

The Contractor's Construction Superconference- Dec. 12-13, 2002

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- **SUPERDISPUTE!**

Hotly Contested Construction Litigation from the
Contractor's Perspective

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Construction Litigation Exists

- The Current Focus on ADR
- Contractors Are Better Off in Court in Hotly Contested Cases

Why Litigation Is Preferred

- ELIMINATE SOME DRAWBACKS TO ARBITRATION
 - Is Arbitration Really More Timely?
 - Arbitration Does Not Cost Less
 - Compromise Awards Do Not Benefit the Contractor
 - Application Of The Law And The Contract Provisions

Benefits of Court Administration

- Scheduling
- Dispositive or Limiting Motions
- Enforcement of Interim Relief
- Discovery
- Consolidation and Joinder
- Multidistrict Litigation

Benefits of Court Administration

- The Judge or Jury as Fact Finder
- Judicial Application of Law
- Appeals
- Enforcement Of Liens

Construction Contract Dispute Clauses

- Hybrid Based on Amount in Controversy
- Controlling the Dispute Forum
- Choice of Law
- Public Projects

Discovery, Documents, and Deadlines

- When A Construction Dispute Or Claim Is Filed In Federal Or State Courts, The Applicable Federal Rules Of Civil Procedure Or The Applicable State Rules Of Civil Procedure Will Apply.
- These Rules Define The Methodology By Which The Parties Will Exchange Information Relevant To The Dispute.

Discovery, Documents, and Deadlines

- In Arbitration And Mediation The Rules Of Exchanging Relevant Information Regarding Disputes Or Claims Is Defined By Applicable Arbitration Or Mediation Rules But The Parties Have The Right To Modify The Rules.
- In Court, The Rules Cannot Be Modified And Must Be Followed.

Discovery, Documents, and Deadlines

- Documents Are An Important Form Of Evidence And Are Critical To A Construction Case Because They Tell Much Of The Story Of The Project And Are Less Subject To The Vagaries Of Human Memory
- Each Party To The Dispute Will File Document Requests To The Other Parties And Each Party Will Provide All Relevant Documents To The Parties

Discovery, Documents and Deadlines

- The Contractor And The Contractor's Legal Counsel Will Make The Relevant Documents Available To The Other Side. Failure To Do So Can Result In Sanctions.
- The Most Important Thing That A Contractor Can Do When Faced With A Dispute Or Claim Is To Already Be Prepared With A Reliable Project Information System And A Document Retention Policy.
- Project Information Management Systems Must Be Well Defined And Maintain. Failure To Maintain The System Can Easily Create Bad Facts.

Documents, Deadlines, and Discovery

- 21st Century Document Discovery Issue- Electronic Documents:
- Advisory Committee Notes to the 1993 Amendments to Fed.R.Civ.P 26 states that parties must produce:
- “Computerized Data and other electronically-recorded information is discoverable even if hard copies of the documents have been produced”

Documents, Deadlines, and Discovery

- Once a party becomes aware that a suit has been filed it - **MUST PRESERVE ALL ELECTRONIC DATA WHICH IT KNOWS OR SHOULD KNOW THAT IS RELEVANT TO THE LAW SUIT.**

Discovery, Documents and Deadlines

- Courts Have Gone As Far As Requiring Emails Which Had Previously Been Deleted From The System Produced.
- If Electronic Files Are Destroyed After Suit Is Filed, Companies May Be Subject To Severe Sanctions, Such As Adverse Judgment Or Dismissal Of An Action *Playboy Enterprises, Inc. V. Welles*, 60 F Supp 2d 1050 (S.D.Cal.1999).
- Current Decisions Are Somewhat Inconsistent Depending On Different Jurisdictions But The Primary Focus Is On Full And Complete Discovery.

Discovery, Documents and Deadlines

- Identify All Locations That Potential Relevant Documents May Be Located. ex. Home Office, Site Office, And Local Office
- Determine The Volume Of Electronic Records And Non-electronic Records
- Determine The Document Retention Policy
- Define And Implement An Evidence Management System

Experts and the Litigation Process

- Timely Retention
- Expert Qualifications
 - Education
 - Licenses
 - Experience
 - Scientific Methods of Analysis
 - Communication Skills

Experts and the Litigation Process

- Forensic Engineering
 - Collapse
 - Fire
 - Explosion
 - Performance
- Forensic Project Management
 - Damages, Estimate vs. actual costs
 - Delay/Acceleration, Planned activities vs. actual

Experts and the Litigation Process

- Potential Evidence Will Be Created Contemporaneously During the Project
- Bids, Proposals and Schedules
- Evidence (Good Facts – Bad Facts)
- Project Legends

Experts and the Litigation Process

- First the Facts
- What do they Mean?
- Deposition Testimony of Fact Witnesses
- Expert Analysis
- Request for Admissions
- Expert Reports
- Expert Depositions
- Trial Exhibits and Testimony

Six Tips for the Contractor: Pleading, Proving and Winning Your Case

- I. The Spearin Doctrine is alive and well, but is a two-edged sword.
 - US v Spearin, 248 U.S.132 (1918)
 - T.L. James & Company v Traylor Brothers, Inc., 294 F. 3rd 743 (5th Circuit) (2002)

Six Tips for the Contractor

- The Sherman R. Smoot Company v Ohio Department of Administrative Services, 136 Ohio App. 3rd (166), 736 NE 2nd 69 (2000)
- Randa/Madison Joint Venture III v Dahlberg, 239 Fed 3rd 1264 (Fed Cir. 2001)
- Control Inc. v United States, 49 Fed. Cl. 294 (2001)

Six Tips for the Contractor

- II. When seeking delay damages, match your pleadings and proof to your contract and the law.
 - No Damage for Delay Clauses are generally enforceable, except where limited by statute
 - (See MN.St 15.411; Va.St 2.2-4335; N.C. St 143-134.3 ; Co.St. 24-91-103.5. WA. St. 4.24.360)

Six Tips for the Contractor

- No Damage for Delay – Common Law
 - Delay not contemplated by the parties.
 - Delay caused by the project owner fraud and misrepresentation.
 - Delay of such unreasonable duration that it would justify abandonment of the contract.
 - Delay not specifically listed in a disclaimed enumeration particular causes of delay.

Eichleay Formula

- Eichleay Formula for calculating unabsorbed overhead costs in connection with government-caused delay to public construction will be applied only when the contractor establishes two things:
 - that it was on “standby”, and not working on the project, but nevertheless bound to it
 - that it was unable to take on substitute work while on standby

Six Tips for the Contractor

- III. Know the Difference Between Pay if Paid and Pay When Paid
 - G.E.L. Recycling, Inc. v Atlantic Environmental Inc., 821 So. 2nd 431, Florida App. (2002)
 - Prompt Pay Statutes Since 1999-Montana, Connecticut, Arizona ,New Mexico and Penn.
 - Pay If Paid Unenforceable In N.C., Wisconsin and Illinois.
 - Pay When Paid May Not Be Strictly Enforced.

Six Tips for the Contractor

- IV. Be Prepared to Defend Your Surety—Recent Case Law Provides New Opportunities for Subcontractors to Assert Claims.
 - Consolidated Electrical & Mechanicals, Inc. v Biggs General Contracting Inc., 167 F. 3rd 532 (8th Cir. 1999) U.S. Ex. Rel. Interstate Mechanical Contractors Inc. v. International Fidelity Insurance Co., 200 F 3rd 456, (6th Cir. 2000)
 - U.S. Ex. Rel. Interstate Mechanical Contractors Inc. v. International Fidelity Insurance Co., 200 F 3rd 456, (6th Cir. 2000) Leonard C. Carnaghi Inc.v Amwest Surety Insurance Co., 617 N. W. 2nd 49 (Mich App. 2000) Leonard C. Carnaghi Inc.v Amwest Surety Insurance Co., 617 N. W. 2nd 49 (Mich App. 2000)

Six Tips for the Contractor

- V. Restitution: The Contractor's Secret Weapon
 - Restatement of the Law Third—Restitution and Unjust Enrichment, 29, Ex. 10.

Six Tips for the Contractor

- VI. Be Sure Your Witness Reads The Documents Before Testifying.
- Be Smart- Tailor Allegations And Proof Carefully To Take Advantage Of Helpful Contractual Provisions And Legal Principles.

Enforcement of Judgments

- First Step - Get the Final Court Order.
- Rules Regarding Timing of Payment
 - What If There Is No Rule?
- Gaining Information-Discovery
- Methods of Enforcement
- Postjudgment Interest by Statute

Enforcement of Arbitration Awards

- Look to State Law-Uniform Arbitration Act of 1955
 - Majority of States Passed: MD-VA yes CA-no
 - Written Contract Provision, Or Later Agreement, To Arbitrate Is Valid/Enforceable, And Generally Irrevocable
 - Agreement For Arbitration Under State Law Confers Jurisdiction On A Court To Enforce It And Enter Judgment.

Enforcement of Arbitration Awards

- Court Will Confirm Award And Enter Judgment At The Request Of Awardee If No Petition To Modify/Correct Or Vacate Pending.
- No Postjudgment Interest From Award To Final Appeal
- Losing Party Can Appeal Confirmation And Resulting Judgment.

Arbitration Appeal Procedures

- Starts With Petition To Modify, Correct, Vacate
- Check State, Venue, Petition And Notice Rules
- Grounds For Modifying/Correcting Award
- Evident Miscalculation/Mistake; Arbitrator Exceeded Powers; Award On Matters Not Submitted Or In Improper Form (Neither Affecting Merits); Need To Clarify Award
- Grounds For Vacating Award
- Award Procured By Corruption/Fraud/Undue Means; Evident Partiality/Corruption/ Misconduct Of Arbitrator; Arbitrator Exceed Powers.

Timing is Important

- Varies By State, Even If Have Passed Uniform Arbitration Act.
- Application For Arbitrator To Modify/Correct Award-md- 20 Days After Delivery Of Award.
- Petition To Modify/Correct-MD- 90 Days After Delivery Of Award
- Petition To Vacate- MD- 30 Days After Delivery Of Award-va-90 Days After Delivery Of Fraud Discovered
- Appeal Of Judgment/Decree
- -VA- Same Manner As Other Civil Orders/Judgments

Related Mediation

- Frequently Mandated By Courts And AAA;
Can Be Included In Contracts
- Legally, Is Enforced As A Contract

Related Mediation

- Mediation Agreement Should Contain Provisions Regarding, Among Other Things:
 - Retention Of Privileges, The Right To Future Discovery, And Non-waiver Of Legal Rights/Positions
 - Confidentiality, Non-discoverability , And Non-admissibility Of Documents, Statement, Offers
- Mediator Cannot Be Called/Compelled To Testify
- Enforcement (Injunction), And Parties' Cooperation In Enforcement.

Adjudication and Construction Disputes in the UK

- The picture before Adjudication
 - Decisions—Review—ADR—Court—
Arbitration

The HGCRA 1996

Withholding Payments

Suspension of Services

“Pay when Paid”--Outlawed

ADJUDICATION AND CONSTRUCTION IN THE UK

- Statutory Adjudication
 - Construction Contracts, Construction Operations
 - Exclusions
 - “Disputes”
 - Procedure
 - In contrast to” the scheme”
 - Adjudicator—impartial
 - Decision within 28 Days!

ADJUDICATION AND CONSTRUCTION IN THE UK

- Who pays?
- Enforcing—the Courts
- Challenges to Decisions
 - Jurisdiction
 - Fairness and Human Rights
 - Mistakes
 - Inability to Pay

ADJUDICATION AND CONSTRUCTION IN THE UK

- Who adjudicates ?
- What for ?
- Who wins ?
- Is it permanent ?
- Do you need lawyers?
- Ambushing the other party
- Will UK adjudication travel overseas ?

Contact Us !

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