP system should manage enrollments and produce loss data and financial reports with ease and efficiency—and be supported by a dedicated CIP team.

Of course, a quality CIP requires quality construction and design partners. When developed with reputable construction and design firms, CIPs provide comprehensive coverage and limits, reduce risk, and support completed operations terms and conditions. ◆

Avoiding Collateral Damage of Trade Wars

By **Christopher M. Sweeney**, Senior Associate, Peckar & Abramson

While fluctuations in material prices and availability are nothing new to the construction industry, the level of uncertainty it currently faces with the ongoing international tariff and trade battles is unusually high. In addition to direct increases to costs of materials like steel and aluminum, there will likely be collateral increases in related materials and equipment purchases and/or rental costs. Contractors and suppliers are rightly concerned about whether they will be able to recover substantially increased costs due to these uncontrollable issues.

For existing contracts, there are potential avenues for recovery (e.g., claims of force majeure, governmental interference and/or escalation), but these are likely steep, uphill climbs. Additionally, contractors can seek exemptions from some tariffs through the Commerce Dept., though initial responses from the government do not look promising.

When negotiating and bidding new projects, contractors need to consider this potential volatility and include contractual language to protect them or, at a minimum, share some of this risk with others.

Experienced construction attorneys can help assess and develop claims on existing contracts and provide guidance and language for upcoming projects. Given the uncertainty, contractors should engage counsel to address these issues sooner rather than later. ◆

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The Value of a Scheduling Standard of Care

By **Bryan Van Lenten**, Managing Consultant, HKA

Since 2011, individual construction disputes globally have cost an estimated $40 million and taken 17 months to resolve on average.

Too often, the resolution of construction disputes is constrained by the lack of easily accessible and detailed project performance data, and the schedule is, arguably, the single most important record of project performance data.

Yet evaluating the quality of a construction schedule is not easy—is it time to set scheduling standards of care?

A Profession in Transition

In the past, schedulers have not been held to the design standard of care definition. But the profession has changed considerably with the advent of powerful scheduling tools that have enabled the creation of complex schedules that track massive amounts of project data.

Today's schedulers must be fluent in complex software suites and may have to maintain schedules of tens of thousands of activities and relationships.

Furthermore, the advent of new technologies, such as 5D BIM, will continue to revolutionize construction management practices, increasing schedule complexity and further highlighting the value of industrywide standards and even professional certification of schedulers.

Leveraging Schedules for Resolution

While scheduling is typically included as part of the contractor's responsibilities under the general conditions section of a contract, specific quality standards and metrics may not be provided.

The inconsistent quality of project schedules represents a failure of the industry to leverage the potential power of new technologies to reduce claims costs and increase certainty.

The idea of a standard of care exercised by scheduling professionals presents many benefits.

The inconsistent quality of project schedules represents a failure of the industry to leverage the potential power of new technologies to reduce claims costs and increase certainty.

It can serve as an objective standard against which to measure performance, shielding the competent scheduler. Additionally, a standard of care publicly communicates scheduling expectations to all parties, thereby reducing uncertainty and risk.

Establishing Best Practices

A first step to a scheduling standard of care would be to codify scheduling best practices into a formal standard of care.

Currently, scheduling best practices are contained in published guidelines from organizations such as the Project Management Institute (i.e., Best Practices Guidelines), the Defense Contract Management Agency and the Government Accountability Office. While these standards overlap, they are not identical.

Deciding which standards to use remains largely a subjective personal preference, which can undermine the necessary objectivity of the analysis. Having an industrywide standard of care would yield a more objective measure of performance with immediate and long-term benefits, clarifying expectations and reducing uncertainty for both owners and contractors.

For an unabridged version of this article, visit www.hka.com/knowledge-centre. ◆

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