March 2007

The newsletter of the ABA Forum on the Construction Industry

UNDER CONSTRUCTION

The Economic Loss Rule – The Only Certainty Is More Uncertainty

By Alfred A. Malena, Jr.
Thompson, Slagle & Hannan, LLC

Can an idea be fairly called a rule when it is different everywhere, and often changing? The Economic Loss "Rule" (the "Rule") is a rule that is often broken. Courts originally developed the Rule (also known as the Economic Loss Doctrine) in cases related to the sale of products or manufactured goods. It states that if a party suffers purely economic losses (that do not include property damage or personal injury), that party may not recover on negligence or other tort claims against the "manufacturer" of that product. In construction cases, the Rule has been applied to prevent a party from bringing tort claims against a design professional for economic losses. The theory behind the Rule is that negligence of a party (such as an architect or an engineer) resulting only in economic loss is best dealt with through the risk allocation of the construction contract process.

Many exceptions have arisen to the Rule. Courts have allowed tort claims under the following conditions, among others: 1) where damage to "other property" (*i.e.*, property other than the good itself) exists; 2) negligent misrepresentation (affirmative actions by a party, such as producing faulty plans); and 3) breach of warranty (normally an implied warranty of fitness). Recently, courts in at least three states have issued important opinions more clearly stating their positions on the Rule. Those looking for consistency will be disappointed.

Wisconsin

Through a lengthy and forceful opinion, in 1325 North Van Buren, LLC v. T-3 Group, Ltd., 716 N.W.2d 822 (Wis. 2006), , the Supreme Court of Wisconsin issued a ringing endorsement of the application of the Rule in construction cases. A project owner, 1325, contracted with a construction manager (CM) for the renovation of an industrial warehouse into condominium apartments. The parties used a modified American Institute of Architects document. The CM, T-3, defaulted, and 1325 brought a variety of claims, including negligence, which involved T-3's Commercial General Liability ("CGL") carrier and professional liability coverage.

The Wisconsin Supreme Court found that the Rule barred the tort claims. The court defined the Rule: "[t]he economic loss

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REPORT OF THE NOMINATING COMMITTEE

The Nominating Committee of the Forum on the Construction Industry convened at the Forum's Midwinter Meeting in San Francisco in January and selected nominees for Chair-Elect and Governing Committee Members-at-Large. The nominees are: For Chair (automatic) **Michael D. Tarullo**, Columbus, OH; for Chair-Elect: **Robert J. MacPherson**, New York, NY; for Governing Committee Members-at-Large: **L. Franklin Elmore**, Greenville, SC, **L. Tyrone Holt**, Denver, CO, **Jennifer A. Nielsen**, Oak Brook, IL, and **Patrick J. O'Connor, Jr.**, Minneapolis, MN. In accordance with the Forum's bylaws, the nominations will be presented to the Forum membership for a public vote on April 13, 2007, as part of its business meeting which is held in conjunction with its Annual Conference in Puerto Rico.

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Newsletter Editor
Patrick J. O'Connor, Jr.
2200 Wells Fargo Center
Minneapolis, MN
612-766-7413
poconnor@faegre.com

Associate Editor
Morgan Holcomb
229 Nineteenth Avenue South
Minneapolis, MN 55455
612-625-3533
holc0026@umn.edu

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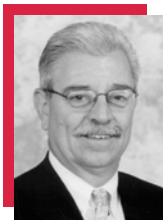
ABA Defending Liberty Pursuing Justice

MESSAGE FROM THE CHAIR ELECT

Mike Tarullo, Chair-Elect



Continuing to Build on the Legacy of Success

As the bitter winter winds begin to fade, we look forward to the rejuvenation of springtime. Each spring at its Annual Meeting the Forum places before its membership nominations for Chair-Elect, and new Governing Committee members. The process undertaken to select these nominees is a thoughtful one focused on a vision that will build upon the legacy of success Forum leadership has provided. A legacy of greatness founded in the Forum's Programs, Publications, and People.

This year the Nominating Committee was faced with the daunting task of selecting future leaders from an abundance of excellent candidates. After significant discussion, the recommendation will be made to the membership that Mr. Robert MacPherson be elected as the next Chair-Elect of the Forum. In addition, Ms. Jennifer Nielson, Mr. Frank Elmore, Mr. L. Tyrone Holt, and Mr. Patrick O'Connor are being presented for election to the Governing Committee. These individuals have demonstrated a commitment to excellence inherent in Forum leadership. All have been active in the Forum programs and publications, and engaged in building that legacy of success enjoyed by the Forum.

A special thanks is extended to those Governing Committee members that will be concluding their term as Committee members. Mr. Adrian Bastianelli, III, Mr. George Meyer, Ms. Krista Pages and Mr. David Senter will end their services as Governing Committee members this summer. These individuals have shared great character, wisdom, and occasionally emotion in serving the Forum. Their contributions to our personal legacy and that of the Forum will not be forgotten.

In August, the Forum will again transition leadership when Doug Oles will be replaced by Ty Laurie as Immediate Past Chair of the Forum. Known for his editorial predilection and selection of great inexpensive wines, Doug's legacy is indelible. Doug will join other great leaders of the Forum as part of the Leadership Circle, providing continued guidance to those who build the future success of the Forum.

It is with great admiration that I will follow in the footsteps of Ty Laurie as Chair of the Forum. An advocate for expanding the collegial environment of the Forum, Ty has brought a new meaning to organizing "athletic" gatherings for the Forum. Often heard and never forgotten, Ty continues to bring great energy and wisdom to this organization.

As the winds of change continue to stir in the construction industry, the Forum will continue to build on its prior success. The legacy of Forum leadership has provided a solid foundation of great programs, publications and relationships. The continuing goal of the Forum is to bring greater value to our members. Technological advances will afford the Forum the opportunity to provide its membership a word searchable database of Forum programs and publications and digital interactive education programs this coming year. Building for the future hand in hand with our young lawyers is a priority for our Divisions. And, combined with the Forum's Fellowship program, the Forum provides a great opportunity to get involved building your own legacy.

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Message from the Chair

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Creating value for the Construction Industry through education and leadership is our core principle. Creating value for our members our mission. I am proud to be part of your leadership team and together we will build upon that legacy of success we now enjoy in the Forum. ♦

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doctrine is a judicially created doctrine under which a purchaser of a product cannot recover from a manufacturer on a tort theory for damages that are solely economic." 1325, 716 N.W.2d at 831. The court provides an explanation of the purposes behind the Rule: "[t]hree principles generally underlie the application of the economic loss doctrine to tort actions between commercial parties: (1) to maintain the fundamental distinction between tort and contract law; (2) to protect commercial parties' freedom to allocate economic risk by contract; and (3) to encourage the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate or insure against that risk". Id. The court places great emphasis on the sophistication of the parties, commercial nature of the transaction and most importantly, the allocation of risk, in telegraphing its conclusion.

The court analyzed the "nature of the contract:" is it for products, services, or a mix of the two? If a mix, which predominates? The court ruled that the 1325/T-3 contract was a mixed product and services contract, and concluded that T-3's main role was to produce a product, the finished condominium building with garage. While it had responsibilities as a construction manager, T-3's major role was as general contractor, as it was contractually bound to complete the project and at financial risk if the cost exceeds the guaranteed maximum price. The fact that the schedule of values allocated only $176,000 out of the $6,099,891, or 2.8% for the construction management fee was given great weight. The court cited the fact that 1325 chose T-3, the low bidder (with whom it had no prior experience) over a "friend" with a higher bid, and 1325 expected a completed project as the result of the contract.

Colorado

The Supreme Court of Colorado reached a different conclusion in A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862 (Colo. 2005). The court concluded that, despite the explicit adoption of the Rule in a 2000 case (Town of Alma v. Azco Constr., Inc., 10 P.3d. 1256 (Colo. 2000)), Colorado law allowed a negligence action by a homeowners association directly against the subcontractors that built a townhouse complex.

In A.C., the association brought suit against the developer, general contractor and subcontractors for a long list of construction defects. After settling with the developer and general contractor, only tort claims against the subcontractors remained. The subcontractors moved for and won summary judgment at the trial level based upon the economic loss rule, but met reversal in the Court of Appeals. The Supreme Court upheld the Court of Appeals, finding that subcontractors owe homeowners a duty of care independent of contractual obligations. As a result, the court found that the economic loss rule simply did not apply.

The A.C. court defined the Rule with a major exception: "[o]ur formulation of the economic loss rule is that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach *absent an independent duty of care under tort law* [emphasis added]." A.C., 114 P.2d at 865. "Where there exists a duty of care independent of any contractual obligations, the economic loss rule has no application and does not bar a plaintiff's tort claim because the claim is based upon a recognized independent duty of care and thus falls outside the scope of the economic loss rule." Id. at 866. The court found that subcontractors have an independent duty of care in the construction of homes, based upon: several prior cases where such a duty was found concerning other contractors; the lack of a meaningful distinction between subcontractors and other "builders" (having previously found such duties from "builders" to homeowners), and statutes enacted by the legislature protecting homeowners (public policy).

Thus, the A.C. court found that homeowners have an unfettered right to pursue tort actions against those contractors (regardless of privity or tier) that construct their homes, and the economic loss rule simply does not apply. The court does not address, but we are left with the impression, that the Rule would apply only in a commercial context.

California

A California District Court of Appeal enforced the Rule in a homeowner/architect context in O'Connor v. Hertz, 2005 WL 3106407 (Cal. App. 4th Dist.) (not reported). The O'Connors, a married couple, contracted with Hertz, an architect, for the design of an extensive home and large garage. Through the design process, the couple requested, and the architect incorporated, expansions and additions to the original design. The O'Connors decided not to build due to expense, and instead filed suit against Hertz for breach of contract, negligence, negligent misrepresentation, and fraud. After

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the close of evidence in a jury trial, the trial judge granted nonsuit to the architect on the negligence count.

The O'Connor court found that economic loss rule articulated in Aas v. Superior Court, 12 P.3d 1125 (Cal. 2000) applied to the professional relationship between an architect and contracting homeowner. The court found that recent legislative enactments allowing suits for construction defects were limited to specific circumstances, and were not a broad right. The court was dismissive of the O'Connor's negligence claim, staing that "… claiming the defendants were negligent in failing to adhere to an agreed-upon budget, the O'Connors are simply attempting to convert a garden variety breach of contract into a tort."

Conclusion

The economic loss rule continues to be a forum specific "Rule" without predictable application. It appears clear that certain states (Wisconsin being one of them) are serious about limiting tort claims arising from the construction context. Others, such as Colorado, say they are following the rule but have created exceptions (allowing homeowners an independent right to sue all parties involved in construction on tort claims), on public policy grounds, that nearly obviate the rule. In California, a state most often known for its expansive mindset, at least one court enforced the Rule strictly. The end result is that the economic loss rule continues to be "in play", and we may need to come up with a better word to describe such a slippery subject than "Rule." ♦

Self-Administered Arbitration: Something Worth Considering?

By Samuel T. Reaves
Kennedy Covington Lobdell & Hickman, L.L.P

I recently had another lawyer in a significant construction dispute advocate that we arbitrate the case without using any arbitration organization to administer the arbitration. He went so far as to suggest that such "self-administered" (also called "self-directed," "non-administered," or "ad hoc") arbitration is the "wave of the future" in dispute resolution. I refused to agree to his request, but did he have a valid point? Do we use arbitration organizations out of necessity, or out of habit?

Self-administered arbitration ("SAA") offers several potential advantages. First and foremost is cost. Arbitration organizations can charge filing fees of $10,000 to $15,000 or more per party just to initiate the arbitration. With these types of fees, it is no wonder lawyers have questioned the value provided and questioned whether the lawyers and arbitrators can simply "do it themselves."

The second possible advantage of SAA is speed and efficiency. For instance, while it may take an arbitration organization weeks or even months to get an arbitration "off the ground" and select the panel or arbitrators, that process could go more quickly with SAA, depending on the parties' agreement for arbitrator selection. Another potential efficiency gain is the ability to communicate directly with the arbitrators. Many arbitration organizations prohibit such direct communications. Direct communication might prevent delay and miscommunication.

Greater flexibility is a third possible advantage. Each organization follows its standard procedures for administering an arbitration. Those procedures may not be helpful in a particular situation, but may nevertheless be applied rigidly because of the volume of cases being handled and the difficulty of tailoring procedures for each case. For example, standard procedures may call for a series of administrative conferences about matters that the parties have already addressed, or a "standard" letter may go out setting a response deadline or specifying an arbitrator selection procedure when the parties have agreed to something different. Unusual situations – such as a stay or bifurcation of proceedings – may also be frustrating to deal with if an organization is trying to apply standardized case handling procedures.

That said, lawyers should tread carefully before agreeing to SAA. Foregoing an organization might also mean forfeiting the rules the organization has developed to govern the arbitration. Lawyers might need to address those rules on their own. Lawyers going the SAA route also lose the "buffer" between the parties and the arbitrators, e.g., in deciding whether an arbitrator might have a conflict. SAA may therefore necessitate a much more detailed arbitration clause, as there are no organizational "default" rules (though relevant arbitration statutes may provide default procedures). Lawyers considering SAA are well advised to review various sets of arbitration rules and make sure to deal with the topics addressed by those rules. In simply adopting an organization's rules in their agreement, the parties may inadvertently authorize the organization to administer the arbitration. (*See* Rule R-2, AAA Construction Industry Arbitration Rules, hereinafter cited as "Constr. Indus. Arb. Rule").

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Self-Administered Arbitration: Something Worth Considering?

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Among the major issues that the parties should consider and address in any SAA are the following:

- "Initiation" of arbitration. When an arbitration is "initiated" affects time-related matters, such as statutes of limitations and deadline for responding to the arbitration demand. Thus, parties should carefully define how the arbitration is commenced. If there is no arbitration organization and no panel yet selected, it may be that "initiation" is defined as serving the other party with an arbitration demand.

- Arbitrator selection. Another advantage of using an organization is that many organizations maintain a roster of approved arbitrators from which a panel can be selected. Without an organization, the parties will need to agree to the process for selecting an arbitrator (as well as any arbitrator qualifications, such as being a licensed attorney practicing in a particular field). The process that probably "fits" best with self-directed arbitration, especially if faster resolution is the goal, is to make the claimant select an arbitrator in its arbitration demand, make the respondent select one in its response to the demand, and have the two then appoint the third (assuming, of course, that there is a panel rather than a single arbitrator).

- Arbitrator vacancies and disqualification. Under the AAA's Construction Industry Arbitration Rules, the AAA determines whether an arbitrator is disqualified because of a conflict of interest, and the AAA also fills any arbitrator vacancy that arises. (*See* Constr. Indus. Arb. Rule R-18, R-20). The procedures in an arbitration administered by JAMS are similar. (*See* JAMS Comprehensive Arbitration Rules & Procedures, Rule 15). Lawyers need to agree up front on who resolves arbitrator conflicts of interest, so that lawyers don't end up in the uncomfortable (and unnecessary) position of asking an arbitrator to disqualify himself or herself. One possibility in this regard is to have the arbitrators who aren't affected by the request for disqualification decide the issue, or to have a separate arbitrator appointed who decides only this issue. The parties should also determine how to fill arbitrator vacancies.

- Discovery and Evidence. The parties should either decide on the scope and extent of discovery, or else specify that the arbitrators decide these issues. The parties should also determine whether and to what extent formal rules of procedure and evidence apply to the arbitration.

- Remedies and Award. Are the arbitrators authorized to grant dispositive motions? To enter default? To grant TRO's, preliminary injunctions, and other interim relief? The parties should answer these questions, as well as setting both the form and timing of the final award.

- "Gap-Filling" Procedures. Parties interested in SAA should consider adding a "default" clause in the arbitration agreement that specifies that if there is any matter that they have not addressed concerning the manner of conducting the arbitration proceedings, the arbitrators are empowered to decide it.

- Document Retention. Since there is no arbitration organization, the parties should think to address who is responsible for maintaining the "original" files concerning the arbitration after it is over, and for how long. The logical choice for this duty may be the chair of the panel.

Parties who wish to embark on their own arbitration proceeding may also consider using a set of rules specifically developed for self-administered arbitration. For instance, the International Institute for Conflict Prevention and Resolution ("CPR") has adopted Rules for Non-Administered Arbitration (the "CPR Rules"), revised and effective June 15, 2005. The CPR Rules provide procedures for the parties to direct their own arbitration, giving the arbitrators the power to decide almost all issues that may arise. CPR is involved in only limited respects, such as arbitrator selection in certain situations (*see* CPR Rules 5.4 and 6), deciding issues of arbitrator disqualification (*see* CPR Rule 7.8), and interpreting the CPR Rules on issues other than the arbitrators' powers and duties (see CPR Rule 21). In other words, "[t]he Rules call for non-administered arbitration, in which CPR only becomes involved when necessary to break an impasse in the proceedings." (CPR Rules General Commentary at 16).

In conclusion, self-directed arbitration may have its place in the right situation, but is unlikely to be the dominant arbitration method any time soon. While lawyers may complain about the cost and efficiency of arbitration organizations, those organizations add value in many circumstances. In truly large construction cases, where tens or hundreds of millions of dollars are at stake, the arbitration filing fees that would be avoided are likely to be such a small fraction of the amount in controversy and the overall litigation costs that parties may not have much incentive to try to avoid those fees through self-directed arbitration, which requires extra effort by the lawyers and arbitrators and their respective staffs to "fill in" the functions that would be provided by an organization. In smaller cases, where the filing fees are lower, this extra effort may likewise not be worthwhile.

On further reflection, I am satisfied with my decision to decline opposing counsel's request for self-administered arbitration. However, in the right case, my answer just might change. ♦

Preemption: Do You Understand the Relationship Between the Federal Arbitration Act and State Arbitration Legislation?

By Brittney L. Turner Fabyanske, Westra, Hart & Thomson, P.A.

Arbitration is highly favored. If there is any doubt about whether parties intended to arbitrate, the court should send the parties to arbitration. But what law applies to disputes about whether arbitration agreements are enforceable? Anyone who has ever moved to compel arbitration, or been faced with such a motion, is probably familiar with the Federal Arbitration Act (the "FAA") and the general notion that the FAA preempts inconsistent state legislation. But how many of us really know what that means?

The Scope of the FAA: What Transactions Involve Interstate Commerce?

The FAA and its attendant caselaw are clear that the FAA governs all transactions that involve interstate commerce. 9 U.S.C. § 2. State courts must therefore apply the FAA to arbitration agreements "involving" interstate commerce. *Id.*; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-272 (1995). The Supreme Court has determined that that Congress intended to use its commerce power to the fullest extent possible and that the requirement that the FAA be applied to all transactions "involving" interstate commerce is to be read in the broadest possible way. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57 (2003); *Allied-Bruce*, 513 U.S. at 277.

In the construction industry, just about every project "involves" interstate commerce and should trigger application of the FAA. For example, the Minnesota Supreme Court applied the FAA to an arbitration agreement in a construction dispute because, although the parties and the project were located in Minnesota, the construction materials for the project were from different parts of the country. *Northwest Mech., Inc. v. Pub. Utils. Comm'n*, 283 N.W.2d 522, 523-24 (Minn. 1979); *see also Jim Walter Homes, Inc. v. Saxton*, 880 So. 2d 428, 432 (Ala. 2003) (holding that a construction dispute involving a house "involves" interstate commerce). Because most construction projects are likely to trigger the provisions of the FAA, construction lawyers must understand the tension between the FAA and state arbitration legislation.

Once the provisions of the FAA are triggered, courts must determine whether any otherwise applicable state laws regarding arbitration are preempted by the FAA. Several Supreme Court cases address the extent to which Congress intended to preempt state arbitration legislation when it enacted the FAA. Those cases provide that state courts must enforce the substantive provisions of the FAA—primarily 9 U.S.C. §§ 1-2, which provide that arbitration agreements are to be enforced. *E.g., Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Cronus Invs., Inc. v. Concierge Servs.*, 107 P.3d 217 (Cal. 2005). But the Supreme Court has ***not*** held that state courts are required to enforce the procedural provisions of the FAA. *Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989). Further, state courts are permitted to enforce state arbitration legislation—particularly procedural requirements—to the extent that the state arbitration legislation does not conflict with the FAA's goals. *Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc.*, 840 F. Supp. 708, 710 (D. Ariz. 1993). State courts cannot, however, enforce state legislation that restricts parties' abilities to arbitrate according to their arbitration agreements. *See, e.g., Allied-Bruce*, 513 U.S. at 271-272.

Preemption in Practice: Recent Decisions Regarding FAA Preemption of State Arbitration Legislation

Although these rules seem simple in theory, things can get complicated when parties assume that a particular state's procedural requirements apply in their situation. Some recent decisions from courts across the country demonstrate that this area of the law is not simple, and as a result, parties who assume that a particular state's procedural provisions apply may find themselves in a world of hurt.

In *Joseph v. Advest, Inc.*, the Superior Court of Pennsylvania examined whether a Pennsylvania state statute providing for a 30-day limit for challenging arbitration awards was in conflict with, and therefore preempted by, the FAA's three-month time limit for challenging arbitration awards. *Joseph v. Advest, Inc.*, 906 A.2d 1205 (Pa. Super. Ct. 2006). The court determined that because the 30-day time limit "more quickly render[s] arbitration awards final," it actually reinforced the goal the FAA to encourage arbitration. *Id.* at 1210. The court concluded that the 30-day limit was not in conflict with the FAA's three-month limit, and the court concluded that the Pennsylvania state statute was not preempted. *Id.* at 1211. As a result, the party seeking review of the arbitration award was precluded from obtaining such a review because that party had assumed that the FAA's three-month time limit would apply. *Id.* at 1214.

In *Manson v. Dain Bosworth Inc.*, the Minnesota Court of Appeals examined whether Minnesota law or the FAA applied regarding the manner of service of the notice of vacation of

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Preemption: Do You Understand the Relationship Between the Federal Arbitration Act and State Arbitration Legislation?

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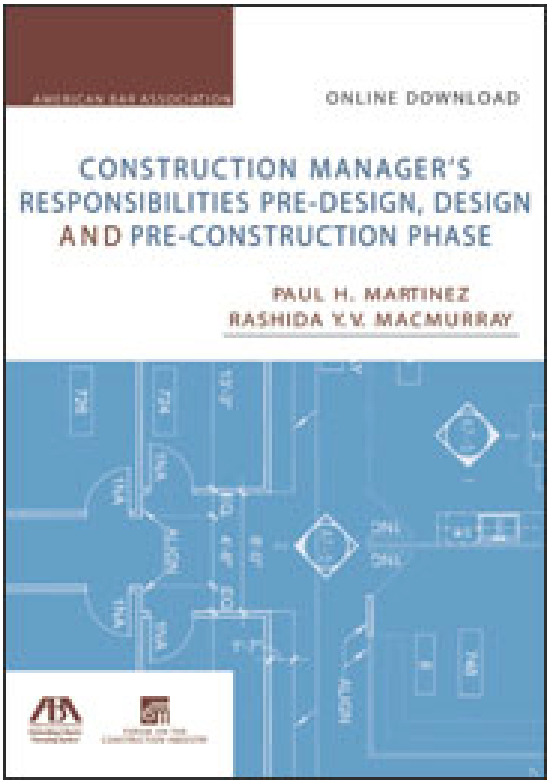
the arbitration award. *Manson v. Dain Bosworth Inc.*, 623 N.W.2d 610 (Minn. Ct. App. 1998). Minnesota law required personal service of the notice of vacation; the FAA allowed for service by U.S. Mail. *Id*. at 614. The party applying for vacation of the award served it by U.S. Mail. *Id*. The Minnesota Court of Appeals determined that the manner of service was procedural and that the FAA's procedural rules did not apply to the state court proceedings. *Id*. at 614-15. Accordingly, the Minnesota Court of Appeals affirmed the district court's order dismissing the motion to vacate. *Id*. at 617.

And in *Simmons Co. v. Deutsche Financial Servs. Corp.*, the Georgia Court of Appeals determined that even though the FAA does not allow appeals from interlocutory orders compelling arbitration, a party could nonetheless appeal such an order pursuant to a Georgia state statute. *Simmons Co. v. Deutsche Financial Servs. Corp.*, 532 S.E.2d 436 (Ga. Ct. App. 2000). The court determined that the statute that allowed the appeal was a procedural rule and did not "undermine the purposes and objectives of the FAA" because although the timing of an interlocutory appeal might delay enforcement of an arbitration agreement, the procedural right does not necessarily prevent enforcement of a valid arbitration agreement. *Id*. at 439-40.

On the flip side, courts have found certain state statutes, particularly statutes that require special notice provisions regarding arbitration, to be in conflict with the goals of the FAA and to be preempted by the FAA. In *Kagan v. Master Home Prods., Ltd.*, the Missouri Court of Appeals concluded that a Missouri state statute that required "notice of arbitration provision" language to be included with all arbitration agreements was preempted by the FAA because the, "FAA has no notice provision similar to that in the Missouri Act." *Kagan v. Master Home Prods., Ltd.*, 193 S.W.3d 401, 407-07 (Mo. Ct. App. 2006). The Missouri Court of Appeals' reasoning was not as thorough as it could have been, but the court seems to have reached the right result. The FAA preempts state legislation if that legislation singles out arbitration agreements and treats arbitration agreements differently from other contracts. Requiring arbitration agreements to contain a special notice provision to be enforceable singles out arbitration agreements and presents an obstacle to their enforcement, which is contrary to the goal of the FAA. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996) (finding Montana state statute preempted by FAA because it singled out arbitration agreements by requiring that arbitration agreements in contracts be highlighted with a special notice provision that was typed in underlined capital letters on the first page of the contract); *Affiliated Foods Midwest Coop., Inc. v. Integrated Distrib. Solutions, LLC*, 460 F. Supp. 2d 1068, 1073 (D. Neb. 2006) (finding Nebraska state statute preempted because it singled out arbitration agreements by requiring that arbitration agreements appearing in "standardized agreements" be highlighted with a special notice provision).



Tips

In our industry, just about every transaction will trigger the provision of the FAA. Construction lawyers must be aware of the tension between the FAA and state arbitration legislation. The tension between substance and procedure is around to stay. Courts and litigants continue to struggle with the interplay of the FAA and state arbitration legislation. As a practitioner, you will serve your clients well by making sure that your clients are aware of the state legislation that may apply to disputes regarding the enforceability of arbitration agreements and by making sure that your clients' contracts clearly provide what law (both substantive and procedural) is to apply to all disputes, including disputes related to arbitrability and the enforcement of arbitration provisions. *See Volt*, 489 U.S. at 479-80 ("[w]here, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA"). After all, the courts are always eager to enforce arbitration agreements according to their terms.

♦

Join Us in Puerto Rico
For Our 2007 Annual Meeting!

WHEN: April 12-13, 2007

WHERE: El San Juan Hotel & Casino
6063 Isla Verde Avenue
Carolina, Puerto Rico 00979
To make hotel reservations, call (866) 317-8935 or (787) 791-1000 or visit online at: http://www.elsanjuanhotel.com/ Please refer to the ABA Annual meeting.

TITLE: Lessons Learned: Benefiting Your Project from Others' Experiences – Good and Bad

TELL ME MORE: There is no teacher like experience. The 2007 Annual Program will explore lessons learned from the experiences of owners, contractors, design professionals and their lawyers on projects and disputes to illuminate for ail of us what went right, what went wrong and how we all might learn to overcome similar challenges down the road.

The Forum has selected a top-notch venue in Puerto Rico. Attendees should have virtually the entire hotel to themselves for their enjoyment. Puerto Rico offers a host of wonderful opportunities - explore the flora and fauna of the lush rainforests, enjoy the surf and sand or wander the cobbled streets of Old San Juan and immerse yourself in the history of the Spanish settlement of Puerto Rico.

Register by mail by March 28, 2007. Pre-registration is available online until April 6, 2007. To register for the program or to download a registration form, please visit the Forum's website, at http://www.abanet.org/forums/construction/featured_program/home.html

UNDERCONSTRUCTION

The newsletter of the ABA Forum on the Construction Industry

March 2007

Lawyers Serving
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American Bar Association
Forum on the Construction Industry
321 N Clark Street
Chicago, IL 60610