

# SO CLOSE & YET SO FAR – SOME FUNDAMENTAL DIFFERENCES BETWEEN US AND UK CONSTRUCTION LAW SEMINAR

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# The Differences Between US and UK Construction Law

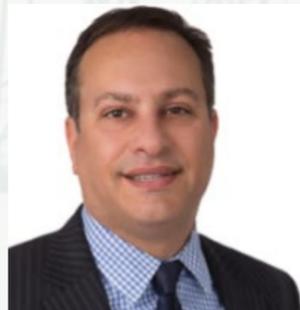
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Presented to:



# In this presentation we will cover the following headline topics:

- The practical side of a US business working in the UK – or international projects invoking British law
- The UK perspective of Construction Law
- The US/International perspective of Construction Law
- Q&A – Feel free to ask questions during or at the end.

# Presenters opening statements – the important but slightly boring statements

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# Topics to be covered

- *Spearin* doctrine v fitness for purpose
- AAA arbitration rules v UK arbitration rules
- The UK adjudication process
- Pay when paid mechanism v payment and payless notices
- Due process v natural justice
- Comprehensive resolution v crystallization
- Discovery/Depositions v UK discovery
- Witnesses v witness statements
- US Experts v UK expert instructions
- AIA discounted variations v JCT / NEC changes
- Letters of credit v bonding arrangements
- Different presenting styles US v UK

# *Spearin* Doctrine vs Fitness for Purpose

The *Spearin* doctrine (, 248 U.S. 132 (1918 *United States v. Spearin*)) is a United States Supreme Court decision, that laid the groundwork for the principal that the owner impliedly warrants the information, plans and specifications which an owner provides to a general contractor.



“Fitness for purpose” (FFP) has its roots in the UK Sale of Goods Act 1979 *e.g.* a door will act as a door, and a window will act as a window. As a result under standard U.K. agreements the general contractor will not be able to rely on owner furnished information, if it results in the construction not being fit for purpose.

# US Design Liability

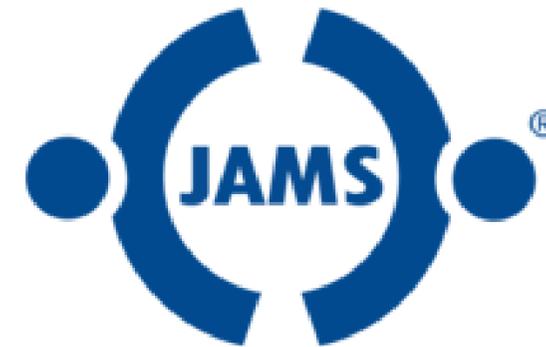
- U.S. utilizes a “reasonable standard of care” standard –reasonable skill & care
- What would a reasonable, locally-licensed architect be expected to design/do under the circumstances
  - Typically requires a locally-licensed expert in the same trade (registered architect, professional engineer, etc.)
- Many changes now in contracting try to shift risk and liability from architect to other parties – GC/Subs –
  - Coordination
  - “Reviewed for general conformity with design intent” versus “approved”

# UK Design Liability

- In the UK there are two generally accepted levels of design liability.
- The first is “reasonable skill and care”.
- The second — and more onerous requirement — is the obligation of “fitness for purpose” (FFP).
- As mentioned earlier FFP has its roots in the UK Sale of Goods Act 1979 *e.g.* a door will act as a door, and a window will act as a window.

# US Arbitration

- A number of different *fora* –
  - American Arbitration Association
  - *Ad Hoc*
  - JAMS Endispute
  - The McCammon Group, etc.
- Mediation often a precondition.
- Note that AIA documents used to default to Arbitration – now there is a checkbox between Litigation, Arbitration or “Other”.
- Large Projects often have Dispute Resolution Boards – a bit more streamlined often.
- Arbitrators given much discretion and flexibility.
- Decisions normally confidential & not reported.



# US Arbitration – The US System

- Arbitration widely recognized by virtually all court systems.
- Federal Arbitration Act & Uniform Arbitration Acts (at state level).
- Arbitration is preferred & many courts push for it – gets complex cases out of the courts and before experienced decision makers.
- The Arbitration Agreement controls the jurisdiction/authority of the arbitrator.
  - Often limited to interpretation of the contract and breaches thereof.

# UK Arbitration - Introduction

- Arbitration is similar in many ways to U.S. arbitrations.
- The areas of dispute are defined in the arbitration referral. These are more narrowly construed than in the U.S. in order to promote “Fair, speedy, economical and binding” decisions that are within the arbitrator's expertise.
- Rules may not permit lawyers to directly question the experts. Questions are posed by the arbitrator or other experts.
- Cases rely heavily on documents that can be submitted.
- Costs, including attorney fees are awarded to the prevailing party.

# UK Arbitration – Default Rules

- In the absence of agreement by the parties, the Arbitration Act gives the tribunal the power to decide all procedural and evidential matters as well as a range of general powers. These include the power to:
  - Decide where and when the proceedings will be held
  - Decide whether written statements of claim/defense should be used
  - Decide which documents or classes of documents should be disclosed
  - Order security for costs
  - Direct that a witness be examined under oath

# UK Adjudication Process – General Introduction

- The philosophy was to aid cash flow and prevent unreasonable behavior.
- Every party to a construction contract has a statutory, un-waivable right, to file for adjudication at any time.
- Adjudication is begun by filing a notice and referral. Once the referral is filed the adjudicator has 28 days to render a decision. Unless mutually agreed to by the parties, failure to reach a decision within the prescribed time renders a decision invalid and unenforceable.
- If parties refuse to agree to an extension of time, adjudicator may resign for reasons of Natural Justice.
- Attorney's fees and expenses are not recoverable, except for costs which may be award at the discretion of the adjudicator.
- Orders are binding unless appealed by filing a lawsuit.
- If you lose **you must pay** within the time prescribed in the Order even if you file an appeal. Payment will be summarily enforced by court.



# Payment Remedies Under U.S. Law



- Payment Remedies Vary –
  - Mechanic's Lien Rights exist in all 50 states & DC – but they are each different.
- Federal & Many State Projects (Gov Con):
  - No lien rights- but have Federal and state little Miller Acts –
    - Mandates Prime to provide payment and performance bonds to assure subcontractor protections.
- States *may have* – Construction Trust Fund Statute (Md., Mich., etc.)
  - Holds upper tier contractors responsible personally and corporately for payment of funds received from the Owner –
  - Monies held “in trust” for lower tier subs/suppliers.

# Pay When Paid Mechanisms



- Contingent Payment Provisions
  - Pay If Paid – Fully contingent on payment by upper tier/owner. Risk on Subs.
  - Pay When Paid – Establishes a reasonable time in which to receive payment.
- PAY IF PAID: Typically requires some sort of “condition precedent” language – makes it clear that receipt of payment from owner or upper tier is a “condition precedent” to that entity’s duty to pay lower tier.
- Not legal in all states (New York State illegal as a matter of public policy; California recent decision).
  - Often converts an “illegal” pay-if-paid to a pay-when paid.

# Payment and Payless Notices

- Pay when paid is not permitted in the UK – philosophy established in the 1990's.
- In the UK there is a right to be paid interim, periodic or stage payments.
- If payment is not received there is a right to suspend performance and to claim for costs and expenses incurred as a result of that suspension.
- Pay when certified clauses are not permitted – and the release of retention can not be prevented by conditions within another contract.
- In the UK we must issue a payment notices detailing the calculation of the sums due for payment.
- The payment notice must be given for every payment provided for by the contract.
- In addition if the payment notice value is being reduced by the payer then a payless notice must also be issued prior to payment explaining the details of any deductions.

# Due Process

Due Process is primarily a question and creature of law – U.S. Constitution

## **PUBLIC CONTRACTS:**

- Public entities must follow APA standard typically – reasonable, legal and rational basis for finding/conclusion
- Most public bodies → Appellate Body (ASBCA, CBCA, etc.) → Court (COFC, Circuit Court, etc. have an administrative appeals process:
  - Contracting Officer
  - Must exhaust administrative remedies before allowed to go to judiciary

## **PRIVATE CONTRACTS:**

- Less organized/formal – parties allowed to contract what claims/disputes procedures they may have or want:
  - Example: Parties can agree to (a) meeting of officers; (b) then mediation; (c) then court litigation or arbitration

# The Doctrine of Natural Justice

- In English law natural justice is technical terminology for the rule against bias and the right to a fair hearing.
- The right to a fair hearing means that no one should be penalized by decisions unless they have prior notice of the case, a fair opportunity to answer matters and the opportunity to present their own case.
- The right to a fair hearing is also referred to in the European Convention of Human Rights which states.
- “...in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

# Comprehensive Resolution vs Crystallization

Ripeness is a U.S. judicial concept that a dispute must actually exist between the parties. Once a dispute exist, the parties can evoke the courts in one proceeding to comprehensively resolve all related disputes between the parties. Ripeness is a low standard that requires little interaction between the parties prior to litigation. As a result, cases are developed and refined through the judicial process of discovery and motions.



Crystallization is a U.K. concept that requires parties to give notice, exchange information and negotiate a dispute before seeking judicial intervention. It seeks to refine the discreet issues that are in dispute so that the decision maker can focus on each dispute. This tends to segregate each issue into a separate dispute that is dealt with often in a separate proceeding. As a result, the proceedings are more focused and discovery and motions are more limited.

# Depositions

## Litigation:

- Federal and State Rules Allow Depositions:
  - Federal – and many states now – limited to 1 day of 7 hours absent Court order to contrary.
  - No explicit limit in number of depositions but Courts can limit if requested or desired or by local rules.

## Arbitration:

- More flexible – AAA Construction Rules (L-4 – Large/Complex Cases):

(f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

# UK Discovery

- The legal protocol followed in the UK is contained in the Civil Procedure Rules Part 31.
- The court will try to minimize the volume of documentation and can issue:
  - an order dispensing with disclosure;
  - an order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party;
  - an order that directs, where practicable, the disclosure to be given by each party on an issue by issue basis;
  - an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;
  - an order that a party give standard disclosure;
  - any other order in relation to disclosure that the court considers appropriate.

# Witnesses

## **Litigation:**

- Witnesses – Fact & Expert allowed – no explicit limitation.
  - Judge can limit number but not overly common.

## **Arbitration:**

- Witnesses – Fact & Expert allowed – no explicit limitation but arbitrator may preclude duplicative or unnecessarily repetitive witnesses/testimony.

# Witness Statements

- Witness statements are formal court documents prepared to set out evidence to prove the facts alleged by a party in a dispute.
- Witness statement in civil proceedings in England are used in disputes relating to contracts, work, car accidents, or disciplinary proceedings.
- They are signed and supported by a statement of truth.
- They should state facts within the writer's personal knowledge, and if not specify the source of the information not within direct knowledge.
- They should not give opinions and documentary evidence should be exhibited to support the statements made – ideally a witness statement should follow the chronological sequence of events.
- Court procedure in England changed in the early 2000's. Prior to that oral evidence was the preference.

# US Experts

- Experts are witnesses with specialized training or education that allow them to be able to provide opinion testimony.
  - Fact Witnesses only can testify as to “facts” – events and occurrences, not opinion.
  - Testify on issues such as: Delay, Impact, Loss of Productivity, Defective Design, etc.
- Allowed in both Court Litigation & Arbitration.
- Typically must qualify them in both venues – but if arbitrator knows the expert, there are circumstances where that is relaxed under their discretion.

# UK Expert Instructions – Duties of Experts

- Experts should be aware of the overriding objective that courts deal with cases justly. This includes dealing with cases proportionately, expeditiously and fairly.
- Experts are under an obligation to assist the court to enable them to deal with cases in accordance with the overriding objective.
- Experts should provide opinions which are independent, regardless of the pressures of litigation.
- A test of ‘independence’ is that the expert would express the same opinion if given the same instructions by an opposing party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates.
- Experts in effect are directed by the tribunal and they require time to review documentation and prepare reports.

# U.S Change Order Provisions

- Strict Notice Provisions
  - 7 day notice
  - 30 day substantiation of costs
- Agreed price
- Unit prices
- Disputed change – owner directive
- Time & materials under a forced account
  - Detail cost records
  - Signed work tickets

# JCT / NEC Variations - Introductions

A variation (sometimes referred to as a variation instruction, variation order (VO), change order or compensation event), is an alteration to the scope of works in a construction contract in the form of an addition, substitution or omission from the original scope of works.

- Variations may include:
  - Alterations to the design
  - Alterations to quantities
  - Alterations to quality
  - Alterations to working conditions
  - Alterations to the sequence of work
  - Works not described correctly
  - There must be express terms in contracts which gives the power instruct variations



# JCT / NEC Variations – The most common UK contracts

- The philosophy of the NEC was to enable all parties to act in a spirit of mutual trust and co-operation.
- Variations under the NEC are forecasts of future spend with mark up added.
- The two most common contracts in the UK are the NEC and the JCT.
- Under a NEC contracts compensation events value time and money together - JCT value money and time separately.
- In NEC strict timelines need to be adhered to and the Project Manager can decide whether or not to proceed with quotations. The JCT is looser with regard to administration.

# Bonding

- Bonding is typically required on Federal and State Construction Projects.
  - Cannot lien government land – no on federal and no on most states .
- Seeing bonding on more and more private/commercial projects.
  - Also seeing more and more subcontractor bonding requirements.
  - Bonding is not insurance but an indemnity arrangement.
  - Surety is a “guarantor” of payment or performance – but principle still remains “on the hook” for the damages/costs/pay-outs.

# Letters of Credit

- Letters of Credit – A form of document that is issued by a bank which is backed by the bank's good credit – a form of payment guarantee.
- Can be used in lieu of payment/performance bonds under certain circumstances.
- Often used in government contracts for construction performed overseas where surety will not bond a project.
  - Occasionally used on commercial/private projects.

# Letter of Credit Arrangements - Britain



- Bonds are used in UK as a means of protection against contractor non-performance.
  - An on-demand bond imposes a primary obligation on the bank to pay in circumstances where the contractor fails to perform the building contract, without the employer having to sue the contractor and prove breach of contract.
  - The obligation to make payment under a default bond (a form of guarantee) is dependent on the employer establishing the contractor's breach of the building contract.
  - A performance bond is designed to ensure that the contractor performs the works in accordance with the building contract. If it does not, the employer will suffer a loss, for example because of delay. The bank agrees to pay the employer for its loss up to a stated maximum sum, often originally set as a percentage of the contract sum.
  - A performance bond may be an on demand or default bond. On a property development project carried out in England and Wales, if a performance bond is required, it is common practice to procure a default bond.

# Letter of Credit Arrangements - Britain (continued)

- Advanced payment bond. The parties may use an advance payment bond where the employer has agreed to pay the contractor an advance payment under the building contract but is concerned that the contractor may not be able to perform the contract or repay the employer if something goes wrong.
- Off site materials. Some standard form contracts refer to a similar, but different, bond in respect of off-site materials or goods. This provides some security to an employer who pays for materials that are kept elsewhere before delivery to site.
- If the parties agree to do without a retention, but the employer still wants some protection against the cost of remedying defects in the works, the contractor may agree to procure a retention bond. The sum covered by the retention bond reflects the amount that the employer would have held as a retention and, just like a retention, usually reduces after practical completion.



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Thank you!

Any questions?