

INSIDE THE MINDS™

CONSTRUCTION DISPUTE RESOLUTION

LEADING LAWYERS ON NAVIGATING THE ADR PROCESS,
DRAFTING EFFECTIVE CONTRACTS, AND MANAGING
CLIENT EXPECTATIONS

2014 EDITION



ASPATORE

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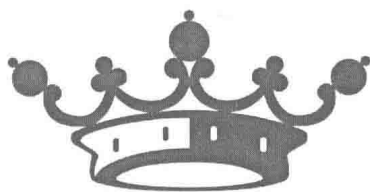
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I N S I D E T H E M I N D S

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*NEW DISPUTE RESOLUTION STRATEGIES FOR
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Building a Path to Resolution: Key Considerations of a Construction Dispute

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Introduction

Construction professionals are in the business of completing successful projects for owner/developers. When a construction dispute arises—whether because of a project delay, cost overrun, defective work, or design error—none of the parties in the construction process will end up happy. Generally, most parties want to resolve a dispute with as little time, expense, and disruption to the project and their business as possible. As a result, construction professionals may benefit from early dispute resolution, and a construction lawyer is critical in that process.

There is no need for a formal claims process to materialize before involving counsel. An effective construction lawyer solves problems by looking for creative solutions to a dispute and limiting further impacts to a project because of a dispute. Although early dispute resolution may not be appropriate or achievable in every case, it is usually in the parties' best interests to try to find a reasonable business solution. This chapter discusses considerations for dispute resolution of construction-related claims and identifies various factors that may affect a construction lawyer's strategies.

Factors Affecting Your Dispute Resolution Strategy

Who Is Your Client?

The key players in a construction dispute likely include the project owner, construction manager, general contractor, subcontractors, suppliers, and the architect. The project lender and insurance companies, although not often named parties in a dispute, may also have significant financial interests in the claims. Dispute resolution strategies vary based upon the construction professional you represent and whether it is the plaintiff or defendant. No matter whom you represent, as a threshold matter, you must address your client's goals at the outset because they will have a significant impact on the dispute resolution strategy.

A client's goals are likely influenced by a number of factors. You need to understand your client's motivation underlying its goals. It is not always as simple as money. Sometimes other business considerations are at issue: repeat lawsuits or claims concerning the same issue, other existing projects

involving similar disputes and/or the same parties, the likelihood of future business relationships between or among the parties, reputational harm, or publicity. Personal factors also may impact your client's decision-making, such as prior claims experience between the same parties on other projects or where the crux of the dispute directly involves a decision made by your individual client or client representative.

Another factor is your client's litigation experience. For example, some owner clients have limited construction experience and have not been involved with litigation. Other clients may have an in-house legal department that is responsible for managing litigation. The level (or lack) of experience affects the client's goals and may require further counseling about the judicial process. Overall, the goals should be concrete and realistic under the circumstances.

Status of the Project

Disputes arise at different phases of a construction project. The status of the work at the time of a claim is an important consideration for dispute resolution. For example, a dispute that arises before any meaningful work has begun is much less likely to impact the project cost and schedule than a dispute arising in the middle of construction. Consider a subcontractor claiming an equitable adjustment for extra work caused by an alleged design error. Such a dispute would involve the subcontractor, general contractor, owner, and architect, each of whom would need to divert attention away from the project to address the dispute. The alleged design error also could impact other subcontractors or suppliers because of coordination and scheduling issues, or delay the performance of follow-on work until the alleged error is corrected. Moreover, such a dispute may require a reallocation of project resources and likely will cause damage beyond the design at issue. Accordingly, prompt resolution of the dispute would allow the parties to minimize these impacts to the project.

Even where a dispute cannot be promptly resolved, however, construction lawyers should look for ways for the parties to continue to satisfy their contractual obligations, avoid further impacts to the project, and preserve legal rights. One option is for the parties to document their claims, reserving all rights, and postpone the dispute resolution process

until after substantial completion or some other project milestone. Accordingly, the parties' focus can remain on completing the project without taking litigation positions.

Most parties will continue to perform their contractual obligations notwithstanding a dispute that arises during construction. Terminating a contract for cause or stopping work is an extraordinary remedy that should be used sparingly. When a construction professional refuses to work, there is a ripple effect on the performance of other work, and the professional usually is replaced at an added cost to the project budget and delay to the schedule. These remedies increase the risks associated with the dispute and often give rise to counterclaims for breach of contract or wrongful termination. Careful consideration should be made before stopping work or terminating a contract in the middle of a project.

In contrast, disputes that arise after the completion of a project—usually for property damage or personal injury resulting from defective work or other professional negligence—do not involve these same strategy considerations. Indeed, disputes sometimes arise many months or years after the work was performed or the project was completed. Under those circumstances, the passage of time may affect the availability of witnesses and evidence underlying the claim.

Insurance and Solvency

The strategy for a construction dispute also may depend on whether there is insurance coverage for the alleged loss. Each of the key players in a construction dispute should have some form of insurance. There may be various types of insurance, depending on the nature of the alleged loss, for instance:

- A commercial general liability policy usually provides coverage for certain losses and damages arising from personal injury or property damage caused by defective work.
- A builders' risk policy provides coverage for the physical property.
- A professional liability policy provides coverage against design errors and omissions.

Construction contracts typically contain numerous insurance provisions that require specific limits and certain parties to be named as additional insureds. Insurance is an important consideration because it may provide an additional source of recovery, and, for a defendant, a right to a defense and indemnity for the alleged loss.

Another factor is whether the defendant has the financial ability to pay the alleged damages, if awarded. Internet searches provide a cost-effective way to assess a defendant's assets, financial health, and corporate structure. Any red flags should be identified and factored into the claims strategy. A party's inability to pay damages has become a serious issue for claims arising in recent years because of the challenging economic environment. It does not matter how strong your liability case is if there is no source of recovery.

Importance of an Early Case Assessment

An early case assessment is critical for analyzing the merits of the claims or defenses so that a client can weigh the pros and cons of litigation. A case assessment begins the moment a client first seeks your legal services, and, as early as possible, you should provide a roadmap of the actions necessary for the assessment. Not only does this allow a client to allocate sufficient resources for the investigation, but it also manages the client's expectations regarding timing and costs.

Analyzing the Merits and Assembling Your Team

The contract documents are the starting point for analyzing a construction dispute. Even though the construction industry uses form contracts, the forms are negotiated and almost always are modified. Therefore, a careful review of the contract documents will reveal key provisions affecting the dispute. These provisions range from venue and choice of law to indemnification, insurance, and limitations of liability. If you represent a subcontractor, you also likely need to consider the owner/contractor agreement because most subcontracts contain some form of a flow-down provision. All relevant contract documents (with amendments) should be reviewed.

You also need to collect, preserve, and analyze the key evidence. With regard to construction projects, the plans, specifications, change orders,

meeting minutes, project logs, inspection reports, as-built schedules, and photographs are the best documentary evidence of what happened leading up to a dispute. The contemporaneous day-to-day project communications most likely consist of voluminous e-mail messages among the team members. Some construction projects use centralized intranet sites for sharing, storing, and disseminating project information. If a dispute involves property damage, any relevant physical evidence should be preserved for evaluation and testing.

A case assessment also requires the identification of potential witnesses and a prioritization of the key witnesses. These key witnesses should then be interviewed in person. This is especially important where the witnesses are former employees or third parties not under your client's control. The witness interviews should cover the basic underlying facts, whether helpful or harmful to your client's position. Identify any inconsistencies among the witnesses' testimony or discrepancies between the project documents and the testimony. Indeed, the sooner you learn of any bad facts regarding your client's position, the better. Prepare memoranda of the witness interviews. Critically, an in-person interview provides the best opportunity to assess the credibility of the witness. You should consider the witness's presentation and testimony from the trier-of-fact's perspective.

The key project documents and witness interviews provide the foundation for a narrative chronology. The narrative chronology is a method to organize the key relevant facts and a straightforward way to present information to your client.

Construction lawyers are not contractors, engineers, or architects.¹ Accordingly, professional consultants are usually necessary to help legal counsel investigate and assess the merits of a claim. This is especially appropriate for disputes involving alleged defective work, project delay, or professional liability. For example, with respect to a claim for defective

¹ Construction law is a specialized practice area, and construction lawyers should have an understanding of basic engineering and construction concepts, know how to read a set of architectural plans, and understand project scheduling principles. Fortunately for new construction lawyers, there are a number of helpful seminars on the basics of construction law, including "Sticks and Bricks" by the American Bar Association's Forum on the Construction Industry, which features engineers and other construction professionals who teach lawyers about their respective trades.