Standard Construction Contracts: Academic Orphan

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Those who design, usually architects or engineers, make contracts with those for whom they work, such as their clients, as well as those entities who work for them, such as consultants. Builders, usually called contractors, make contracts with those who engage them, called owners; those who work for them, such as subcontractors; and those who provide materials, called suppliers.

This linked set of contracts describes the project, allocates risks in this risk-prone activity, and provides methods for resolving the seemingly inevitable disputes. If contracts provide the structure that informs us of the rights and duties of the participants, standard construction contracts are the substructure of the construction project and the industry.

Were each contracting party to negotiate all the terms of its contracts, the transaction costs would be wildly excessive and crucial elements of clarity and consistency endangered. For these reasons and others we shall see, construction could not function efficiently without the use of standardized construction contracts. In America as elsewhere, these prototype contracts are prepared by professional and trade associations.

In an earlier article I defined, described, and analyzed standard construction contracts. In preparing that article I thought about the failure of the academic world to pay attention to this important method of making contracts. In this article I will back up my conclusions, give reasons for this lacuna in basic contract law as taught in the law schools, and offer methods by which basic contract law courses can give proper recognition to this important method of making contracts.

Classifications
In my earlier article, I described the different categories of standard contracts: form contracts (made from prepared contract structures such as contracts to purchase a car or obtain a consumer loan), association contracts (issued by professional and trade associations, such as the American Institute of Architects), and industry contracts (prepared for those in a particular industry, such as master agreements drafted by the International Swap and Derivatives Association).

But I noted that construction standard contracts, though resembling adhesion contracts, are quite different. Because their lack of recognition in the academic world is traceable to the adhesion concept, I will discuss it here.

Adhesion Contracts
The adhesion contract concept, a staple in the casebook world, has been a prime mover in relegating standard construction contracts to at best an obscure footnote in the academic world. The recognition of the adhesion contract as an alternative to the negotiated contract owes much to the pioneering 1943 paper by Professor Friedrich Kessler. Kessler used the insurance and transportation contracts as the focus of the "take it or leave it" paradigm. But soon the adhesion model was extended to all contracts.

By the time I started teaching contract law years ago, we all recognized that most contracts are made using a prototype printed contract developed by one party, as a rule the party with the bargaining power to control the nonindividual terms, and sometimes even them. The control was reflected in standardized "terms and conditions" that were not bargained out, that limited or even destroyed the risk of the stronger party and expanded the exposure of the weaker party that was presented the terms on a "take it or leave it" basis. Enforcing such contracts, if they can be called contracts, gave quasi-legislative power to the stronger party.

Adhesion contracts were printed, were prepared in advance for use in many thousands or even millions of transactions, and often contained obscure and hard-to-understand language. In this sense they resembled standard construction contracts. We shall see that this confusion hindered the development of academic inquiry into these standard contracts. Because they resemble adhesion contracts, the distinction between them was ignored.

Standard Construction Contracts
Before we proceed to the academic world, let me also define standard construction contracts. These are prototype contracts for design and construction, or both. They are put out by professional and trade associations as a service to their members, as a contribution to the construction industry and a basis to claim leadership in the industry. They seek to codify efficient established administrative practices, make fair allocation of risk, and avoid the huge
transaction costs of individual contracts. They are not required by law. But for a host of practical matters, mainly the cost of individual contracts, they are used in whole or major part, except for the individualized provisions (parties, time, and compensation) in most contracts for design and construction, or both.

The major standard contracts are created by the American Institute of Architects (AIA), the Engineers Joint Contract Documents Committee (EJCDC), and a newly formed industry committee (though not architects and engineers) made up of a large number of trade associations that have issued ConsensusDOCS. Now let us look at how these standard contracts are viewed by the academic world.

The Academic World

Academic Recognition of Standard Contracts

I have spent most of my professional career as a law teacher while also writing for the practical practitioners of construction law. This fusion of two worlds inevitably makes me think about where these two worlds intersect.

Academic recognition requires an analysis of where, if anywhere, standard construction contracts fit into mainstream contract law as taught in contract law courses. I exclude the 30 or so construction law seminars taught by practitioners, not regular faculty members. These seminars will likely look to the solutions found in the standard construction contracts and, on occasion but not often, how these standard contracts are made. I will concentrate on mainstream contract law courses. I will seek to answer these questions.

First, is the student exposed to solutions provided by standard construction contracts as compared to other sources of law, such as cases, restatements, statutes, and administrative regulations?

Second, if any reference is made to them, is the student made aware of how these standard contracts are made? This can be contrasted to other methods of making contract rules, such as private autonomy (freedom of contract), the common law (distilling rules from cases), legislation, and administrative regulations.

Construction Law Research

But there is another reason why I want to examine how standard construction contracts fit into the academic world. There is a serious paucity of research on construction law, of which standard contracts are an important component. Research usually comes out of the schools. If standard construction contracts do not rate much attention in the schools, we will not see the sorely needed research.

Standard construction contracts are important elements of construction law. We need to know more about them. Who makes them? How are they made? What is their function?

If serious research is to emerge, much of it will be generated by academics and students who believe the topic merits the efforts that serious research requires. This depends on the atmosphere in the schools. Unless the academics think the topic is worthy of study, we will not see much research. This is another reason why we must see how this is viewed in academia.

Contract Law Courses

Are students exposed to standard construction contracts in their contract law courses? We cannot peer into all the classrooms. Our next best choice is to see the casebooks that students are expected to read.

To determine whether standard construction contracts are part of mainstream contract law, I examined 10 contract law casebooks. Although there are many more out there, I think this a representative sample.

There was a promising beginning in the academic world. Let us look at Professor Fuller's Basic Contract Law, published in 1947. His first reference to association contracts came when he discussed the Battle of the Forms. He concluded his note on this problem by noting that the proper way to solve this problem was "to work out standard forms, fair to both sides, through trade associations representing buyers and sellers."

He gave as illustrations the Worth Street Rules and standard contracts made by the National Association of Purchasing Agents. Those made by the latter association dealt with coal purchases. A survey he made indicated that those that made these industry contracts were concerned that they could be attacked on antitrust grounds as it might be contended they restrained competition.

It is important to see where Fuller plugs these standard contracts into contract law. When he deals with changed circumstances, he makes reference to force majeure clauses for standard contracts made in 1929 "through a series of conferences between members of a joint committee of the National Coal Association and the National Association of Purchasing Agents."

Enforcing such contracts, if they can be called contracts, gave quasi-legislative power to the stronger party.

The eighth edition, published in 2006 and edited by Professor Melvin A. Eisenberg, my colleague in Berkeley, deletes this reference and replaces it with a reference to a text of supplemental readings for the contracts course. That text includes the Uniform Commercial Code (UCC), federal and state statutes, regulations, international contract law, and sample contracts. Some of the sample
contracts are the most important AIA Documents, A101-2007, A102-2007, A201-2007, and A312-1984. These comprise 38 pages of very fine print. It is unlikely that students will ever read them unless a teacher decides they are worth looking at, a rare likelihood. There is no discussion of how they are put together, something that was advertised to briefly in the original Fuller.

Fuller’s next reference deals with the doctrine of conditions, particularly conditions that empower third parties, such as architects and engineers, to make decisions, including when these conditions are excused. He refers to the condition of a certificate issued by the architect and when that condition is excused. Then he quotes at length sections dealing with disputes of the 1937 edition of what became A201, the General Conditions of the Contract. Before quoting them, he notes the eight associations that had approved the contract. These are not included in the eighth edition of Fuller.

Next Fuller refers to the Worth Street Rules, Standard Cotton Textile Salesnote Revision of April 17, 1941. These dealt with the sale of unfinished cloth that comes off the loom. It was adopted by 13 trade associations that dealt with textiles. Fuller inserted this reference into the material dealing with altering performance, in this case the credit term. He states that the standard text notes would “give the parties a more certain guide for their conduct than is provided by judicial decisions.”

I point to these early attempts to recognize the role of trade associations for a number of reasons. Fuller cites them to deal with issues of contract law, such as conflicting forms on purchase orders and sales invoices, and the various issues that deal with performance, such as the doctrine of conditions. He sees the advantages of making vague common law rules more specific by recognizing industry usages. He also makes clear that these standard contracts created by associations can simulate future individual contracting parties. This is an early recognition of what I will later describe as surrogate bargaining.

Next we must look at the casebook of Harold Havighurst, a casebook largely forgotten these days and used rarely even in its heyday. In his 1934 introduction to his first edition quoted in the second edition, he states that the organization of his casebook would be grouped by subject matter, not doctrines. I thought this would be promising as chapter VI was “Building and Construction.”

His introduction notes that for private building, the AIA “supplies forms which are used very extensively.” He quotes AIA publications that state it “sought an equal need of fair treatment and protection.” He continues, lawyers are seldom used and modifications are rare.

He quotes AIA language dealing with changes, changed conditions, the status of the architect, the payment process, termination, delays, and fire insurance. Certainly a student using Havighurst will be aware of these standard contracts. But as I have noted, this was not a leading casebook.

The casebooks of Professor Ian Macneill do show an interest in prototype contracts, such as those of AIA. He discusses them in the context of his special contributions to contract law scholarship, the need to differentiate discrete transactions from relationships, and his focus on planning in contracts.

In his 1971 edition, Macneill quotes the work of Johnstone and Hopson on the history of AIA contracts. Macneill makes the important distinction between these contracts and adhesion contracts, a point I have made. He quotes liberally from AIA documents and follows the work of Fuller on the Worth Street Rules. These early casebooks show that the world of standard contracts made by associations has not been entirely ignored in the teaching of contract law. But that was a generation ago.

But here we must be careful. Fuller and his successors were leading contract casebooks. After 1996 this material was deleted for space reasons. Deletions are often the result of getting rid of something in which the author has little interest and that can be sacrificed. Even before the material was deleted, my impression is that the editors and likely users had little interest in exploring it with the students in the classroom. It is easy to delete material that is usually ignored. It seems clear that Fuller’s successors lacked Fuller’s interest in this method of making contracts.

The 1986 edition of Kessler does recognize the difference between adhesion contracts and contracts made by trade associations. It follows Fuller and gives as illustrations the coal contracts and the Worth Street Rules.

Except for a brief reference to Professor Macaulay’s remark that some contracts are made by industry trade associations, there is nothing in Farnsworth that deals with standard construction contracts despite a textual note on construction contracts. Nor is there anything in Calamari, Scott, Murray, Speidel, or Knapp.

To sum up, after a promising beginning in the mid-20th century, there is little in current casebooks on these standard contracts. To make the situation worse, except for Fuller, those casebooks that did mention standard construction contracts were not strong market performers. Yet even in the few books that placed a hesitant foot in the water by references to trade associations, we see almost nothing of how these contracts are put together.

Another source for this conclusion was based on an informal survey of contract law teachers in Berkeley. Although most noted the existence of these prototype contracts for many transactions, most conceded that they spent little time analyzing them.
Let me conclude on a personal note. My almost half a lifetime of teaching contract law and using many casebooks has persuaded me that students in mainstream contracts courses are not going to be exposed to either the solutions provided by standard industry contracts nor the process by which they are made. Why is this so?

Reasons for Orphan Status

Much of this lack of scholarly interest is traceable to the methods law schools use to gather a staff. Young teachers, particularly at the national and top-ranked state schools, are recruited from the Ivy League schools. These recruits increasingly have advanced degrees and, as a rule, have been clerks to outstanding judges. Most have not had any practical law firm experience. They are not particularly the case in the United States. This is not the case in the United States. I attribute this to the method by which American law schools select their faculty. Now let us look at the literature.

With the exception of more practice-oriented journals such as The Construction Lawyer, construction law articles are rare in American legal literature. This is particularly the case in the journals considered more prestigious by academics, usually edited by students. I make this assertion based upon the research needed for the eight editions of my Legal Aspects of Architecture, Engineering and the Construction Process.25

Why the scarcity of construction law research by American academics? It is certainly meager when compared to the literature in the UK, other common law countries, and the continent. It is through the literature that teachers, especially those who write texts and casebooks, and students become acquainted with construction law.

Construction law lacks the trendiness of politics, race, gender, and government regulation. This is, in my opinion, the reason for it being largely absent from the literature. Why is what is found in the classroom important?

The academic literature is referred to in the casebooks and classroom. When the literature ignores construction law and a fortiori standard construction contracts, it is unlikely that students will be exposed to standard construction contracts.

Danger in Orphan Status

But why should the academic world pay more attention? Contracts for design and construction are too important to be ignored both in their own right and as illustrations of industry contracts. I need not tote up the dollars spent on these activities, their effect on the economy, and their sheer number. These are well known.

We must distinguish standard construction contracts from adhesion contracts. Professor Perillo has pointed to this, distinguishing true adhesion contracts from what he calls "neutral standard forms."26 Perillo noted that numerous such "standard forms, developed by organizations, are currently employed by business lawyers and businesses for transactions between businesses."27 They are too important to be ignored.

Increasingly contract law directs its attention to how contracts are put together. The vast expansion of the adhesion doctrine and the focus on consumer protection demonstrates that contracts are rarely made by two farmers bargaining over their boundary fence. Another illustration of the need to focus on the contract-making process is the impact of high-technology on the making of contracts.28

That this method of making prototype contracts by private associations is used pervasively in the commercial world shows that they are worthy of study and academic recognition. They deserve an academic spotlight.

To sum up, after a promising beginning in the mid-20th century, there is little in current casebooks on these standard contracts.

Slowly it is being given limited academic recognition by the increasing number of seminars and courses in construction law.29 This reflects the willingness of the bar to teach what they believe is important and the realization by students that such courses will help them in practice. It also shows student interest in this increasingly recognized body of law. But it is only a beginning. We need more recognition in the basic contract law courses.

There is another reason to recognize this method of making contracts. It can provide a good tool for making comparisons, a staple of contract law teaching. Majority rules are compared to minority rules. Teachers who employ a comparative approach often cite European civil codes to compare them to the American law. Teachers compare the common law to the Uniform Commercial Code. It would be valuable to compare the American common law on specific issues with the solutions provided by the standard construction contracts. Just as the UCC emphasizes practical concerns, the standard construction
contracts seek to reflect common, accepted solutions to real problems. Standard construction contracts add another tool to the rule-comparison technique.

Where It Fits Into Contract Law Courses

It would not be difficult to fold this material into a traditional contracts casebook. The material as to how they are made by professional and trade associations can be included where adhesion contracts are discussed. This would show the important distinction between them.

The outcomes provided for by standard construction contracts would be usefully included when certain issues are discussed, such as unforeseen circumstances and force majeure clauses. They also can be inserted at the material where alternative dispute resolution is taught, such as arbitration. The waiver of consequential damages often done on construction standard contracts can be linked to contract damages. Clearly the risk allocation provided by standard contract documents could be used as an approach to many common law rules and other contractual risk allocation.

Standard Construction Contracts Deserve More Attention

The construction project, with its linked set of contracts between many participants and its complexity, could not survive today without standard construction contracts. Yet we know so little about them.

In my earlier article I described standard construction contracts, show how they differ from adhesion contracts, how they are made, how they are selected, how they allocate risk, and how they should be interpreted. I also have noted the increased legislative incursions into the common law.

Important as they are, standard construction contracts are, at best, orphans in the teaching of contract law. They deserve to be full family members.

Endnotes

1. Much of this introduction has been adapted from an earlier paper that I wrote for the International Construction Law Review. See J. Sweet, Standard Construction Contracts in the USA, 28 Int'l Constr. L. Rev. (forthcoming 2011).


5. Lon L. Fuller, Basic Contract Law 178-80 (1st ed. 1947).

6. Id. at 180.

7. Id. at 684.


9. Id. at 569-607.

10. Fuller, supra note 5, at 807-09.

11. Id. at 925.

12. Id.

13. See Havighurst, supra note 4, at v. References will be made to the second edition as I could not find the first. I am assuming that the two editions were similar in covering standard construction contracts.

14. Id. at 309.

15. Id.

16. Id. at 329, 336, 369-70, 371-72, 403, 416.


18. Id. at 591-94 (quoting Quintin Johnstone & Dan Hopsion Jr., Lawyers and Their Work (1967)).

19. Id. at 281-83.

20. As I have noted, Macneil had a genuine interest in this process. But Macnell's casebook did not have the popularity of Fuller's. It was used rarely in the schools. His approach was more successful in continental Europe. I doubt that many students were exposed to his sharp, critical thinking. The long time between editions (1971, 1978, and 2002) demonstrates this. The same can be said about Havighurst even more so. The early ventures into standard construction contracts were not followed by other casebooks still on the market.


22. Farnsworth, supra note 4, at 190. The only reference to AIA documents is found in a case included that noted that the bond was a standard form of bid bond as promulgated by the AIA, Id. at 139.

23. Id. at 137.


25. My coeditor of the seventh and eighth editions was Marc M. Schneier.


27. Id. In his examples he includes a master agreement drafted by the International Swap and Derivatives Association (ISDA) for nonfinancial terms. The ISDA includes 815 institutions of leading financial institutions, various end users of derivatives, and premier law firms. He also notes general terms and conditions made by a standard board for the sale of natural gas.


29. Allen L. Overcash, The Case for Construction Law Education, 29 Constr. Law 5 (Summer 2009); Lawrence C. Melton, What We Teach When We Teach Construction Law, 29 Constr. Law. 8 (Summer 2009).