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The 2023 AAA® Construction Conference

# Effective dispute avoidance & resolution

throughout the project lifecycle

June 8, 2023

Hilton Santa Monica Hotel & Suites, Santa Monica, CA



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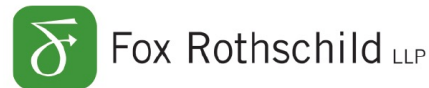
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**June 8, 2023**  
**1:45-2:45 PM**

# **Game Changer Takeaways in Construction Dispute Resolution**

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## **Session Moderator:**

**Rod Toben**, Vice President, Construction Division, American Arbitration Association

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## CONTRACT NEGOTIATIONS

- Substantive/Risk Allocation Terms
- Dispute Resolution Provisions
  - Litigation vs. Arbitration
  - Consider customized, non-binding or binding ADR provisions
  - What can be customized?
- AAA Clausebuilder



# CLAUSEBUILDER®

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ALTERNATIVE DISPUTE RESOLUTION  
**ClauseBuilder® Tool**

Welcome | Clause Type | Clause Options | Review

## Welcome

The American Arbitration Association's® ClauseBuilder tool is designed to assist individuals and organizations develop clear and effective arbitration and mediation agreements.

1. Choose the type of Clause
2. Customize clause to meet your needs
3. Review and Save clause

**Disclaimer**

This ClauseBuilder Tool is being provided for informational and educational purposes only. No legal advice is being given, and no attorney-client relationship is created by the use of the ClauseBuilder.

While the ClauseBuilder is intended to provide information about dispute resolution generally, you should not act or rely on the information contained in this website without first seeking the advice of an attorney.

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**THIS TOOL WILL ALLOW YOU TO:**

- ▶ Create Custom ADR Clauses
- ▶ Follow a Simple, Self-Guided Process
- ▶ Preview, Review, Edit and Download Clauses

ClauseBuilder is an easy-to-use online tool that allows users to build the clause that is right for them.

ClauseBuilder walks you through the process step-by-step starting with the nature of the contract and the desired dispute resolution process.

- Number of Arbitrators
- Arbitrator Qualifications
- Locale Provisions
- Governing Law
- Discovery
- And more.....

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## SMOOTH HANDOFF FROM NEGOTIATION TEAM TO PROJECT TEAM

- Hold a contract review session with negotiation and project teams
- Provide written summaries of key contract terms
- Ensure key project team players read and understand the contract



## ORGANIZE TEAM WITH A CONTRACT MATRIX

- Includes key clauses, who responds, and how to respond
- Role-based customization for each team member
- Color code: red, yellow, green
- Laminate and hang from each desk

Changes	
General	Must be in a signed writing or by change order or change directive. Out of scope work done without change order may not be paid.
Bases for Price Relief	<ol style="list-style-type: none"> <li>1. Postponement of Work Commencement Date.</li> <li>2. Change In Company Requirements.</li> <li>3. Cost Implications of decisions and determinations determined in arbitration.</li> <li>4. Unforeseeable Conditions.</li> <li>5. Pre-Existing Hazardous Substances.</li> <li>6. Dispute respecting procedure or scheduling related to coordinating with other contractors.</li> <li>7. "Any decision of the Project Manager or her/his designate(s)".</li> <li>8. Company approved Change to the Work.</li> <li>9. Majeure Force.</li> <li>10. Suspension of Work at one or more Work Locations ...</li> <li>11. Increased costs or delays resulting from Owner taking early possession or making early use of the Work.</li> <li>12. Dispute resolution.</li> <li>13. Delay due to Owner or its contractors.</li> <li>14. Cost of acceleration to make up for delays not caused by Contractor.</li> <li>15. Requirements contained in permits or approvals which are in addition to those in Exhibit [X].</li> <li>16. Postponement of Work Location Start Date.</li> </ol>
Bases for Schedule Relief	<ol style="list-style-type: none"> <li>1. Postponement of the Work Commencement Date for any drill rig or any Work Location Start Date.</li> <li>2. Force Majeure.</li> <li>3. Suspension of Work at one or more Work Locations.</li> <li>4. Increased costs or delays resulting from Owner's taking early possession or making early use of the Work.</li> <li>5. Dispute resolution.</li> <li>6. Delay due to Owner or its contractors.</li> </ol>
<b>Risk Allocation; Damages; Limitations of Liability</b>	
Warranties	
Performance Guarantees	
Force Majeure	Broadly defined to include, among other things, abnormally severe storms, washouts (not caused by construction activities), orders of court and other authorities, major labor disruptions (excluding lock-outs), and "any other causes . . ." by which a party "is rendered incapable, in whole or in part, of carrying out its obligations under the Contract . . ." Give verbal notice within 48 hours, and written notice and a plan of corrective action within 72 hours of the event of force majeure. The first 48 hours in the aggregate for one drill rig is non-compensable. After that Contractor gets standby and additional money for work required to restore damaged work. As to the effect on the schedule.
Unforeseeable Conditions	Time and money for "unforeseeable conditions", broadly defined to include historical, archeological or paleontological artifacts, geological conditions, undisclosed or improperly located utilities, man-made obstructions, Pre-Existing Hazardous Substances, and protected flora and fauna
Delay Damages	No LD's. Except for permitted delays, Contractor liable for any failure to complete the Work on time, which is of the essence.
Consequential Damages	Waived except 3rd party indemnity, gross negligence, illegal acts.
Limit of Liability	



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## PROJECT EXECUTION: BEFORE DISPUTES ARISE

- Document all project records
- Establish and use a document management system
  - Maintain complete files
  - Organize and store logically for efficient retrieval and compilation
- Maintain complete project schedule files
  - Do not delete or save over files
- Create an “issues file” when actual or potential change orders or claims arise
  - Maintain budget for potential claim exposure



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## PROJECT EXECUTION: AS DISPUTES ARISE

- Follow contract to assert, preserve, and perfect claims/defenses
  - Notice and change order provisions
  - Surety bonds and mechanics' liens
  - Dispute resolution provisions
- Contemporaneously document claims/positions with supporting data
  - Persuasive in dispute proceedings
  - Cost effective
- Know when and how to involve counsel
- Keep key project players close



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## DISPUTE RESOLUTION PROCEEDINGS: PREPARATION

- The Rules: learn it, know it, live it
- Properly prepare your witnesses
  - Objectivity is key
  - Avoid Perry Mason moments



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## DISPUTE RESOLUTION PROCEEDINGS: BEHAVIOR

- AAA Construction Rule R-60 Sanctions
- AAA Construction Rule R-48 (c) and (d) ((ii.)) Scope of Award
- AAA Construction Rule R-33 (c) Conduct of Proceedings



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## DISPUTE RESOLUTION PROCEEDINGS: MANAGING UP

- AAA Construction Rule R-33 (b) Conduct of Proceedings
- Recognize your Case
- Hot-Tubbing of Experts



- Grounds for Award Modification Requests
  - AAA Construction Rule R-51 Modification of Award
  - Type of modification: typographical, technical, or computational

# Questions?





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