August 2005

The newsletter of the ABA Forum on the Construction Industry

UNDER CONSTRUCTION

Ansari: Problems with Forum Selection Arbitration Clauses

by Steven D. Welhouse and Paul M. Lurie

It is common for pre-dispute arbitration clauses to include a location for any arbitration hearings. When such a forum selection clause is present, where does one bring action to compel or deny arbitration of a particular dispute? The answer may depend on whether Section 4 of the United States Federal Arbitration Act (commonly referred to as the "FAA"), 9 U.S.C. § 1, *et seq.*, applies and the federal Appellate Circuit in which you bring your action. Moreover, there are pitfalls for the unwary who may find their cause subject to a Federal Rule of Civil Procedure 12(b)(3) dismissal for picking the wrong forum. *See Continental Cas. Co. v. American Nat'l Ins. Co.*, 2005 WL 1844613 (7th Cir. (Ill.)).

It is important to remember that the FAA operates only in disputes involving interstate commerce. *See* 9 U.S.C. § 2. While the FAA allows state courts to enforce the Act, by its terms, § 4 can only be enforced by a U.S. District Court and not by a state court, and only by a district court having an independent basis for jurisdiction.

With respect to its effect on forum selection, currently there are three different Federal Appeals court interpretations of § 4. The majority view was recently affirmed by the 10th Circuit in *Ansari v. Qwest Communications Corp.*, 2005 WL 1625225 (10th Cir. (Colo.)) (District Court sitting in Colorado will not entertain a § 4 action where the agreement provided that arbitration was to be located in Washington D.C.). Under the majority view, § 4 provides that a district court may compel arbitration only within in its district, and only if the arbitration agreement at issue selects a forum located within or encompassing its district. This interpretation is now shared by the 3d, 6th, 7th and 10th federal Circuit Courts of Appeals, and various federal district courts, including the Southern District of New York and District of New Jersey. *See Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391 (3d Cir. 1974); *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007 (6th Cir. 2003); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323 (7th Cir. 1995); *Sea Spray Holdings, Ltd. v. Pali Fin. Group, Inc.*, 269 F. Supp.2d 356 (S.D.N.Y. 2003).

The Fifth Circuit has a second interpretation of § 4. In *Dupuy-Busching Gen. Agency, Inc. v. Ambassador Ins. Co.*, 524 F.2d 1275 (5th Cir. 1975), the parties' arbitration forum selection clause provided for arbitration in New Jersey, but a party sought to avoid arbitration by filing a lawsuit in Mississippi federal district court. The responding party moved to compel

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New Division Steering Committee Members

The Forum would like to welcome the following new steering committee members: Division 1: Bill Franczek and Catherine Shanks; Division 2: Joe Cleves and Matt Gillies; Division 3: Josh Leavitt, Carrie Okizaki and Bruce Gerhardt; Division 4: Kerry Kester, Jim Dickson, Michelle Copeland and Shiv O'Neill; Division 5: Roy Bash, Scott Ryan, Tom Czik, Eric Berg and Carla Brown; Division 9: Joe Kovars; and Division 10: Joel Gerber and Heather Jones.

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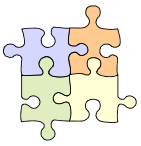
Defending Liberty Pursuing Justice

MESSAGE FROM THE CHAIR ELECT

Ty Laurie,
Chair Elect

We Fit The Pieces Together



"Construct" means to make by fitting the parts together, and the term applies to more than the structures that our clients design, build, engineer, and supply. We must fit the pieces together when negotiating the contracts, writing the agreements, settling the arguments, and, litigating the disputes, when all else fails.

Learning how to fit the pieces together is something we labored over in law school. After law school, of course, we realized that the process only continues. We also must fit the pieces together – we must construct – a successful legal career.

The Forum on the Construction Industry assists its members on both these fronts. The Forum helps us service our clients better and build better careers.

By providing education, the Forum helps us refine the fit we create for our clients. That education takes many different forms: continuing education at Forum meetings, colleagues to reach out to for advice, and available books and materials focusing on critical aspects of construction law.

The Forum also provides each of the parts necessary to build or enhance a career in construction law: networking at Forum meetings, year-round opportunities to publish or speak, and developing expertise and name recognition by participating with colleagues on committees.

The Forum has gathered the parts for you. You only need pick up the pieces and begin to construct.

In that regard, I invite you to attend the Forum's Fall Meeting in Toronto: **Ten Key Decisions to a Successful Construction Project**. Both your colleagues and an abundance of practical guidance on construction law await you at the Intercontinental Toronto Centre for a two-day program beginning Thursday, September 29th.

Our Toronto program identifies and analyzes the key decisions that guide most construction projects to successful completion. Presentations will be lively. Those in touch with their inner-actor will attempt role playing to demonstrate the finer points. And a note to some of us (you know who you are): checklists will be available.

After a day of construction law and career building, Toronto offers Lake Ontario, the Hockey Hall of Fame, and world class dining and shopping. If you've never seen Niagara Falls, now is the time. The Falls are located about an hour-and-a-half from the hotel. Please join us. The autumn is beautiful in Toronto.

As many veteran members will tell you, major construction regarding both education and careers occurs at Forum meetings. I urge you to attend and hope to meet each and every one of you in Toronto.

I also urge you to plan ahead for our midwinter meeting in New York and our annual meeting under swaying palm trees on an island in Mission Bay…

TWO MORE OF THE PIECES

One: Expecting the Unexpected
Two: Swimming with the Sharks

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arbitration in New Jersey. *See id*. The Fifth Circuit affirmed the Mississippi district court's decision to grant the motion, compelling the parties to arbitrate in New Jersey. *See id.*

The Fifth Circuit's approach recognizes and enforces the parties' agreement, and eliminates the 'race to the courthouse' by a party seeking to avoid an agreement. However, this interpretation seems to be odds with § 4's language. With the provision that, "[t]he hearing and proceedings, under such agreement, *shall be within the district in which the petition is filed* (italics added)," § 4 seems to obviously require that a district court can only compel arbitration in its own district. While the Fifth Circuit's approach provides a practical solution to the 'race to the courthouse' problem, while still maintaining the parties' intent, as articulated by the *Ansari* court, "[n]o statutory language supports this approach." 2005 WL 1625225, at *4.

The third, and most problematic, interpretation of § 4 is that followed by the Ninth Circuit. Under this view, a district court may compel arbitration in its own district, and may ignore the forum selected by the parties. Thus, if a forum selection clause identifies Illinois as the arbitration situs, and a party to the agreement sues in a California district court to compel arbitration in that district, for example, the California district court may ignore the parties' selected forum and compel arbitration in California.

In *Textile Unlimited, Inc. v. A..BMH and Company, Inc.*, 240 F.3d 781 (9th Cir. 2001), the Ninth Circuit found that the FAA's § 4 was discretionary, and held that "nothing in the Federal Arbitration Act requires that Textile's action to enjoin arbitration be brought in the district where the contact designated the arbitration to occur." *Id.* at 783. Finding that § 4's venue provisions were permissive, the court also held that actions to compel arbitration cold be filed in any district court having jurisdiction and were not confined to the district provided for in an applicable forum selection clause. The court held that the FAA "does not require venue in the contractually-designated arbitration locale." *Id.* at 783. Under the court's ruling, a party could petition any district court having jurisdiction for an order compelling arbitration regardless of any forum selection clause in the parties' arbitration agreement. *Id.* at 785.

The *Textile Unlimited* court based its decision on its interpretation of a United States Supreme Court case construing the venue provisions of §§ 9-11 of the FAA. Sections 9, 10, and 11 provide for, respectively, the confirmation, vacation and modification of arbitration awards. In *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 120 S.Ct. 1331 (2000), the Supreme Court granted certiorari to resolve a split among the Circuit Courts over the interpretation of certain of the FAA's venue provisions as being either permissive or mandatory. As cited by the Court, the lower court decisions making up the split addressed either § 9 or § 10, or both. *Id.* at 196-97, 120 S.Ct. at 1335. Notably, however, none of the decisions involved § 4. *See id.*

Reading them together, and in light of the FAA's statutory history, the Supreme Court held that the venue provisions of §§ 9, 10, and 11 are permissive, not mandatory. *Id.* at 198-200, 120 S.Ct. at 1336-37. As such, in the absence of a venue agreement between the parties, actions coming under these sections could be brought in any district court having jurisdiction, and were not required to be filed in the district in which the arbitration award was made. In supporting its decision, the Court also cited Congress's specific use of the word "may" in the language of each of these sections. The Court further noted that construing venue as being mandatory would place these Sections at odds with § 3, which allows parties to apply for stays of arbitration in districts other than the district of arbitration, and would require disturbance of the Court's extensive § 3 precedent. *Id.* at 201-02, 120 S.Ct. at 1337-38.

The Ninth Circuit reads the *Cortez Byrd Chips* case as holding that all venue provisions found within the FAA, including § 4, are permissive. In certain passages, the Supreme Court's opinion does seem to suggest that its holding addresses the FAA as a whole, including § 4. For example, in the last sentence of the opinion, the Court states, "[w]ith that we agree in holding the permissive view of FAA venue provisions entitled to prevail." 529 U.S. at 1204, 120 S.Ct. at 1339. However, in the first paragraph of the opinion, Justice Souter frames the issue by writing that, "[t]he case raises the issue whether the venue provisions of the Federal Arbitration Act (FAA or Act), 9 U.S.C. §§ 9-11, are

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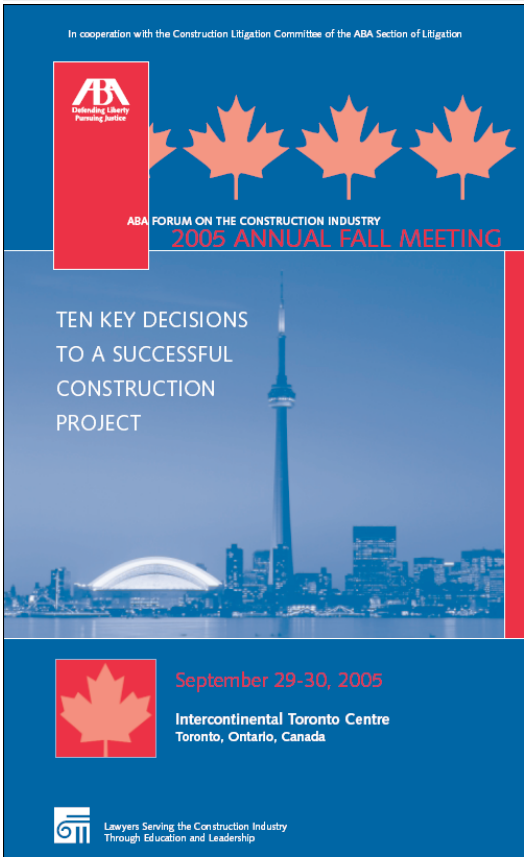
Plan to Attend the Fall 2005 Meeting!



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restrictive . . . or are permissive." *Id.* at 194, 120 S.Ct. at 1334. Although § 4 is conspicuous by its absence in this passage and in most of the opinion, the Ninth Circuit finds that *Cortez Byrd Chips* holds § 4 is to be construed the same as §§ 9-11.

The Ninth Circuit's analysis is open to criticism. Sections 9, 10 and 11 each address post-arbitration actions taken against an award, whereas § 4 addresses pre-arbitration enforcement of an agreement. *See* 9 U.S.C. §§ 4, 9-11. Section 3, also discussed by the Supreme Court in *Cortez Byrd Chips*, involves stays of arbitration pending the determination of arbitrability issues. Unlike § 4, however, § 3 does not affect the enforcement of arbitration agreements. Thus, the purposes of §§ 3, 9-11 vary from that of § 4.

Standard arbitration clauses suggested by agencies such as the American Arbitration Association ("AAA") do not specify a forum state, the assumption being that the parties will want and agree to arbitrate in the State where the project is located. In the event that there is no agreement as to the forum state, the AAA rules for commercial and construction disputes allow for the parties to request a specific locale. *See* AAA Commercial Arbitration Rules and Mediation Procedures, R-10; AAA Construction Arbitration Rules and Mediation Procedures, R-11. If this situs is objected to, the AAA will determine situs administratively based on the convenience of the parties and witnesses without a right to appeal. *See id*. Practically speaking, for most projects, this determination is likely to be in the State where the project is located. Using the flexible AAA type approach eliminates the kind of litigation which is the subject of this article.

Most commercial construction disputes are likely to be in federal district courts under § 4 of the FAA. Therefore, if you practice in a majority rule jurisdiction, be aware of problems of specifying an arbitration locale outside the jurisdiction of federal courts in which you normally practice. ♦

Editor's Note

Under Construction is pleased to introduce its new associate editor, Morgan Holcomb. Morgan is an associate at Maslon, Edelman, Borman, & Brand, LLP, in Minneapolis, where she focuses her practice in construction law, and commercial litigation. Prior to joining Maslon, Morgan clerked for the Hon. John R. Tunheim, United States District Court for the District of Minnesota. The Editors intend to continually strive to inform you of upcoming events, publications and other Forum activities, and alert you of any recent developments in construction law. Please do not hesitate to contact Morgan if you have something that you believe should be published in Under Construction.

We Fit the Pieces Together

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The Forum's 2006 Joint Midwinter Meeting at the stately Waldorf Astoria, a New York City landmark, will be held on Thursday, January 26th. The program, **Expecting the Unexpected**, focuses on handling the impact of unexpected events on a fixed fee contract. Attendees will examine the following:

- When and How Contractors/Suppliers Allow Contingencies in Bids
- Finalizing Lower Tier Agreements
- Force Majeure Delays
- Pre-existing Adverse Conditions at the Site
- Changes in Law
- Defaults and Price Escalations Affecting Subcontractors and Suppliers
- International Contingencies
- Short Cues from Industry Speakers

In the spring, the Forum will convene in San Diego at the Paradise Point Resort & Spa for the 2006 Annual Meeting. The program, **Construction from the Owner's Perspective: Swimming with the Sharks**, will be held on Thursday and Friday, May 18th and 19th.

A few in-the-works program items include: top mediators giving us an insider's view of what works and what doesn't during mediations and how to respond to certain mediator tactics; jury instructions for a construction case; how to try a paperless case and innovative methods for using courtroom technology; litigating international construction cases; how to have a multi-jurisdictional practice; and appealing an arbitration award.

Those of you attending the 2006 Annual Meeting will be on an island retreat with over 400 private, quiet bungalows, each with a patio on Mission Bay or the lagoons. Between mediator tactics and jury instructions, you can golf on the 18-hole golf course, walk on the marina or go boating, swim in one of the heated pools, and relax at a Balinese spa and salon.

You only need pick up the pieces and begin to construct . . . ♦

Alert: Unlicensed Contractors Work for Free

B. Scott Douglass

The California Supreme Court recently decided a case that could be catastrophic for contractors working in California and a further protection for anyone contracting with an unlicensed contractor. In short, the Supreme Court held in *MW Erectors, Inc. v. Neiderhauser Ornamental and Metal Works Company, Inc.*, 05 C.D.OS. 6163 (July 14, 2005), that contractors unlicensed at **any** time during a project cannot sue for payment, unless they satisfy a narrow statutory safeharbor for contractors substantially complying with licensing laws. An unlicensed contractor's forfeiture is required even if equity – principles of fundamental fairness – might compel payment to the unlicensed contractor.

The *MW Erectors* Decision

On July 14, 2005, the California Supreme Court decided *MW Erectors*, a case in which a second-tier subcontractor (MW Erectors) sued the subcontractor (Neiderhauser) that hired it for more than $1.3 million for steel work performed under two contracts on a private hotel project. The two contracts were signed by MW Erectors while it was unlicensed. Additionally, MW Erectors' work on the first contract, which represented nearly $1.0 million of its claim, started before its specialty license was issued, and its work on the second contract, which represented the balance of its claim, started after it was properly licensed. In response to the suit, Neiderhauser argued that the claims were barred under Business & Professions Code Section 7031(a), because MW Erectors was not licensed when the contracts were signed nor licensed for the first eighteen days of the year-long project in which it was involved under the first contract. MW Erectors countered that while it was not "technically" licensed for part of its work under the first contract, it substantially complied with the contractor licensing requirements. MW Erectors further countered that Neiderhauser was judicially estopped from complaining about the brief period it was unlicensed. More specifically, Neiderhauser took, and benefited from, the opposite position in a lawsuit against the project's general contractor and owner, when Neiderhauser impliedly relied on MW Erectors' due licensure in recovering a "substantial amount" on a MW Erectors pass-through claim.

In reversing the Court of Appeals, which allowed payment for work performed while MW Erectors was licensed, the Supreme Court initially stressed that the equities favoring MW Erectors were trumped by Section 7031(a). The Court explained this statute is a "stiff all-or-nothing penalty" that is "directly at odds with the premise that contractors with lapses in licensure may nonetheless recover partial compensation by narrowly segmenting the licensed and unlicensed portions of their performance." As the Supreme Court further explained:

> MW [Erectors] cannot invoke [the equitable doctrine of] judicial estoppel for the simplest of reasons. Section 7031(a) expressly provides that "regardless of the merits," one may not "bring or maintain *any action, or recover in law or equity* in any action, . . . for the collection of compensation for the performance of any act or contract where a license is required . . . without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract." (Emphasis in original.)

Based on this "strong and clear statutory mandate," the Supreme Court was also unswayed by the unrebutted assertion that Neiderhauser had already recovered "substantial amounts" from the project's general contractor and owner for MW Erectors' work, and would be unjustly enriched if payment were not passed on to MW Erectors. Again, the Supreme Court stressed that: "Section 7031(a) will be applied, regardless of equitable considerations, even when the person for whom the work is performed has taken calculated advantage of the contractor's lack of licensure."

After resolving MW Erector's equitable arguments, the Supreme Court examined the statutory substantial-compliance exception that could nonetheless allow MW Erectors to recover on its claims. Focusing on the version of the statute in existence in 2000, which has since been amended, the Court noted that the substantial compliance exception "could apply only when, among other things, the contractor, despite a later lapse in licensure, 'had been duly licensed as a contractor in this state prior to performance of the act or contract' for which compensation is sought." It then determined that, because MW Erectors had never held the specialty license before it started work on the project, the substantial compliance exception did not apply, and MW Erectors was barred from recovering on its $1.0 million claim under the first contract.

Finally, the Supreme Court addressed MW Erectors' right to recover on its claim under the second contract. Neiderhauser argued that construction contracts are illegal, void and unenforceable from the outset if the contractor is unlicensed when it signs the contract. In support of its position, Neiderhauser pointed to the licensing laws, which define a contractor as one who, among other things, "undertakes to or offers to undertake to, or . . . submits a bid to" perform construction work, and which make it a misdemeanor for unlicensed contractors to "act in the capacity of a contractor." The Supreme Court acknowledged that although a number of California cases

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Alert: Unlicensed Contractors Work for Free

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have held such contracts void on this basis, no "modern case" has "applied this principle to deny recovery where the contractor, though not licensed at the time he or she executed the agreement, was fully licensed at all times during its performance [on a private project]." Relying again on Section 7031(a), the Supreme Court noted that "allowing suit on and recovery under such circumstances violates no express term of Section 7031(a)." Accordingly, the Court allowed MW Erectors to recover under the second contract despite its failure to be licensed when the contract was signed.

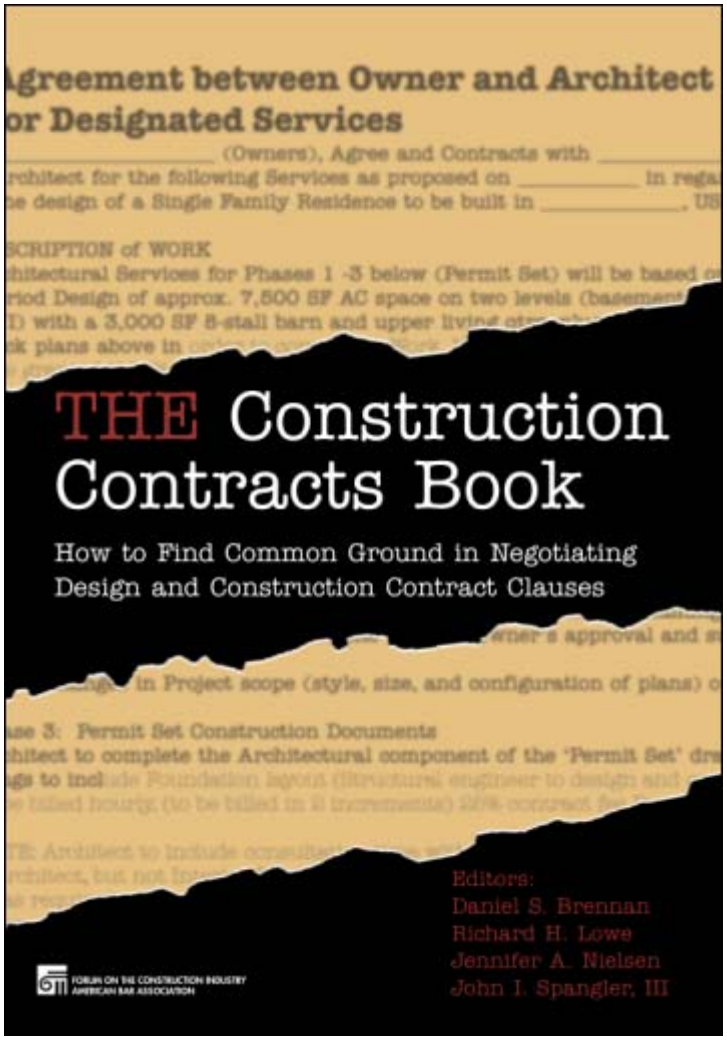
Implications for the Construction Industry

The California Supreme Court's unequivocal pronouncement that unlicensed contractors work for free serves as a powerful reminder to carefully and routinely monitor the licensing status of all contractors and subcontractors with whom you work. (The status of a contractor's license can be easily determined through the California State Licensing Board's website, which can be viewed at www.cslb.ca.gov.) If a contractor discovers that its license, or the license of any subcontractor with whom it has contracted, has been suspended, it must immediately take action to have the license reinstated. Similarly, an owner should confirm at the outset that the contractor, and each of its proposed subcontractors, is licensed before entering into a construction contract. Barring this up-front confirmation, owners should at least confirm licensing status of contractors and subcontractors in response to a contractor claim. ♦

Associate Editor's Note

California is not alone in requiring contractors to be licensed to avail themselves of the courts when seeking payment. *See generally Failure of building and construction artisan or contractor to procure business or occupational license as affecting enforceability of contract or right of recovery for work done—modern cases*, 44 A.L.R. 4th 271. Licensing requirements are an outgrowth of the states' police power, and are intended as a protection against fraud and incompetence. *E.g.*, *Power City Comm., Inc. v. Calaveras Tel. Co.*, 280 F. Supp. 808 (E.D. Cal. 1968) (noting that §7031 is more than a mere "housekeeping" rule and is intended to protect the public against dishonesty and incompetence). As illustrated by the *MW Erectors* case, however, this protection comes at a sometimes draconian price to contractors.

As the authors of this article note, *MW Erectors* was decided under the 2000 version of California's statute. In 2002, the statute was amended to allow "a person who utilizes the services of an unlicensed contractor [to] bring an action . . . to recover all compensation paid to the unlicensed contractor for performance of any act or contract." 7031 (b). By its terms, Subsection (b) is subject to the "substantial compliance" language of subsection (e), but the import of substantial compliance on the disgorgement subsection is unknown.



Ohio Addresses Issue of Unauthorized Practice of Law and Arbitrations

By Steve Withee

With increasing frequency, courts are holding that out of state attorneys representing their clients in arbitration proceedings are engaged in the unauthorized practice of law if the attorney does not hold a license in that state. The practical problems this presents for parties could be significant and costly.

Participants in the construction process frequently travel to find work. It is not unusual for contractors to bid on or developers to construct projects located outside their home state. Similarly, a contractor may have a significant relationship with a client that requires the contractor to travel to multiple states. This multi-jurisdictional practice can be a benefit to a client's bottom line, but it can be a bane to its attorney if the client ends up in a dispute.

Similar to the decision in *The Florida Bar v. Rapoport* 845 So.2d 874 (Fla. 2003), and following the growing trend, the Ohio Supreme Court recently held that an individual not licensed to practice law in Ohio engaged in the unauthorized practice of law when he represented clients in securities arbitration. *Disciplinary Counsel v. Alexicole, Inc.*, 822 N.E.2d 348 (Ohio 2004)

In *Alexicole* a Delaware corporation and its sole shareholder, Bandali Dahdah, represented clients in securities arbitrations in Ohio. Dahdah was not licensed to practice law in Ohio or any other jurisdiction. Dahdah stipulated that he regularly prepared claims, conducted discovery, negotiated settlements, and participated in mediations and arbitrations in Ohio. The Supreme Court ruled that by participating in these activities Dahdah and his corporation were engaged in the unauthorized practice of law. Both Dahdah and the corporation were enjoined from providing any similar services in the future.

At first blush it seems this decision can be limited to its facts since Dahdah apparently was not licensed to practice law in *any* jurisdiction. The terms of the injunction, however, give the decision a much broader application. Specifically, the court held that unless Dahdah became "an attorney licensed and in good standing to practice law in the State of Ohio" he could not provide any legal service or advice to any person or corporation in Ohio. The prohibited services included any form of representation related to a "securities arbitration, a lawsuit, or other legal or quasi-legal proceeding." Thus, this broad language may be easily applied to out of state construction attorneys looking to represent their clients in an arbitration proceeding in Ohio.

It remains to be seen whether Ohio will adopt a "safe harbor" provision for arbitrations such as those adopted in California or currently under consideration in Florida. The *Alexicole* decision, however, serves as a reminder of the potential hazards that face construction lawyers when their clients are involved in projects in multiple states. ♦

In Memorium: Professor Emeritus John Cibinic

Photo courtesy of George Washington Law School

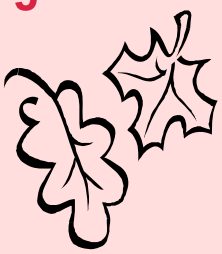
By James F. Nagle

We note with sadness the sudden passing on August 1, 2005 of Professor Emeritus John Cibinic of George Washington University Law School. Professor Cibinic is well known to all of our members as a co-author of the Nash & Cibinic texts on government contracts, including *Formation of Government Contracts, Administration of Government Contracts, Competitive Negotiation,* and *Construction Contracting.* Although he did not focus exclusively on construction, his writing and decades of teaching and lectures have educated several generations of construction lawyers. His texts are continually cited to and by judges as authoritative statements of the law, not only because they were so well researched and written, but because they were completely objective, not having a pro-government, contractor or subcontractor bias. He exemplified the very best of the legal and teaching professions.

His legacy is undeniable and the debt owed to him by the construction bar is immeasurable. A giant of our profession has passed and we honor his memory. ♦

Join Us For Our 2005 Fall Meeting!

Join us in Toronto



WHEN: Thursday and Friday, September 29-30, 2005

WHERE: Intercontinental Toronto Centre, in Toronto, Ontario, Canada

TITLE: Ten Key Decisions to a Successful Construction Project

TELL ME MORE: From "Key Decision Number One: Creating the Project Program" to "Key Decision Number Ten: Successfully Close Out and Turnover the Project" our fall program will analyze key project decisions and offer practical advice on how and when those decisions will best benefit from legal input. The program has been carefully designed to appeal to seasoned practitioners, as well as lawyers new to construction practice. You will leave with outstanding written materials, including checklists and tips to guide you and your clients through various types of construction contracts.

Bring your passport to assure an easy border crossing!

The ABA Forum on the Construction Industry gratefully acknowledges the generous support of the Sponsors for the Fall Meeting Reception at the Hockey Hall of Fame: Borden Ladner Gervais LLP, Goodmans LLP , and Osler Hoskin Harcourt LLP

To register for the program online or to download a registration form, please visit the Forum's website, at www.abanet.org/forums/construction. Not sure if you're registered? Contact T-rex at 877-309-1565 or 630-262-1599.

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