



Practical Tips to Avoid Construction Disputes

Vietnam Arbitration Week

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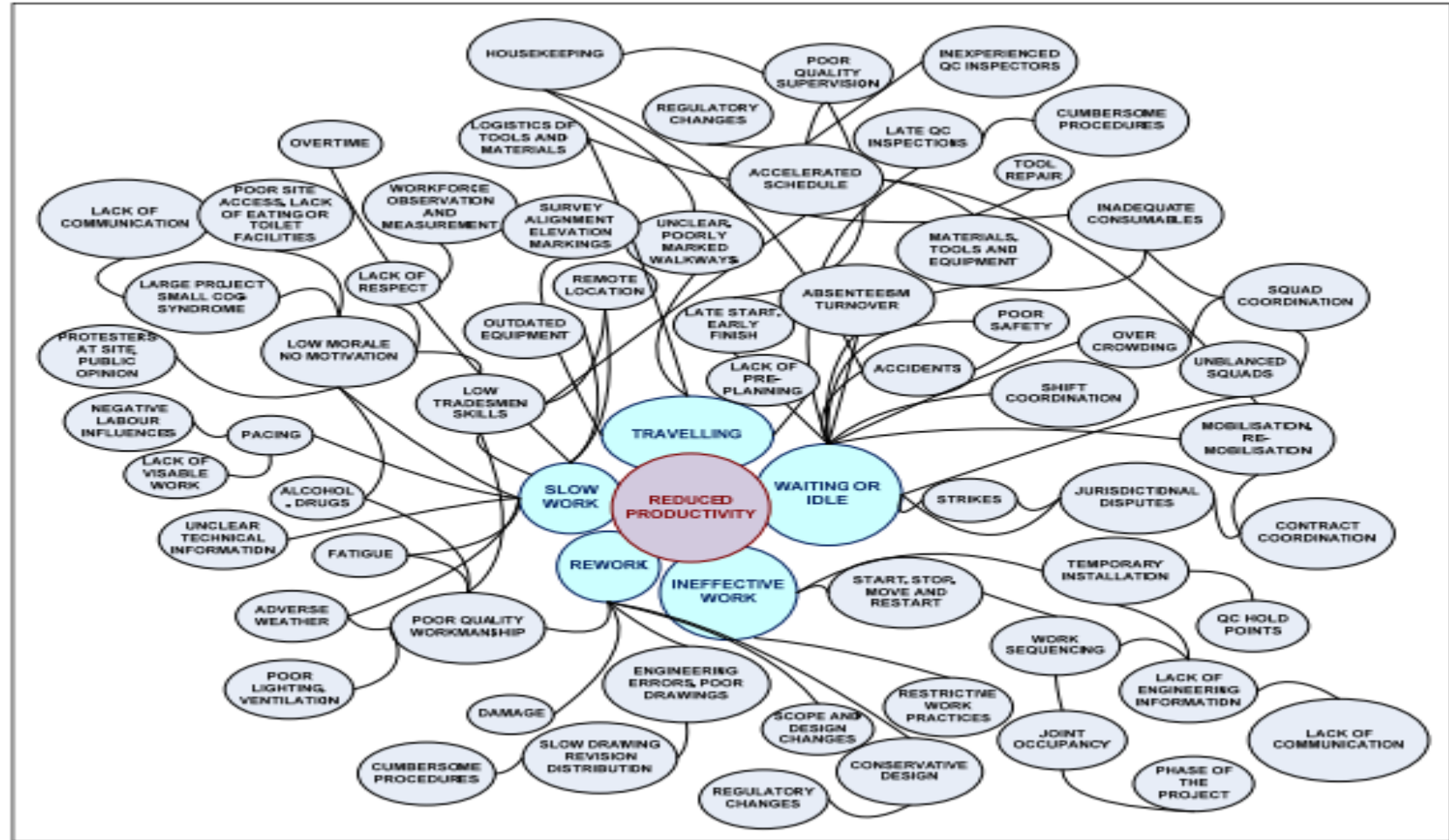
Overview of King & Spalding and its Construction & IA Practice



- +1,100 lawyers in 21 offices worldwide.
- One of the largest teams of construction & IA lawyers in the world, including several with dual engineering and architects qualifications.
- We often work as “Project Counsel” with clients during the execution of their projects.
- Three K&S lawyers among “Global Top 25” construction lawyers per *Who’s Who Legal*.
- Only firm worldwide ranked in Band 1 for international arbitration by *Chambers Global*, *Chambers USA*, *Chambers Latin America*, *Chambers Asia-Pacific (Singapore)*, and *The Legal 500 US*.
- Top Two International Arbitration Practices Worldwide per *Global Arbitration Review 2019*

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1. Common Causes for Disputes
 2. Contract Phase
 3. Construction Phase
 4. Close-Out Phase
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Computes



Common Reasons for Dispute

- Misunderstand contract
- Lack of communications
- Unreasonable attitudes
- Incorrect ground data
- Deviations
- Faulty administration of project/Incompetent personnel
- Financial difficulties
- Force majeure (*i.e.*, Covid-19)

Construction Lifecycle



Contract
Phase

Construction
Phase

Close-Out
Phase

Contract Phase: Things to Do (1/3)



General

- Must have contract in writing, no oral or implied
- Read and understand everything, including exhibits, warranties, documents incorporated by reference
- Do not follow blindly form contracts (FIDIC, AIA...)
- Hire experienced counsel
- Make sure counterpart is authorized to act
- Perform due diligence on contractor
- Finalize contract before work start

CONTRACT = ROADMAP of PROJECT

Contract Phase: Things to Do (2/3)



Time

- Have clear project commencement and completion dates
- Be realistic (example, current dispute in Canada)

Payment

- Have clear payment terms
- Require detailed schedules and updated schedules with each application for payment; review/approve work performed before payment
- “Right to Stop Work” and ‘Right to Stop Payment” clauses

Contract Phase: Things to Do (3/3)



Changes to Scope of Work

- Have clear procedure to submit and approve change orders
- All change orders must be in writing, contain detailed information, and approved in writing prior to payment approval

Delay

- “No damages for delay” clause
- Liquidated damages clause

Dispute Resolution

- Mediation, Dispute Review Board
- Litigation vs. arbitration

Construction Lifecycle



Contract
Phase

Construction
Phase

Close-Out
Phase



Pre-Construction: Things to Do

Permits

- Determine what permits, studies, and approvals are required
- Meet relevant officials to clarify statutory requirements

Design Plans and Drawings

- Hire consultants (land planners, architects, engineers...)
- Ensure plans are accurate and comply with applicable laws
- ‘Come clean’ with contractor with material adverse information

Project Management Personnel

- Hire competent PM personnel with right experience and temperament

During Construction: Things to Do



Scheduling and Cost Control

- Develop and maintain scheduling/cost control system
- Delay & cost overrun are two most common reasons for dispute

Meeting Minutes and Monthly/Regular Reports

- Review them carefully and edit them if needed
- Assume internal reports/communications will be disclosed

Project Management Technologies

- Consider investing in Building Information Modeling (BIM) software, document management software...etc.
- Help enhance communication, facilitate analysis, predict/identify potential problems

During Construction: Disputes

- Follow all Dispute Resolution steps in contract
- Document everything & ask other side to document claims
- If other side breaches, mitigate damages & continue to perform
- Keep the money
- Watch for liens
- Preserve all evidence
- Litigation Hold Notice



Construction Lifecycle



Contract
Phase

Construction
Phase

Close-Out
Phase

Close-Out Phase: Things to Do (1/2)



Construction Closure

- Punch-list, Certificate of Substantial Completion & Occupancy
- Close office and release staff (make sure to comply w/ laws)

Financial Closure

- Final payment (specify not acceptance of work/claim waiver)
- Release of bank guarantees

Contract Closure

- Submission of As-built Drawings, Test Reports, Warranties, etc.
- Obtain release of liens

Close-Out Phase: Things to Do (2/2)



Debrief / Lessons Learned

- Analyze actual cost vs. estimate cost (consider audit)
- Get feedback from staff, all relevant parties, authorities
- Archive most important project records
- Document important issues faced and their resolution
- Assess whether project meets requirements and objectives
- Ask ourselves are there better ways to improve project execution/management?

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Luan Tran is a partner with King & Spalding's international arbitration practice, one of the largest and leading practices in the world. He has nearly 25 years of experience in international arbitration. He is among the few first-chair trial and arbitration lawyers with active U.S. and Southeast Asia practices. He has handled complex disputes relating to construction, energy, real estate, and other investment projects before the major arbitral institutions. A frequent speaker and author on Southeast Asia, particularly his native Vietnam, he was recently recognized as a "Trailblazer" by the Recorder for his work in the region. He is based in the firm's Los Angeles and Singapore offices.

Luan was a member of the Board of Directors and is a current member of the Council and Asia and California Advisory Groups of the American Arbitration Association and the International Centre for Dispute Resolution. He was also a member of Law360's International Arbitration Editorial Board.

Luan led the Southeast Asia practice at a previous international law firm, and has lived and worked in Singapore and Vietnam. Luan co-authored the Vietnam chapters for two leading international arbitration publications. He also serves as an arbitrator on Vietnam-related matters, and recently sat as the presiding arbitrator in one of the first-ever ICC hearings in Vietnam.

In addition to his international arbitration experience, Luan is recognized as a leading attorney in ownership and partnership disputes between co-founders of technology companies. In a profile of his work in co-founder lawsuits, such as the Snapchat and Yik Yak matters, Forbes magazine called him the "go-to lawyer" in this area. During his career, Luan has recovered over \$150 million on behalf of plaintiffs in his tech co-founder cases. Tran's experience and success for the plaintiffs gives him significant advantages and insights when representing the defendants.

Luan also co-founded the largest minority-owned disputes law firm in the U.S. (with over 35 attorneys) that was recognized by the National Law Journal as one of the top ten litigation boutiques in the country. Luan has been honored as one of the best attorneys in California and the U.S. by national bar organizations and publications. He is fluent in French and Vietnamese.



Thank You