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Practice Area: Construction Law and Litigation

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In a prior article, we touched on the Wisconsin courts' tendency to enforce contract provisions which require that all related disputes be resolved through arbitration and not the court system. This is a well known and oft played tune. A recent Wisconsin court decision replays the first verse of that tune, provides a second verse, and expands on the chorus.

**VERSE 1:** Arbitrations are creatures of contract. In a contract dispute, it is a court's job to simply interpret and enforce the parties' intended agreement. If the parties intended to resolve all disputes through arbitration, it is the court's duty to require arbitration to essentially give the parties what they bargained for. That an arbitration decision may arguably be unsupported by the facts or even based on an erroneous reading of the law is often of no concern to the Court. Often, the only issue before a court is whether the parties received that for which they bargained. Namely, an arbitration proceeding and a resulting decision. This was the *Stewart v. Silvercryst Limited Inc.* decision discussed in our August 2011 Construction Law Bulletin.

**VERSE 2:** Parties often agree to let an arbitrator decide whether a dispute is subject to the arbitrator's power. A party can unknowingly agree to this, too. Standard construction industry form language can lead to this result and cause later arguments over the scope of the arbitrator's authority. This is one of the issues in a recent Wisconsin court decision, *Mortimore v. Merge Technologies*, where the parties argued over whether a dispute between them was subject to resolution through arbitration. As with many construction contracts, the contracts at issue in *Mortimore* included a provision which said that all disputes would be subject to resolution by arbitration under the rules of the American Arbitration Association. Further, both contracts included language which said that any amendments must be in writing to be valid. In *Mortimore*, one of the parties argued that the arbitration provisions did not apply because it was the parties' intent that the last agreement between them exclude arbitration. The party argued that the arbitration provision should never have been in the contract in the first place, that it was mistakenly included, and it was not the parties' intent to arbitrate disputes. The party therefore argued that an arbitrator did not have any authority to resolve the underlying dispute between the parties. The Court disagreed, ruling that the Court's job was only to ensure that the parties got what they agreed to. As the contracts both said—an arbitration. But the Court went on, ruling that the parties' agreement was that all disputes be resolved pursuant to the rules of the AAA and that this was also dispositive of the issue. This is because the AAA's rules included a provision stating that the arbitrator's authority included the authority to rule on the arbitrator's own jurisdiction, "including any objection with respect to the existence, scope or validity of the arbitration agreement." Hence, by the parties' own agreement, the Court ruled that their arbitrator was entitled to determine whether the arbitrator had jurisdiction to resolve the underlying dispute between them.

**THE CHORUS:** The story told in the First Verse is that contract language which seems boilerplate—like an arbitration provision—can often prove to be a benefit or a burden. Indeed, the boilerplate often provides the basis for a court to force parties to resolve their disputes through out of court procedures even though traditional litigation may be preferred by one of the parties.

The story told in the Second Verse is that adopting the AAA's standard arbitration rules and procedures is meaningful. Indeed, those rules and procedures include the rule that the parties' arbitrator can decide whether the arbitrator has authority to resolve the dispute in the first instance.

Of course, on the front end of a project before the work has started and there are any disputes, it is often difficult to forecast what disputes may later arise. But proper risk management requires that parties know what their contracts say and understand how they could help or hurt them later. Hence, the *Stewart* and *Mortimore* decisions are instructive and provide us with the important lesson set out in the Chorus. Namely, parties should be careful about the contract provisions they agree to today as they could regret it tomorrow.

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