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Construction and Engineering Practice Alert

When the Project Goes Wrong: Thinking Twice About Using Transactional Counsel as Disputes Counsel and Other Advice for Choosing Disputes Counsel

As everyone in the construction industry knows only too well, most construction projects end up in dispute. A major construction project which is not the subject of threatened or actual litigation or arbitration is a rarity.

When a contentious issue arises on a construction project, whether at the project level or as a formal dispute, a client may be tempted to call their transactional counsel for help. Of course, your transactional lawyer may be a great non-contentious lawyer — the lead on dozens of major transactions, head of a talented team and attentive to your every business need. And perhaps the terms of the contract they drafted were also exactly what you wanted. But are they or their disputes partners best placed to advise you on contentious issues, or would you be better served by a separate firm as litigation counsel?

The initial reaction to the above question may be that your disputes counsel should be from the same firm as your transactional lawyer given that the firm is already on the scene, and given the intuition that there will be a shorter learning curve and easier coordination between the transactional lawyers and the disputes lawyers, and that the existing firm will have a greater investment in defending their client's position.

However, there are multiple major pitfalls inherent in this "one firm" approach. In fact, using the same firm can constrain the strategies adopted for the dispute and for any possible settlement. Before considering why this is the case, it is worth bearing in mind that, when a dispute on a construction project is referred to litigation or arbitration, the person who ultimately has to determine which side prevails, and on what terms, is someone who had nothing to do with the project: a neutral decision-maker, namely a judge, an arbitrator or an arbitral tribunal. A client may be better served by a lawyer who, like the ultimate decision-maker, has some distance from the original contract and can make an independent judgment about the best strategy, witnesses and approaches to meet the client's business goals and positioning of the case. Moreover, in all instances, choosing disputes counsel, like choosing a surgeon, should be an intentional choice designed to ensure that you are employing the best one for the job, not merely the closest at hand (and certainly not merely the cheapest).

Transactional lawyers, and their disputes colleagues from the same firm, may — indeed likely will — be affected by unconscious bias. All of us use mental shortcuts or "heuristics" to make critical decisions. Nobel-prize winning psychologist Daniel Kahneman and his colleague Amos Tversky developed the term "framing effect" to describe how seemingly rational choices may be in fact distorted or "framed" through subjective presentation.[1] Another heuristic they identify is "anchoring bias" — that is a cognitive bias towards an initial estimate or starting point, which ultimately weighs heavily in the outcome of a decision.[2] These types of heuristics affect everyday decisions, including decisions made in business and law. As Daniel Kahneman noted: "By their very nature, heuristic shortcuts will produce biases."

Transactional lawyers tend to have "confirmation bias": strong views, which are not objective, about what documents mean and why they did a good job. Even courts have noted this.[3] Confirmation bias can mean favoring a position early on and giving undue weight to evidence that supports that early conclusion, particularly where the evidence comes from individuals at the project level who may have had significant input into the original contract. Where the same firm is hired as disputes counsel, confirmation bias is likely to permeate the decision-making process as input will inevitably be sought from the transactional team, even if the latter do not have a formal role in the disputes team.

"False consensus" bias is another risk, where transactional lawyers believe that their interpretation of an agreement based on what they intended and what they thought they accomplished is the only interpretation, even if the text is capable of different meanings. In our experience, many transactional lawyers also disregard or play down the impact of local law on the interpretation or application of a contractual provision.

Another possible manifestation of bias is that a litigation/arbitration partner may be inclined to believe that their non-contentious partner did a good job. A client deserves disputes counsel who are unconstrained from asking the hard questions about the transactional lawyer's work. For example: What is the plain meaning of the contractual language? Is it arguably ambiguous? Would the client's interests be best advanced by relying on parol evidence or commercial context? Are the right arguments being made? Is the client being well served in discussions about whether to litigate the dispute or is the client being steered towards settlement to avoid calling transactional counsel's work into question? Is an attractive solution being avoided because the transactional firm would have to admit its own potential liability?

A client may be better served with an independent litigator who can more easily say, "No offence, but that construction of the wording makes no sense", or "Your position goes against current law and we need to find a way to resolve this quickly". Reframing the work of the transactional lawyers is a delicate conversation to have under the best of circumstances, and more likely to proceed well with lawyers from a separate firm.

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[1] *The Framing of Decisions and the Psychology of Choice*, 211 Science 453 (1981).

[2] *Judgment and Uncertainty: Heuristic and Biases*, 185 Science 1124 (1974).

[3] E.g. *Oxbow Carbon LLC Unitholder Litigation*, 2017 WL 3207155, at *6 (Del. Ch. July 28, 2017): "Motivated reasoning, motivated remembering, and confirmation bias are part of the human condition".

Ultimately, the natural tendency to engage in framing raises the potential for biased decisions — the opposite of what a client needs when defending a lawsuit. In the words of Professor Kahneman, the ideal advisor is "a person who likes you and doesn't care about your feelings".

Transactional lawyers and other partners from their firm may also be motivated by self-protection. When engaging litigation or arbitration lawyers from the same firm as the transactional lawyers, there is an almost inevitable tendency to offer litigation/arbitration strategies which protect the firm as much as the client — and it is possible that those strategies may not be entirely consistent with what is best for the client alone. Disputes counsel can face internal pressure to justify the contractual language, the negotiations, the documents and the advice given by their transactional partners. Particularly when the non-contentious lawyer is the firm's main client contact — the partner who literally puts work on the contentious lawyer's desk for this client and others — it may be difficult if not impossible for the latter to tell the former that the contract has flaws, or that the strategy has to be repositioned, or that a term is ambiguous and that it is important to rethink what the parties meant.

A trial lawyer's greatest asset with a fact finder is his or her credibility. To persuade, the trial lawyer must be credible. To be credible, the trial lawyer must be able to take positions based on the evidence without apparent bias. If the trial lawyer is seen not only as an advocate for their client, but for his or her partner and their work or work product at issue, that will affect their credibility.

Ultimately, there are a multiplicity of risks to be considered when a client chooses to hire the transactional firm to litigate a dispute over the project. The risks will generally outweigh any of the presumed benefits of retaining one firm for both roles. Efficiency and prudence usually favour an independent law firm to help a client develop the most effective litigation or arbitration strategy, prepare and run the case, and/or negotiate a strong settlement.

Moving to more general considerations when it comes to choosing your disputes counsel, practising law is a profession, and conducting litigation or arbitration is a specialist profession. While dispute resolution is inherently unpredictable, and the likely outcome of any litigation or arbitration difficult to identify with certainty, one factor which <u>will</u> materially alter the outcome of any dispute is your disputes counsel. To be sure, disputes lawyers are not magicians. A difficult case may remain a difficult case even when presented by the most experienced and persuasive advocate. However, such an advocate may be able to persuade a judge or arbitral tribunal to award a lower measure of damages. Alternatively, seasoned disputes counsel may be able to craft a strategy whereby your opponent is under pressure to agree to an early settlement on terms favourable to you. More importantly, most cases have a mix of good points and bad points — and this is especially true in construction cases where both owner and contractor will often have contributed to problems. It is in these situations where overall responsibility or liability may not be clear cut that experienced deal counsel will come into their own and get the decision-maker on your side from an early stage of the litigation or arbitration — and ensure that they remain there all the way until the end of the proceeding.

In the adversarial system, the decision-maker can only reach their decision based on the cases presented by each party. Identifying the facts to be put to the decision maker is generally a time-consuming process. If done properly, it is not cheap. Good disputes lawyers do not just accept what their client's project team says (the project team will also have the sorts of biases referred to above, as well as obvious self-interest). They will find the truth, and deploy it. In a major construction dispute, this may involve reviewing and analysing hundreds of thousands of documents, speaking to numerous witnesses and liaising with experts on a range of specialist issues. Each of these workstreams needs to be managed and undertaken by skilled and experienced lawyers.

Last, fire must be met with fire. If your opponents have good representation, you need the same or you will suffer a serious disadvantage. The reputation of your disputes counsel also matters. Rightly or wrongly, judges and arbitrators are influenced by the names of the individual lawyers and law firms appearing before them. There is no firm like ours in terms of reputation, expertise or experience. Get us on your side.

For further information on our construction and engineering disputes practice, please visit https://www.quinnemanuel.com/practice-areas/construction-litigation/

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