View from the Tower, A

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These three books have been added recently to my library:


I bring these books to your attention to illustrate a weakness I see in the Construction Bar. We emphasize the “practical”, narrowly defined, to the almost total exclusion of what I shall, for want of a better term, call “intellectual”.

Construction lawyers are practical people. Their reading and the scarce resources they commit to their libraries concentrate almost totally on solution-providing publications. Will they help draft, review or negotiate a contract? Will they help advise a client, conduct an arbitration, or try a case? The sources are cases, regulations and statutes from the relevant jurisdiction or, at least, American sources, plus practical “tips” from experienced practitioners.

Using this standard, the texts I have noted are not “practical”. To be sure, if I had an American delay dispute, I would find some relevant material in Werz’s text. If I wanted the view of the preeminent English scholar on issues which face American lawyers, such as total cost, “no damage” clauses or payment condition clauses in subcontracts, I would consult Wallace. Finally, were I representing a client able to penetrate the unwelcoming Japanese construction market, I would certainly want to consult Matsushita. Still, unless I had a problem involving Swiss, Commonwealth or Japanese law, these fine texts are not “practical”.

As I noted, the Construction Bar is rarely exposed to the intellectual side of Construction Law. Let me illustrate.

We rarely explore the theory of private autonomy, upon which our Contract Law is based. (To what extent should the state control Construction Contracts?) We are rarely, if ever, exposed to comparative treatment of construction legal problems. (How do continental legal systems deal with differing site conditions?) We know little about the history of our traditions. (Historically, why were dispute resolution powers given to the architect or engineer in common law countries?) We have little solid empirical data at our fingertips, and we would not be likely to consult such that does exist. (Does very limited scope of judicial review of arbitration awards affect whether arbitration is selected? How do Dispute Review Boards work in practice?) We rarely, if ever, examine the economic efficiency of risk allocation. (Is it more efficient to put the risk of differing site conditions on the owner or the contractor?)

Before stating what I see as the reasons for what I call a weakness in the Construction Bar, let me attack the definition that I stated provisionally of “practical”. Information I noted in the preceding paragraph could help represent or advise a client. In arguing the issue of the finality of an engineer’s decision, historical background could aid advocacy. Empirical data on contracting practices could improve the effectiveness of an argument as to the scope of review of an arbitration award. Similarly, empirical data, rather than anecdotal information, can help a client decide whether to use a Dispute Review Board. Were I advising a group drafting a standard contract or a legislative committee, economic efficiency would help provide a good contract or legislative solution.

I realize that the cost in time, money and library shelf space devoted to publications depends upon the amount of time a lawyer devotes to construction practice. A lawyer who handles a construction case now and then cannot be expected to invest in the fine texts of Wallace, Werz and Matsushita. But I am addressing the 6,000 members of the Forum Committee. You are called in on the difficult, important cases. Your advice is sought by contract drafters and legislators. You are likely to be the teachers of Construction Law in schools or continuing education programs. As leaders, you should spend your money, time and library shelf space on what many lawyers would describe as materials that are not “practical”. (Also, you should have intellectual curiosity.)

Now let me suggest reasons for what I see as the Construction Bar’s narrowness. First, materials which are theoretical, comparative, empirical, sociological or economic are very scarce. I shall address this in more detail in another column. Second, your legal education, which should be the gateway to intellectual development, is not likely to have exposed you to intellectual research in Construction Law. While your law school courses exposed you to such material (even if you viewed such material with indifference), Construction Law was not, until recently, considered an academic discipline. Even if you took such a course in the 20 or so schools which now offer one, the approach is likely to have been “nuts and bolts”. (Here I must plead guilty, although each edition of my Legal Aspects of Architecture, Engineering and the Construction Process includes more references to intellectual material.)

You may be a solid, competent construction lawyer without exposure to intellectual material. But you cannot be an excellent lawyer, a leader of the Construction Bar, unless the lacuna of which I write is filled.
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