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UNDERCONSTRUCTION

Supreme Court to Schein Additional Light on Question of Who Decides Arbitrability

Richard J. Tyler

On December 8, 2020, the Supreme Court heard oral argument in the case *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963, which is now on its second trip to the Court. The case presents the question of whether "a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator." Throughout the briefing and in argument, the exemption is colloquially referred to as the "carve-out." While the parties' main battle is over the interpretation of the operative arbitration clause, there is a collateral issue of significance that may or may not be decided by the Court: Respondent's contention that incorporation by reference of institutional arbitration rules, such as those of the American Arbitration Association ("AAA"), does not constitute clear and unmistakable evidence of the parties' intent to arbitrate arbitrability.

Editor's Note: After this article was submitted for publication the Supreme Court issued a per curium order dismissing the writ of certiorari as "improvidently granted." The dismissal leaves intact the Fifth Circuit decision as well as the unanimous circuit case law holding that the incorporation of institutional arbitration rules evidences clear and unmistakable intent to delegate arbitrability to the arbitrator. The dismissal notwithstanding, the Schein case remains a cautionary tale regarding contract drafting and unresolved questions surrounding delegation.

Who Decides Arbitrability?

The determination of "arbitrability" – *i.e.*, whether the parties have submitted a particular dispute to arbitration – traditionally is seen as an issue for the courts to decide.[1] More recently, however, the Supreme Court has stressed that the question of who decides arbitrability "turns upon what the parties agreed about *that* matter."[2] Determining the parties' agreement generally involves the application of ordinary state-law principles governing the formation of contracts with one exception: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[3] If there is a clear and unmistakable delegation of arbitrability to the arbitrator, a court may not decide the issue.[4]

While the Supreme Court has not definitively ruled on the question, the federal courts of appeal have uniformly held that an arbitration clause that incorporates by reference the AAA rules (or similarly worded arbitral rules) constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.[5] The rationale underlying these decisions is straightforward. Under long-settled principles of contract law, parties can incorporate outside documents, such as the AAA rules, into their contract. Because those rules provide that the arbitrator has the power to rule on his or her jurisdiction as well as the scope of the arbitration agreement,[6] incorporating these rules is an agreement to arbitrate arbitrability.[7]

Schein, Act I: The Wholly Groundless Exception Deemed Wholly Groundless

The *Schein* case involves an antitrust suit brought in a Texas federal court by Archer & White Sales, Inc. ("Archer") seeking both money damages and injunctive relief. Henry Schein, Inc.

IN THIS ISSUE

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and its affiliated defendants (collectively, "Schein") moved to compel arbitration based on the following arbitration clause in a dealer agreement:

> This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.

Following a hearing, a magistrate judge compelled arbitration because: (1) the claim did not seek "only" injunctive relief and monetary damages were the predominant relief sought, and (2) the incorporated AAA rules "very clearly state that the question of the arbitrability of a dispute is referred to the arbitrator under the AAA rules."[8]

The district court, however, vacated the magistrate judge's ruling on two grounds.[9] First, the Court found that the parties did not clearly and unmistakably agree to arbitrate the arbitrability of actions seeking injunctive relief because the pleaded action fell squarely within the terms of the express carve-out from arbitration.[10] Second, the court found that, even if a delegation had occurred, recent Fifth Circuit jurisprudence permitted it to determine arbitrability when a party's argument in favor of arbitration was "wholly groundless."[11] The Court found Schein's arguments in favor of arbitration to be wholly without merit based on the plain language of the arbitration clause.[12]

The Fifth Circuit affirmed the district court.[13] The Court acknowledged that the parties' express incorporation of the AAA rules "present[ed] clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." After noting that the interplay between this delegation and the exception was "at best ambiguous," the Court determined that it need not decide the delegation issue because the Fifth Circuit's adoption of the "wholly groundless" exception provided it "a narrow escape valve." Because the arbitration clause expressly excluded actions involving injunctive relief, the Court affirmed the district court based on the arguments in favor of arbitration being "wholly groundless."[14]

The Supreme Court, in a unanimous decision, reversed the court of appeals on two grounds.[15] First, there was no support for a "wholly groundless" exception in the language of the Federal Arbitration Act. Rather, the Courts were required to interpret the Act as written, and the Act in turn required that Courts interpret the parties' contract as written:

> When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

Second, the "wholly groundless" exception was inconsistent with the Court's prior jurisprudence holding that a court may not rule on the merits of a claim assigned by a contract to an arbitrator even if the Court believes the claim is frivolous: "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." Because the court of appeal had not addressed the delegation issue, the case was remanded for further proceedings.

Schein, Act II: Deciding Who Decides Arbitrability

On remand, the Fifth Circuit again affirmed the district court.[16] The Court noted the parties' agreement that a valid arbitration clause existed and precedent establishing that incorporation of the AAA rules constituted clear and unmistakable evidence of the parties agreement to arbitrate arbitrability. Notwithstanding, the Court found that the placement of the carve-out in the clause was dispositive: "The plain language incorporates the AAA rules – and therefore delegates arbitrability – for all disputes except those under the carve-out. Given that carve-out, we cannot say that the Dealer Agreement evinces a 'clear and unmistakable' intent to delegate arbitrability."[17]

The Supreme Court granted Schein's petition for certiorari, but denied a cross-petition by Archer. Archer maintained that if the Court granted Schein's petition, the Court should also decide the "logically antecedent" question of whether merely choosing a set of arbitration rules constitutes "clear and unmistakable" evidence that the parties agreed to allow an arbitrator to decide arbitrability.

Before the Court, the parties have arrived at vastly different views on the application of the "clear and unmistakable" evidence rule. Not surprisingly, both parties have argued that their view of the arbitration clause presents the simplest, most commonsensical reading of its text.

At its core, Schein's argument is that a "clear and unmistakable" delegation of arbitrability resulted from the incorporation of the AAA rules and thus the Court lacked authority to decide arbitrability. Schein reasons that the delegation is an antecedent agreement that is subject to the rules governing arbitration agreements generally and that one of those rules is the presumption that any doubts regarding the scope of an arbitration agreement be resolved in favor of arbitration.[18] Given that presumption, the fact that the carve-out is silent regarding who decides arbitrability does not restrict the delegation effected by the incorporation of the AAA rules. In Schein's view, the court of appeals conflated the questions "who decides arbitrability" and "whether the dispute is arbitrable," thereby gutting the delegation.[19] In doing so, the Court created a scenario in which responsibility for deciding arbitrability is divided between a court and an arbitrator, leaving open the question of who decides which arbitrability decisions are for the court and which are for the arbitrator.[20]

Archer argues that that no delegation occurred, either as a matter of law or fact. First, Archer contends that the "clear and unmistakable" evidence rule is not satisfied because the agreement does not contain an explicit delegation.[21] Second, notwithstanding the denial of certiorari (and twelve contrary

court of appeals decisions), Archer contends that the "mere incorporation" of the AAA rules is insufficient to show by clear and unmistakable evidence that the parties intended to delegate arbitrability to an arbitrator.[22] Finally, Archer maintains that even if a delegation exists, it was never triggered under the plain language of the agreement. Here, Archer argues that because its action seeks injunctive relief, the carve-out applies, the claim is not subject to arbitration under the AAA rules, and thus no delegation of arbitrability under the AAA rules ever occurred.[23]

Both views of the clause have faults. As the Chief Justice pointed out, the Schein view of the clause has the arbitrator deciding whether a claim falls within the carve-out when the parties expressly stated they did not want arbitrators dealing with actions seeking injunctive relief.[24] The Archer view, on the other hand, would divide responsibility for arbitrability determinations between the arbitrator and the court, adding a new question to the mix, namely, who decides who makes the arbitrability decision.

Conclusion

There are several takeaways from the *Schein* case even as the Supreme Court ruling remains pending. First is the importance of carefully reviewing dispute resolution clauses in contracts. The *Schein* parties have now spent approximately eight years fighting over arbitrability. Whatever the outcome in the Supreme Court, the *Schein* case demonstrates the critical importance of precisely reciting the parties' mutual intent regarding the dispute resolution process. To paraphrase Archer's counsel, parties need to express their intentions in simple, explicit sentences.[25]

Second, the case (or, perhaps more accurately, the carve-out) highlights the tension between the presumption that any doubts as to the scope of arbitral issues should be resolved in favor of arbitration and the principle that courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. This conflict is muddied by yet another principle: that arbitration agreements are to be construed like any other contract – *i.e.*, what effect is to be given the delegation worked by incorporating arbitration rules.

Finally, it is not clear whether the Court will decide the specific question of whether incorporation of the AAA (or similar) rules constitutes clear and unmistakable evidence that the parties intended to delegate arbitrability to an arbitrator. According to Schein, Archer did not raise this argument until the remand, and then only in a footnote to its supplemental brief.[26] In addition, it is unclear whether deciding the incorporation issue is necessary to reach a decision in the pending case. If the Court leaves the issue untouched, the law in twelve circuits (and in some states) will remain that incorporation of arbitration rules allowing arbitrators to determine their own jurisdiction constitutes clear and unmistakable evidence that the parties intended to delegate arbitrability to an arbitrator.[27] ■

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Endnotes

1. *AT&T Technologies, Inc. v. Communications Workers*, 106 S. Ct. 1415, 1418 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."). *See also Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 592 (2002) ("question of arbitrability" applies to narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, such as whether the parties are bound by a given arbitration clause).
2. *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1923 (1995) (emphasis in original).
3. *First Options*, 115 S. Ct. at 1924, citing *AT&T Technologies*. The Court adopted this rule due to concerns that parties often may not focus on the question of whether a court or arbitrator should decide whether a particular dispute is arbitrable. 115 S. Ct. at 1925. The Court reasoned that, because the question of who should decide arbitrability is "rather arcane," treating silence or ambiguity as consent to arbitration "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge" would decide. *Id.*
4. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2018) ("if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.").
5. *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020) (collecting cases). The Supreme Court has stated that "[t]he rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions." *Henry Schein*, 139 S. Ct. at 528.
6. AAA Construction Industry Arbitration Rules and Mediation Procedures effective July 1, 2015, R-9(a) ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.").
7. *E.g., Blanton*, 962 F.3d at 845 (where contract expressly incorporated the AAA rules into the agreement "[o]n its own terms, that's pretty compelling evidence that Piersing agreed to arbitrate 'arbitrability.'").
8. Civil Action No. 12-cv-00572 in the United States District Court for the Eastern District of Texas, Doc. 44 at 3.
9. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 2016 U.S. Dist. LEXIS 169245 (E.D. Tex. December 7, 2016).
10. 2016 U.S. Dist. LEXIS 169245, *18-20 ("it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration. As such, there is no reason to believe that incorporation of the AAA rules, including the AAA rule that delegates the question of arbitrability to the arbitrator, should indicate a clear and unmistakable intention that the parties agreed to arbitrate the question of arbitrability in these circumstances – when an action falls squarely within the clause excluding actions like this from arbitration.").
11. 2016 U.S. Dist. LEXIS 169245, *20-22. The Fifth Circuit adopted the "wholly groundless" exception, which had been recognized in other circuits, in *Douglas v. Regions Bank*, 757 F.3d at 460 (5th Cir. 2014).
12. 2016 U.S. Dist. LEXIS 169245, *16 ("Given the plain meaning of the language chosen by the Parties, and there being no basis for reading significant limitations into the express exclusion, the Court concludes that there is, in this case, a 'positive assurance' that no reasonable interpretation of the arbitration clause would force this action into arbitration." (citation omitted)).
13. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d at 488 (5th Cir. 2017).
14. *Id.* at 495-497 ("We see no plausible argument that the arbitration clause applies here to an 'action seeking injunctive relief.'").
15. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. at 524 (2018).
16. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d at 274 (5th Cir. 2019).
17. 935 F.3d at 281-282.
18. No. 19-963, Brief for the Petitioner at 25-27.
19. *Id.* at 33 ("The whole point of a delegation of arbitrability is to have an arbitrator determine whether the plaintiff's claim is arbitrable - and a core aspect of that determination is whether the claim falls within the scope of the arbitration agreement. By deciding that very question as part of the inquiry into who decides arbitrability, a court is necessarily resolving the underlying question of arbitrability too." (internal citations omitted)).
20. *Id.* at 36-37.
21. No. 19-963, Brief for the Respondent at 16 ("the arbitration clause is silent on delegation; it does not utter one syllable on the topic. It is implausible that anyone truly thinking about this "arcane" issue would write a contract that way. In the real world, when parties actually contemplate a delegation clause, *they expressly include a delegation clause*.") emphasis in original.
22. *Id.* at 17-26. *See also id.* at 18-20 (Sophisticated or not, no rational person thinking about that "arcane" issue relies on a single, unspecified, oblique provision tucked away in a copious set of rules primarily incorporated for an entirely different purpose (read: setting the ground rules for any arbitration)).
23. *Id.* at 26-31.
24. Rough Hearing Transcript at 5-6. The transcript is available at https://www.supremecourt.gov/oral_arguments/argument_transcript/2020, Argument Session: November 30, 2020 - December 09, 2020 (last accessed December 31, 2020).
25. No. 19-963, Brief for the Respondent at 16 ("Five simple words can easily be inserted into every contract and avoid endless waste and confusion: 'The arbitrator shall decide arbitrability.'").
26. No. 19-963, Brief for the Cross-Respondent in Opposition at 4-5.
27. *Blanton*, 962 F.3d 842, 846 (collecting cases). *See, e.g., Anderton v. Practice-Monroeville, P.C.*, 164 So. 3d at 1094 (Ala. 2014).

Cutting Edge Federal Contract Claims: Contractor Prevails on "Negligent Negotiations" Theory

Nick Solosky

The Contract Disputes Act (CDA) provides the framework for government contractors to pursue claims for time and money against federal agencies. Typically and traditionally, following the well-worn path that during performance, the government caused the contracts to incur time and/or costs beyond what the contract required entitling the contractor to recover time extensions and costs through a request for equitable adjustment (REA) or CDA Claims. In this way, CDA Claims are usually easy to understand. But, not all claims are so straightforward.

Recently, several contractors advanced CDA Claims presenting the novel legal theory that the government must take responsibility for fundamental planning issues dating all the way back to the project's proposal phase and well before performance. Dubbed the "Negligent Negotiations" theory, the premise is that an agency's failure to engage in meaningful negotiations during contract *formation* can lead to additional costs during *performance* – and, more importantly, that the agency must pay those costs to the contractor as damages.

This article unpacks the legal basis underlying the Negligent Negotiations theory. Next, it examines how the Boards of Contract Appeals approach CDA Claims based on the theory. Finally – and critically for government contractors – it discusses the practical implications and the steps you should take if the Negligent Negotiations theory applies to your government contract or construction project.

Legal Basis for the Negligent Negotiations Theory

The Negligent Negotiations theory arises out of the obligations set forth in Federal Acquisition Regulation (FAR) 15.306(d)(3). In simple terms, the regulation requires federal agencies to engage in "meaningful negotiations" during contract formation of negotiated procurements. During these discussions, the contracting officer "at minimum" must discuss deficiencies and significant weaknesses included in the offeror's proposal.

Contractors advancing CDA Claims based on the Negligent Negotiations theory argue that the agency's failure to engage in these meaningful discussions during negotiations caused them to incur additional costs or to perform additional work during contract performance. In other words, the agency bears responsibility for setting the project up to fail before the work even started.

The ASBCA Allows a Negligent Negotiations Claim to Proceed

The first test for the Negligent Negotiations theory came before the Armed Services Board of Contract Appeals in *Appeal of Chugach Fed. Sols., Inc.*, ASBCA No. 61320, 19-1 B.C.A. (CCH) ¶ 37380 (May 16, 2019). In that case, the contractor appealed a CDA Claim for an adjustment of contract price, arguing that the Navy's failure to convey its concerns with respect to staffing levels at the proposal stage caused it to incur substantial costs to meet the agency's actual expectations during contract performance. That is, the contractor argued that the Navy was aware from the start that the proposed staffing levels would not meet expectations (and assigned a significant weakness to the proposal in that regard), but nevertheless considered the proposal acceptable and proceeded with awarding the contract.

The Navy filed a motion to dismiss on the basis of jurisdiction, arguing that the Claim was "in reality a pre-award bid protest" that challenged the Navy's evaluation of the proposal, "rather than a claim related to [the contractor's] performance of the contract." The ASBCA denied the agency's motion, noting that the contractor was not a disappointed bidder, but rather an awardee with a legitimate claim related to contract performance (i.e., that it performed additional work beyond what was negotiated by the parties).

In a subsequent May 2020 decision, the ASBCA denied the Navy's motion for summary judgment with respect to the Negligent Negotiations claim. The Board found that the contractor supported its Claim through documents and deposition testimony of Navy witnesses that demonstrated a material issue of fact as to whether the Navy properly informed the contractor of the significant weaknesses identified during the proposal phase.

The *Chugach* case remains pending as of January 2021, so there is still potential for the Board to address the Negligent Negotiations theory in a more direct and substantive way.

The CBCA Declines to Extend the ASBCA's Rationale in *Chugach*

The Civilian Board of Contract Appeals (CBCA), in contrast to the ASBCA decision discussed above, has been more hesitant to consider CDA Claims based on the Negligent Negotiations theory. In its July 2020 decision, *Hamstra Chico LLC, Appellant*, 20-1 B.C.A. (CCH) ¶ 37654 (July 16, 2020), the CBCA granted the government's motion for summary judgment and denied the contractor's appeal for certain utility costs.

The appeal in *Hamstra* concerned a U.S. Department of Veterans Affairs (VA) contract for the construction and lease of a building. The initial solicitation stated that the cost of "electricity, gas, and water [would] be paid directly by the VA." However, the agency later issued an amended solicitation stating that such utility costs would be paid directly by the contractor. The contractor acknowledged the amendment, but did not alter its subcomponent cost proposal. The VA did not consider the issue a deficiency or significant weakness and proceeded to award the contract based on the

contractor's proposal (including, significantly, the signed amendment). After completing construction, the contractor submitted a CDA Claim arguing that the agency engaged in defective negotiations by failing to identify the utility cost issue as a concern or weakness during the proposal phase.

In denying the appeal, the CBCA expressly acknowledged the *Chugach* decision (ASBCA decisions are not binding at the CBCA), but distinguished the case on the facts. Importantly, that means that the Negligent Negotiations theory is not necessarily *invalid* at the CBCA. The Board left the door open for a claim involving different facts. By way of example, claims involving the agency assigning a significant weakness during the proposal phase (as seen in the *Chugach* decision at the ASBCA) could certainly result in a different outcome from the CBCA.

By analogizing *Hamstra*'s facts to those in *Chugach* as part of the decision, the CBCA seems to hint it is not entirely opposed to the Negligent Negotiations theory of recovery, and that it may consider such a claim under the right circumstances in the future.

Practical Considerations for Federal Contractors

Bottom Line Up Front: Federal construction contractors awarded contracts through FAR Part 15 negotiated procurements may be able to pursue Negligent Negotiation claims – if they have the right facts and enough evidence.

Based on the decisions from the ASBCA and CBCA examined in this article, a colorable claim under the Negligent Negotiations theory will likely have the following three key elements:

- Conflict between the contractor and the agency for legal responsibility over a disputed portion or element of the work;
- Evidence that the contractor advised the agency of its intent to approach the work using certain means or methods; and
- Proof that the agency flagged the contractor's approach as a deficiency or significant weakness during the contract's proposal phase, but elected to award the contract and proceed with performance anyway.

The third element (evidence of government knowledge during the proposal phase) presents the greatest challenge for contractors seeking to recover under the Negligent Negotiations theory. Procedurally speaking, the contractor is unlikely to know in advance whether (or not) the agency assigned a weakness to any particular element of its proposal. Viewed through the lens of the *Hamstra* decision at the CBCA, it is possible that the absence of evidence in that regard could sink a Negligent Negotiations claim in the end.

Contractors that suspect the agency engaged in Negligent Negotiations must undertake affirmative and diligent steps to protect their rights to seek a time extension and damages under the contract and the FAR. These best practices include: (1) providing timely and detailed notice of the condition to the agency, (2) keeping comprehensive project records, and (3) tracking the project schedule and costs.

Contractors that take these steps up front will put themselves in a better position to obtain relief through an REA or CDA Claim later down the line (even if the Negligent Negotiations theory is not borne out by the facts of record). Proper notice and detailed record keeping are key elements of every CDA Claim regardless of the underlying legal theory. ■

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MEMBER FEATURE SERIES

Asha Echeverria, a Strong Construction Lawyer Embracing New Rules of Collaboration.

In this edition, we feature the Forum's Publications Chair, Asha Echeverria, shareholder at Bernstein, Shur in Portland, Maine. Learn about Asha, a self-described "gentlewoman farmer" on UC Online at ambar.org/FCLUC.

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MESSAGE FROM CHAIR-ELECT

Patience and Adaptability: Hallmarks of The Forum 2020 Experience and Beyond

Wm. Cary Wright

Little did we know at the beginning of 2020 that the Forum, due to COVID-19, would be embarking on a historic year that none could have envisioned. The year, which started out as usual, took what we thought would be a minor detour when COVID-19 struck the nation, then took a major turn when the pandemic persisted much longer than anticipated. Through it all, however, the Forum remained patient and adaptable, and grew to be stronger.

In late January, the Midwinter Meeting was held in Tucson, Arizona – a first for the Forum. It was a beautiful setting and attendees enjoyed being with one another for the first meeting after the holidays. The topic was "2020: A Focused Look at Risk Management in the New Decade." Little could we have anticipated what was to come.

A few weeks later, the first cases of COVID-19 were reported on the west coast, in the Seattle area. At the time, no one paid much attention to the impact this could have on Forum meetings, much less to our daily lives and the nation as a whole. However, as it turned out, the Annual Meeting, scheduled to be held in Seattle in April, with the topic titled "2020 Foresight: Effective Project Management and Strategies," had to be cancelled and rescheduled to the Fall 2021.

Rather than sit idly by, the Forum and dedicated sponsors developed and rolled out a webinar series to address how the construction industry and we as practitioners could navigate through the myriad of issues presented by COVID-19. The series was extremely well received, and set the groundwork for future webinar series, provided at no charge to members and industry participants.

As the impacts from COVID-19 increased, it became apparent that the pandemic would last much longer until a vaccine was developed. It became clear that the Forum would have to remain patient and be flexible. Which it did and continues to do.

To that end, the Forum leadership sought approval from the Governing Committee to have a Gap Year – that is, move the Forum in-person activities scheduled for the 2020-2021 ABA Bar Year to the 2021-2022 Bar Year. Also, the current leadership – Chair, Chair-Elect, Immediate Past Chair and Governing Committee members – would continue in their current roles for an additional year. The same would go for Division Chairs should they desire to continue in their roles for another year. This was approved by the Governing Committee, and then subsequently approved by the ABA Board of Governors, approving a Forum bylaw change permitting this to occur.

So, with this in mind, we are scheduled to meet back in person at the Fall 2021 Meeting in Seattle, with the same topic: "2020 Foresight: Effective Project Management and Strategies" but should probably be modified slightly (perhaps "20/20") demonstrating yet again the Forum's adaptability. The Forum's patience and adaptability will continue to be rewarded as we look forward to seeing and learning with one another in person and continuing to grow stronger. ■

Wm. Cary Wright, Carlton Fields, Tampa, FL

MESSAGE FROM THE EDITOR

I Learned A LOT From You!

R. Thomas Dunn

This is my last edition of *Under Construction* as its editor. I wanted to say how thankful I am of the dozens of authors and contributors, my editorial team members (Jayne Czik, Neal Sweeney, Catherine Bell, Wes Bonnheim, Jean Terry, Mike Lane, and Carmela Mastrianni), and ABA team members (Elmarie Jara, Tamara Harrington, LaShaunda Williams, Colleen Hardison, and others). I have served as an associate editor and editor of *Under Construction* for the previous ***six years!*** In that time, I have learned so much from you all. I greatly enjoyed working on the articles, coming up with ideas, and changing things up. *Under Construction* was a fabulous way for me to connect with you all over the past 6 years. During my tenure, working with the Forum's Divisions, we created the following running columns: On In-House Counsel's Desk (Div. 11), Workplace Chatter (Div. 6), Dispute Resolver (Div. 1), and Construction Law 101 (Young Lawyers Division). We have featured numerous members and remembered the members who we have sadly lost. We created an ABA Connect page and engagd on social media to increase *Under Construction*'s reach.

I am even more excited to see what comes next with Neal Sweeney as *Under Construction*'s editor beginning with our 23rd Volume! Neal has been a great team member and I know he will take *Under Construction* to the next level along with his new associate editor and editorial team. ***Congrats Neal!*** Authors and contributors, please keep sending *Under Construction* your top caliber articles, viewpoints, and other submissions. *Under Construction* is a substantial part of the Forum's goal of ***building the best construction lawyers*** and we cannot do it without YOU. **Thank you!** ■

R. Thomas Dunn, Pierce Atwood LLP, Providence, RI and Boston, MA

ON IN-HOUSE COUNSEL'S DESK

Thanks to Division 11 (In-House Counsel) for providing another great article for the On In-House Counsel's Desk Column. Read the full article at ambar.org/FCLUC.


Trending Captive Insurance Programs – What's Attracting A/E Firms?
By Catherine Bragg, TRC Companies, Inc. and Beverly Tompkins, Simpson Gumpertz & Heger

WORKPLACE CHATTER

The Forum's Division 6 (Workplace Management & Human Resources) provides regular contributions to *Under Construction* in its Workplace Chatter column. This edition contains a timely article from Phillip B. Russell and Jaslyn W. Johnson forecasting the Biden administration's impact on OHSA. Read the full article at ambar.org/FCLUC.


A First Look at OHSA Under the Biden Administration
By Phillip B. Russell and Jaslyn W. Johnson, Ogletree, Deakins, Nash, Smoak & Stewart P.C.

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CONSTRUCTION LAW 101

To advance the Forum's mission of building the best construction lawyers, *Under Construction* publishes construction law 101 articles for our law student and new attorney members. In this edition, we published four touching on the economic loss doctrine, overhead costs, experts, and liquidating agreements! Read the full article online at ambar.org/FCLUC.


Economic Loss Doctrine and its Application to Construction Contracts
By Wajiha Rais and Lindy Stevens, Varela, Lee, Metz & Guarino


Not Your Typical Overhead Caution Sign
By Kevin M. Lugo and Scott A. "Gator" Galbraith, MBP

Liquidating Agreements: Bridging a Contractual Gap
By Peter K. Doely, Maslon LLP

Document Requests to Help You and Your Experts in Schedule Delay and Damages Disputes
By Matthew Gasbarro, Lighthouse Consulting Group

DISPUTE RESOLVER

Division 1 (Litigation & Dispute Resolution) submitting excellent articles for its Dispute Resolver column on leadership and "vouching-in" construction disputes. Read the full articles at ambar.org/FCLUC.

Avoiding Construction Disputes: The Two Golden Rules of Leadership
By Chase Callaway, David Pattillo & Associates

The Lost Art of "Vouching-In" – Still Viable Today
By Michael A. Hornreich, Weinberg Wheeler Hudgins Gunn & Dial

UNDERCONSTRUCTION

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The ABA Forum on Construction Law is celebrating its 45th Anniversary in 2021. The Forum could not have developed the reputation of building the best construction lawyers without the effort, volunteerism, and leadership of the members who have been with us since the Forum's inception. Thank you!

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