

American Bar Association  
Forum on the Construction Industry

---

THAT'S MINE  
A Contractor's View on Termination

Sean R. Calvert  
Calvert Menicucci, P.C.  
Albuquerque, New Mexico

April 24-26, 2008  
La Quinta Resort and Club—Palm Springs, California

---

©2008 American Bar Association

## **I. COMMON LAW TERMINATION REMEDIES**

The decision to terminate a contract, whether made by the contractor or by the owner is always one to be made with trepidation.<sup>1</sup> It can have profound effects on the parties to the termination as well as to the construction project as a whole. These include not only the effects intended by the terminating party, but also effects which frequently are unintended and unforeseen by the party initiating the termination. Accordingly, prior to exercising the right to terminate a contract or when responding to a notice of termination, the contractor, owner and counsel should carefully consider the possible ramifications of the termination.

For most commercial construction projects the parties' right to terminate the contract is defined by the terms of the contract itself. However, even where the contract may specify the grounds for termination by the parties and their rights upon termination, those rights are often modified or supplemented by a party's common law termination rights.<sup>2</sup> In fact, most standard form construction contracts specifically provide that the contractual termination rights and remedies are in addition to and not in derogation of a parties' common law rights.<sup>3</sup>

The actual grounds for termination and the remedies available upon a proper termination under the common law, however, are significantly more restrictive than those provided in most standard form construction contracts. Unlike the expansive and enumerated grounds for termination provided by most standard form construction contracts, for example AIA A201 (1997) §14.1, the right to terminate a contract at common law is normally limited to where the other party has repudiated the contract, or has so significantly breached the contract that its nonperformance goes to the essence of the contract.<sup>4</sup> Some courts allow for a slightly more relaxed approach to determining whether a party has materially breached such that termination is appropriate, but even

there the breach must be “substantial nonperformance and entire or substantial failure of consideration.”<sup>5</sup>

Where the breach is so substantial as to go to the essence of the contract, default termination still may not be appropriate where the nonperformance has been excused.<sup>6</sup> Similarly, where after a material breach the parties continue to perform and act as if there had been no breach, the material breach may be waived.<sup>7</sup>

Presuming that a termination is properly declared, absent a contract provision providing for the measure of damages, the measure of damages will depend on where the termination occurred during the construction of the project. Before the project has been substantially completed the owner’s remedy is the reasonable cost of completing performance less the amount of the contract with the terminated contractor.<sup>8</sup> The owner may recover the difference so long as the scope of work remains the same.<sup>9</sup> Obviously under this measure of damages, if the cost of completion is less than the remaining balance of the construction contract, then the owner is not entitled to any further compensation. The jurisdictions are split, however, as to whether the cost of completion must be reasonable and who bears the burden of proving the reasonableness or unreasonableness of an owner’s completion costs.<sup>10</sup>

Substantial completion of a construction project, however, alters the damages to which the owner is entitled.<sup>11</sup> “This doctrine mitigates the harsh consequences that would accrue if small errors in performance were treated as material breaches, e.g., termination of the defaulting party and full damages resulting from failing to complete performance.”<sup>12</sup> Where the project is substantially complete the owner may still be entitled to its actual costs to complete the work or to correct defective work.<sup>13</sup> As long as the costs of completion or correction are reasonable, the costs may still be recoverable even when substantially more than the original contract price.<sup>14</sup> However, where the cost of correction would greatly exceed the diminished value of the project, or where repair would involve unreasonable economic waste, the owner’s measure of damages should be

the difference between the value of the structure as completed and the value the structure if it had been constructed in accordance with the contract.<sup>15</sup> The cost of correction is inappropriate in these cases because those costs are so disproportionate to the value received for the repair as to constitute “economic waste.”<sup>16</sup> When the diminished value rule is applied, the value should be measured at the time of the breach.<sup>17</sup>

“Application of the proper damage measure depends, in many instances, upon a fine weighting of facts relating to the substantiality of performance versus the unreasonable economic waste or hardship to the contractor on a case-by-case basis.”<sup>18</sup> In cases involving numerous deficiencies of varying degrees of seriousness, an owner may even be entitled to a mix of damages measured both by the diminution in value and the cost of correction.<sup>19</sup>

As with the terminating owner, a contractor having properly terminated its contract is faced with different measures of damages, all of which are intended to provide it the benefit of its bargain.<sup>20</sup> One measure of damages is the total contract price, less the costs of completion, less any progress payments made through the date of termination.<sup>21</sup> Another measure of damages frequently approved is the amount due for work properly completed, plus the profit the contractor would have earned on the balance of the contract.<sup>22</sup> Of course where the contractor would have experienced a loss on its contract if it had completed its scope of work, it will not be entitled to a recovery under either theory.<sup>23</sup>

Absent contract provisions giving the owner additional remedies, it may complete the contract and charge the contractor with the costs of completion, but it is not entitled to any assistance in doing so.<sup>24</sup> The properly terminating owner gains no rights in the material, equipment or subcontracts still owned by the terminated contractor such that it may use those in completing the project. Absent a contract provision providing the properly terminating owner with a right to material provided for the project, but for

which the owner has not yet paid, the owner has no right to use that material or equipment.<sup>25</sup> Similarly, upon termination an owner assumes no privity in the subcontracts held by the contractor and cannot proceed with completing the work utilizing those subcontractors, absent an assignment of their contracts.<sup>26</sup> Of course the owner may make a separate agreement with the subcontractor if it will agree to continue. It is to provide the terminating party with the materials, equipment and labor contracts to complete the project as efficiently as possible that most standard form construction contracts contain termination clauses specifically identifying the terminating party's rights in the project materials, equipment and labor contracts.

## **II. I AGREED TO WHAT? – CONTRACTUAL TERMINATION REMEDIES**

### *A. American Institute of Architects Standard Form Contracts*

In response to the uncertainty of common law termination and the difficulties inherent in completing a project where one of the parties has been terminated, the American Institute of Architects standard form contract documents include several risk allocation provisions governing termination. The most obvious provisions appear in Article 14, Termination Or Suspension Of The Contract. In fact, the index to the AIA A201 for termination or suspension lists only Article 14, with the exception of Section 4.1.3 governing termination of the Architect and Section 15.1.6 governing claims for consequential damages. An assumption that Article 14 contains all of the relevant provisions governing termination would miss several clauses affecting the terminating party's ability to complete the project. In addition to Article 14, the practitioner should be aware of Section 5.4, governing the contingent assignment of subcontracts, and

Sections 9.3.2 and 9.3.3, governing title to work for which a payment application has been made, and Section 13.4.1, supplementing the contractual rights and remedies.

1. *Article 14, Termination or Suspension of the Contract*

Section 14.1 provides three different grounds for termination by the contractor, all of which require a work stoppage of differing degrees. Section 14.1.1 allows the contractor to terminate the contract if the work is stopped for a period of 30 consecutive days through no act or fault of the Contractor for four specified reasons:

.1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;

.2 An act of government, such as a declaration of national emergency that requires all Work to be stopped;

.3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or

.4 The Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Section 2.2.1.<sup>27</sup>

Section 14.1.2 provides the owner a similar right to terminate the contract where the project has been suspended or delayed pursuant to Section 14.3 for more than 100 percent of the total number of days scheduled for completion, or for 120 days in any 365 day period, whichever is less.<sup>28</sup> Termination under Section 14.1.2 does not require that any of the additional conditions set forth in 14.1.1 have occurred. For a termination to be effective under either 14.1.1 or 14.1.2 once the delays and work stoppages justifying termination have occurred the contractor must provide a seven-day written notice to the owner and the architect prior to terminating the contract.<sup>29</sup>

One of the issues that comes up when the contractor attempts to terminate pursuant to Article 14 is whether the written notice required by Section 14.1.3 is purely a

notice of the election to terminate the contract, or whether the written notice gives the owner the right to cure the defect in performance. Section 14.1.3 does not specifically indicate that the owner has a right to cure the default in performance, but the AIA section giving the owner the right to terminate upon the giving of a similar seven-day written notice has been interpreted to include an opportunity for the contractor to cure the default.<sup>30</sup> Generally a breaching party's right to cure its default is required in equity.<sup>31</sup> For the most part, however, the defaults justifying termination by the contractor are not defaults which are subject to ready cure by the owner, with the exception of 14.1.1.3 and 14.1.1.4.

In addition to the right to terminate granted to the contractor by Sections 14.1.1 and 14.1.2, the AIA documents provide the contractor the right to terminate its contract if the work is stopped for a period of sixty consecutive days because the owner has repeatedly failed to fulfill the owner's obligations under the contract documents with respect to matters important to the progress of the Work.<sup>32</sup> As with a termination under Sections 14.1.1 and 14.1.2, the contractor must give seven days' written notice of its intent to terminate the contract. Since there is no prior written notice requirement for termination under Section 14.1.4, the language of that section requiring an "additional" seven days may refer back to the seven day notice contemplated by Section 14.1.3 and require the giving of two separate notices to the owner and the architect. At least one commentator has indicated that presumably the notice in Section 14.1.4 is in addition to the notice required by 14.1.3, although the sections do not specifically reference each other.<sup>33</sup> Termination under Section 14.1.4 is particularly troubling for the contractor seeking to terminate the contract, as while Section 14.1.4 requires a breach by the owner of its obligations under the contract, it is not specific as to breach of which obligations would justify termination. Section 14.1.4 merely provides that termination is justified if the work has been stopped for a period of 60 consecutive days because of the owner's repeated failure to fulfill its "obligations under the Contract Documents with respect to

matters important to the progress of the Work.”<sup>34</sup> Presumably this would include repeated breaches of the owner’s obligations under the contract as explicitly set forth in Article 2. The question arises, however, whether Article 14.1.4 justifies termination for an owner’s breach of duties imposed or implied in other sections of the contract, and whether Article 14.1.4 as it refers to “obligations under the Contract Documents” bars termination for breach of duties implied in law.

The AIA family of documents provides similar specific grounds for the owner to terminate its contract with the contractor.<sup>35</sup> Like the contractor’s right to terminate under Section 14.1.1, the owner’s right to terminate is expressed for specific causes.

- .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority;  
or
- .4 otherwise is guilty of substantial breach of a provision of the Contract Documents<sup>36</sup>

Unlike the contractor’s termination rights under Section 14.1.1, the owner’s termination right is frequently not subject to an easy determination as to whether the required event for termination has occurred. Thus the determination of whether the contractor is supplying sufficient properly skilled workers or proper materials, has failed to make payment to subcontractors in accordance with the subcontract terms or is guilty of a substantial breach of the contract is often a factual dispute.<sup>37</sup>

In order to effectuate the termination under Section 14.2.1, the owner must both give the contractor and the contractor’s surety, if any, seven days’ written notice of the intent to terminate, but the owner must obtain a certificate by the architect<sup>38</sup> (Initial Decision Maker) that sufficient cause exists to justify termination.<sup>39</sup> Generally the owner

must strictly comply with these conditions precedent.<sup>40</sup> Frequently, the owner may provide the required notice, but fails to obtain a determination from the architect that termination is justified.<sup>41</sup> Where the owner has failed to provide the required architect's certification, the termination for default is wrongful.<sup>42</sup> Even where the default is wrongful, however, for lack of an architect's certificate, the owner may in certain circumstances still be entitled to terminate its contract.<sup>43</sup> In *Ingrassia* the Court held that a defective certificate or the lack of an architect's certificate, while a condition precedent to termination under the contract, is not a condition precedent to common law termination and the owner was entitled to terminate its contract, but without the presumptive effect of the architect's certification.

Where the conditions for termination have been met and the owner has complied procedurally with the termination requirements of Section 14.2.2, the owner is entitled not only to terminate the contractor, but also to certain additional rights.

- .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools and construction equipment and machinery thereon owned by the Contractor;
- .2 Accept assignment of subcontracts pursuant to Section 5.4;  
and
- .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.<sup>44</sup>

Unlike the common law termination, the owner's termination under Section 14.2.2, if properly commenced, can provide the owner with the means with which to complete the contract. Where the owner has properly terminated the contract, the contractor is not entitled to any further payment until the owner has finished the work.<sup>45</sup> Once the contract has been completed by the owner, the contractor is entitled only to the unpaid balance of the contract, less the costs of finishing the work and other damages incurred by the owner.<sup>46</sup> If the costs of finishing the work and other damages incurred by the owner

exceed the contract balance at the time of termination, then the contractor is not entitled to any further compensation and the owner is entitled to damages against the contractor for the excess costs and damages.<sup>47</sup> Section 14.2.4 contemplates yet another certification by the architect, this time as to the amount to be paid to the owner or the contractor under Section 14.2.4. It is unclear what the effect of the architect's certification is, or what would be the effect where the architect's certification is not obtained.<sup>48</sup>

2. *Section 5.4 Contingent Assignment of Subcontracts*

Where the owner has properly terminated its contract with the contractor, the AIA documents provide for the assignment of the contractor's subcontracts to the owner on certain conditions:

.1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor in writing; and

.2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.<sup>49</sup>

This provides the owner with the ability to selectively accept assignment of the subcontracts for the performance of the work.<sup>50</sup> By allowing for assignment of the subcontracts the owner can avoid delays in the completion of the project incident to reprocurring subcontractors and can avoid having to negotiate with existing or replacement subcontractors for completion of the work at prices in excess of the original subcontract costs. Where the owner accepts the assignment of the subcontract agreement, the owner assumes the contractor's rights and obligations to the subcontractor.<sup>51</sup> In some cases this may include the obligation to make payments to the subcontractor which the owner had already made to the contractor, but which the contractor had not made to its subcontractors.<sup>52</sup> When the owner accepts assignment of a subcontract, it steps into the shoes of the contractor and is bound by the terms of the subcontract, even where those

terms differed from the terms of its prime contract and where the owner subsequently assigns the subcontract to a completion contractor.<sup>53</sup>

If the work had been suspended more than 30 days prior to the owner's execution of the assignment, then the subcontractor is entitled to an equitable adjustment for cost increases resulting from the suspension.<sup>54</sup> Presumably the cost increases are limited to those actually resulting from the suspension and the subcontractor must prove that the additional costs arose as a result of the suspension. There is some issue as to whether Section 5.4.2 would give rise to an owner's liability for *Eichleay* type damages.<sup>55</sup> Once the owner has accepted assignment of the subcontract, it is entitled to further assign the subcontract to its completion contractor.<sup>56</sup> Even where the subcontract is assigned to a completion contractor, the owner remains liable to the subcontractor.<sup>57</sup>

*B. ConsensusDOCS*

1. *Article 11 Suspension, Notice to Cure and Termination of The Agreement*

Like the AIA family of documents, the new ConsensusDOCS specifically provide grounds for the owner to terminate its contract. The bases for owner termination of the contract are almost identical to those specified in the AIA documents: 1) failure to supply enough properly skilled workers or materials, 2) failure to promptly pay its workers, subcontractors or suppliers, 3) failure to comply with laws, ordinances, rules, regulations or orders of any authority having jurisdiction, and 4) material breach of a provision of the contract.<sup>58</sup> The ConsensusDOCS, like the AIA documents, also require a seven-day notice of default, which the ConsensusDOCS specifically indicate is intended as a time when the contractor may cure its default.<sup>59</sup>

There are some significant differences, however, when it comes to owner termination under the ConsensusDOCS. The most obvious difference is that the ConsensusDOCS provide alternate interim remedies other than termination. If a contractor is in default and has failed to cure such default within seven days of written

notice of the default, upon an additional three days' written notice and failure to correct the default, the owner is entitled to elect certain specified remedies short of declaring the contract terminated.

- 11.2.1 supply workers and materials, equipment and other facilities as the Owner deems necessary for the satisfactory correction of the default, and charge the cost to the Contractor, who shall be liable for the payment of same including reasonable Overhead, profit and attorney's fees;
- 11.2.2 contract with Others to perform such part of the Work as the Owner determines shall provide the most expeditious correction of the default, and charge the costs to the Contractor;
- 11.2.3 withhold payment due the Contractor in accordance with Paragraph 9.3; and
- 11.2.4 in the event of an emergency affecting the safety of persons or property, immediately commence and continue satisfactory correction of such default as provided in Subparagraphs 11.2.1 and 11.2.2 without first giving written notice to the Contractor, but shall give prompt written notice of such action to the Contractor following commencement of the action.<sup>60</sup>

While these actions are allowed under the AIA documents -- for instance the AIA documents provide for the owner to perform portions of the work through other contractors -- there is no specific provision entitling the owner to do so as a remedy for default and to charge the contractor for the costs. The obvious exception is the owner's right to withhold payment, which the owner is entitled to do under the AIA documents for breach as well. The remedies provided in Section 11.2 of the ConsensusDOCS 200 are in addition to the owner's right to terminate the contract; however the notice requirements for the two remedies differ.<sup>61</sup>

Another significant difference between termination under the ConsensusDOCS and the AIA documents is that termination under the ConsensusDOCS requires two, and in some cases three, notices and cure periods prior to termination. As discussed above, the AIA documents provide for seven days' written notice of default and an opportunity

to cure before the owner can terminate the contract.<sup>62</sup> The ConsensusDOCS, however, provide for an initial seven-day written notice of default and an opportunity to cure, and then before the owner can either terminate the contract or elect the lesser interim remedies discussed above, a second written notice must be given and further period for cure allowed. In the case of the interim remedies provided under Section 11.2, the owner must give an additional three-day written notice.<sup>63</sup> In the case of actual termination of the contract, the owner must give an additional fourteen days' written notice.<sup>64</sup>

Upon termination under the ConsensusDOCS, the owner's remedies are almost identical to those provided for under the AIA documents, but there is a linguistic difference which may result in differences in application. As with the AIA documents, the owner is entitled to recover from the contractor if the costs of completing the contract scope exceed the contract balance. The ConsensusDOCS' provision, however, provides for the owner's recovery of its completion costs, plus reasonable attorney's fees, less the contract balance.<sup>65</sup> Compare this to the owner's ability to recover the costs of completing the work, including any compensation for architect's services and other damages incurred by the owner.<sup>66</sup> While the AIA documents do not specify what other damages the owner might be entitled to upon termination, it could reasonably cover more than just the attorney's fees provided for in the ConsensusDOCS.

While, with the exception of the notice periods, there is not a significant difference between the AIA and ConsensusDOCS regarding termination by the owner, that is not true when it comes to termination of the contract by the contractor. The actual bases for termination by the contractor are the same as those provided for in the AIA documents, with one exception, but where the AIA documents require significant periods of work stoppage before the contractor can terminate, this is not always true for the ConsensusDOCS. Where the work has been stopped for a thirty-day period through no fault of the contractor the ConsensusDOCS provide for the contractor to be able to terminate the contract on grounds similar to those in the AIA documents:

11.5.1.1 under court order or order of other governmental authorities having jurisdiction;

11.5.1.2 as a result of the declaration of a national emergency or other governmental act during which through no act or fault of the Contractor, materials are not available; or

11.5.1.3 suspension by the Owner for convenience pursuant to Paragraph 11.1<sup>67</sup>

It should be noted that as this clause refers to suspension for a thirty-day period, rather than for thirty days, termination under this clause will probably require a period of work stoppage for at least thirty consecutive days. Another point worth noting in the above provision is that the ConsensusDOCS provide for termination where the work stoppage is a result of a government act during which materials are not available.<sup>68</sup> This is broader than the basis for termination under the AIA documents, which requires that the government act utilized as the basis for the termination actually require that the work be stopped.<sup>69</sup> Presumably the ConsensusDOCS clause would cover situations where the contractor was unable to obtain material, even though the government had not declared the work actually stopped.<sup>70</sup> It should also be noted that the ConsensusDOCS provides for termination because of owner-directed suspension of the work in excess of thirty consecutive days, whereas the AIA documents require work stoppage in aggregate more than 100 percent of the total number of days scheduled for the work, or more than 120 days in any 365-day period.<sup>71</sup>

Unlike the AIA documents, there exist four grounds for termination by the contractor which do not require any work stoppage at all. Where the owner:

11.5.2.1 fails to furnish reasonable evidence pursuant to Paragraph 4.2 that sufficient funds are available and committed for Project financing, or

11.5.2.2 assigns this Agreement over the Contractor's reasonable objection, or

11.5.2.3 fails to pay the Contractor in accordance with this Agreement and the Contractor has complied with the notice provisions of Paragraph 9.6, or

11.5.2.4 otherwise materially breaches this Agreement.<sup>72</sup>

All of these grounds, with the exception of 11.5.2.2, exist in the AIA documents.<sup>73</sup> Unlike the AIA documents, however, no work stoppage is required as a result of the defaults before the Contractor terminates the contract.

Another significant difference between the AIA documents and the ConsensusDOCS relates to the contractor's recoverable damages in the event of termination. Like the AIA documents, upon a proper termination by the contractor, it is entitled to recover the costs of the work executed through the termination, plus its costs for demobilization and a reasonable overhead and profit.<sup>74</sup> Unlike the AIA documents, however, the ConsensusDOCS specifically entitle the contractor to recover overhead and profit on the work that was not performed as a result of the termination.<sup>75</sup> The contractor is also entitled to recover for "any proven loss, cost or expense in connection with the Work".<sup>76</sup>

I noted with respect to the AIA documents, the remedies provided in the contract have been interpreted to be in addition to the common law remedies, and the contract actually indicates that the contractual remedies are in addition to all other remedies available to the parties.<sup>77</sup> This is not true with respect to the ConsensusDOCS. The ConsensusDOCS specifically provide that the parties' "rights, liabilities, responsibilities and remedies with respect to this Agreement, whether in contract, tort, negligence or otherwise, shall be exclusively those expressly set forth" in the contract.<sup>78</sup> Accordingly, a failure to comply with the conditions precedent to termination under the ConsensusDOCS is probably fatal to the termination.

## 2. 5.5 *Contingent Assignment of Subcontracts*

The ConsensusDOCS provide for the assignment of the contractor's subcontracts to the owner in specific circumstances.

- 5.5.1.1 this Agreement is terminated by the Owner pursuant to Paragraphs 11.3 or 11.4; and
- 5.5.1.2 the Owner accepts such assignment after termination by notifying the Subcontractor and Contractor in writing, and assumes all rights and obligations of the Contractor pursuant to each subcontract agreement<sup>79</sup>

These are almost the conditions for contingent assignment that appear in the AIA documents. Accordingly the discussion above on the assignment of subcontracts under the AIA documents would apply equally well here, with one significant exception. The ConsensusDOCS, unlike the AIA documents, allow for the assignment to the owner of the contractor's subcontracts upon the owner's terminating the contract for its convenience.<sup>80</sup> By way of contrast, the AIA documents allow only for assignment where the contract is terminated for default.<sup>81</sup> Obviously, the owner's interest in obtaining assignment of the contractor's subcontracts so that it can complete the scope of work applies with equal force when the termination is one for the owner's convenience as it does when the contractor is terminated for cause.

### **III. COMPLETION CONCERNS**

#### *A. Who Owns The Materials*

As discussed above, most standard form construction contracts provide that upon termination of the contract by the owner for the contractor's default, the owner is entitled to take possession of the contractor's materials located at the project site.<sup>82</sup> This same remedy, although broader in scope, is available to the government on projects under the Federal Acquisition Regulations.<sup>83</sup>

This remedy is certainly useful to the terminating owner and is not otherwise available to them. Professor Sweet noted the reasons given for the post termination remedy as:

1. to provide incentive to the contractor to take away its property from the site so that the owner can efficiently bring in a successor;

2. to provide the owner with material and equipment by which it can expeditiously continue the work with a successor (Note the conflict with (1) above); and
3. to give the owner property from which it can obtain payment for any claim it may have against the contractor.<sup>84</sup>

When purchasing materials, absent a contract provision specifically addressing the transfer of title to the property, title will transfer at the time and place where the seller physically delivers the goods.<sup>85</sup> Contrary to the above, where the contract specifically identifies the manner and conditions on which title is to pass to the owner, the contract provisions will control.<sup>86</sup> However, the contract clauses do not provide the terminating owner or the terminated contractor with a clear delineation as to which materials the owner has obtained title and which materials it may seize as a result of the default.

#### *1. Effect of Payment*

The standard construction contract clauses providing for the owner to take possession of materials at the project site are limited to those materials belonging to the terminated contractor and do not automatically apply to materials delivered to the project site by subcontractors and material suppliers.<sup>87</sup> For government contracts the government may take possession of all material on the project site regardless of who supplied the material to the project.<sup>88</sup> Accordingly, upon a proper termination of the contractor, except for federal government contracts, the owner is entitled to the possession and use of the materials only of the contractor, and any other material on the project site, title for which has already been transferred to the owner. Even as to the contractor's materials, pursuant to the termination clause the owner obtains only the right to take possession of and utilize the materials, but does not obtain any title in the materials other than equitable title to the material as security against a deficiency judgment against the contractor.<sup>89</sup> Thus the owner would not qualify as a buyer in the ordinary course and would not be entitled to avoid replevin of material for which it had not obtained title.

Before taking possession of construction materials, therefore, the owner must determine what material it actually holds title to and what material it is entitled to take possession of as a result of the termination. The AIA contract documents provide for title to materials to pass to the owner “no later than upon payment” to the contractor.<sup>90</sup> Unfortunately, this clause does not specify with any certainty when title will pass, only that title should pass to the owner not later than payment. Professor Sweet notes that when the AIA adopted the “no later than upon payment” approach, it intended title to pass according to state law.<sup>91</sup> Of course, as noted above, the Uniform Commercial Code, which generally governs passing of title to goods, provides that the contract controls as to the time of passing of the title.<sup>92</sup> This results in a lack of clarity, to say the least, as to when title is presumed to have passed. Even if the a court were to look to the backup provision of the Uniform Commercial Code to determine that title passes upon delivery, such a presumption would probably be valid only as between the owner and contractor, since the contract fails to specify the event for passing of title. Most purchase orders, however, do specify the conditions precedent to the passing of title, normally receipt of payment by the supplier.<sup>93</sup> Accordingly, it is not clear that where the owner has paid the contractor and the materials have been incorporated into the project that the owner has actually obtained clear title to the materials. In such circumstances the owner may be subject to a replevin action or action for conversion, even though the material has been incorporated into the building.<sup>94</sup>

Where the owner has paid the contractor for the materials and the materials have been incorporated into the project, it can at least be said that the owner should be entitled to title to the materials.<sup>95</sup> Unfortunately, just because the contract calls for title to pass not later than payment to the contractor does not mean that title will actually pass. In fact the AIA documents contemplate that title will not pass, and instead what the owner obtains upon payment is a warranty from the contractor that title will pass to the owner no later than receipt of payment and that all materials contained in prior applications for payment

for which the contractor has received payment are free of liens, encumbrances or other security interests.<sup>96</sup> As noted by Professor Sweet:

If the contractor has breached whatever warranty the contractor has given, under A201 subparagraph 9.3.3 the owner has a claim, perhaps a worthless one, against the contractor if a third party asserts an ownership or security interest in materials or equipment for which the owner has paid.<sup>97</sup>

The ConsensusDOCS take a different and slightly more straightforward, if ungainly, approach.<sup>98</sup> The ConsensusDOCS require as a condition precedent to the approval of a payment application that the contractor submit:

bills of sale and proof of required insurance, or such other procedures satisfactory to the Owner to establish the proper valuation of the stored materials and equipment, the Owner's title to such materials and equipment, and to otherwise protect the Owner's interests therein, including transportation to the site.<sup>99</sup>

By actually requiring that the contractor provide documents evidencing the passing of title to the property to the owner, the ConsensusDOCS would satisfy the objection raised by Professor Sweet. Unfortunately the process as envisioned is difficult in application and would require a high level of sophistication by the contractor and the owner for it to operate properly. Initially, it is worth noting that the clause actually refers to the contractor's providing bills of sale as evidence of title, but bills of sale are generally not documents that would pass title to material, other than cars, boats, airplanes and other registered vehicles.<sup>100</sup> Presumably the drafters of the clause intended for title to transfer by use of bills of lading or other documents sufficient to pass title under the Uniform Commercial Code, but the clause as drafted may not quite realize that intent. A second problem for the contractor and owner under the ConsensusDOCS clause is that it requires a transfer of documentation and inspection and approval of documentation with each application for payment for all of the materials included in the application. This would certainly make auditing the project easier, but is not particularly conducive to the efficient administration of the contract. More troublesome is the likely event where the

contractor and owner either ignore the requirements of this clause for passing of title, or agree to payment based on documents which do not effectively pass title to the owner.

As discussed above, it not always easy for a terminating owner or a terminated contractor to determine in the run up to a termination or in the limited cure periods granted by the contracts what material are the property of the owner and what belongs to the contractor or to third parties.<sup>101</sup> Unfortunately the effect of a wrong conclusion as to ownership of material immediately prior to or immediately after termination may be substantial. The owner who wrongfully seizes material belonging to the contractor or third parties, or the contractor who seizes material which properly belonged to the owner, may be guilty of conversion and subject to extra contractual damages.

It does not get any easier when the termination is between the contractor and a subcontractor. The same problems that occur when determining the parties' rights in material following a termination by the owner occur when the contractor terminates a subcontractor. Under the ConsensusDOCS the issues are almost identical, since the ConsensusDOCS subcontract form, if used, provides for the same provisions regarding passing of title and rights in material after termination.<sup>102</sup> Other standard contract documents, including the AIA documents, however, do not contain any provision for title to materials to pass to the contractor, or for possession of the subcontractor's materials upon termination. This may actually be to the contractor's benefit since, as noted above, absent a contract term specifying the passing of title, the title is presumed to pass upon delivery of the materials.<sup>103</sup> Unfortunately, the presumption that title to goods passes upon delivery will not assist the contractor where the subcontractor did not have good title to the goods as may be the case when a supplier had conditioned transfer of title upon receipt of payment. If the contractor has not made payment to the subcontractor, it will not be entitled to a "buyer in the ordinary course" defense to the supplier's action to replevin the goods or for conversion. It should be noted, however, that at least one court has found the contractor's right to take the subcontractor's materials to have been

incorporated into the subcontract through a general incorporation by reference provision to the prime contract.<sup>104</sup>

## 2. *Effect of Delivery to the Project Site*

As discussed above, most standard construction contracts make at least some attempt at defining when title to materials will pass to the project owner. Where the contract actually succeeds in specifying the conditions precedent to or the timing for the passing of title, those contract provisions will be controlling.<sup>105</sup>

In the absence of a contract provision, however, the presumption is that title will pass upon delivery of the goods. Title can pass upon shipping or upon actual delivery of the goods to the project site.<sup>106</sup> However, where title passes upon delivery, there is no requirement that the title not be subject to a security interest in the seller.<sup>107</sup> Accordingly, just because the goods have been delivered to the project and the contract does not specifically identify a different time for passing of title, does not mean that the owner automatically has free and clear title to the goods.

Disregarding for the moment the effect of delivery upon title, delivery of the materials to the project can have a substantial impact on the supplier's rights, and accordingly upon the contractor's and owner's decisions in terminating a contract. Delivery of materials to a project is generally sufficient to entitle the supplier to a claim under the Miller Act, and most state Miller Acts, even where the material is not incorporated into the project.<sup>108</sup> Even where it is not sufficient to entitle the supplier to recovery, it often establishes a rebuttable presumption of incorporation into the project.<sup>109</sup> Similarly, depending on the state, delivery of materials to the construction project can 1) entitle a supplier to a mechanic's lien, 2) entitle a supplier to rebuttable presumption of incorporation into the project and a mechanic's lien, or 3) can be of no effect.<sup>110</sup>

Thus delivery of material to the project prior to termination in some circumstances will control whether a claim for the material may be made and against whom. It is critical for the owner and contractor prior to or immediately after termination

to determine what part of the material delivered to the project site has been paid for and if a claim is made for the material, who that claim will be against. The terminating owner has an interest in ascertaining whether the supplier of material to the project has been paid for the material so that the owner can use that material in the completion of the project. If materials supplied by the terminated contractor are not to be utilized by the completing contractor, then the terminating owner would be well-advised to consider the burden of proof for establishing a lien against the project. If the material supplier has the burden of proof of incorporation or if there is a rebuttable presumption upon delivery, then the owner should in writing reject the materials and direct the contractor to remove the materials from the project site. If delivery creates an irrebuttable presumption of incorporation into the completed project, then the owner may want to investigate whether the completion contractor could utilize the materials on the project site and thus reduce the completion costs.

The terminated contractor and its surety may have the same concerns, but will normally have even less ability to influence the owner or completion contractor to take and utilize the material.

### 3. Specially Fabricated Materials

Specially fabricated or custom built items create unique problems for the contractor and owner on terminated projects. Normally fabricated or custom built materials have been constructed in accordance with the owner's specifications for a specific purpose. As such they are often more expensive, more time-consuming to replicate and are particularly needed by the project owner.

For the owner terminating the project, therefore, there is frequently a particular interest in obtaining the specially manufactured goods as part of the termination. Obtaining the manufactured goods from the contractor will avoid significant delays and lead time in obtaining the material from another source, especially where the owner has made partial payments for the fabrication of the material prior to termination. Specially

fabricated items, however, are rarely fabricated at the project site. Accordingly, the owner's ability to seize material and equipment at the project site upon termination often will not result in the owner's obtaining the items that are most critical to its completion of the project.

Specially fabricated goods are particularly troubling for the terminated contractor, as frequently the contractor may be liable for the goods, notwithstanding the fact that the owner rejects delivery where the contract was terminated. While not controlling, the special manufacture of materials will frequently make the supplier a subcontractor for purposes of establishing a Miller Act or "Little Miller Act" claim against the contractor.<sup>111</sup> Accordingly, special fabrication of materials may subject the contractor to an action on his bond for the cost of the materials. This is true even where the materials have been destroyed after identification to the contract.<sup>112</sup>

Even more troubling for the terminated contractor are the supplier's rights and remedies under the Uniform Commercial Code. Where the contractor has rejected or otherwise breached the terms of a purchase order as a result of the owner's termination, the supplier may be entitled to identify the materials to the contract, or if the material has not been completely manufactured, may either complete fabrication of the material or cease fabrication and resell the material as scrap.<sup>113</sup> Under either of the above options, once the materials have been identified for the project the supplier can tender delivery of the materials in return for payment.<sup>114</sup> This puts the terminated contractor in the position of either having to accept goods for which it has no reasonable use, or rejecting the goods and thereby breaching the purchase order. Of particular concern with regard to specially fabricated goods is Uniform Commercial Code Section 2-709 which provides for the supplier, if unable after reasonable efforts to resell the goods, to pursue the contractor for the purchase price of the material, plus incidental damages.<sup>115</sup>

A terminated contractor may thus have to either purchase materials which it does not need and cannot use, or pay for materials which it does not receive. In either case it

is clearly in the contractor's best interest to attempt to create a resale market for the specially fabricated materials. In most situations that resale market is limited to the project owner or the replacement contractor. An owner knowing that a contractor has to unload fabricated material that it can't use elsewhere may attempt to negotiate a lower price for the materials, as it would otherwise be a loss to the contractor or its surety. On the other hand, knowing that the owner will have to expend additional time in having the replacement contractor obtain similar fabricated materials, the contractor may be in a position to obtain a premium for the material to avoid delay to the owner. In either case the party subject to a claim for the material if it is not sold will be at a strategic disadvantage in negotiating the sale and use of the material.

#### 4. Appeal of Square Construction Company

One of the rare discussions in the reported caselaw of a dispute over post-termination seizure of the contractor's materials and equipment is contained in the Corps of Engineers Board of Contract Appeals decision in *Appeal of Square Construction Company*.<sup>116</sup> The decision in *Square Construction Company* and its concurrent and subsequent federal court and board of contract appeals litigation contains a good indication of some if not all of the problems that can arise for a terminating owner and a terminated contractor.

In 1972 a joint venture of Square Construction Company and LaFera Contracting Co. was awarded a contract with the Washington Metropolitan Area Transit Authority (WMATA) for the construction of a section of the subway system between the Pentagon and Crystal City for a contract price of \$23,113,984.00. The contract called for completion of the work within 900 days following notice to proceed. Shortly after commencement of the contract the construction manager for WMATA became concerned with the contractor's progress. Throughout the later part of 1972 and all of 1973 WMATA and its construction manager complained about the progress of the work. In response to these complaints the joint venture complained about delays to its work caused

by WMATA, the construction manager and other delays beyond the control of the joint venture. On January 24, 1974 the contracting officer terminated the joint venture's contract and took possession of all materials and equipment at the project site.

After termination the joint venture appealed the contracting officer's decision terminating its contract for default.<sup>117</sup> The Corps of Engineers Board of Contract Appeals found the contracting officer's termination to be justified. The joint venture argued, but the Board of Contract Appeals found it could not reach the joint venture's claim that the termination placed WMATA in no better position than if it had allowed the joint venture to complete its contract, as the completion date under the relet contract was subsequent to the date the joint venture claimed it would have been complete.<sup>118</sup> The completion contract was awarded at a total cost of \$19,579,576.13. Accordingly WMATA sought recovery from the joint venture of procurement costs of \$2,950,657.09, plus interest.<sup>119</sup> In response the joint venture sought an offset and credit for materials and equipment taken by WMATA and either expended or allowed to deteriorate in value.<sup>120</sup>

In a separate action during the course of the project, the joint venture and its surety brought an action in United States District Court for the District of Columbia seeking a declaratory judgment granting it possession of the surplus steel which it had purchased, but which would not be utilized in the completion contract. During the course of that litigation the parties attempted to arrange for sales of the surplus steel, but due to disputes over the allocation of the proceeds of the sale, such sale was never consummated. Accordingly, by the time the District Court determined that the joint venture had legal title to the surplus steel but WMATA retained equitable title as security for its completion claims, the price of the steel had dropped significantly.<sup>121</sup> Accordingly, the Board of Contract Appeals found that the loss in value was due to the contractor's refusal to allow the materials to be sold at a reasonable price and to have the proceeds held in trust by WMATA. The joint venture did not fare as badly on some of its other claims for waste of its materials and equipment taken by WMATA and the Board of

Contract Appeals found that the joint venture was entitled to an offset of \$150,000 for deterioration of one of the pieces of the joint venture's equipment.

Another side note in the Board of Contract Appeals litigation that illustrates all of the difficulties in a contract termination was a reference to yet other litigation involving this project between the joint venture and its steel supplier. Apparently WMATA agreed to accept the assignment of the steel supply contract with the proviso that it was subject to approval by the steel supplier. The steel supplier refused to accept the assignment and so the supply contract was terminated. The steel supplier then entered into a separate contract with the completion contractor. According to the references in the Board of Contract Appeals' decision, the steel supplier contracted with the completion contractor for \$1,184,588.57 to supply steel it was bound to supply under the original supply contract at a price of \$612,752.55.

As if the multiplicity of lawsuits over this termination were not enough, that is not the end of this particular termination tale. Subsequent to the cases discussed above, there were multiple appeals and remands.<sup>122</sup>

*B. Who Owns the Equipment?*

Like the case for materials, who owns and is entitled to possession of the equipment on the project can significantly affect the seriousness of a default termination. This is particularly true for specialized equipment or for equipment which can be utilized on other projects. Before discussing the effect of ownership of equipment upon a default termination, a distinction ought to be made when we refer to "equipment." The standard form contracts refer generally to equipment, but do not make clear what this term is intended to cover. For purposes of this discussion and for purposes of analyzing a default termination, a distinction should be made between equipment intended to become part of the finished project, lifts, elevators, mechanical and electrical equipment, manufacturing equipment, etc. and equipment brought to the project by the contractor or its subcontractors solely for the purpose of constructing the project. When it comes to

equipment intended to become part of the project, the equipment is more properly analyzed under the discussion above governing materials, although frequently equipment will be considered to be specially fabricated materials for purposes of the analysis. It is with the construction equipment brought to the project by the contractor and its subcontractors, whether owned or rented, and intended to be removed from the project at or prior to completion with which we are now concerned.

*1. Owned Equipment Versus Rented Equipment*

The termination provisions of the standard form construction contracts entitle the terminating owner to take possession of the contractor's equipment located on the project site and to use such equipment for the completion of the project.<sup>123</sup> In both cases, however, the owner's right to take possession of the equipment is limited to equipment "owned" or "belonging" to the contractor.<sup>124</sup>

Whether the equipment located on a project site at the time of termination is owned by the contractor, owned by a subcontractor, leased or rented may not be easily determined by the owner at the time of termination. This is particularly true as the difference between owned equipment with a retained security interest and leased equipment is not obvious, and may not be clear even with substantial knowledge as to how the purchase of the equipment was structured.<sup>125</sup>

If the equipment is truly owned by the contractor, then under the contract clause the owner is entitled to the use of the equipment in the completion of the work on the project. The owner may also be entitled to possession of the equipment as security for amounts that may be found due by the contractor for completion of the project.<sup>126</sup> As such, the owner certainly has an interest in expeditiously determining what equipment is owned by the contractor and subject to the owner's right to possession. The owner, however, should be fully willing to release any equipment taken under the default termination where any third party makes a colorable claim to title to the equipment. Depending on state law, the owner may have a possessory security interest in the

equipment superior to other creditors of the contractor secured in the equipment by filing.<sup>127</sup> In such case the project owner may be entitled to be paid by the secured creditor prior to release of the equipment, or may, as in *Appeal of Square Construction*, be entitled to have funds held in escrow pending a determination of the owner's damages secured by the equipment.

The issue as to possession of the contractor's construction equipment is obviously of significant interest to the terminated contractor. Frequently the construction equipment on a project is intended to achieve a particular objective on the project, at which time the contractor will remove the equipment to another project where it has scheduled the use of the equipment. Possession by the owner of the contractor's construction equipment may frequently result in the contractor being delayed in the performance of its work on other projects for lack of the equipment taken by the owner. Under certain circumstances these delays may subject the contractor to damages on the projects for which the equipment was intended to be used next, and the contractor may seek to recover from the owner taking possession of the equipment. Depending on whether the original termination was wrongful and the extent of the owner's knowledge as to the contractor's intended use of the equipment, it may be possible for a contractor to make out a viable claim for indemnification for the damages sustained as a result of the owner's wrongful seizure of the contractor's equipment.

Even where the contractor did not intend to utilize the equipment on other projects, the owner's taking of the construction equipment will frequently subject the contractor to paying for construction equipment which, due to possession by the owner, it cannot utilize. This is true both for rented and owned equipment. Frequently construction equipment will be purchased under installment contracts or long-term equipment leases with security in the lender. These agreements normally include a "hell or high water" clause providing that the contractor must pay the lender the periodic lease

or installment, regardless of whether the contractor has possession of the equipment, the equipment is working or almost any other defense to payment.<sup>128</sup>

*C. Assignment of Subcontracts*

As discussed above, most standard form contracts provide for the contingent assignment of the contractor's subcontracts upon termination of the contractor, as long as the owner agrees to accept assignment of the subcontract. This assignment is, however, agreed between the owner and the terminated contractor and has not necessarily been agreed to by the subcontractor whose contract is to be assigned. Generally a contractual right can be assigned unless:

(a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or

(b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or

(c) assignment is validly precluded by contract.<sup>129</sup>

Of course the standard form contracts contemplate not only the assignment of the contract rights, but also the delegation of the contractor's duties under the subcontracts. Normally a contract duty can be properly delegated, unless the delegation is contrary to public policy or the terms of the contract.<sup>130</sup> Reference to assignment of a contract absent other contrary indications refers to assignment of rights and delegations of duties contained in the contract.<sup>131</sup>

The problem frequently is, notwithstanding the owner and contractor's agreement that the subcontracts would be assigned, that the contractor has made no arrangements for assignment of the contract, or the terms of the subcontract make any such assignment subject to the approval of the subcontractor.<sup>132</sup> Where the subcontract does not expressly prevent assignment, assignment still may be invalid where the effect of the assignment

would be to change the costs of performance for the subcontractor.<sup>133</sup> In at least one case an AIA A201 has been interpreted as not allowing assignment absent written assent by the subcontractor.<sup>134</sup> While that case involved a 1977 version of the A201, a modified version of the clause relied upon by the court as requiring approval of the subcontractor continues to appear in the current A201 at paragraph 13.2.2. As with the issue of title to material, the assignment clause does not necessarily assign the referenced subcontracts, as for various reasons they may not be assignable, but rather it is a warranty which has the right to assign the contracts and will do so upon termination.<sup>135</sup>

Assuming for the moment that assignment of the subcontracts can be accomplished, frequently the terminating owner or assigned subcontractor's concern is, "Do I want the assignment?" From a terminating owner's perspective there are obviously the benefits to be gained from maintaining project continuity and avoiding any unnecessary delays or price increases in completing the project. These goals can frequently be accomplished by assenting to the assignment of the subcontracts. Before agreeing to the assignment, however, it important to consider carefully whether the owner actually wants to enter into contracts directly with the subcontractors and what the ramifications might be of being bound by the terms of the subcontract agreements. If the contractor was terminated for financial instability and inability to pay its subcontractors and suppliers, but otherwise the project was being performed in a timely manner and in accordance with the plans and specifications, then presumably the subcontractors could continue to adequately perform under the assignment. However, what if the contractor was terminated for delays to the project or for defective work? Clearly the owner would not want to accept assignment of a subcontract where the subcontractor was potentially the cause or one of the causes of the project delays or defects. Even if the only issue is the terminated contractor's failure to pay its subcontractors and suppliers, the terminating owner may, by accepting assignment of the subcontracts, grant the subcontractor rights to payment from the owner, which it would otherwise have to pursue with the contractor.<sup>136</sup>

This is particularly true where assignment would grant the subcontractor contractual privity for claims which would otherwise be answerable only by the terminated contractor's surety.

Another problem for both the terminating owner and the assigned subcontractor is exactly what the terms of the agreement are between them after assignment. The standard form contracts do not address which terms will prevail as between the assigned subcontract and the terminated prime contract. Presumably the terms of the subcontract would prevail over the terms of the prime contract, even where those were incorporated by reference into the subcontract, as otherwise the assignment would run afoul of the requirement that the assignment not adversely affect the subcontractor's rights and responsibilities.<sup>137</sup> The assignment of subcontracts following a termination has resulted in issues interpreting whether or not the subcontractor had a direct claim against a government owner.<sup>138</sup> Assignment has also resulted in an assignee's being bound by arbitration agreements to which it was not a signatory.<sup>139</sup> More troubling, though not addressed in any reported case, would be the effect of assignment on standard construction subcontract clauses limiting the subcontractor to payment if the general contractor is paid by the owner, "pay-if-paid", limiting the subcontractor to amounts obtained from the owner for delays and changes, etc. These clauses, while common, become meaningless where by virtue of assignment, the owner has assumed the position of the contractor.

#### **IV. Pulling the Trigger – Termination by the Contractor**

##### *A. Is It Really Necessary to Shoot?*

Default termination is a drastic remedy, which should be utilized only for good cause and upon solid evidence.<sup>140</sup> As noted by the Court in *Walker & Co. v. Harrison*:

[T]he injured party's determination that there has been a material breach, justifying his own repudiation, is fraught with peril, for should such determination, as viewed by a later court in the calm of its contemplation,

be unwarranted, the repudiator himself will have been guilty of material breach and himself have become the aggressor, not an innocent victim.<sup>141</sup>

It is particularly drastic, and rare, where the default termination is instituted by the contractor. Under certain circumstances, however, default termination may not only be justified, but from the position of the contractor, necessary to avoid significant losses resulting from continued performance.<sup>142</sup> This is most frequently true where the contractor fails to receive payment for the work performed.

For the contractor, termination is a particularly troublesome question as, unlike a terminating owner, by terminating its contract the contractor is presumably foregoing future payments to be made by the owner which were part of the contractor's financial planning and forecast when bidding and contracting for work. In addition, by terminating its contract on bonded projects, the contractor is not only betting personally that it got the termination declaration correct, but is wagering with the surety's liability on the performance bond. Accordingly the advice frequently given to the contractor considering termination of its contract is "Don't do it — without being sure you're right."<sup>143</sup> While not particularly pleasant advice for the contractor, it is usually correct. Where the contractor opts to go forward, however, it is necessary to do more than make sure that the decision is correct, but also to make sure all of the procedural requirements for termination have been met.<sup>144</sup>

The initial issue to be addressed in determining whether or not the contractor is right in deciding it can terminate the contract is the basis for the contractor's decision to terminate. Is the contractor terminating under an express termination provision of the contract or is the termination based on a common law material breach of the contract aside from the specified grounds for termination under the contract? Where the contract actually spells out grounds for the contractor to terminate its contract, an issue arises as to whether the contractor can ever rely on common law termination remedies in addition to those contained in the contract.<sup>145</sup> Under the AIA documents, as noted by the Court in

*Ingrassia*, common law termination may be available, but the same cannot be said of the ConsensusDOCS, which specifically exclude supplementation of the contract terms by common law remedies.<sup>146</sup>

More troubling is termination under the common law where the contract actually specifies conditions precedent to termination on the grounds alleged. Consider the most frequent ground for contractor termination: non-payment by the owner. Generally failure to make payments under the contract will constitute a material breach of the terms of the contract, particularly as this is the preeminent obligation of the owner under the contract.<sup>147</sup> Common law termination for failure of payment, however, will normally require repeated failures.<sup>148</sup> At least under the AIA documents the owner need not repeatedly fail to make payments, but termination is available only where the failure to certify or make payments has resulted in a work stoppage of at least 30 consecutive days.<sup>149</sup> Accordingly the contractor may be put to the election of either relying on multiple failures to make prompt payments, or stopping work upon the first failure to make payment and waiting at least thirty days before terminating the contract. If the contractor makes the wrong choice, or a court later determines that one of the options was not available, normally the common law termination remedy, then the termination will still be wrongful.

Another issue that comes up with termination on modern construction projects is that frequently what would otherwise be grounds for termination has contractually been agreed by the parties only to give rise to a claim under the contract.<sup>150</sup> In most standard construction contracts there are specific contractual provisions granting the owner the ability to unilaterally add to or delete portions of the work, stop the contractor's performance of the work and withhold payment for work performed, which, absent such provisions, would frequently constitute material breaches of the contract. Where the parties have agreed to provide a contractual remedy for an action that would otherwise constitute a material breach of the contract, the courts will enforce that agreement.<sup>151</sup>

Given the difficulties inherent in declaring termination of the contract, the first question ought to be whether or not it is really necessary to pull the trigger and terminate the contract. Can the contractor pursue its administrative and contractual remedies and avoid termination? Where terminating the contract appears to be a foregone conclusion, frequently both the owner and the contractor are disgruntled with the course of the project. In such circumstances it may often be in the best interest of both the owner and the contractor to structure a termination for convenience, specifically spelling out what the responsibilities and liabilities will be of each and what rights the parties have in the material, equipment and contracts going forward.

*B. If you Shoot First, Don't Miss – Contractual Preconditions to Termination*

As with termination by the owner, there are specific preconditions to terminating the contract for the default of the owner. These preconditions generally are not as involved as those imposed on the owner and do not require the architect or Initial Decision Maker's certification that there has been a breach of the terms of the contract.<sup>152</sup> As with an owner termination, however, prior to terminating its contract, the contractor must give the owner notice of the intended termination and an opportunity to cure its breach.<sup>153</sup>

*1. Notice*

All of the standard form construction contracts require that prior to terminating its contract, the contractor provide notice to the owner of its intent to terminate.<sup>154</sup> While they do not specify the purpose of the termination notice, generally the termination notice period is intended to provide the party being terminated with an opportunity to cure its breach of the contract and avoid termination.<sup>155</sup>

This concept works relatively well under the standard form contracts where the owner is terminating the contractor, but is a little more questionable when the contractor is the party terminating the contract. For instance, the AIA A201 allows a contractor to terminate its contract where the work has been stopped for a period of 30 consecutive

days through no fault of the contractor by an order of a court or other public authority having jurisdiction over the project.<sup>156</sup> It is not clear what purpose is served by providing the owner with a seven-day notice prior to terminating the contract where the delay in the project that constitutes the breach entitling the contractor to terminate is not within the control of the owner. Similarly, the contractual bases for contractor termination are not forward looking and therefore are not subject to cure. If the contractor provides an owner proper written notice of a suspension of the work in excess of 30 days entitling it to terminate the contract, can the owner cure the breach by allowing the contractor to perform a couple of days of work, or is the suspension of work for a period of thirty days the basis for termination, regardless of any later ability to perform work? Of course as a general rule a cure notice need not be provided where it would be a useless gesture.<sup>157</sup> Whether the breach is subject to cure or not, as a precautionary measure the contractor should always provide the contractually required termination notice, if only to avoid any possible appearance of rushing to terminate.

Section 14.1.4 of the AIA A201 is particularly troublesome for purposes of sending a termination cure notice and determining the effect of efforts by the owner in response to the notice. As noted above, Section 14.1.4 is not clear when it refers to “seven additional days’ written notice” whether the contractor is required to provide two notices, one under Section 14.1.3 and one under Section 14.1.4. Setting aside for the moment the number and time period for the termination notices under Section 14.1.4, the issue becomes the effect of owner efforts to cure. Section 14.1.4 allows for termination based on a work stoppage of sixty consecutive days because of a breach of the owner’s obligations under the contract. As an example, assume a project where the work has been suspended for at least sixty days as a result of the owner’s failure to secure and pay for necessary approvals and easements under Section 2.2.2 of the A201. Clearly this is an example where the requirements of Section 14.1.4 have been met. What if, on receiving the termination notice, the owner obtains the required easements so that construction of

the project can move forward? Does the owner's belated performance of its obligations under Section 2.2.2 negate the contractor's ability to terminate, or does the contractor have the right to terminate regardless of the owner's efforts since the work has been stopped for a period of at least sixty consecutive days? Where an owner has corrected the contractual breach, although after the time period set in the contract for the contractor to terminate has passed, the contractor should be exceedingly careful.

## 2. *Project Financing*

From the contractor's viewpoint the core purpose of the contract is adequate assurance that the owner will pay for the work the contractor is to perform and probably only ranks behind the owner's actual payment for the work performed. Commensurate with its importance to the contractor, it is listed as the first basis for the contractor's termination of the contract in the ConsensusDOCS where the project has not been delayed.<sup>158</sup> What constitutes reasonable evidence that sufficient funds are available such that termination is improper is difficult to determine.<sup>159</sup> This difficulty in defining exactly what would constitute reasonable evidence that sufficient funds are available is compounded by limitations placed on the availability of that remedy in the standard form contracts.

For instance, while the ConsensusDOCS do not require that the project actually be stopped as a result of the owner's failure to provide reasonable evidence of project financing, the right to terminate is limited to where the owner fails to provide the evidence required by Paragraph 4.2. Paragraph 4.2, however, requires only that the owner provide evidence of Project financing. This does not specify that the entire project be financed, that the owner have funding for directed changes which have not yet been incorporated into changes in the contract price, or additional work which the owner intends to have performed but has not presently directed. It becomes even more problematical when looking at termination under the AIA documents for the owner's failure to provide adequate assurances of payment. As recently unequivocally remarked

to the Forum, the 2007 changes to the AIA documents, in addition to the failings of the ConsensusDOCS, adds the further complication that frequently the contractor may not be able to make a request for financial information under the contract such that the failure of the owner to provide the information would justify termination.<sup>160</sup>

As a general rule, adequate assurances ought to at a minimum reflect currently existing funds or commitments of at least the contract balance including all executed change orders. A contractor considering termination should think twice before terminating on the basis that the owner has not produced evidence of project financing to include changes which have not yet been finalized. Similarly, owners would best avoid providing evidence of project financing that reflects only the contract sum after deducting credits, like liquidated damages or credits for non-conformance with the plans and specifications which have not been assessed and approved.

### 3. *Payment Failure*

Failure to make payment to the contractor is the most likely reason for a contractor making the determination to terminate its contract with the owner. Failure to make payments, however, is not automatically a substantial breach of the terms of the contract. Where the failure of payment complained of represents a small percentage of the total contract value, the non-payment may not be sufficient to justify termination.<sup>161</sup> Generally, the non-payment must be a substantial failure to make payment, or must be such that it acts to prevent the contractor from proceeding with the work.<sup>162</sup> Similarly it is not enough that payments are not made timely, but rather the payment delays must substantially breach the terms of the contract.<sup>163</sup>

As a practical matter it is exceedingly unlikely that the standard form contracts, although they provide for termination by the contractor upon the owner's failure to make payments as required, alter the common law rule to any meaningful extent. The ConsensusDOCS clause does not appear to set any prerequisites to termination, other than the notice of non-payment provided in Paragraph 9.5 and the notice of termination

contained in 11.5.2.<sup>164</sup> Thus there is no requirement that the owner repeatedly or persistently fail to make payments, but only that the owner “fails to pay the Contractor in accordance with this Agreement, and the Contractor has complied with the notice provisions of Paragraph 9.6.”<sup>165</sup> This would seem to allow termination even for a single failure of payment by the owner, provided that the proper notices have been sent. It is unlikely, however, that a single non-payment, unless representing a significant portion of the overall project price or combined with a work stoppage, would constitute a substantial breach justifying termination. This problem exists as well in the AIA documents, but as the A201 does not allow termination by the contractor for non-payment until the work has been stopped for at least thirty consecutive days, the question of whether there has been a substantial breach should have been decided by the time the contractor has given the contractually required notices, has stopped work, has waited the thirty days and given its further termination notice and cure period. If the owner cannot or will not make payment or has not terminated the contractor while the contractor is still complying with the prerequisites to termination, then the owner probably is not in a position to pay for the current or any future work.

Because the contracts probably require more than a simple single instance of non-payment before the contractor is entitled to terminate its contract, the owner can (and not infrequently does) delay making payments or reduce the amount of the payment. Under such circumstances it is unlikely that the contractor, other than allowing this to go on for multiple payment application cycles, can create a situation where the owner’s acts would constitute a substantial breach of the contract. As such if it appears that the owner either lacks the ability to pay, or intends not to pay in accordance with the terms of the contract, the contractor will normally over the course of multiple payment application cycles have to repeatedly send late payment notices and stop work notices in order to preserve its claim that the owner’s non-payment amounted to a substantial breach.

#### 4. *Project Suspension*

Termination by the contractor, at least under the AIA documents, is going to require that work on the project have been suspended for at least some portion of time. As with the other contractual pre-requisites to termination, the work suspension requirements will be strictly enforced.<sup>166</sup> The recent decision in *In re Roy Frischhertz Const. Co., Inc.* provides a good guide to just how closely the contractual work suspension provisions will be enforced by a court in analyzing a termination by the contractor. In *Roy Frischhertz* the contractor commenced work on the construction of the Audubon Café in New Orleans shortly before Hurricane Katrina. Hurricane Katrina struck New Orleans on August 29, 2005 and the contractor sent its termination notice under Section 14.1.1 of the AIA A201 to the owner on October 4, 2005. In response to the termination by the contractor, the owner sent its own termination to the contractor. The contractor then commenced a declaratory judgment action seeking a declaration that it had properly terminated the contract and seeking contract damages. The owner counterclaimed for breach of contract and its costs of completion.

On August 28, 2005 the mayor of New Orleans issued a mandatory evacuation order until the earlier of five days after its issuance or the declaration by the Governor that the State of Emergency no longer existed. On September 6, 2005 the mayor issued a second evacuation order for an additional 30 days. During the period of the second evacuation order a re-entry plan was put in place for business owners in certain sections of the city, allowing them to re-enter the city. While probably not critical to the court's reasoning, the court went so far as to consider the effect of a one-time visit by one of the contractor's personnel to check on a rented bobcat and to check on the damage at the project site in determining whether the contractor had been stopped for thirty consecutive days. In the end the court determined that "Audubon's argument fails because it denies the reality of the situation in New Orleans in the months after the hurricane, and it defies common sense."<sup>167</sup> The court's analysis of the start and end dates of each of the

evacuation orders, the ability of the contractor to get its personnel to the project site and the purpose for which it could get personnel into the site is reflective of the level of focus the court will put on whether or not the contractor has met the contractual work stoppage requirements prior to termination.

The contractor may be entitled to a little more latitude in meeting the project suspension requirements where the owner is the party actually responsible for the delay to the project as a result of a breach of the owner's obligations under the contract.<sup>168</sup> In *Gillard v. Green* the Ohio Court of Appeals considered whether the contractor had complied with the contractual work stoppage requirements under Section 14.1.3 of the 1987 AIA A201. There the court found that there was sufficient evidence produced at trial that the trial court could determine that the project was delayed for a period of at least sixty days as a result of the owner's breach of its contractual obligations to reasonably promptly make responses to the contractor's request for information. Of note in *Gillard* is that there was no evidence that the work on the project was actually stopped, only delayed in excess of sixty days. The Court of Appeals did not appear concerned with the lack of an actual work stoppage. Similarly, the court found that the contractor's failure to continue to perform work for a period of seven days after submitting its termination notice did not negate its termination claim.<sup>169</sup>

*C. When to Shoot – Timing is Everything*

Once the contractor has determined that it is entitled to terminate the contract and has convinced or just ignored its counsel's reticence to declare the contract terminated, the question becomes when to terminate the contract. To some extent the timing of termination will be controlled by the contract provisions. Obviously the proper pre-termination notice has to be provided, two notices in some cases, and allow for any contractually mandated cure period. Those provisions address only what periods of time must precede the contractor actually withdrawing from the project site and not non-mandatory timing considerations. As discussed above with respect to termination by the

owner for default that declaration frequently affects the parties' rights in the material, equipment and payment. Shouldn't the contractor therefore take these effects into consideration in timing its termination notice?

*1. Timing Termination Around Payment*

As discussed above there is very little that one can be positive of when declaring a contract terminated for the default of the owner. You can't be sure that a court won't later determine that the termination was wrongful and resulted in the contractor abandoning the project.<sup>170</sup> You can't be sure that a court won't later determine that the contractor failed to follow the termination procedures set forth in the contract. What you can be sure of, however, is that once the contractor declares the owner in default and terminates its contract, it will see no further payment on that project until the dispute has been resolved. Accordingly, termination should be structured from the contractor's standpoint so it maximizes the amount of money received relative to the amount of work performed.

Where the breach of the contract for which the contractor seeks termination is the failure of payment by the owner, then obviously the contract should be terminated as expeditiously as possible while still complying with any notice and work stoppage requirements. Where the termination is based on some other breach of the contract by the owner then it may be in the contractor's best interest not to terminate as soon as it believes that it has cause to do so. Consider the situation where a contractor is considering termination for the owner's failure to provide reasonable evidence of project financing under Paragraph 11.5.2.1 of the ConsensusDOCS 200. That contract form provides that the contractor is to submit its payment application once a month for work performed in the preceding thirty days and payment is to be made within twenty days of receipt of the payment application.<sup>171</sup> If the contractor submits its termination notice at or around the date that its application for payment is due to the owner, then the contractor will have performed at a minimum thirty-seven days' of work on the project for which it

is unlikely that it will receive payment pending final resolution of the dispute. On the other hand if the contractor waits to send its termination notice until receipt of payment for the work performed, it should have limited its exposure to work performed while the payment application was processed, by contract at most twenty days, plus any work performed after sending the termination notice.

Because the contractor is required to have stopped work for a period of time prior to its having the ability to terminate its contract under the AIA documents, the contractor frequently need not worry as much about performing additional work for which payment will not be received after termination. The calculus with respect to limiting the contractor's exposure for work performed but for which it has not been paid does not change, however.

## 2. *Timing Termination Around Material Deliveries*

As with the discussion of timing termination around payment, the terminating contractor needs to consider the effect of its termination on its recovery for project materials. As noted above, as a general rule title to material delivered to the project passes upon delivery and payment for the materials. Accordingly the contractor wants to assure that to the extent it has ordered material or may be subject to contract or payment bond claims for materials fabricated for the project that it receives payment for those materials and transfers those materials to the owner. The contractor wants to assure that it does not wind up delivering to the project owner materials for which it has not been paid, or which are surplus to the project for which it would be entitled to a credit upon returning the material to the supplier, as once it terminates its contract it may be difficult for the contractor to regain possession of those materials.

With respect to the contractor's first consideration, receiving payment for materials for which it may be liable, the calculus is not all that different from attempting to maximize the relationship between the work performed and payments received. Obviously the contractor wants to have billed for and received payment for the majority

of the material for which it may be liable. Unless the owner has agreed to pay for materials suitably stored off site, this means that the contractor wants to ensure that as much material as possible has been delivered to the project site, has been included in payment applications and has been paid for by the owner. The difficulty with this is that especially on large or specially fabricated material and equipment, the period between when the contractor issues a purchase order for the material and releases it for fabrication and the time when the material is actually delivered to the project can be substantial. Accordingly prior to sending its termination notice to the owner, the contractor should contact its subcontractors and suppliers supplying material and equipment to the project and determine what material has been committed and may be the subject of a payment bond claim, where that material is in the pipeline and what the costs would be to the contractor if the orders are cancelled, if they can be.

An issue arises, however, when terminating the contract on the basis of non-payment. If the owner is not paying for the work that has been performed to date such that the contractor is entitled to terminate, then it is unlikely that the owner will pay for any material subsequently provided. Delivery of the material to the project site and inclusion in a payment application is probably not in the contractor's best interest where the contractor is not going to be paid for the material. Failure to deliver material such that it endangers timely project completion of course may cause the owner to terminate the contract before the contractor can issue its own termination. Similarly the contractor's removal of material from the project may constitute breach of the contract such that the owner terminates.<sup>172</sup> Accordingly the contractor must be exceedingly careful in not delaying the project or removing materials, but also not providing more material than absolutely necessary where it is not going to be paid for the materials.

Of course it is frequently in both the contractor's and the owner's best interests for all of the material and equipment ordered for the project to be paid for and title and possession thereto given to the owner. This avoids delays in completing the work, cost

escalations in repurchasing the materials, duplicate payments and claims for materials and losses as a result of returns of the material. Unfortunately the parties' disputes frequently get in the way of the owner paying for materials or the contractor delivering materials. This almost invariably results in waste and loss to both parties. Absent a dispute as to the quality of the materials or its compliance with the plans and specifications, serious consideration should be given to arrangements for the delivery and payment for materials and equipment already procured.

### *3. Pre-emptive Termination*

One of the problems for contractors in terminating a contract is that almost invariably when the contractor terminates the contract and ceases work, the owner, notwithstanding the prior declaration that the contract has been terminated, will declare the contractor in breach for abandonment and terminate the contract.<sup>173</sup> The owner will often then proceed to take advantage of its post-termination remedies to take possession of the project site, materials, equipment and subcontracts. It is only sometime later when the court or an arbitrator decides whether or not the first termination was proper that the parties will be able to know whether the seizure of the materials and equipment was justified or will serve as the basis for additional damages to the contractor.

This scenario is particularly true under the AIA documents, as the contractor must essentially telegraph its intent to potentially terminate the contract significantly, 30 to 120 days, in advance of its actual termination. An owner will frequently recognize these signals from the contractor and will either beat the contractor to the punch and terminate the contract before the contractor has an opportunity to, or if the contractor's basis for termination seems questionable, wait until the contractor declares the contract terminated and then terminate the contract for the contractor's abandonment.

The owner's pre-emptive or retaliatory termination is frequently of little practical consequence, as the either way the contract will be terminated and at the end of the day a court will determine whether or not there existed proper grounds for termination and who

breached the contract first. There are, of course, strategic benefits to being the first party to terminate, just as there are strategic benefits to assuming the role of wronged party where the other party terminated without justification. One practical effect of the owner's pre-emptive termination and exercise of its termination remedies is that the owner may take possession of the contractor's equipment. Unlike the contractor's timing, calculations for materials and payment discussed above, frequently the contractor is less concerned about being paid for its equipment time; rather it is interested in actually having possession of the equipment.

Where the contractor terminates the contract for the owner's breach it will presumably immediately after, or sometimes during, the cure period demobilize and remove its unpaid materials and equipment from the project site. Where the owner pre-emptively terminates the contract, however, the contractor does not have the opportunity to remove its equipment. That equipment may therefore be subject to the owner's use and claims until the dispute is finally resolved.<sup>174</sup>

While the owner may similarly telegraph its intent to terminate the contract the contractor's ability to pre-emptively terminate the contract is much more restricted than the owner's. As frequently the contractor must stop work or pursue administrative remedies, architect's determination, etc. prior to its termination, the contractor does not have the same ability to beat the owner to the punch.

## **V. Conclusion**

Termination for default, whether instituted by the owner or the contractor, is rarely the optimal solution for the contractor. Where the contract has been terminated by the owner, or where the contractor has no commercial option other than terminating its contract, it is in the contractor's best interest to try to structure the termination so as to limit the additional damages caused by the termination to the owner as well as to itself. Even where the parties cannot agree on a termination for convenience, serious consideration should be given to whether and to what extent the owner wants to exercise

its contractual rights to material, equipment and subcontracts. Where the owner needs to exercise its right to the contractor's material, equipment and subcontracts for the benefit of the project, consideration should still be given to exactly how that process should be structured, what the owner's rights are and when the owner will have satisfied its need for the material and equipment. While due to the dispute between the parties it is frequently impossible to address these issues fully, hopefully this paper will benefit the practitioner in advising contractor clients on the possible ramifications of a termination for default.

---

<sup>1</sup> David Buoncristiani and Douglas F. Coppi, *Termination Claims, in Proving and Pricing Construction Claims*, 212 (Robert F. Cushman et al. eds., 2001).

<sup>2</sup> *Ingrassia Constr. Co. v. Vernon Township Board of Educ.*, 784 A.2d 73, 77 (N.J. App. 2001).

<sup>3</sup> *See*, American Institute of Architects A201 (1997), §13.4.

<sup>4</sup> *Fairfax v. Washington Metropolitan Area Transit Auth.*, 582 F.2d 1321, 1327 (4<sup>th</sup> Cir. 1978); and *RTC v. Key Fin. Servs.*, 280 F.3d 12, 16 (1<sup>st</sup> Cir. 2002).

<sup>5</sup> *Economy Swimming Pool Co. v. Freeling*, 236 Ark. 888, 370 S.W.2d 438 (Ark. 1963).

<sup>6</sup> *United States ex rel. S&D Land Clearing v. D'Elegance Mgmt.*, 2000 U.S. App. LEXIS 16173 (4<sup>th</sup> Cir. 2000).

<sup>7</sup> *Northern Helex Co. v. United States*, 197 Ct. Cl. 118, 455 F.2d 546, 551 (1972).

<sup>8</sup> RESTATEMENT (SECOND) OF CONTRACTS, §347 (1981); and *Eastlake Constr. Co. v. Hess*, 686 P.2d 465, 474 (WA 1984).

<sup>9</sup> *Martin v. Phillips*, 440 A.2d 1124, 1125 (NH 1982).

<sup>10</sup> David Buoncristiani and Douglas F. Coppi, *supra* Note 1, at 214.

<sup>11</sup> *Nathan Constr. Co. v. Fenestra, Inc.*, 409 F.2d 134, 138 (8<sup>th</sup> Cir. 1969).

<sup>12</sup> *Just Wood Indus. v. Centex Constr. Co.*, 1999 U.S. App. LEXIS 18729, \*8 (4<sup>th</sup> Cir. 1999).

<sup>13</sup> *Pinellas County v. Lee Constr. Co.*, 375 So.2d 293 (Fla. App. 1979).

<sup>14</sup> *McElroy v. Patton*, 265 N.E.2d 397 (Ill App. 1970).

<sup>15</sup> RESTATEMENT (SECOND) OF CONTRACTS, §348, cmt c; *Forsythe v. Starnes*, 554 S.W.2d 100 (Mo. App. 1977).

<sup>16</sup> *Eastlake Const. Co. v. Hess*, *supra* note 8.

<sup>17</sup> *George A. Shegda, Inc. v. Standard Merchandising Co.*, 332 A.2d 498 (Pa. 1974).

<sup>18</sup> Philip L. Bruner, *Construction Claim Recovery Measures: Untying the Gordian Knot*, 20 Forum 278, 293 (1985).

<sup>19</sup> *Summit Constr. Co. v. Yeager Garden Acres, Inc.*, 470 P.2d 870 (Colo. App. 1970), *appeal after remand* 513 P.2d 458.

<sup>20</sup> Philip L. Bruner, *supra* note 18, at 286.

<sup>21</sup> RESTATEMENT (SECOND) OF CONTRACTS, §347 illus. 6 (1981); and *Tull v. Gundersons, Inc.*, 709 P.2d 940 (Colo. 1985).

<sup>22</sup> D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES, §12.24 (1973).

<sup>23</sup> *Crankshaw v. Stanley Homes, Inc.*, 207 S.E.2d 241, 243 (Ga. 1974).

- 
- <sup>24</sup> *Monson v. Fischer*, 118 Cal. App. 503, 520-21, 5 P.2d 628, 635 (1931).
- <sup>25</sup> *Charles Simkin & Sons, Inc. v. Massiah*, 289 F.2d 26, 29 (3d Cir. 1961); *Dermer v. Faunce*, 62 A.2d 304 (Md. 1948), *affirmed* 462 A.2d 582.
- <sup>26</sup> *C. C. Smith Co. v. Frankini Constr. Co.*, 135 N.E.2d 924 (Mass. 1956).
- <sup>27</sup> AIA A201, §14.1.1 (2007).
- <sup>28</sup> AIA A201, §14.1.2 (2007).
- <sup>29</sup> AIA A201, §14.1.3 (2007).
- <sup>30</sup> *Paragon Restoration Group, Inc. v. Cambridge Sq. Condominiums*, 836 N.Y.S.2d 501, (Erie Cty 2006) *affirmed in part and modified in part* 839 N.Y.S.2d 658 (N.Y. App. Div. 4<sup>th</sup> Dep't 2007).
- <sup>31</sup> PHILIP L. BRUNER, PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW, §18:15.
- <sup>32</sup> AIA A201, §14.1.4 (2007).
- <sup>33</sup> PHILIP L. BRUNER, PATRICK J. O'CONNOR, JR., *supra* note 31, at §5:258.
- <sup>34</sup> AIA A201, §14.1.4 (2007).
- <sup>35</sup> AIA A201, §14.2 (2007).
- <sup>36</sup> AIA A201, §14.2.1 (2007).
- <sup>37</sup> *Moore v. Maddock*, 231 N.Y.S. 291 (N.Y. App. Div. 1928), *affirmed* 251 N.Y.S. 420, 167 N.E.2d 572 (Decision as to reasonable time for completion is reserved to the jury); *Fox Lake v. Aetna Cas. & Sur. Co.*, 534 N.E.2d 133 (2d Dist. 1989) *appeal denied* 541 N.E.2d 1116 (Amounts withheld by contractor were not substantial enough to be a material breach of the contract and justify termination); *Ervin Constr. Co. v. Van Orden*, 874 P.2d 506 (Idaho 1993) (Whether defects in construction constituted a material breach was a factual question).
- <sup>38</sup> Commencing with the 2007 AIA Documents the certifications, including termination certifications have been given to an Initial Decision Maker who may or may not be the architect. For ease of reference and continuity with the prior AIA Documents I have replaced "Initial Decision Maker" with "architect" in these discussions.
- <sup>39</sup> AIA A201, §14.2.2 (2007).
- <sup>40</sup> *General Supply & Constr. Co. v. Goelet*, 148 N.E. 778 (NY 1925), *motion granted*, 150 N.E. 532 (1925).
- <sup>41</sup> *Supreme Indus. v. Town of Bloomfield*, 2007 Conn. Super. LEXIS 721 (2007).
- <sup>42</sup> *Id.*, and *R. Lee Tolley Co. v. Marr*, 12 Tenn. App. 505 (1930), *but see* *Meirowsky v. Phipps*, 222 Tenn. 112, 432 S.W.2d 885 (1968).
- <sup>43</sup> *Ingrassia Constr. Co. v. Vernon Township Board of Educ.*, *supra* note 1.
- <sup>44</sup> AIA A201, §14.2.2 (2007).
- <sup>45</sup> AIA A201, §14.2.3 (2007).
- <sup>46</sup> AIA A201, §14.2.4 (2007).
- <sup>47</sup> *Id.*
- <sup>48</sup> PHILIP L. BRUNER, PATRICK J. O'CONNOR, JR., *supra* note 31, at §5:268.
- <sup>49</sup> AIA A201, §5.4.1 (2007).
- <sup>50</sup> *Id.*
- <sup>51</sup> AIA A201, §5.4.1 (2007).

- 
- <sup>52</sup> *Pike Indus. v. Middlebury Assocs.*, 436 A.2d 725 (Vt. 1980), *cert. denied* 455 U.S. 947, 102 S.Ct. 1446, 71 L.Ed.2d 660, *contra* *Universal Fiberglass Corp. v. United States*, 537 F.2d 400 (Ct. Cl. 1976).
- <sup>53</sup> *See Empls Ins. of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d 1316 (11<sup>th</sup> Cir. 2001).
- <sup>54</sup> AIA A201, §5.4.2 (2007).
- <sup>55</sup> *See* PHILIP L. BRUNER, PATRICK J. O'CONNOR, JR., *supra* note 31, at §5:128.
- <sup>56</sup> AIA A201, §5.4.3 (2007).
- <sup>57</sup> *Kier Constr., LTD v. Raytheon Co.*, 2005 Del. Ch. LEXIS 36 (Del. 2005).
- <sup>58</sup> ConsensusDOCS 200, §11.2 (2007).
- <sup>59</sup> *Id.*
- <sup>60</sup> ConsensusDOCS 200 (2007).
- <sup>61</sup> ConsensusDOCS 200, §11.3.1 (2007).
- <sup>62</sup> AIA A201, §14.2.2 (2007).
- <sup>63</sup> ConsensusDOCS 200, §11.2 (2007).
- <sup>64</sup> ConsensusDOCS 200, §11.3 (2007).
- <sup>65</sup> ConsensusDOCS 200, §11.3.1 (2007).
- <sup>66</sup> AIA A201, §14.2.4 (2007).
- <sup>67</sup> ConsensusDOCS 200, §11.5.1 (2007).
- <sup>68</sup> ConsensusDOCS 200, §11.5.1.2 (2007).
- <sup>69</sup> AIA A201, §14.1.2.2 (2007).
- <sup>70</sup> *Automatic Extruding & Packaging, Inc.* 74-2 BCA (CCH) ¶10,949 (G.S.B.C.A. 1974), *reconsideration denied* 75-1 BCA (CCH) ¶11,067.
- <sup>71</sup> AIA A201, §14.1.2 (2007).
- <sup>72</sup> ConsensusDOCS 200, §11.5.2 (2007).
- <sup>73</sup> AIA A201, §14.1 (2007)
- <sup>74</sup> AIA A201, §14.1.3 (2007).
- <sup>75</sup> ConsensusDOCS 200, §11.5.3 (2007).
- <sup>76</sup> *Id.*
- <sup>77</sup> *Ingrassia Constr. Co. v. Vernon Township Board of Educ.*, *supra* note 1, and AIA A201, §13.4.1 (2007).
- <sup>78</sup> ConsensusDOCS 200, §13.7 (2007).
- <sup>79</sup> ConsensusDOCS 200, §5.5 (2007).
- <sup>80</sup> ConsensusDOCS 200, §5.5.1.1 (2007).
- <sup>81</sup> AIA A201, §5.4.1.1 (2007).
- <sup>82</sup> AIA A201, §14.2.2 (2007) and ConsensusDOCS 200, §11.3.2 (2007).
- <sup>83</sup> Federal Acquisition Regulation 52.249-10.
- <sup>84</sup> J. SWEET, LEGAL ASPECTS OF ARCHITECTURE ENGINEERING AND THE CONSTRUCTION PROCESS, 3d Ed. p. 884.
- <sup>85</sup> Uniform Commercial Code §2-401(2).
- <sup>86</sup> Uniform Commercial Code §2-401(1).
- <sup>87</sup> AIA A201, §14.2.2 (2007); ConsensusDOCS 200, §11.3.2 (2007); and *Ranger Constr. Co. v. Prince William County School Board*, 605 F.2d 1298, 1302-1303 (4<sup>th</sup> Cir. 1979).
- <sup>88</sup> Federal Acquisition Regulations, 52.249-10.
- <sup>89</sup> *Appeal of Square Constr. Co.*, 78-2 B.C.A. (CCH) ¶13,267 (Eng. BCA 1978).

- 
- <sup>90</sup> AIA A201, §9.3.3 (2007).
- <sup>91</sup> JUSTIN SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS, §15.12 3d Ed.
- <sup>92</sup> Uniform Commercial Code, §2-401(1).
- <sup>93</sup> J. McManus, Jr., *Legal Analysis of 1987 Edition of A-201: A-201 Workbook* (AGC 1987).
- <sup>94</sup> P. J. Freiermuth Co. v. Faustino, 7 P.2d 370 (Cal. App. 1932); and Shepard v. Mills, 50 N.E. 709 (Ill. 1898).
- <sup>95</sup> AIA A201, §9.3.3 (2007).
- <sup>96</sup> Id.
- <sup>97</sup> J. SWEET, *supra* note 91, at §15.12
- <sup>98</sup> ConsensusDOCS 200, §9.2.2 (2007).
- <sup>99</sup> Id.
- <sup>100</sup> Uniform Commercial Code, §1-201.
- <sup>101</sup> Leo Spear Constr. Co. v Fidelity & Casualty Co., 446 F.2d 439 (2d Cir. 1971).
- <sup>102</sup> ConsensusDOCS 750, §8.2.4 and 10.1.3 (2007).
- <sup>103</sup> Uniform Commercial Code, §2-401(2).
- <sup>104</sup> Charles Simkin & Sons, Inc. v. Massiah, 289 F.2d 26 (3d Cir. 1961).
- <sup>105</sup> Uniform Commercial Code, §2-401(1).
- <sup>106</sup> Uniform Commercial Code, §2-401(2).
- <sup>107</sup> Id.
- <sup>108</sup> United States use of Color Craft Corp. v. Dickstein, 157 F. Supp. 126 (E.D.N.C. 1957); United States use of Westinghouse Electric Supply Co. v. Enderbrock-White Co., 275 F.2d 57 (4<sup>th</sup> Cir. 1960), *but see* Florida use of Westinghouse Electric Supply Co. v. Marvin, 280 F.Supp. 1019 (S.D. Fla. 1967) (Florida Miller Act); and United States use of General Electric Co. v. H. I. Lewis Constr. Co., 375 F.2d 194 (2<sup>nd</sup> Cir. 1967).
- <sup>109</sup> Poly-Flex, Inc. v. Cape May County Mun. Utils. Auth., 832 F.Supp. 889 (N.J. 1993).
- <sup>110</sup> Gaster v. Wilmington Plumbing Supply Co., 321 A.2d 504, 506 (Del. 1974) (“delivery of materials at a job site create an irrebuttable presumption that such materials were thereafter made a part of the structure in issue”); Templeton v. Sam Klain & Son, Inc., 425 N.E.2d 89, 94 (Ind. 1981)(delivery of materials creates a rebuttable presumption of incorporation into the project); and Colp v. First Baptist Church, 260 Ill. App. 269 (1931), *affirmed* 341 Ill. 73, 173 N.E. 67 (supplier had burden of proof to establish materials furnished had gone into erection of building).
- <sup>111</sup> United States for Use and Benefit of E & H Steel Corp. v. C. Pyramid Enterp., Inc., 2007 U.S. App. LEXIS 27347 (3d Cir. Nov. 27, 2007) (“furnishing customized or complex material may in some cases be a helpful indication of the strength of the supplier’s relationship”); ISSC, Inc. v. Baugh Skanska Inc., 2005 U.S. App. LEXIS 28629 (9<sup>th</sup> Cir. 2005); United States use of Wellman Engineering Co. v. MSI Corp., 350 F.2d 285 (2d Cir. 1965); United States use of Consol. Pipe & Supply Co. v. Morrison-Knudsen Co., 687 F.2d 129 (6<sup>th</sup> Cir. 1982); and Vulcraft v. Midtown Business Park, 800 P.2d 195 (N.M. 1990).
- <sup>112</sup> United States ex rel. Bartec Indus. v. United Pac. Co., 976 F.2d 1274 (9<sup>th</sup> Cir. 1992), *amended by, rehearing denied by* 15 F.3d 855 (9<sup>th</sup> Cir. 1994).
- <sup>113</sup> Uniform Commercial Code, §2-704; Foxco Industries, Ltd v. Fabric World, Inc., 595 F.2d 976 (5<sup>th</sup> Cir. 1979).

- 
- <sup>114</sup> Uniform Commercial Code, §2-507; *Parkwood Lumber, Inc. v. Rivisco, Inc.*, 2000 U.S. App. LEXIS 661 (2d Cir. 2000).
- <sup>115</sup> Uniform Commercial Code, §2-709; *Foxco Industries, Ltd. v. Fabric World, Inc.*, *supra* note 113.
- <sup>116</sup> 76-1 B.C.A. (CCH) ¶11,747 (Eng BCA 1975)
- <sup>117</sup> *Id.*
- <sup>118</sup> *Id.*
- <sup>119</sup> *Appeal of Square Construction Co.*, 78-2 B.C.A. (CCH) ¶13,267 (Eng. BCA 1978).
- <sup>120</sup> *Id.*
- <sup>121</sup> *Id.*
- <sup>122</sup> *Square Constr. Co. v. Washington Metro. Area Transit Auth.*, 800 F.2d 1256 (4<sup>th</sup> Cir. 1986); *Square Constr. Co. v. Washington Metro. Area Transit Auth.*, 657 F.2d 73 (4<sup>th</sup> Cir. 1981); and *Square Constr. Co. v. Washington Metro. Area Transit Auth.*, 657 F.2d 68 (4<sup>th</sup> Cir. 1981).
- <sup>123</sup> AIA A201, §14.2.2 (2007) and ConsensusDOCS 200, §11.3.2 (2007).
- <sup>124</sup> *Id.*
- <sup>125</sup> *In re Grubbs Constr. Co.*, 319 B.R. 698 (M.D. Fla. 2005).
- <sup>126</sup> *Appeal of Square Constr. Co.*, *supra* note 119.
- <sup>127</sup> *In re Farris*, 1994 U.S. App. LEXIS 34136 (6<sup>th</sup> Cir. 1994).
- <sup>128</sup> *Harte-Hanks Direct Marketing/Baltimore, Inc. v. Varilease Tech. Fin. Group, Inc.*, 299 F.Supp. 2d 505, 522(Md. 2004); *In re Triplex Marine Maint., Inc.*, 258 B.R. 659, 670 (E.D. Tex. 2000); and *Angelle v. Energy Builders Co., Inc.*, 496 So. 2d 509 (La. App. 1986).
- <sup>129</sup> Restatement (Second) of Contracts, § 317(2).
- <sup>130</sup> Restatement (Second) of Contracts, §318.
- <sup>131</sup> Restatement (Second) of Contracts, §328.
- <sup>132</sup> *Empire Discount Corp. v. William E. Bouley Co.*, 160 N.Y.S.2d 395 (Monroe County 1957).
- <sup>133</sup> Restatement (Second) of Contracts, §317(2)(a).
- <sup>134</sup> *Sanders Co. v. B.B. Andersen Constr. Co.*, 1987 U.S. Dist LEXIS 6526 (Kans. 1987), *motion granted by* 1987 U.S. Dist. LEXIS 9001, *motion denied, stay granted by* 1987 U.S. Dist. LEXIS 10255.
- <sup>135</sup> Restatement (Second) of Contracts, §333(1).
- <sup>136</sup> *New Boston Hous. Enters. v. Fitzgerald Contracting Co.*, 12 Mass. L. Rep. 310 (2000).
- <sup>137</sup> Restatement (Second) of Contracts, §317(2)(a); *Beacon Constr. Co. v. Prepakt Concrete Co.*, 375 F.2d 977 (1<sup>st</sup> Cir. 1967).
- <sup>138</sup> *RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125 (6<sup>th</sup> Cir. 1996).
- <sup>139</sup> *Emplrs. Ins. of Wausau v. Bright Metal Specialties, Inc.*, *supra* note 53; *Beacon Constr. Co.*, *supra* note 137 at 979.
- <sup>140</sup> PHILIP L. BRUNER, PATRICK J. O'CONNOR, JR., *supra* note 31, at §18:2; *CJP Contractors, Inc. v. United States*, 45 Fed. Cl. 343, 371 (Fed. Cl. 1999); and *Walker & Co. v. Harrison*, 347 Mich. 630, 81 N.W.2d 352 (1957).
- <sup>141</sup> *Walker & Co. v. Harrison*, *supra* note 140 at 635, 355.
- <sup>142</sup> *Gillard v. Green*, 2001 Ohio 2644 (Ct. App. 2001)

- 
- <sup>143</sup> PHILIP L. BRUNER, PATRICK J. O'CONNOR, JR., *supra* note 31, at §18:3, p. 864.
- <sup>144</sup> *e.g.*, AIA A201, §14.1 (2007); and ConsensusDOCS 200, §11.5 (2007)
- <sup>145</sup> *Compare* SABO, LEGAL GUIDE TO AIA DOCUMENTS, 4<sup>th</sup> Ed. at 397-98 (1998) and *Ingrassia Constr. Co., Inc. v. Vernon Township Board of Educ.*, *supra* note 1.
- <sup>146</sup> ConsensusDOCS 200, §13.7 (2007).
- <sup>147</sup> *Macri v. United States*, 353 F.2d 804, 810 (9<sup>th</sup> Cir. 1965); and *United States use of C.J.C., Inc. v. Western States Mechanical Contractors, Inc.*, 834 F.2d 1533, 1551 (10<sup>th</sup> Cir. 1987).
- <sup>148</sup> *Guerini Stone Co. v. P. J. Carlin Constr. Co.*, 248 U.S. 334, 39 S.Ct. 102, 63 L.Ed. 275 (1919).
- <sup>149</sup> AIA A201, §14.1.1 (2007)
- <sup>150</sup> *Mega Const. Co., Inc. v. United States*, 29 Fed. Cl. 396, 415 (1993).
- <sup>151</sup> *McGee Constr. Co. v. Neshobe Dev.*, 156 Vt. 550, 594 A.2d 415 (1991).
- <sup>152</sup> *General Supply & Constr. Co. v. Goelet*, *supra* note 40 at 779.
- <sup>153</sup> *Blaine Economic Dev. Auth. v. Royal Elec. Co.*, 520 N.W. 2d 473 (Minn. Ct. App. 1994)
- <sup>154</sup> AIA A201, §14.1.3 (2007); ConsensusDOCS 200, §11.5.1 (2007); and EJCDC Document No. 1910-8, ¶15.5 (1990).
- <sup>155</sup> *United States use of Cortolano & Barone, Inc. v. Morano Constr. Corp.*, 724 F.Supp. 88, 98 (S.D.N.Y. 1989).
- <sup>156</sup> AIA A201 §14.1.1.1 (2007). *See also*, In re: Roy Frischhertz Const. Co., 2007 Bankr. LEXIS 3495 (E.D. La. 2007) (Discussing proper termination by contractor as a result of Hurricane Katrina).
- <sup>157</sup> *L.K. Comstock & Co. v. United Engineers & Constructors, Inc.*, 880 F.2d 219, 232 (9<sup>th</sup> Cir. 1989).
- <sup>158</sup> ConsensusDOCS 200, §11.5.2.1 (2007).
- <sup>159</sup> Uniform Commercial Code 2-609, Cmt 3; Restatement (Second) of Contracts, §251.
- <sup>160</sup> J. Duffy O'Connor, *The 2007 AIA Document: New Forms, New Issues New Strategies: The Demise of the Project Manual; Early Bid Financial Disclosures; Hazardous Haz-Mat Revisions ; & Insuring the Uninsurable*, ABA Forum on the Construction Industry and TIPS Fidelity and Surety Committee Joint Presentation January 31, 2008
- <sup>161</sup> *Vinen Corp. v. Alan W. Nau Contracting, Inc.*, 557 A.2d 1056 (N.J. App. Div. 1989) *cert. denied* 570 A.2d 952.
- <sup>162</sup> *Guerini Stone Co. v. P. J. Carlin Constr. Co.*, *supra* note 148 at 344; and *Macri v. United States ex rel Maxwell*, *supra* note 147 at 810.
- <sup>163</sup> *Haden v. Krupp Asset Management Corp.*, 776 F. Supp. 1151 (S.D. Miss. 1990).
- <sup>164</sup> ConsensusDOCS 200, §11.5.2.3 (2007).
- <sup>165</sup> It should be noted that at least as of the sample documents that ConsensusDOCS made available for instructional purposes the reference to notice in Paragraph 9.6 is incorrect as that paragraph addresses substantial completion. The notice provision for payment is contained in Paragraph 9.5.
- <sup>166</sup> In re Roy Frischhertz Constr. Co., *supra* note 156.
- <sup>167</sup> *Id.*
- <sup>168</sup> *Gillard v. Green*, *supra* note 142.
- <sup>169</sup> *Id.*

---

<sup>170</sup> Haden v. Krupp Asset Management Corp., *supra* note 163.

<sup>171</sup> ConsensusDOCS 200, §9.2.1 (2007).

<sup>172</sup> Minichillo v. Robert Cook & Sons, 3 Mass. L. Rep. 181 (Super. Ct. Middlesex 1994), *remanded by* 702 N.E.2d 57, *review denied* 709 N.E.2d 1119.

<sup>173</sup> General Ins. Co. of America v. K. Capolino Constr. Corp., 983 F.Supp. 403 (S.D.N.Y. 1997).

<sup>174</sup> Foley Machinery Co. v. John T. Brady Co., 310 N.Y.S.2d 49 (1970).