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A Structured Approach to Managing
Construction Disputes

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June 12, 2025

11:15 AM-12:30 PM

Breaking the Clause: Tackling Problematic Contract Clauses





BREAKING THE CLAUSE:

**TACKLING PROBLEMATIC
CONTRACT CLAUSES**

Meet Our Panelists

MODERATOR



Michael R. Powell

Regional Vice President,
American Arbitration Association
Los Angeles, CA



Buck Beltzer

Partner,
BBG Construction Law
Greenwood Village, CO



Christopher M. Burke

Senior Partner,
Varela, Lee, Metz & Guarino LLP
Tysons Corner, VA



John Marshall Cook

Partner,
Fox Rothschild, LLP
Washington, DC



Robert Nida

Shareholder & Senior
Litigation Counsel,
Nida & Romyn, P.C.
Los Angeles, CA



AGENDA

- 01. Understanding Insurance Provisions in Construction Contracts**
- 02. Assessing and Addressing Project Performance Issues**
- 03. Managing Project Delays, Disruptions, and Scope Changes**
- 04. Navigating Dispute Resolution Mechanisms in Construction Arbitration**



Problematic Contract Clauses: Insurance Provisions

Insurance Coverage Gaps

- Contractor / Owner / Designer Insurance Requirements
- Gaps between Subcontractor and Contractor
- Ensuring that policies in place for all known risks
- Issues of coverage from multiple policies
- Forum for Dispute Resolution and Choice of Law



Problematic Contract Clauses: Insurance Provisions

Complex Insurance Administration Issues

- Notices of Continuing Disputes
- Deductibles and Self-Insurance Concerns
- Disputes Concerning Waiver Between Parties
- Disputes Concerning Number of Deductibles
 - How Disputes are Resolved



Problematic Contract Clauses: Insurance Provisions

Professional Liability Across Different Contracting Mechanisms

- Traditional Design-Bid-Build Versus More Shared Design Project Delivery Systems
- Performance Specifications – Professional Liability Insurance
- Ensuring Subcontractor Licensure, Bonds and Coverage



Problematic Contract Clauses: Project Performance

Payment Provisions – Pay If Paid vs. Pay When Paid

- “Pay if Paid”
 - General contractor (or higher-tier contractor) must pay its subcontractor if and only if the owner pays the general contractor first.
- “Pay When Paid”
 - General contractor must pay its subcontractor within a reasonable time after the owner pays the general contractor.



Problematic Contract Clauses: **Project Performance**

Payment Provisions – The DMV

- Virginia
 - In any construction contract where there is at least one general contractor and one subcontractor, the contract “shall be deemed to include” a provision making the general contractor liable to the subcontractor for payment for its work—regardless of whether the owner pays. Va. Code Ann. § 11-4.6(B)(2).
 - Payment the earlier of:
 - 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the subcontractor has invoiced; or
 - 7 days after receipt of amounts paid by the owner to the general contractor or by the contractor to the subcontractor for work performed by a subcontractor pursuant to the terms of the contract.

Payment by the owner cannot be a condition precedent.



Problematic Contract Clauses: **Project Performance**

Payment Provisions – The DMV

- Virginia
 - Still permits general contractor to withhold payment in the following instances:
 - Subcontractor non-compliant work / backcharges
 - Where owner becomes insolvent or debtor in bankruptcy
 - Retainage
 - Where payment withheld for defective work, statute requires:
 - General contractor to provide written notice to sub within 50 days of receipt of the sub invoice / pay application
 - Written notice must state reasons with nonpayment, dollar amount withheld, subcontractor responsible for noncompliance.



Problematic Contract Clauses: **Project Performance**

Payment Provisions – The DMV

- Maryland
 - Pay if Paid Permitted
 - Contract must expressly state that payment by the owner is a “condition precedent” to payment by the general contractor to the subcontractor. If this language is absent, the clause converts to “pay when paid.”
- DC
 - Pay if Paid Permitted
 - No required language. However, the pay-if-paid clause must be clear and unambiguous to be enforceable.



Problematic Contract Clauses: **Project Performance**

Payment Provisions – The Tri-State Area

- New York
 - “Pay if Paid” Clauses not permitted and void per public policy – but recent decision involving claimant with no lien rights
- New Jersey
 - Permitted
- Connecticut
 - “Pay if Paid Clauses” permitted; Feb 2025 general assembly bill proposing ban



Problematic Contract Clauses: **Project Performance**

Contracting Around Legislative Payment Mandates

- In states like Virginia, must simply strictly comply with statutory requirements
- Where “pay if paid” clauses are permissible and you want your payment clause to survive challenge, best to:
 - **Express Condition Precedent Language**
 - Use of terms like “condition precedent,” “subject to,” and “only if” make the clause stronger.
 - **Clarity on Risk Allocation**
 - Explicitly state that the subcontractor bears the risk of owner nonpayment.
 - **Avoid Ambiguous Timing Terms**
 - Do not include phrases like “within a reasonable time,” which courts may interpret as a timing provision rather than a condition precedent.



Problematic Contract Clauses: **Project Performance**

Contracting Around Legislative Payment Mandates

- **Sample Enforceable Clause:**

“Subcontractor acknowledges that payment by Owner to Contractor for the Subcontractor’s work is a **condition precedent** to Contractor’s obligation to pay Subcontractor. Subcontractor assumes the risk of nonpayment by the Owner for any reason and agrees that Contractor shall have no obligation to make payment to Subcontractor for any portion of the Subcontract Work for which Contractor has not received payment from the Owner.”

- **Optional Strengthening Provision:**

“Subcontractor agrees that it is relying solely on the credit of the Owner for payment and assumes the risk of Owner’s nonpayment. In no event shall Contractor be liable to Subcontractor unless and until Contractor receives payment from Owner for the Subcontract Work.”



Problematic Contract Clauses: **Project Performance**

Milestone Definitions

- Substantial Completion
 - State of Being Versus Determination of Professional
- Challenges to Determinations of Professionals and Contract Prohibitions on Same



Problematic Contract Clauses: **Project Performance**

Milestone Definitions – Substantial Completion

- AIA 201-2017 General Conditions
 - § 9.8 – Substantial Completion
 - § 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.
 - § 9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion....
- So...when is the Project substantially complete?



Problematic Contract Clauses: Project Performance

Milestone Definitions – Substantial Completion

- AIA 201-2017 General Conditions
 - Architect's Decision Determines the Date
 - 2300 Pennsylvania Avenue, LLC v. Harkins Builders, Inc., 513 Fed. Appx. 273 (4th Cir. 2013)
 - General contractor's argument that the date on which the architect issues a substantial completion certificate is not determinative of actual substantial completion reads "the requirement of the architect's certification out of the definition of substantial completion" and thus fails to give "effective meaning to all of [the contract's] terms."
 - Subjective opinion of the Architect is a necessary element to determine the date of substantial completion



Problematic Contract Clauses: Project Performance

Milestone Definitions – Substantial Completion

- Does the Architect Always Have Final Say?
 - *Allen v. A & W Contractors, Inc.*, 433 So. 2d 839, 841 (La. Ct. App. 1983) (Analyzing AIA A201)
 - “We do not consider this provision to be sacrosanct if the facts show substantial completion at a date earlier than that certified by the owner’s architect.”
 - *Holy Family Catholic Congregation v. Stubenrauch Assocs., Inc.*, 402 N.W.2d 382, 387 (Wis. Ct. App. 1987)
 - “Thus, while the date of an architect’s certificate of substantial completion may be persuasive in determining the statutory date of substantial completion, we conclude that the dispositive event in this case was Holy Family’s occupation of the building for its intended purpose.”)



Problematic Contract Clauses: Project Performance

Milestone Definitions – Substantial Completion

- Does the Architect Always Have Final Say?
 - *Phoenix Servs. Ltd. P'ship v. Johns Hopkins Hosp.*, 892 A.2d 1185, 1226 (Md. Ct. Spec. App. 2006) (*citing* 14 Williston § 42.24 at 531)
 - “In order for a contract to foreclose or waive the important right of a party to challenge or litigate the conclusions of a third party, the parties to the contract must clearly and expressly agree that the third party’s determination is final, binding, and conclusive. Put another way, they must use unequivocal language that unmistakably evidences the parties’ intent, because the contract must leave no doubt that this was intended.”
 - AIA 201-2017 General Conditions – “Binding”?



Problematic Contract Clauses: **Project Performance**

Milestone Definitions – Substantial Completion

- AIA 201-2017 General Conditions
 - § 9.8 – Substantial Completion
 - § 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.
 - So...what does it mean to be used for its intended purpose?



Problematic Contract Clauses: Project Performance

Milestone Definitions – Substantial Completion

- Intended Purpose

- *Louisville/Jefferson Cty. Metro Gov't v. HNTB Corp.*, 2007 WL 1100743, at *3 (W.D. Ky. Apr. 11, 2007) (unreported) (finding that a baseball stadium was substantially completed because the owner could “occupy” and “utilize” the ballpark for games, notwithstanding a dispute concerning the functionality of the lighting system);
- *Hungerford Constr. Co. v. Fla. Citrus Exposition, Inc.*, 410 F.2d 1229, 1231 (5th Cir. 1969) (finding improper construction resulting in leaks to the roof of a convention center and resulting damage to the finishes did not warrant assessment of delay damages because the owner was able to occupy and use the building for its intended purpose.)



Problematic Contract Clauses: Project Performance

Milestone Definitions – Substantial Completion

- Intended Purpose – Scope of Work Definitions
 - *Coastal Chem, Inc. v. Brown, 35 S.W. 3d 90 (Court of Appeals of Texas, Houston 2000)*
 - Coastal argued that substantial completion required the plant to be fully operational and ready for safe start-up. Brown contended that it meant the successful installation of the plant, not necessarily its full operational status. Trial court / verdict sided with Brown – Project was substantially complete as of February 25, 1992



Problematic Contract Clauses: Project Performance

Milestone Definitions – Substantial Completion

- Intended Purpose – Scope of Work Definitions
 - *Coastal Chem, Inc. v. Brown, 35 S.W. 3d 90 (Court of Appeals of Texas, Houston 2000)*
 - Contract: “The date when the Plant is ‘*Substantially Complete*’ (or *mechanically complete or ready for commissioning, i.e., initial operation*) occurs when the plant, unit or facility has been erected in accordance with the Contract and applicable codes and all work necessary for safe start-up has been completed, excluding non-essential punch list work such as painting, insulation and incidental construction, and pre-commissioning activities have been completed....
 - Appeals Court: “A plain reading of the contract leads to the conclusion that ‘substantially complete’ means an erected structure, with all work necessary for safe start up completed. It does not mean an operating plant. The contract specifically provides for precommissioning activities to take place after substantial completion, but prior to start-up of the plant.”



Problematic Contract Clauses: Project Performance

Milestone Definitions – Substantial Completion

- Intended Purpose – Latent Defects?

- *Coastal Chem, Inc. v. Brown, 35 S.W. 3d 90 (Court of Appeals of Texas, Houston 2000)*

- Coastal asserts that any acceptances of John Brown's work do not override the requirement for a fully-operational plant. Coastal claims that it was asked to accept the plant as substantially complete on February 29, 1992, when it was not possible to know that latent defects prevented the plant from being substantially complete on that date.
 - Appeals Court: "Coastal's assertion that the existence of any latent defects, not discovered until after the acceptance of substantial completion, vitiates substantial completion is incorrect. Once Coastal accepted John Brown's work as substantially complete, any claims of defective workmanship did not invalidate the achievement of substantial completion. Instead, Coastal's remedy for any defective workmanship was in John Brown's continuing obligations under the warranty provision."



Problematic Contract Clauses: **Project Performance**

Milestone Definitions – Substantial Completion

- Contracting Around Courts' Interpretations of Substantial Completion
 - **Use Objective Criteria**
 - Subjectivity is a common cause of disputes related to substantial completion. To avoid this, contracts should incorporate objective, measurable criteria that clearly delineate the threshold for substantial completion.
 - **Examples include:**
 - Receipt of a temporary certificate of occupancy or equivalent.
 - Completion of all life safety systems and code compliance testing.
 - Operational functionality of essential MEP (mechanical, electrical, plumbing) systems.
 - Completion of all work identified in a milestone schedule.



Problematic Contract Clauses: **Project Performance**

Milestone Definitions – Substantial Completion

- Contracting Around Courts' Interpretations of Substantial Completion
 - **If Incorporating the Role of a Certifying Authority**
 - **Best Practice:** Assign a specific party the role of certifier in the contract and describe the process for how and when substantial completion will be assessed and documented.
 - **Determine the “binding” nature (or not)**



Problematic Contract Clauses: **Project Delays and Changes**

Force Majeure Definitions and Expansions

- Force Majeure Events in the wake of COVID
- Economic events (tariffs) as Force Majeure Events

Concurrent Delay

- Timing of Delay commencement
- Delays to non-critical activities

Clauses Defining Techniques for Measuring Delay

- Delays to non-critical activities TIAs for measurement of claim delay
- Insertion of TIAs into approved schedule



Problematic Contract Clauses: Project Delays, Changes, and Claims

Notice Requirements

- Written vs. Actual Notice
- Lack of Prejudice
- Jurisdictional Differences
 - Written / Actual / Constructive
 - Implications of Waiver
 - Waiver via Pattern of Performance



Problematic Contract Clauses: **Project Delays, Changes, and Claims**

Indemnification Claims

- Jurisdictional Differences on Indemnification for Sole Negligence
- Duty to Defend Versus Duty to Indemnify



Problematic Contract Clauses: Project Delays, Changes, and Claims

Indemnification Claims

- Jurisdictional Differences on Indemnification for Sole Negligence
 - NY / NJ / CT
 - Indemnification clauses in construction contracts that require one party to indemnify another for the latter's own negligence are void and unenforceable.
 - N.Y. General Obligations Law § 5-322.1, N.J.S.A. § 2A:40A-1, Conn. Gen. Stat. § 52-572k
 - What about concurrent / joint negligence?
 - PA
 - No general anti-indemnity statute prohibiting indemnification for indemnitee's sole negligence
 - But if indemnification provision seeks to cover indemnitee's sole negligence, clause should expressly say so (broad language insufficient)



Problematic Contract Clauses: Project Delays, Changes, and Claims

Indemnification Claims – Duty to Defend for Sole Negligence?

- Jurisdictional Differences Again
 - Some states prohibit defense obligations to defend for indemnitor's sole negligence (incl. AZ, AK, GA, and others)
 - Massachusetts – permissible
 - “By its plain language, G.L.c 149, Sec. 29C is not applicable to (indemnitor's) obligation to defend. ... G.L.c 149, Sec. 29C makes no reference to the “duty to defend” undertakings.... Therefore, pursuant to the parties' subcontract, (indemnitor) has an enforceable duty to defend (indemnitee).” *Riordan v. John T. Callahan & Sons, Inc.*, 1999 WL 1203922 (Mass. Super. Ct. 1999)
 - Louisiana – not permissible
 - “As we held previously, (indemnitee) cannot be indemnified for their own negligence. This is clearly against public policy. Likewise, requiring (indemnitor) to defend (indemnitee) for its own negligence is equally against public policy.” *Frazier v. Columbia Gas Development Corp.*, 605 F. Supp 200 (W.D. La. 1985)



Problematic Contract Clauses: Project Delays, Changes, and Claims

Indemnification Claims

• Drafting Considerations for Enforceable Indemnification Clauses

- Parties drafting indemnity provisions in construction contracts should consider the following:
 - **Avoid Broad Indemnification Language:** Clauses that attempt to indemnify a party “for any and all claims” are likely to be interpreted as including claims arising from the indemnitee's own negligence and therefore void under certain state's laws
 - **Include Savings Clauses:** A savings clause may state that indemnification does not apply “to the extent any such claims arise out of the sole negligence of the indemnitee.” This language has been upheld by courts to limit indemnity to permissible bounds.
 - **Separate Insurance Procurement Clauses:** Clauses requiring Party A to procure insurance for Party B can validly cover Party B's negligence if clearly distinguished from indemnification obligations.
 - **Conform with Case Law Guidance:** Drafters should consult decisions in their jurisdiction to align indemnification language with prevailing judicial interpretations. Consider separate clauses for indemnification and defense.



Problematic Contract Clauses: **Dispute Resolution**

Pass-Through Claims

- Who decides and what is the standard?
- How adjudicated?
- Drafting points



Problematic Contract Clauses: **Dispute Resolution**

Project Level Disputes Provisions (IDM)

- Helpful?



Problematic Contract Clauses: **Dispute Resolution**

Project Level Disputes Provisions (IDM)

- Admissible? How?

“A201 § 15.1.4.2 The Contract Sum and Contract Time shall be adjusted in accordance with the Initial Decision Maker’s decision, subject to the right of either party to proceed in accordance with this Article 15.”

“A201 § 15.2.5 The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.”



Problematic Contract Clauses: **Dispute Resolution**

Project Level Disputes Provisions (DRB)

- Helpful?



Problematic Contract Clauses: **Dispute Resolution**

Project Level Disputes Provisions (DRB)

- Admissible? How?

*“Admissibility: If a dispute remains unresolved, only the Board's final signed Report sent to the Parties is **admissible as evidence** in a subsequent dispute resolution proceeding. Neither Party may call a member of the Board as a witness in a subsequent proceeding.”*





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