



AMERICAN ARBITRATION ASSOCIATION®

# 2017 AAA® CONSTRUCTION CONFERENCE NAVIGATING THE UNIQUE ASPECTS OF CONSTRUCTION ARBITRATION

New York, NY | Thursday, June 22, 2017 | 8:00 AM – 5:00 PM



The American Arbitration Association (AAA) would like to thank the sponsors of the  
**2017 AAA Construction Conference: Navigating the Unique Aspects of Construction Arbitration**  
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**8:30 - 8:45**  
**Welcome & Introductions**

**Michael A. Marra**, Vice President, Construction Division,  
 American Arbitration Association





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**8:45 - 10:00**  
**How to Effectively Deal With the 300**  
**Change Order Dispute – Who Controls**  
**the Process?**

**Adrian Bastianelli**, Peckar & Abramson, P.C.; Washington, DC

**Neal Eiseman**, Goetz Fitzpatrick LLP; New York, NY

**Karen Layng**, Chief Strategic Officer and General Counsel,  
Scheck Industries; Westmont, IL

**Wendy K. Venoit**, Hinckley Allen; Boston, MA



# CONTROL OF THE PROCESS



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## THE 300 CHANGE ORDER DISPUTE

- ▶ Who controls the process?
- ▶ How does the arbitrator gain and maintain control?



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## THE PREHEARING CONFERENCE



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## THE 300 CHANGE ORDER DISPUTE

- ▶ How important is the prehearing conference?
- ▶ How important is the meet and confer prior to the prehearing conference?
- ▶ Should the prehearing conference be in person?
- ▶ Should the principals be required to attend the prehearing conference?



## JOINDER



## THE 300 CHANGE ORDER DISPUTE

- ▶ How should joinder be handled?
- ▶ What happens if multiple parties are joined?
- ▶ How does the arbitrator maintain control when the number of parties multiply?



## STATEMENT OF CLAIMS AND DEFENSES



## THE 300 CHANGE ORDER DISPUTE

- ▶ What should be included in the statement of claim and defenses?
- ▶ Why is this important?



## MOTIONS



## THE 300 CHANGE ORDER DISPUTE

- ▶ Can change orders be disposed of by motions or are motions a waste of time and money?
- ▶ Should a party be required to first demonstrate the likelihood of success before filing a motion?
- ▶ Will a limited hearing of evidence allow for the disposal of change orders on a motion?
- ▶ Are stipulations a waste of time?
- ▶ Should the parties submit prehearing briefs?



## THE SPREADSHEET





## THE 300 CHANGE ORDER DISPUTE

### How can the arbitrator keep track of all of the change orders?

- ▶ Tracking by change order number – Establish a system
- ▶ The Excel spreadsheet
  - Change order number
  - Change order name
  - Exhibits applicable to change order
  - Dollar claimed
  - Respondent dollar amount if lose
  - Short statement of entitlement
  - Short statement of defenses



## THE HEARING



## THE 300 CHANGE ORDER DISPUTE

- ▶ How can the hearings be streamlined?
- ▶ Is it possible to fully try each change order separately and what are the benefits?
- ▶ Can similar change orders be grouped for separate hearings?
- ▶ Will bifurcation of liability and quantum work?



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## THE 300 CHANGE ORDER DISPUTE

- ▶ Should a time clock be used?
- ▶ Should witness statements be used?
- ▶ Can deposition transcripts or affidavits be substituted in lieu of live testimony?
- ▶ Can speaking stipulations be effective?



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# EXHIBITS



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## THE 300 CHANGE ORDER DISPUTE

- ▶ How should exhibits be handled?
- ▶ Should exhibits be grouped by change order or in date order?
- ▶ What is the advantage of the electronic presentation of exhibits?
- ▶ How can a list of facts for each change help?



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# DAMAGES



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## THE 300 CHANGE ORDER DISPUTE

- ▶ How should damages be handled?
- ▶ Can stipulations work?
- ▶ Should there be an audit?
- ▶ Should Respondent be required to make an alternative presentation of damages assuming it does not prevail on liability?



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# EXPERTS



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## THE 300 CHANGE ORDER DISPUTE

- ▶ How should experts be handled?
- ▶ Should witness statements be used?
- ▶ Will hot-tubbing work?



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# ATTORNEYS' FEES



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## THE 300 CHANGE ORDER DISPUTE

- ▶ How should attorneys' fees be handled?
- ▶ Did both parties request attorneys' fees?
- ▶ Does the clam need to be presented on a claim by claim basis?



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# THE AWARD



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## THE 300 CHANGE ORDER DISPUTE

- ▶ How do the arbitrators reach and draft an award?
- ▶ What are the problems with a reasoned award?
- ▶ How can the difficulties with drafting a reasoned award be simplified?
- ▶ At the end of the hearing, what kind of presentation do the arbitrators need from the parties?



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*Questions?*



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**10:00 - 10:15**  
**Break**







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## 10:15 - 11:30 Global Construction Disputes – Don't Get Left Behind

**Roy Cooper**, Senior Vice President, Arcadis

**David McPherson**, Managing Partner, Watt TieDer

**Luis Enrique Graham**, Partner, Hogan Lovells

**Charles Juliana**, Vice President & General Counsel, IPS



## GLOBAL CONSTRUCTION DISPUTES – DON'T GET LEFT BEHIND

- ▶ Why International Arbitration?
- ▶ What are the Rules?
- ▶ Unique Aspects of Construction Arbitration in Latin America
- ▶ Arbitration is Complete, Award in Hand – What's Next?



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## GLOBAL CONSTRUCTION DISPUTES – THE 2016 TRENDS

### The Global Construction Disputes Report

For the seventh year, Arcadis has taken an in-depth, data-driven review of disputes globally in 2016 and focused on five key areas:

- ▶ common causes;
- ▶ average value;
- ▶ typical length of dispute;
- ▶ most popular resolution methods; and
- ▶ regional nuances.



Those findings are summarized in Arcadis' **Global Construction Disputes Report**.



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## GLOBAL CONSTRUCTION DISPUTES – THE 2016 TRENDS

### Overall Results of the Global Construction Disputes Report

- ▶ The global average value of disputes was \$46 million.
- ▶ The global average length of disputes decreased from last year from was 15.5 months to 1 year and 2.3 months.

REGION	DISPUTE VALUES (US\$ MILLIONS)						LENGTH OF DISPUTE (MONTHS)					
	2011	2012	2013	2014	2015	2016	2011	2012	2013	2014	2015	2016
Middle East	112.5	65	40.9	76.7	82	56	9	14.6	13.9	15.1	15.2	13.7
Asia	53.1	39.7	41.9	85.6	67	84	12.4	14.3	14	12	19.5	14.6
North America	10.5	9	34.3	29.6	25	21	14.4	11.9	13.7	16.2	13.5	15.6
UK	10.2	27	27.9	27	25	34	8.7	12.9	7.9	10	10.7	12
Continental Europe	35.1	25	27.5	38.3	25	19	11.7	6	6.5	18	18.5	14.1
GLOBAL AVERAGE	32.2	31.7	32.1	51	46	46	10.6	12.8	11.8	13.2	15.5	14.3



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## GLOBAL CONSTRUCTION DISPUTES – THE 2016 TRENDS

Poor Contract Administration remains the #1 Cause of Disputes!

- ▶ Failure to properly administer the contract remained at the top reason for construction disputes.
- ▶ Moving up this year in the rankings was the issue of the employer, contractor, or subcontractor failing to understand and/or to comply with contractual obligations.

2016 RANK	CAUSE	2015 RANK
1	Failure to properly administer the contract	1
2	Poorly drafted or incomplete and unsubstantiated claims	2
3	Employer/contractor/subcontractor failing to understand and/or comply with its contractual obligations	5
4	Errors and/or omissions in the Contract Document	3
5	Incomplete design information or employer requirements (for Design and Build and D&C)	4



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## GLOBAL CONSTRUCTION DISPUTES – THE 2016 TRENDS

North American Results

- ▶ The value of disputes in North America dropped slightly in 2016. The time taken to resolve these disputes in the region increased by over 2 months in 2016.

	DISPUTE VALUES (US\$ MILLIONS)						LENGTH OF DISPUTE (MONTHS)					
	2011	2012	2013	2014	2015	2016	2011	2012	2013	2014	2015	2016
North America	10.5	9	34.3	29.6	25	21	14.4	11.9	13.7	16.2	13.5	15.6

- ▶ For the third year running, the most common cause for disputes in North America during 2016 was errors and/or omissions in the contract documentation.

2016 RANK	CAUSE	2015 RANK
1	Errors and/or omissions in the contract document	1
2	Poorly drafted or incomplete/unsubstantiated claims	New
3	Failure to properly administer the contract	2



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**AAA MODEL RULES FOR INTERNATIONAL  
DISPUTE RESOLUTION PROCEDURES  
VS.  
NEW ICC RULES EFFECTIVE MARCH 1, 2017**  
David McPherson, *Managing Partner, Watt Tieder*



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**INTERNATIONAL CONSTRUCTION DISPUTES PRIMARILY ARBITRATED**

International Centre for Dispute Resolution (ICDR)

- ▶ International Dispute Resolution Procedures  
*Effective July 1, 2016*

International Chamber of Commerce (ICC)

- ▶ Arbitration Rules of the Arbitration Court  
*Effective March 1, 2017*



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## COMMONALITIES BETWEEN ICDR AND ICC RULES

- ▶ Agreement to Arbitrate
- ▶ Request or Demand for Arbitration
- ▶ Request and/or Counterclaim
- ▶ Reply to Counterclaim
- ▶ Appointment of Arbitral Tribunal
- ▶ Preparing Case and Submission of Evidence
- ▶ Post-Hearing Submissions
- ▶ Issuance of Award
- ▶ Occasional Request for Corrections/Modifications to Award



## THE DIFFERENCES – INITIATING THE ARBITRATION

### ICDR

- ▶ Written Notice Or Online ([www.icdr.org](http://www.icdr.org))
- ▶ Arbitration Commenced When Administrator Receives Notice of Arbitration
- ▶ 30 Day Response Time (Art. 3)

### ICC

- ▶ File At ICC Offices (1 Of 3) (Art 4.2)
- ▶ Arbitration Commenced When Received By The ICC Secretariat
- ▶ Tribunal Often Appointed And Confirmed Prior To Filing All Initial Pleadings
- ▶ 30 Days Response Time



## THE DIFFERENCES – MEDIATION

### ICDR

- ▶ Following Submission Of An Answer, Administrator May Invite Parties To Mediate (Art. 5)
- ▶ ICDR Has International Mediation Rules
- ▶ Parties May Agree To Mediate At Any Time

### ICC

- ▶ No Mention Of Mediation



## THE DIFFERENCES – JOINDER

### ICDR

- ▶ Joinder Allowed after Appointment of any Arbitrator if agreed to by all Parties and Arbitrator (Art. 7.1)

### ICC

- ▶ No Joinder after Appointment of any Arbitrator (Art 7.1)



## THE DIFFERENCES – AMENDING OR SUPPLEMENTING CLAIMS

### ICDR

- ▶ Any Party may Amend a Claim or Defense unless Tribunal Finds Such Amendment Inappropriate (Art. 9)
  - Prejudice to other Party
  - Timing?

### ICC

- ▶ Not Allowed (Very Difficult) after Terms of Reference



## THE DIFFERENCES – ESTABLISHMENT OF THE TRIBUNAL

### ICDR

- ▶ Absent Agreement on Procedure, “*ICDR List Method*” Used (Art 12.6)
- ▶ 45 Days after Commencement → Procedure to Select or Selection (Art. 12.3)
  - Administrator May Appoint
- ▶ Absent Agreement on Number Of Arbitrators, Administrator Has Discretion to require 1 or 3 Arbitrators (Art. 11)

### ICC

- ▶ No List of Qualified Construction Arbitrators
- ▶ Common → Each Side Appoints 1 Panelist and they select 3<sup>rd</sup> (Art. 12.5)
  - 30 Days To Challenge (Art. 14.2)
  - Reasoned Decision Allowed (NEW – Art. 11.4)
- ▶ Failure To Agree On Panel Selection Procedure: Court Appoints
- ▶ President Of Tribunal Different Nationality (Art. 13.5)



## THE DIFFERENCES – ICC TERMS OF REFERENCE

- ▶ Unique To ICC
- ▶ Must Identify All Claims and Counterclaims and List of Issues to be decided (Art. 23.1 (c) & (d))
- ▶ Must be Concluded within 30 Days from Filing Case with Tribunal (Art 23.2)
  - Prior to March 2017 Amendment = 60 Days
- ▶ No New Claim made without Tribunal approval
  - Amending Terms requires Agreement of Parties = Difficult/Impossible
- ▶ Tribunal to Issue Award within 6 Months
  - Regularly Extended
  
- ▶ Criticized = Defining issues at very start of process



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## THE DIFFERENCES – DISCOVERY

### ICDR

- ▶ Tribunal Has Final Authority (Art. 21.2)
- ▶ Tribunal Manages Discovery with Following Objectives:
  - Maintain Efficiency and Economy;
  - Avoid Unnecessary Delay/Expense;
  - Avoid Surprise;
  - Assure Equality of Treatment; and
  - Safeguard Opportunity to Present Claims/Defenses Fairly (Art. 21.1)
- ▶ Exchange all Documents that will be used at trial (Art. 21.3)
- ▶ eDiscovery = Produce in Most Convenient/Economical (Art 21.6)
  - Parties may apply for native format
  - Searched must be "*As Economical As Possible*"
  - Testing is mentioned to focus and limit eDiscovery
  - Depositions/Written Discovery "*Generally Not Appropriate*" (Art 21.10)



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## THE DIFFERENCES – DISCOVERY

### ICC

- ▶ Rules do not provide for Discovery
- ▶ Parties may apply for “Additional Evidence” (Art 25.5)
  - Interpreted to require Parties to provide Documents in Possession
  - Parties typically required to:
    - Identify Documents to Review;
    - Why Documents cannot be accessed from other sources; and
    - Why Documents are needed
- ▶ No Rules to control expense and process



## THE DIFFERENCES – WITNESSES AT THE HEARING

### ICDR

- ▶ Tribunal determines manner in which witnesses are examined and who shall be present during Examination (Art 23.3)
- ▶ “*Evidence May Be Presented In The Form Of Written Statements*” (Art 23.4)
  - Option for Direct Examination?

### ICC

- ▶ All Direct Testimony submitted prior to Hearing
- ▶ Statement of Claim and Statement of Defense
  - Detailed Submission with Factual and Legal Argument
  - Supported by Witness Statements and Expert Reports
  - Scott Schedule for Construction Cases
- ▶ Cross-Examine Witnesses and Provide Oral Argument



## THE DIFFERENCES – EXPERTS AT THE HEARING

### ICDR

- ▶ Tribunal “*May Appoint One or More Independent Experts*” (Art 25.1)
- ▶ Parties May Respond to Report In Writing
- ▶ Parties May Cross-Examine Independent and Present Their Own Expert

### ICC

- ▶ Tribunal Is Free To Appoint Its Own Expert, But It Is Rare
- ▶ Expert Reports Are Submitted With Party’s Case
- ▶ Common For Tribunal To Require “Hot-Tubbing”
  - Sometimes Joint Report Prepared By Experts Prior to Hot-Tubbing



## THE DIFFERENCES – ICC EXPEDITED PROCEDURE

### ICC

- ▶ Brand New Concept
- ▶ Arbitration Agreements after March 1, 2017
- ▶ Amount in Dispute less than \$2,000,000 or by Agreement
- ▶ Court Has Discretion to Appoint Sole Arbitrator With/Without Input
- ▶ No Terms of Reference
- ▶ CMC Within 15 Days and Award Within 6 Months Of CMC
- ▶ Tribunal Has Discretion to Prohibit Discovery, Limiting Witnesses and Other Actions to Assure Expedited Award



## THE DIFFERENCES – AWARD

### ICDR

- ▶ 60 Days Following Closing of Hearing (Art 30.1)
  - Further Submissions Allowed (Art 27.1)
    - As a Matter of Course?
- ▶ Reasoned Award (Art 30.1)

### ICC

- ▶ 6 Months from Terms of Reference (Art 31.1)
  - Often Extended
- ▶ Usually Quite Detailed



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## UNIQUE ASPECTS OF CONSTRUCTION ARBITRATION IN LATIN AMERICA

Luis Enrique Graham, *Partner, Hogan Lovells*

June 2017



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1. Arbitration in the Construction Industry
2. Who are the parties to Construction Arbitration Procedures?
3. Distinctive Features in Latin America
4. Enforcement Issues: Awards contrary to public policy
5. Judicial Assistance in Latin America
6. Conclusions



# ARBITRATION IN THE CONSTRUCTION INDUSTRY



## ARBITRATION IN THE CONSTRUCTION INDUSTRY

- ▶ Latin America:  
Construction arbitration is focused on infrastructure projects
- ▶ United States and Europe:  
Construction arbitration is focused on both, private and private projects.



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## WHO ARE THE PARTIES TO A CONSTRUCTION ARBITRATION PROCEEDING?



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## WHO ARE THE PARTIES TO A CONSTRUCTION ARBITRATION PROCEDURE?



A. State v. Private disputes

B. Disputes derived from EPC Contracts



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## DISTINCTIVE FEATURES OF CONSTRUCTION ARBITRATION IN LATIN AMERICA



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## DISTINCTIVE FEATURES OF CONSTRUCTION ARBITRATION IN LATIN AMERICA

1. Massive Amounts of Data
2. Critical use of experts
  - Experts often define the outcome of the case
3. Use of a special arbitration clause
  - Technical issue: expert opinion
  - Legal issue: arbitration



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## DISTINCTIVE FEATURES OF CONSTRUCTION ARBITRATION IN LATIN AMERICA


4. Lack of Regulation and Case Law
5. Use of Foreign Contract Templates
  - Use of foreign agreements and concepts not contemplated by the applicable law
  - E.g. *best efforts*, *consequential losses*, *punitive damages*, etc.
6. Diverse Arbitral Tribunals
7. Always Institutional Arbitrations



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# ENFORCEMENT ISSUES: AWARDS CONTRARY TO PUBLIC POLICY



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## ENFORCEMENT ISSUES: AWARDS CONTRARY TO PUBLIC POLICY

The Mexican Supreme Court established that awards are contrary to public policy when:

They incur in severe deviations from fundamental notions of procedural justice

The issues placed before a court are beyond the limits of that policy.



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## ENFORCEMENT ISSUES: AWARDS CONTRARY TO PUBLIC POLICY

In addition, the award can be set aside if the arbitrator's interpretation of the law is *manifestly unfair or incorrect*.

- ▶ This unfair or incorrect interpretation would be contrary to public policy.
- ▶ Resembles the "manifest disregard of the law" doctrine in the US.



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## JUDICIAL ASSISTANCE IN LATIN AMERICA



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#### Arbitral Letter:

- ▶ Aimed to facilitate the communication between arbitrators and courts
- ▶ Allows the tribunal to turn to a court to carry out the enforcement



#### Challenge of the Award:

- ▶ The final award may be reviewed by national courts.
- ▶ The parties cannot waive their right to challenge an award contrary to law.



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## TAKE-AWAYS



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1. Construction arbitration in Latin America is mainly focused on infrastructure projects

2. Disputes usually arise between State and private actors

3. There is a tendency to use a special arbitration clause that differentiates technical from legal issues

4. The use of experts is often critical in defining the case

5. The use of foreign legal concepts is a common complication for the decision of the case

6. There are particular enforcement issues when the award is analyzed under the public policy concept



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## SO YOU WON – NOW WHAT?

Charles N. Juliana, *VP and General Counsel,*  
*IPS-Integrated Project Services, LLC*  
June 2017



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## GLOBAL CONSTRUCTION DISPUTES – DON'T GET LEFT BEHIND

Arbitration is Complete  
CHECK



Award in Hand  
CHECK

Now What?



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## GLOBAL CONSTRUCTION DISPUTES – DON'T GET LEFT BEHIND

### The New York Convention

- ▶ Provides an international framework for the enforcement of both the arbitration agreement and the resulting award
- ▶ Provides arbitral awards are unenforceable if:
  - Illegal underlying agreement or process infirmities
  - The scope of the arbitration submission was exceeded
  - The subject matter of the dispute is not capable of settlement by arbitration under the law of the country
  - Enforcement would violate public policy



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## THE 1958 UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (“THE NEW YORK CONVENTION”)

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”.

UN Convention, Article III



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## INTERESTING DEVELOPMENTS

### China

- ▶ Chinese Court Enforces a Foreign Judgment For The First Time on the Basis of Reciprocity

### India

- ▶ Enforceability of Foreign Arbitration Awards in India: Diminishing The Gap Between Pre BALCO and Post BALCO Regime?

### Others

- ▶ What Might Changes to the UAE Penal Code Mean for Arbitrators and Expert Witnesses?



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# Questions?



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## 11:30 - 12:30 Changes to the 2017 AIA Documents and Potential Impacts on Dispute Resolution

**Kenneth Cobleigh, Esq., Managing Director,  
AIA Contract Documents Content**

**Howard Goldberg, Esq., Goldberg & Banks, P.C.**



# 2017 AIA CONTRACT DOCUMENTS RELEASE



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## 2017 RELEASE: PROCESS

- ▶ Roundtable discussions with industry representatives.
- ▶ Review of materials published by other industry stakeholder associations and related contract terms and issues.
- ▶ Sought guidance from several AIA knowledge communities,
- ▶ Sought comments from groups representing industry stakeholder interests and prominent attorneys representing industry stakeholders.
- ▶ Iterative revise/review/comment/revise process

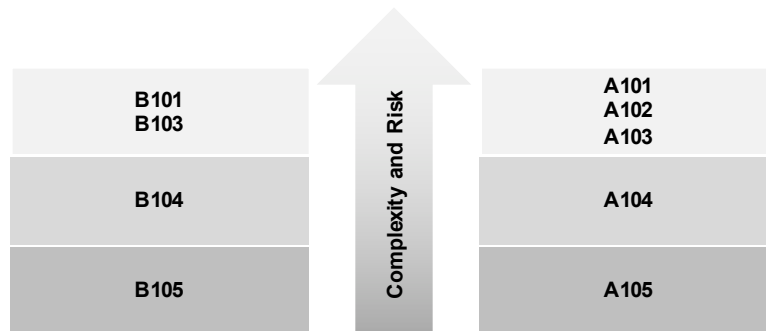


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## PROJECT RISK TOLERANCE AND COMPLEXITY

Balance project complexity and need for contract protection



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## INSURANCE: WHY AN EXHIBIT

- ▶ Changing range and types of coverage
- ▶ Flexibility in developing Project insurance requirements
- ▶ Need to allow for adaptation to changes in the insurance market w/o edits to A201
- ▶ Facilitate transmission to insurance advisors/brokers
- ▶ Exhibit for 2014 Design-Build documents



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## INSURANCE: THE EXHIBIT

- ▶ Separate (but identical) Exhibit for A101, A102 and A103
- ▶ Key terms of Exhibit and Article 11 of A201 written into A104
- ▶ A105 contains very basic insurance provisions



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## INSURANCE: THE EXHIBIT

- ▶ Requires Owner or Contractor to obtain and maintain property insurance written on builder's risk "all-risk" completed value or equivalent policy form
- ▶ Begins from premise that Owner will obtain and maintain property insurance, but allow parties to shift burden to Contractor
- ▶ Sufficient to cover the value of the entire Project on a replacement cost basis
- ▶ And existing structure in case of renovation or remodeling
- ▶ Maintained until Substantial Completion and thereafter continued or replaced through the Contractor's one-year period for correction of the Work



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## INSURANCE: THE EXHIBIT

- ▶ Must include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors—and the interests of mortgagees as loss payees
- ▶ Owner assumes financial responsibility for any loss not covered because of deductibles or self-insured retentions



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## INSURANCE: THE EXHIBIT

In addition, the parties may agree that the Owner will purchase and maintain certain optional extended property coverages:

- ▶ Loss of Use, Business Interruption, and Delay in Completion Insurance
- ▶ Ordinance or Law Insurance
- ▶ Expediting Cost Insurance
- ▶ Extra Expense Insurance
- ▶ Civil Authority Insurance
- ▶ Ingress/Egress Insurance
- ▶ Soft Costs Insurance



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## INSURANCE: THE EXHIBIT

The parties may also agree that the Owner will purchase and maintain certain other optional coverages:

- ▶ cyber security insurance
- ▶ other potential Owner coverages



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## INSURANCE: THE EXHIBIT

Contractor Required Coverages for all Projects:

- ▶ Commercial General Liability
- ▶ Automobile liability
- ▶ Worker's Compensation
- ▶ Employer's liability



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## INSURANCE: THE EXHIBIT

Contractor Required Coverages depending on the nature of the Project:

- ▶ Jones Act and Longshore & Harbor Worker's Compensation
- ▶ Professional Liability
- ▶ Pollution liability coverage
- ▶ Maritime Liability
- ▶ Coverage for use or operation of manned or unmanned aircraft



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## INSURANCE: THE EXHIBIT

Other coverages the Contractor might obtain:

- ▶ Railroad Protective liability
- ▶ Asbestos Abatement liability
- ▶ Coverage for physical damage to property while in storage or transit
- ▶ Property coverage for property owned by the Contractor and used on the Project
  
- ▶ Payment and Performance Bonds



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## INSURANCE: A201 ARTICLE 11

- ▶ Owner and Contractor must provide each other with notice of an impending or actual cancellation or expiration of coverage
- ▶ Notice provided within 3 business days of the date the party becomes aware
- ▶ Party receiving notice has the right to stop the Work until lapse cured – unless lapse caused by that party



## INSURANCE: A201 ARTICLE 11

New provisions on adjustment and settlement of loss covered by property insurance:

- ▶ Loss adjusted by and payable to the Owner as fiduciary
- ▶ Prior to settlement Owner notifies Contractor of proposed settlement and proposed allocation of proceeds
- ▶ Contractor has 14 days to object
- ▶ If Contractor does not object, the Owner settles and Contractor bound by settlement and allocation
- ▶ If Contractor timely objects, Owner may proceed to settle the loss and dispute between Owner and Contractor is resolved per the Claims and Disputes provisions



## INSURANCE: KEY TAKEAWAY

Exhibit allows parties to develop project specific owner and contractor insurance requirements

If parties simply want the standard coverages historically required by A201, they simply need ignore optional coverage sections and fill in required policy limits/sub-limits and penal sums for bonds.



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## TERMINATION FEE PROVISIONS

- ▶ AIA documents have allowed Owner to terminate for convenience
- ▶ Contractor and Subs were entitled to “reasonable overhead and profit on work not executed”
- ▶ Architect and Consultants were entitled to “anticipated profit on the value of services not performed”



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## TERMINATION FEE PROVISIONS

- ▶ Owners often deleted OH and P entitlement provisions
- ▶ Other industry groups moved away from entitlement to OH&P



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## TERMINATION FEE PROVISIONS

2017 Documents:

- ▶ Owner-Contractor, Owner-Architect, and Architect-Consultant agreements eliminate automatic entitlement to OH&P and prompt parties to discuss and negotiate a termination fee
- ▶ A401 retains entitlement to OH&P on unperformed Work
- ▶ Nothing prevents Contractor and Sub from negotiating a termination fee in lieu of arguing over lost OH&P calculation



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## TERMINATION FOR CONVENIENCE (§7.1.1 AND A201 §14.4.3)

§7.1.1 If the Contract is terminated for the Owner's convenience in accordance with Article 14 Document A201-2017, the then Owner shall pay the Contractor a termination fee as follows:

*(Insert the amount of or method of determining the fee, if any, payable to the Contractor following a termination for the Owner's convenience.)*



## RETAINAGE (§5.1.7.1)

**§ 5.1.7.1** For each progress payment ~~amount determined in accordance with Section 5.1.6 made prior to Substantial Completion of the Work, the Owner may withhold the following amount, as retainage, from the payment otherwise due:~~ *(Insert a percentage or amount to be withheld as retainage from each Application for Payment. The amount of retainage may be limited by governing law.)*

**§ 5.1.7.1.1** The following items are not subject to retainage: *(Insert any items not subject to the withholding of retainage, such as general conditions, insurance, etc.)*

**§ 5.1.7.2** ~~Reduction or limitation of retainage, if any, shall be further as follows:~~ *(If the retainage established in Section 5.1.7.1 is to be modified under the following circumstances: prior to Substantial Completion of the entire Work, including modifications for Substantial Completion of portions of the Work as provided in Section 3.3.2, insert provisions for such modifications.)*

**§ 5.1** ~~Add 7.3 Except as set forth in this Section 5.1.7.3, upon Substantial Completion of the Work, a sum sufficient to increase the total payments to Contractor may submit an Application for Payment that includes the full amount of the Contract Sum, less such amounts as the Architect shall determine for incomplete Work, retainage applicable to such work and unsettled claims; and withheld from prior Applications for Payment pursuant to this Section 5.1.7. The Application for Payment submitted at Substantial Completion shall not include retainage as follows: (Section 9.8.5 of AIA Document A201-2007 requires (Insert any other conditions for release of applicable retainage upon Substantial Completion of Work with consent of surety, if any.)~~

~~2~~ Add, if





## NOTICE (§§1.6, 3.7.4, AND 13.3)

**§ 1.6.1** Except as otherwise provided in Section 1.6.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by electronic transmission if a method for electronic transmission is set forth in the Agreement.



## OWNER'S FINANCIAL ARRANGEMENTS (§2.2.) (CONTINUED)

**§ 2.2.2** Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract only if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor's request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.

**§ 2.2.3** After the Owner furnishes evidence of financial arrangements under this Section 2.2, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.



## CONTRACTOR'S RESPONSIBILITIES IF MEANS/METHODS ARE SPECIFIED (§3.3.1.)

- § 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract, ~~unless the Contract Documents give other specific instructions concerning these matters.~~ If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, the Contractor shall evaluate the jobsite safety thereof and, ~~except as stated below,~~ shall be ~~fully and~~ solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely ~~written~~ notice to the Owner and Architect, and shall ~~not proceed with that portion of the Work without further written instructions from the Architect.~~ ~~If the Contractor is then instructed to proceed with the required propose alternative means, methods, techniques, sequences, or procedures without acceptance of changes.~~ ~~The Architect shall evaluate the proposed by the Contractor, the Owner shall be alternative solely responsible for any loss or damage arising solely from those Owner required conformance with the design intent for the completed construction. Unless the Architect objects to the Contractor's proposed alternative, the Contractor shall perform the Work using its alternative means, methods, techniques, sequences, or procedures.~~



## CONTRACTOR'S CONSTRUCTION SCHEDULES (§3.10.1.)

### § 3.10 Contractor's Construction and Submittal Schedules

- § 3.10.1 The Contractor, promptly after being awarded the Contract, shall ~~prepare and~~ submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall ~~contain detail appropriate for the Project, including (1) the date of commencement of the Work, interim schedule milestone dates, and the date of Substantial Completion; (2) an apportionment of the Work by construction activity; and (3) the time required for completion of each portion of the Work. The schedule shall provide for the orderly progression of the Work to completion and shall not exceed time limits current under the Contract Documents.~~ ~~The schedule shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.~~



## CONTRACTOR'S DESIGN RESPONSIBILITY (§3.12.10.)

§ 3.12.10.1 If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by ~~a properly an appropriately~~ licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional. Shop Drawings, and other submittals related to the Work, designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architects. The Owner and the Architect shall be entitled to rely upon the adequacy, and accuracy and completeness of the services, certifications, and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor all the performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review, and approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. ~~The Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents.~~

§ 3.12.10.2 If the Contract Documents require the Contractor's design professional to certify that the Work has been performed in accordance with the design criteria, the Contractor shall furnish such certifications to the Architect at the time and in the form specified by the Architect.



## COMMUNICATIONS BETWEEN OWNER AND CONTRACTOR (§4.2.4.)

### § 4.2.4 Communications ~~Facilitating Contract Administration~~

~~Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the~~ The Owner and Contractor shall endeavor ~~to~~ include the Architect in all communications that relate to communicate with each other through or affect the Architect's services or professional responsibilities. The Owner shall promptly notify the Architect ~~about matters arising out of or the substance of any direct communications between the Owner and the Contractor otherwise~~ relating to the Contract Project. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and ~~material~~ suppliers shall be through the Contractor. Communications by and with separate contractors Separate Contractors shall be through the Owner. The Contract Documents may specify other communication protocols.



## MINOR CHANGES IN THE WORK (§7.4.)

### § 7.4 Minor Change in the Work

The Architect ~~has authority to may~~ order minor changes in the Work that are consistent with the intent of the Contract Documents and do not involving involve an adjustment in the Contract Sum or an extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such. The Architect's order for minor changes shall be in writing. If the Contractor believes that the proposed minor change in the Work will be effected by written order signed by affect the Contract Sum or Contract Time, the Contractor shall notify the Architect and shall be binding on the Owner and Contractor. not proceed to implement the change in the Work. If the Contractor performs the Work set forth in the Architect's order for a minor change without prior notice to the Architect that such change will affect the Contract Sum or Contract Time, the Contractor waives any adjustment to the Contract Sum or extension of the Contract Time.



## SCHEDULE OF VALUES (§9.2.)

### § 9.2 Schedule of Values

Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit a schedule of values to the Architect, before the first Application for Payment, ~~a schedule of values~~ allocating the entire Contract Sum to the various portions of the Work and. The schedule of values shall be prepared in such the form, and supported by such the data to substantiate its accuracy as, required by the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment. Any changes to the schedule of values shall be submitted to the Architect and supported by such data to substantiate its accuracy as the Architect may require, and unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's subsequent Applications for Payment.



## REMOVING LIEN CLAIMS (§9.6.8.)

**§ 9.6.8** Provided the Owner has fulfilled its payment obligations under the Contract Documents, the Contractor shall defend and indemnify the Owner from all loss, liability, damage or expense, including reasonable attorney's fees and litigation expenses, arising out of any lien claim or other claim for payment by any Subcontractor or supplier of any tier. Upon receipt of notice of a lien claim or other claim for payment, the Owner shall notify the Contractor. If approved by the applicable court, when required, the Contractor may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.



## SUBSTANTIAL COMPLETION AND CLAIMS ARISING BEFORE AND SUBSEQUENT TO SUBSTANTIAL COMPLETION (§§9.8 AND 15.1.7.)

**§ 15.1.3.2** Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party. In such event, no decision by the Initial Decision Maker is required.



## LIQUIDATED DAMAGES (§15.1.1)

### § 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.



## RIGHT TO DEMAND IMMEDIATE MEDIATION AND ARBITRATION (15.3.3.)

§ 15.3.3 Either party may, within 30 days from the date that mediation has been concluded without resolution of the dispute or 60 days after mediation has been demanded without resolution of the dispute, demand in writing that the other party file for binding dispute resolution. If such a demand is made and the party receiving the demand fails to file for binding dispute resolution within 60 days after receipt thereof, then both parties waive their rights to binding dispute resolution proceedings with respect to the initial decision.



### DESIGN BUILD COMPONENTS – 3.6.4.3.

§ 3.6.4.3 If the Contract Documents specifically require the Contractor to provide professional design services or certifications by a design professional related to systems, materials, or equipment, the Architect shall specify the appropriate performance and design criteria that such services must satisfy. The Architect shall review and take appropriate action on Shop Drawings and other submittals related to the Work designed or certified by the Contractor's design professional retained by, provided the Contractor that submittals bear such professional's seal and signature when submitted to the Architect. The Architect's review shall be for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect shall be entitled to rely upon, and shall not be responsible for, the adequacy, and accuracy and completeness of the services, certifications, and approvals performed or provided by such design professionals.



### SUSTAINABLE PROJECTS DOCUMENTS HISTORY

- ▶ 2007 Owner-Architect Agreements contained very basic references and requirements
- ▶ D503-2011 Guide for Sustainable Projects
- ▶ 2013 SP versions of Design-Bid-Build (A201), CM as Constructor, and CM as Advisor documents
- ▶ 2014 SP exhibit for Design-Build



## E204-2017: SUSTAINABLE PROJECTS EXHIBIT

- ▶ Single document sets forth roles and responsibilities for each Project participant as they relate to unique elements of sustainable design and construction
- ▶ Once Owner determines project will involve a Sustainable Objective, E204 is incorporated into the Owner-Architect and Owner-Contractor agreements and as appropriate into each of the other Project related agreements
- ▶ Establishes a comprehensive process for identifying, developing, and assigning responsibility for sustainable design and construction elements (similar to that outlined in D503 and preceding SP documents)



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## E204-2017: SUSTAINABLE PROJECTS EXHIBIT

- ▶ Sustainable Objective
- ▶ Sustainability Workshop
- ▶ Sustainability Plan
- ▶ Sustainable Measures
- ▶ Other issues unique to Sustainable Projects

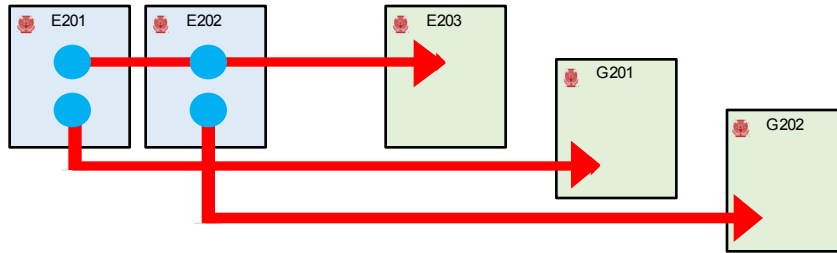


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### UPDATED DIGITAL DOCUMENTS



### AIA DIGITAL PRACTICE DOCUMENTS

#### Agreement + E203

#### Protocols – G201 and G202



## BIM AND OTHER DIGITAL DATA

- ▶ 2017 Agreements require the parties to agree on protocols governing the use and transmission of digital data, and
- ▶ Require the use of E203, G201 and G202 to establish those protocols
- ▶ With respect to BIM, the 2017 agreements further provide that any use of, or reliance on, information contained in a Model, without first having established the protocols, is at the using or relying party's own risk and without liability to any other project participant



## BIM AND OTHER DIGITAL DATA

- ▶ A201-2017 section 3.11 clarifies that the Contractor can maintain Contract Documents, Change Orders, Construction Change Directives and other Modifications at the site in electronic format
- ▶ A201-2017 also addressed the issue of Notice in electronic format



## OTHER RESOURCES

- ▶ A503
- ▶ B503
- ▶ Comparatives
- ▶ A201 Commentary
- ▶ B101 Commentary
- ▶ Articles
- ▶ Webinars and seminars
- ▶ ABA Forum on Construction Law (Fall 2017)



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# OBTAINING AND USING AIA CONTRACT DOCUMENTS



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## FORMATS AND PRICE RANGES



Paper

Agreements  
\$9.99 – \$24.99  
Forms \$49.99/50



Basic Single Document

\$29.99 / Agreement  
\$9.99/ Form



ACD5- Custom Single Document

Agreements  
\$59.99 – \$79.99  
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ACD5- Unlimited

\$949.99, AIA member price  
\$1,199.99, non AIA  
member price



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## CONTACT

### Questions about AIA document content:

Email: [docinfo@aia.org](mailto:docinfo@aia.org)

Tel.: (202) 626-7526

Web: [www.aia.org/contractdocs/reference](http://www.aia.org/contractdocs/reference)

### Questions about AIA document products/ ACD5:

Email: [docstechsupport@aia.org](mailto:docstechsupport@aia.org)

Tel.: (800) 942-7732



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*Questions?*



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**12:30 - 1:30**  
**Lunch**



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**1:30 - 2:45**  
**The Best Defense is a Good Offense –**  
**Keys to Claims Prevention and**  
**Mitigation**

**William K. “Bill” Andrews**, Andrews Myers, P.C.; Houston, TX

**L. Wearen Hughes**, Bass, Berry & Sims PLC; Nashville, TN

**Dr. Anamaria I. Popescu, P.E, PMP, PSP**, Berkeley Research Group; Pine, CO

**Frank J. Baltz**, Senior Vice President & Chief Legal Officer, Clark Construction Group, LLC; Bethesda, MD



## OBJECTIVES

- ▶ Typical Project Disputes that End up in Arbitration
- ▶ Best Practices to Avoid and Resolve Project Disputes
- ▶ Best Practices in Arbitration
- ▶ Concluding Remarks
- ▶ Q&A



## TYPICAL PROJECT DISPUTES THAT END UP IN ARBITRATION

- ▶ **Scope Definition/Change Orders**
- ▶ **Multiple BAFOs During Contractor Selection**
- ▶ **Improper Risk Allocation In Contract Language**
- ▶ **Lack Of Site Access and Permits**
- ▶ **Delay/Time Extension/Acceleration**
- ▶ **Cumulative Impact Claims**
- ▶ **Productivity Loss/Disruption**
- ▶ **Design Issues**
- ▶ **Unforeseen Site Conditions/Differing Site Conditions**
- ▶ **Lack Of Qualified Project Team Members**
- ▶ **Workmanship/Quality Issues**
- ▶ **Roles Not Clearly Defined In JV Partnerships**
- ▶ **Late Submission of Drawings/Multiple "Holds" On Drawings**
- ▶ **Turnover in Project Team**
- ▶ **Delayed Submittal Reviews and Late RFI Responses**
- ▶ **Substantial Completion/Final Completion Certificates**



## BEST PRACTICES TO AVOID AND RESOLVE PROJECT DISPUTES

### **Contract Risk Review Joint Session**

- ▶ Beginning of Project
- ▶ Owner, Contractor, Designer
- ▶ Partnering Program
- ▶ Agree to Make Contractual Amendments if “Grey Areas” Discovered
  
- ▶ Questions to Ask:
  - Who Leads it?
  - What is Covered in Session?



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## THE 300 CHANGE ORDER DISPUTE

### **Development and Maintenance of an Issue Database**

- ▶ Background and Implementation
- ▶ Integration into Monthly Reports
- ▶ Cause and Effect Nexus
- ▶ Record Content Linked to Cost and Schedule Data
- ▶ Death by 1,000 Cuts Concept
- ▶ Well Prepared for Arbitration if “Goes All the Way”
- ▶ Best “Proof” in Cumulative Impact Claims



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## BEST PRACTICES TO AVOID AND RESOLVE PROJECT DISPUTES

### Development and Maintenance of an Issue Database

Doc Date	Doc Type	Excerpt (relevant text)	Major Area	Issue Category
12-Aug-14	Weekly Engineering Report	Mechanical: The following documents are under BP review and comments have not been received by Technip. Late comments are delaying documents included in priority requisition packages delaying procurement from issuing packages for bid/re-bid. HP & LP Vent Tips Data Sheet - holding up engineering progress	Topside	Late Client Responses/Approvals/Info
12-Aug-14	Weekly Engineering Report	As indicated before to BP, please provide the detailed vendor drawings for the UTA/SDU/CDU by no later than September 19 to avoid delays to the EPCI schedule. HPU dimensions were needed by 15 August, now overdue.	Subsea	Late issuance of Engineering
12-Aug-14	Weekly Engineering Report	BP will need to obtain licenses from Trinidad and Tobago Government for the microwave frequencies.	All	Regulatory Non-Compliance
12-Aug-14	Weekly Engineering Report	New GSH engineer is revising deliverables and rearranging schedule to better suit GSH needs. Alignment needed between GSH/Marlycia/project. Changes to deliverables/schedule need to come through project designated contact points.	Subsea	Drawing or Layout Revisions/Changes
12-Aug-14	Weekly Engineering Report	TP is requesting a deviation from the current 26" riser coating lengths in Design Basis. The coating length could be decreased if DNV-OS-F101 criteria are used, from the current 65 ft to 17.1 ft. If a safety factor of 2 on DNV length is used, the coating requirement would be ~ half of the current 65 ft. BP to determine if this is acceptable.	Subsea	Drawing or Layout Revisions/Changes



## BEST PRACTICES TO AVOID AND RESOLVE PROJECT DISPUTES

### Development and Maintenance of an Issue Database

Issue Category	Apr. - 15	Aug. - 14	Sep. - 14	Oct. - 14	Nov. - 14	Dec. - 14	Jan. - 15	Feb. - 15	Mar. - 15	Grand Total
Acceleration	1								1	2
Deficient Drawings/Design/Plans/Errors				1	2	2		3	1	9
Drawing or Layout Revisions/Changes		2		8	4		3			17
Labor Issues								1		1
Lack of Manpower/Skilled labor									1	1
Lack of Material	3				1	3	3	4	3	17
Late Client Responses/Approvals/Info		6	3	1			2			12
Late issuance of Engineering	1	2	4	10	4	1	8	4	1	35
Management			2	1				4	2	9
Productivity Issues						1				1
Regulatory Non-Compliance		4								4
Site Maintenance/Safety Issues				1		1				2
Strikes	2						2			4
Subcontractor Issues								1		1
Weather					1	1				2
<b>Grand Total</b>	<b>7</b>	<b>14</b>	<b>9</b>	<b>22</b>	<b>12</b>	<b>9</b>	<b>18</b>	<b>17</b>	<b>9</b>	<b>117</b>

Contractor Issue

Owner Issue



## BEST PRACTICES TO AVOID AND RESOLVE PROJECT DISPUTES

### Notice and Claim Preservation:

- ▶ Present in a Non-threatening Way
- ▶ Set a Precedent Early on
- ▶ Contractual Language can be too Onerous on Notice Provisions
- ▶ Reservation of Rights Clearly Stated (Or Cumulative Impact Claims Can Be Invalid)
- ▶ Create a "Notice Template Form"
- ▶ Can There Be Such a Thing as "Excessive Notice"?
- ▶ Initial Presentation of "Bad News" Via Phone Call Vs. Letter-Don't Blindside the Other Side
- ▶ How Do Arbitrators View These Notice Provisions and Lack of Compliance?
- ▶ E.g. California Statute- "Reasonable and Just" (CAL CIV Code 1511)



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## Best Practices to Avoid And Resolve Project Disputes

### Schedule Integrity and Management

- ▶ Schedule Characteristics for Credible Analysis
- ▶ Diligence Must not Stop after Baseline is Accepted
- ▶ Schedule Updates Are Contractual Too!
- ▶ Obligation of Both the Owner and Contractor
- ▶ Variance Analysis to Identify Delay on a Consistent Basis
- ▶ Manage by Exception: Pareto Principle
- ▶ A Claim Whose Foundation is Focused on Delay Damages Ultimately Relies on Convincing the Arbitrator of 4 Elements (In This Order):
  1. The Schedule Baseline and Updates are Credible
  2. The Critical Path is Valid
  3. Impacts Affected the Critical Path (e.g. Causation Analysis Valid)
  4. Responsibility Assignment is Accurate



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## BEST PRACTICES TO AVOID AND RESOLVE PROJECT DISPUTES

### Change Order Management

- ▶ Implement a Well Defined Change Management Process with Responsibilities
- ▶ Track Changes, Show impact in Schedule and EAC
- ▶ Settle in Discrete packages
- ▶ No More than 30 days Between Submittal and Final Decision- "Fish or Cut Bait Mentality"
- ▶ Create Separate WBS Code, Cost Code & Schedule Activity
- ▶ Use Contract Management Software to Organize & Manage
- ▶ **Do** Capture Both the Cost and Schedule Impact or Indicate "Unknown at This Time" and Reserve Rights
- ▶ **Do** Clearly State the Origin (Root Cause) of the Change
- ▶ **Do** Attach the Appropriate Supporting Documentation
- ▶ **Do Not** Group Multiple Change Order Requests into 1 CO
- ▶ **Do Not** Mix Pricing Structure in the Same CO



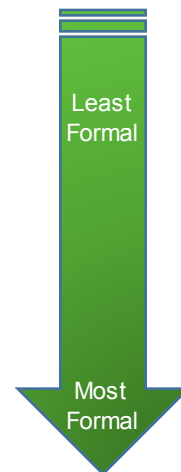
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## BEST PRACTICES TO AVOID AND RESOLVE PROJECT DISPUTES

### Establish a Precedence of Dispute Resolution Forums on the Project

- ▶ Integrated Planning Session with Contractor/Owner
- ▶ Phone Call Prior to Formal Letter: No Blindsiding
- ▶ Informal/Impromptu Project Meetings
- ▶ Scheduled Weekly/Monthly Progress Meetings
- ▶ Meetings of Party Representatives not Directly Involved in Project
- ▶ Independent Expert (e.g. Project Neutral, IDM, Judge) to Decide Claims
- ▶ Dispute Review Board (Periodic)
- ▶ Dispute Review Board (ad-hoc)
- ▶ Meetings Including In-House or Outside Counsel
- ▶ Mediation
- ▶ Arbitration



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## BEST PRACTICES TO AVOID AND RESOLVE PROJECT DISPUTES

### Best Practices at Arbitration

- ▶ Delay, Productivity Loss and Cumulative Impact Claims
- ▶ Make Sure an Issue/Claims List Exists
- ▶ Don't Throw the Kitchen Sink Into It
- ▶ Have Good Documentation to Back Up Claims-Cause and Effect Nexus Clearly Established
- ▶ Avoid the "Shot Gun" Approach (e.g. Total Cost Claims)



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## BEST PRACTICES TO AVOID AND RESOLVE PROJECT DISPUTES

- ▶ Contract Risk Review Joint Session
- ▶ Notice and Claim Preservation
- ▶ Issue Database
- ▶ Schedule Integrity and Management
- ▶ Change Order Management
- ▶ Dispute Resolution Forums on the Project
- ▶ Best Practices at Arbitration




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**QUESTIONS?**



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***Thank you***





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**2:45 - 3:00**  
**Break**



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**3:00 - 4:00**  
**How Do We Get the War Stories if**  
**We're Never Allowed to Go to Battle?**

John E. Bulman, Pierce Atwood LLP

Jeffrey Cruz, Skanska USA Building Inc.

Brianna E. Kostecka, King & Spalding

Tamara J. Lindsay, MWH Constructors



## INTRODUCTION – WHY THIS TOPIC?

- ▶ Dichotomy between experience expected and experience in reality
- ▶ More settlements, less opportunities
- ▶ Judiciary is taking note; equally as important in arbitration



## WHAT CAN YOUNG LAWYERS DO?

### **Observe:**

- ▶ Anything and everything and as often as possible

### **Prepare:**

- ▶ Deposition outlines and binders, direct/cross examination outlines, hearing exhibits, etc.

### **Draft:**

- ▶ Document requests and objections, motions, briefs, etc.

### **Ask:**

- ▶ Request opportunities, advocate for yourself



## WHAT CAN SEASONED LAWYERS DO?

### Encourage Observation

- ▶ Observation time counted towards billable hours

### Provide Opportunities

- ▶ Get out from behind desks and “on their feet”

### Take Advantage of a Young Lawyer’s Knowledge

- ▶ Associates who have been entrenched in document review and brief writing will know the case and the documents better than anyone.

### Provide Feedback

- ▶ Discussions about lessons learned



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## THE ARBITRATION PROCESS

### Phases where young lawyer participation CAN increase

- ▶ Client Contact Generally
- ▶ Administrative Conference
- ▶ Beyond just being a “potted plant”
- ▶ Arbitrator Selection
- ▶ Active participation and discussion with client and internally



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## THE ARBITRATION PROCESS (CONT'D)

### Information Exchange

- ▶ Prepare witnesses for fact and expert depositions; take and defend depositions; argue motions; attend and participate in procedural hearings

### Expert Reports

- ▶ Direct communication with experts on reports and revisions; involvement in meetings with experts

### Pre-Hearing Brief

- ▶ Themes, strategy, point person



## THE ARBITRATION PROCESS (CONT'D)

### Hearings (obvious)

- ▶ Second chair;
- ▶ Prepare witnesses for testimony;
- ▶ Conduct direct and cross examinations;
- ▶ Deliver portions of opening and closing statements;
- ▶ Argue motions



## THE ARBITRATION PROCESS (CONT'D)

### Hearings (less obvious)

- ▶ Arbitrators
  - Include second chairs in conferences
  - Invite young attorney to address point
  - Witness exam split
- ▶ Advocates
  - Process less formal
  - Argue discrete motions
  - Compare notes – did I miss anything?
  - Split witnesses (see above)



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## THE ARBITRATION PROCESS (CONT'D)

### Post-Hearing Submissions

- ▶ Submissions and Proposed Awards
- ▶ Enforcement/Vacator of Award



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## WHAT CAN ARBITRATORS DO?

- ▶ Will arbitrators mimic the judiciary?
- ▶ Encourage the parties to have their young lawyers participate in the arbitration beyond the work done behind a computer screen
- ▶ Be forgiving of mistakes made by young lawyers on their feet (where possible)
- ▶ Provide feedback



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*Questions?*





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**4:00 - 5:00**  
**Minimizing Risks of Ethical Dilemmas  
at Arbitration**

**Ethical Considerations for Counsel in  
Construction Arbitration**

**Albert Bates, Jr.**, Pepper Hamilton, LLP

**William G. Frey**, Gibbons P.C.

**Larry D. Harris**, The Law Offices of Larry D. Harris

**Tonya L. Johannsen**, The Beck Group



**OVERVIEW OF ETHICAL CONSIDERATIONS FOR COUNSEL IN  
CONSTRUCTION ARBITRATION**

1. Summary of Sources of Ethical Obligations of Counsel Representing Parties in Arbitration Proceedings
2. Series of Fact Patterns and Learning Points



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## SOURCES OF ETHICAL OBLIGATIONS OF COUNSEL REPRESENTING PARTIES IN ARBITRATION PROCEEDINGS

1. Applicable Rules of Professional Conduct
2. The Arbitration Agreement
3. Rules of the Arbitral Institution
4. Federal or State Laws, Court Rules, or Regulations
  - Examples include:
    - a) Unauthorized Practice of Law
    - b) Governing Law
    - c) Governing Regulations
5. Rules of the Seat and Other Applicable Ethical Rules



## LEARNING POINT: THE ETHICS RULES APPLY TO ARBITRATION – MODEL RULE 1.0(M)

**"Tribunal"** denotes a court, **an arbitrator in a binding arbitration proceeding** or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.



## Learning Point: Authority of Arbitrator to Enforce the Rules – AAA Construction Rule 25

The arbitrator “**shall have the authority to issue any orders necessary to enforce the provisions of rules R-23 and R-24**”...and “**to otherwise achieve a fair, efficient and economical resolution of the case...**,” including the following:

- ▶ **allocating costs** of producing the information
- ▶ If “**willful non-compliance with an order...**”
  - Adverse inference
  - Exclude evidence
  - Award costs arising from non-compliance
  - Any other orders permitted under applicable law



## LEARNING POINT: ARBITRATORS MAY ORDER SANCTIONS – AAA CONSTRUCTION RULE 60

The arbitrator “**may, upon a party’s request, order appropriate sanctions** where a party fails to comply with its obligation under these rules or with an order of the arbitrator”

With certain procedural safeguards, an arbitrator may enter **non-monetary** sanctions, including “limiting a party’s participation in the arbitration” or entering an “adverse determination of an issue or issues.”

An arbitrator may **NOT** enter a default award as a sanction.



## AVENUES TO RELIEF FOR BREACH OF ETHICAL OBLIGATIONS IN ARBITRATION

### Counsel/Party Ethical Breaches

- ▶ Seeking Relief from the Arbitrators
  - Sanction the Offending Party
  - Sanction Counsel
  - Award of Legal Fees/AAA Fees /Arbitrator Compensation
- ▶ Report to Appropriate Disciplinary Authority
- ▶ Seek Relief from a Court

Arbitrator Ethical Breaches – Report to AAA Potentially Disciplinary Authority



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## HYPOTHETICAL FACT PATTERNS AND LEARNING POINTS



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## FACT PATTERN 1: DELETING OR WITHHOLDING THE “SMOKING GUN” FROM PRODUCTION



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Lawyer suspects that Client has deleted or withheld from production “all” copies of the “smoking gun” evidence.

1. What are the obligations of the Lawyer to verify the existence of the document and/or the circumstances surrounding its deletion/destruction?
2. What are the obligations of the Lawyer if the client refuses to allow the production of the document?
3. Can the Lawyer ethically disclose to the Tribunal that her client destroyed the document?
4. Does it matter if your client is a foreign corporation that was not being advised by US counsel when the destruction occurred?



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## LEARNING POINT: MODEL RULE 3.4(A)

### Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or **conceal** a document or other material having potential evidentiary value. A lawyer shall not counsel or assist **another person** to do any such act;



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## LEARNING POINT: MODEL RULE 3.4(C)

### Fairness to Opposing Party and Counsel

A lawyer shall not:

(c) **knowingly** disobey an obligation under the rules of a **tribunal** except for an open refusal based on an assertion that no valid obligation exists;



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## LEARNING POINT: MODEL RULE 3.4(D)

### Fairness to Opposing Party and Counsel

A lawyer shall not:

(d) in pretrial procedure, make a frivolous discovery request or fail to make a **reasonably** diligent effort to comply with a legally proper discovery request by an opposing party;



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## LEARNING POINT: MODEL RULE 1.6

### Lawyer Confidentiality Obligations

**Base Premise** – (a) A lawyer **shall not** reveal information relating to the representation of a client unless the client gives **informed consent**.

**Exception** – (b) Lawyer **may** reveal information to the extent the lawyer reasonably believes necessary:

*(2) to prevent client from committing fraud that is “reasonably certain to result in substantial injury to the financial interests” of another and “in the furtherance of which the client has used the lawyer’s services.”*



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## LEARNING POINT: MODEL RULE 1.6

### Lawyer Confidentiality Obligations (cont.)

Exception – (b) Lawyer **may** reveal information to the extent the lawyer reasonably believes necessary:

(3) *to prevent “substantial injury to the financial interests” of another that is **reasonably certain to result** from the client's commission of “fraud in furtherance of which the client has used the lawyer's services”*

(6) “to comply with other law or a court order”



## LEARNING POINT: MODEL RULE 1.16

### Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;



## FACT PATTERN 2: CATASTROPHIC DESIGN ERROR



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Arbitration pending between Owner and Contractor for additional time and compensation for construction of office building. Contractor alleges changes as a result of poor design, and Owner alleges performance deficiencies by Contractor.

Owner engages an expert engineer to defend against the “poor design” claim. Expert finishes her expert report, concluding that performance deficiencies by Contractor lead to the delays. However, in preparing for the arbitration, Owner’s Expert uncovers a significant error in the Owner’s structural calculations for the roof system. She concludes that, under certain easily attainable load conditions, roof collapse is likely, creating imminent threat of death or severe bodily harm to office workers.



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Expert calls Owner's lawyer and advises her that the situation poses imminent safety, health and welfare risks to the workers. Counsel immediately notifies Owner of the issue.

Expert wants Counsel to immediately advise the tenants of the problem, and thinks that the problem is so serious that it should be reported to governing authorities immediately.

Owner refuses to consent to disclosing the issue to anyone, and advises Counsel that he will discuss the issue with the Owner's engineer, "who created this mess." Owner tells Expert and Counsel to focus on the issues in the arbitration instead of creating "new issues" or he'll fire both of them. Counsel directed to proceed to arbitration.

Owner's Counsel weighs her options and seeks your advice.



## QUESTIONS TO BE CONSIDERED

- ▶ **May** Counsel disclose this structural issue to the tenants? The authorities? To anyone?
- ▶ Are there any circumstances when Counsel must disclose the issue to the appropriate authorities?
- ▶ Does Owner's Counsel have any ethical duty to disclose the structural issue to the Tribunal? Opposing Counsel?
- ▶ Does the structural issue effect Counsel's presentation or otherwise implicate an ethical issue in the arbitration?
- ▶ Is the scope of the lawyer's representation of the Client relevant in any way to her ethical obligations?



## OTHER CONSIDERATIONS (BEYOND OUR FOCUS TODAY):

- ▶ Confidentiality Obligations of Expert to Client
- ▶ Legal and/or Ethical Obligations of the Engineering Expert
- ▶ Owner and/or Engineer's Duty to Warn
- ▶ Confidentiality of any "Peer review" Undertaken
- ▶ Nature and Extent of Disclosure Necessary
- ▶ Effect of Immediate Involvement of Insurance Carrier



## LEARNING POINT: MODEL RULE 1.6

### Lawyer Confidentiality Obligations

**Base Premise** – (a) A lawyer **shall not** reveal information relating to the representation of a client unless the client gives **informed consent**.

**Exception** – (b) Lawyer **may** reveal information to the extent the lawyer reasonably believes necessary:

- (1) "to prevent **reasonably certain** death or substantial bodily harm"



## FACT PATTERN 3: INTENTIONAL DELAY OF ARBITRATION



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Client advises lawyer has retained bankruptcy counsel to “explore its options.” Client directs lawyer to delay the arbitration proceeding as long as possible; ignore all deadlines; delay and delay.

Lawyer considers: commencing court proceedings challenging the existence of an agreement to arbitrate; raising jurisdictional objections in arbitration; delaying arbitrator selection; improper challenges to arbitrators; seeking joinder of additional parties; refusing to follow orders in respect of information exchange; refusing to make advance deposits to the AAA; requesting postponements; and, various other dilatory tactics.

What are the ethical obligations of the Lawyer if Client instructs her to seek to delay the proceedings as long as possible?



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## LEARNING POINT: MODEL 3.2

### Expediting Litigation

A lawyer shall make **reasonable** efforts to expedite litigation consistent with the interests of the client.

Model Rule 1.0(h) states “**reasonable**” ... “when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.”



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**5:00 - 5:15**  
**Closing Remarks**

**Michael Powell**, Vice President, Construction Division,  
American Arbitration Association



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**5:15**  
**Adjourn - Cocktail Reception**



A special thanks to



for hosting the cocktail reception at the 2017 AAA Construction Conference.

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