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Construction Law

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Law and Practice

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1. GENERAL

1.1 Governing Law

Under the United States federal system, there is federal or national law and the laws of the 50 individual states. Commercial relations are principally governed by state law. Other than federal laws addressing specific federal policies, discussed below, there is no "national construction law" in the United States.

The Associated General Contractors of America (AGC) and the American Bar Association Forum on Construction Law (ABA), two large and respected national organisations create and annually update the online Construction State Law Matrix. This practice guide references the AGC/ABA Construction State Law Matrix throughout. The matrix can be found here: www.agc.org/industry-priorities/contracts-law/state-law-matrix. This matrix is a starting point for identifying and researching state construction laws; it is not a definitive statement of the law on any topic in any state.

There is substantial similarity across state laws, but each state has its own constitution and statutes, and common law governs both. Model uniform laws enacted by many or most states reinforce similarities across state laws. When federal law applies and it conflicts with the otherwise applicable state law, federal law controls.

1.2 Standard Contracts

Standard contract forms are frequently used in the construction industry in the United States. The use of standard forms on private projects is voluntary and not mandatory. Parties are free to draft their own contracts, with limited exceptions that the contract terms cannot violate the public policy of a particular state.

Government Contracts

On contracts with federal, state or local governments or involving public funding, the contract form or specific terms may be required by statute or regulation. The federal government, in particular, has extremely specific and detailed mandatory contract clauses that must be employed. Part 36 of the Federal Acquisition Regulation (FAR) regulates federal projects and prescribes policies and procedures unique to contracting for construction and architect-engineer services, and includes requirements for using certain clauses and standard forms that apply also to contracts for dismantling, demolition, or removal of improvements. Find these at www.acquisition.gov/far/part-36.

AIA Contract Forms

FIDIC standard contracts are generally not used on projects in the United States, but there is nothing prohibiting the use of FIDIC standard contracts by private parties. The American Institute of Architects (AIA) publishes the most commonly used standard construction and design form contracts at https://www.aiacontracts.org/. The AIA has a large variety of standard forms depending on the project delivery system, the relationship between the parties, including Owner-Contractor, Owner-Design-Builder, Contractor-Subcontractor, Owner-Architect, type of contract pricing, etc.

In the United States, the term "employer" is not used. Instead, the term most widely used in the United States, including in standard construction contracts is "owner", "project owner", or if the owner is a public entity, the "government". For consistency, the term "owner" rather than "employer" will be used throughout this practice guide.

ConsensusDocs Contract Forms

The standard construction contract forms published by ConsensusDocs at www.consensus-

docs.org/contracts/are the next most frequently used set of forms after those published by the AIA. ConsensusDocs was founded under the leadership of the AGC, the largest national construction trade organisation, along with 19 other construction organisations. ConsensusDocs also offers a complete library of forms to cover a wide range of construction transactions, similar to the AIA's offerings.

EJCDC and DBIA Standard Forms

Other standard forms are published by the Engineers Joint Contract Documents Committee (EJCDC) at www.ejcdc.org, and the Design-Build Institute of America (DBIA), https://dbia.org/contracts. EJCDC documents tend to focus on heavy civil and industrial construction, rather than building construction. The family of standard forms published by the DBIA obviously focuses on construction under a design-build delivery system.

1.3 COVID-19

The construction market was impacted by the COVID-19 pandemic in various ways, including, increased safety measures, work stoppages, shortage of skilled labour, and supply-chain disruption. However, most construction projects were considered "essential" and were able to continue construction through the year 2020.

The implementation of COVID-19 safety protocols on construction sites has resulted in contractors finding ways to incorporate potentially under-utilised resources or capabilities on a construction project, such as technology (Zoom meetings, enhanced imaging such as drones, and thermal imaging) and pre-fabrication, and modular construction. COVID-19 safety protocols have also resulted in contractors re-evaluating and implementing more efficient ways to plan, schedule, and execute construction activities. In many ways, the effects of COVID-19 safety protocols and measures implemented by contractors could lead to more efficient and cheaper construction projects going forward.

2. PARTIES

2.1 The Employer

In the United States, project owners are typically federal and state governments (public contracts), or private developers and builders (private contracts).

Owner's Responsibilities on Federal Projects

As noted in **1.2 Standard Contracts**, public contracts are subject to complex regulations established by federal and state governments including FAR Part 36. The government agency (such as the Army Corps of Engineers, the Department of Defense, or the Department of Agriculture) procures pre-qualified private contractors or design professionals to competitively bid on public contracts. The government agency may award the project based on a traditional sealed bid process or through a competitive negotiation process. Public owners have rights and obligations to disclose information, pay contractors, direct changes to the work, and enforce the contract in the event of a contractor default or if the work is defective or incomplete.

Owner's Responsibilities on Private Projects

On private contracts, project owners such as private developers, owner-builders, and private investors may contract with multiple parties to assist with construction activities, including lenders (financing the project), design professionals, and general contractors. A private owner's typical duties include managing financing, land acquisition, providing accurate site data (geotechnical data, utilities, surveying), paying design professionals and contractors, and interacting with local government agencies. Once construction is completed, a private owner may

operate and maintain the project/facility, or sell the project/facility to a new owner.

The standard industry contract forms set forth specific owner responsibilities including providing information to the contractor and the design professional, describing the work site (surveys, drawings, subsurface conditions); securing permits; and reserving the right to stop, suspend, or carry out the work (AIA Document A201 – 2017 § 2; ConsensusDocs 200 § 4 (2011, Revised 2019)).

2.2 The Contractor

The traditional method of contracting in the United States is a design-bid-build process in which the owner contracts separately for design and construction services. Under this method, a "general" contractor is hired by the project owner to build, manage, and oversee all aspects of construction from the start of construction through to completion, including providing the materials, labour, equipment and services necessary for construction.

General contractors are usually larger contractors with ample resources and manpower to oversee larger construction projects. During construction, general contractors work directly with the owner and the design professional and its subcontractors to schedule, plan and execute construction activities. On a day-to-day basis, general contractors are responsible for project safety, co-ordinating site access, monitoring schedules and managing subcontractors.

On public projects, a contractor is subject to more complex rights and obligations in performing its work. FAR Subpart 36.2, "Special Aspects of Contracting for Construction", sets out detailed regulations relating to labour, liquidated damages, and bonding requirements applicable to federal construction projects which would not be applicable on private projects.

2.3 The Subcontractors

Subcontractors, including speciality trade contractors, suppliers, and service providers, contract with the general contractor or other subcontractors to perform a specific scope of work. Subcontract agreements set forth the subcontractor's rights, obligations, scope of work, conditions of payment, and dispute resolution process. The industry standard contracts, including those supplied by ConsensusDocs and the AIA, have established a subcontractor series specific to subcontractors (ConsensusDocs 700 Series; AIA A401 (2017 ed)) which incorporate and consider important rights and terms unique to a subcontractor, including conditions of payment and "flow-down" clauses.

Flow-Down Clauses

"Flow-down" clauses require the subcontractor to agree to have the same rights and privileges in relation to the general contractor as the general contractor has to the owner. Such clauses are common in subcontract agreements as they ensure consistency between the owner/contractor and contractor/subcontractor agreements. See, for example, AIA Document A201 – 2017 § 5.3 and ConsensusDocs 200 § 5.2 (2011, Revised 2019). More information on subcontracting is addressed in **8.2 Subcontracting**.

2.4 The Financiers

Lenders, banks, government agencies, real estate investment trusts, or other special purpose investment vehicles ("lenders") regularly provide the financing to support construction projects. Owners enter into financing arrangements and contracts with lenders to receive financial support for the major components of construction such as land acquisition, design planning services (architect, engineer), and paying contractors.

A construction financing agreement sets forth the rights and terms between a lender and own-

er, including the lender's financing obligations, the terms of the loan, the collateral or guarantee obligations of the owner, schedule requirements, and conditions precedent to loan distributions. Although lenders are not involved with day-to-day construction activities, lenders may contract to have certain rights to approve qualified contractors, take over construction activities if the owner defaults, declare owner default, pay contractors and subcontractors, and accept project completion.

3. WORKS

3.1 Scope

Private and Public Contracts

On private contracts, the owner is responsible for determining the scope of the work for the construction contract. Owners typically engage a design professional and possibly other consultants to assist the owner and handle much of the detailed development of the scope of the work and to ensure that the scope of the work is complete and accurate to meet the needs of the project. On public contracts, heavy civil and infrastructure projects, larger government agencies, especially the federal government and state departments of transportation, are more likely to develop the scope of the work in-house. Governments, regardless of size and sophistication, will almost always engage an outside design professional for building construction scopes of work. Smaller government entities are more likely to engage outside resources to develop the scope of the work, regardless of the type of construction.

Building Construction

In building construction, the process will typically start with the development of the owner's programme of requirements, but ultimately result in detailed plans and specifications, unless design-build is used. For infrastructure projects, the process will typically start with the conceptual design, but also result in detailed plans and specifications, unless design-build is used. Even on design-bid-build projects, contract specifications often include at least some element of performance specifications, which require the contractor to "design-build". Performance specifications generally provide less specific information but give the desired result of the construction, and require the contractor to design that element of the work, subject to review and approval by the owner through its design professional.

3.2 Variations

Changes or variations, whether initiated by the owner or the contractor are typically addressed through the changes clause of a contract. A changes clause typically defines what constitutes a change, which party is entitled to request the change, notice requirements once a change is identified, practical steps involved in requesting and implementing a change, and procedures to determine adjustment of the contract price, and performance time. A changes clause is commonly utilised to address issues such as differing site conditions, design conflicts, scope changes, and force majeure events.

Industry Standard Construction Contracts

The industry standard construction contracts specifically address how such changes will be managed by the parties during construction, whether requested by the owner or contractor (A201 – 2017, Article 7; ConsensusDocs 200; Article 8 (2011, Revised 2019)). Owners have the right to change the contractor's work, but the problem often arises when the parties cannot agree on a price for the changed work. If the parties cannot agree on the adjustment of the time or contract sum, the contractor can submit a claim in accordance with the contract; however, the contractor will be required to perform the work to avoid delays (A201 – 2017, Article 7.3;

ConsensusDocs 200; Article 8.2 (2011, Revised 2019)).

Federal Government Construction Contracts

On federal government construction projects, the changes clause gives the government the right to make changes to the contract scope of the work, including changes to the specifications, method or manner of performance of the work, and to direct acceleration of the work. Along with that authority, the government also has an obligation to issue an equitable adjustment and modify the contract if the directed changes cause an increase or decrease in the contractor's costs or the time of performance (FAR Part 52.243-4). Like the industry forms, if the parties cannot agree to any adjustment of the contract cost or time of performance, the contractor is required to submit a claim in accordance with the disputes clause of the contract (FAR Part 52.243-5).

3.3 Design

Traditional Delivery Method

The project architect or engineer (design professional) is responsible for the project design under the traditional delivery method where an owner executes separate contracts for design and construction. The contractor is typically not responsible for design services, except for design services specifically delegated by the contract and services within the construction means, methods, techniques, sequences, and procedures employed by the contractor and its subcontractors in connection with construction activities (ConsensusDocs 200 § 2.3 (2011, Revised 2019); AIA Document B201-2017).

Design-Build Projects

On design-build projects, the standard form of agreement between the owner and design-builder provides a set of owner's criteria establishing the owner's requirements for the project. The design-builder will typically review the owner's criteria, develop a preliminary design and provide a proposal to the owner. Upon mutual agreement, the parties will execute amendments to the design-build contracts, setting forth the complete design and scope requirements (AIA A141–2014; ConsensusDocs 410 (2017)).

3.4 Construction

General Contractor

The general contractor is typically responsible for all major construction activities, including planning and scheduling, and providing all the labour, materials, equipment and services necessary to complete the work. Relying upon the project design documents to perform construction, the general contractor is responsible for its own construction means, methods, techniques, sequences and procedures utilised (ConsensusDocs 200 § 3.1.3 (2011, Revised 2019)). Subcontractors are also responsible to the general contractor to perform their respective scope of work in accordance with the subcontract and project requirements.

Design Professional

Design professionals may have certain construction administration tasks requested by the owner in the design professional's contract with the owner. For example, a design professional may be responsible for reviewing the contractor's proposals, approving shop drawings, reviewing a contractor's applications for payment, issuing changes, and certifying completion of the project. Unless contractually agreed to, a design professional is not responsible for the contractor's means and methods of performing its construction work.

Owner

Owners may also elect to perform construction activities themselves and to award separate contracts to contractors other than the general contractor. The AIA A201 form expressly

reserves this right for the owner (see AIA Document A201 – 2017 § 6.1.1).

3.5 Site Access

Through the parties' contracts, owners typically assume the risk of the project site and conditions, such as underground obstacles, geotechnical conditions, and any archaeological findings. Such issues are not typically governed by mandatory or regulatory law, although the FAR clauses do specifically govern differing site conditions on public projects and provide that the government assumes the risk of differing site conditions (FAR Part 52.236-2).

Typically, a contractor will be required to provide the owner with prompt notice of a concealed or unknown condition when the conditions are encountered. The AIA General Conditions form provides that if the contractor encounters site conditions that differ from those expected, the contractor may be entitled to an equitable adjustment in the Contract Sum or Contract Time, or both (AIA Document A201 – 2017 § 3.7.4). A similar clause and relief are set forth in ConsensusDocs 200 Standard Agreement and General Conditions between Owner and Constructor (ConsensusDocs 200 § 3.16.2 (2011, Revised 2019)).

3.6 Permits

Different forms of permits may be required to access, construct, and operate a building or facility (ie, building, safety, and occupancy permits). Typically, owners place the burden on the general contractor or design-build contractor to obtain building and construction permits, and the contractor will be responsible for the fees, licences and inspections by government agencies necessary for proper execution and completion of the work. If the permit relates to land acquisition (easements or surveys) or use modifications (residential, commercial, mixed use), the owner is generally responsible for obtaining the permit and the associated fees (AIA Document A201–2017 §§ 2.3.1 and 3.7.1; ConsensusDocs 200 § 4.3 (2011, Revised 2019)).

3.7 Maintenance

During construction, the contractor is typically responsible for maintenance of the works. Maintenance can include a broad range of activities such as storage, signage, waste disposal, debris removal, clearing roads and pavements, and providing electricity to the project. Once a project reaches final completion, the owner will typically assume maintenance responsibilities. The division of maintenance responsibilities is addressed in the industry form contracts (ConsensusDocs 200 § 9.6.2 (2011, Revised 2019); AIA Document A201–2017 § 9.8.4).

3.8 Other Functions

Other functions of the construction process, such as operation, finance and transfer of ownership are generally addressed between the owner and third parties, not the owner and contractor.

3.9 Tests

The contractor typically assumes responsibility for the costs of tests, inspections and approvals, including co-ordinating with third parties or public authorities (AIA Document A201–2017 § 13.4.1; ConsensusDocs 200 § 3.7.1 (2011, Revised 2019)). However, an owner may be responsible for inspections deemed necessary after contract execution, as the contractor was unable to account for such costs in its pre-contract bid (AIA Document A201–2017 § 13.4.1; ConsensusDocs 200 § 3.7.2 (2011, Revised 2019)). If procedures for testing, inspection, or approval reveal portions of the work that fail to comply with the requirements established by the contract, the contractor will bear responsibility for the costs to meet the standards necessary to pass the tests, inspections or approvals (AIA Document A201–2017 § 13.4.3; ConsensusDocs 200 § 3.7.3 (2011, Revised 2019)).

3.10 Completion, Takeover, Delivery

Achieving substantial or final completion, takeover, and delivery of the project generally occurs when the work has been performed in accordance with the contract documents such that the owner can occupy or utilise the work for its intended use. After inspections are complete and the work is designated as substantially complete, the design professional will prepare a certificate of substantial completion that will establish the date of substantial completion, at which time the warranties required by the contract documents will commence and the owner will take over the project (AIA Document A201–2017 § 9.8).

The owner may occupy or use any completed or partially completed portion of the work at any stage when such portion is designated by separate agreement with the contractor, provided such occupancy or use is consented to by the insurer and public authorities (AIA Document A201–2017 § 9.9; ConsensusDocs 200 § 9.6 (2011, Revised 2019)).

3.11 Defects and Defects Liability Period

Defects Liability Period

In the United Stated it is standard for the contractor to cure defective work for a period of one year after substantial completion of the work (AIA Document A201–2017 § 12.2.2; ConsensusDocs 200 § 3.9 (2011, Revised 2019)). Owners are required to provide the contractor with prompt notice of defective work discovered after substantial completion, otherwise the owner may risk waiving its rights for the contractor to correct the defect (AIA Document A201–2017 § 12.2.2.1; ConsensusDocs 200 § 3.9 (2011, Revised 2019)). If after receiving prompt notice the contractor fails to correct the work in a reasonable time period, the owner may correct the work under its contractual right to carry out the work and issue a deductive change order for the cost of correcting the defective work, or recover the costs from the contractor (AIA Document A201–2017 § 12.2.4; ConsensusDocs 200 § 3.9.3 (2011, Revised 2019)).

Breach of Contract Claim

The one-year warranty period will not release the owner's right to breach of contract claims alleging defects in the work (AIA Document A201–2017 § 12.2.5; ConsensusDocs 200 § 3.9.6 (2011, Revised 2019)). The breach of contract claim remains available to the owner for the applicable law and statute of limitations. The time period to assert a claim for a construction defect is set by state statutory law and varies from state to state. A general survey of state statutes of limitation and repose can be found here: www.agc.org/industry-priorities/contracts-law/state-law-matrix.

Remedies for Construction Defects

Like the statutory time periods mentioned above, the remedies for construction defects vary from state to state. Generally though, remedies for construction defects include recovery for diminished value of the project or building, loss of income (ie, loss of rent), and costs of repairs.

4. PRICE

4.1 Contract Price

In the United States, the owner generally determines the method of establishing the contract price through the owner's selection of its preferred contract structure and means of procuring price bids or proposals from contractors. In design-bid-build construction, the owner typically solicits lump-sum price bids through a competitive bidding process. The contract price may also be established through competitive negotiations with competing contractors, or by directly selecting the contractor and negotiating the price.

Selecting a Contractor by Competitive Bid

The contract award from a bidding process may be based solely on the lowest price, or on the best value, experience of the contractor, proposed work plan, schedule, and other factors. The bidding process and manner of award is determined by the owner and whether the project is funded or owned by public or private entities. Public entities are subject to specific laws that determine the manner in which the procurement is conducted and how the contract is awarded. A private owner can select whatever contractor it prefers and the owner is not required to engage in any competitive process.

Determining the Type of Contract Price Structure

The project delivery structure selected by the owner will affect the contract price structure, the status of the project design when the construction contract price is determined, and the various project components that will be included in or excluded from the contract price. The contract price can be structured as a fixed, lump-sum price; unit price; cost reimbursement with a fixed fee or a percentage fee; or a guaranteed maximum price.

4.2 Payment

In the United States, construction contracts generally provide certain remedies for late payment and non-payment. The construction contract may provide a rate of interest for late payments or provide the contractor with the right to stop work (after providing proper notice concerning the non-payment) without the contractor breaching the contract. Non-payment or late payment can also be a breach of the construction contract that results in the contractor being entitled to damages or, if on a prolonged basis, the right to stop work and/or terminate the contract (AIA Document A201 – 2017 §§ 9.7, 14.1; ConsensusDocs 200 §§ 9.5, 11.5 (2011, Revised 2019)).

Construction Prompt Payment Statutes

In addition to contract remedies, there are specific federal statutes that address prompt payment of subcontractors and suppliers on federal construction projects (31 U.S.C. §§ 3901-3905). Numerous states have also enacted specific statutes similarly addressing prompt payment of contractors and/or subcontractors and suppliers. A survey of such prompt payment statutes can be found here: www.agc.org/prompt-payment-state-state-map.

Mechanic's and Materialmen's Liens

State mechanic's and materialmen's lien laws provide extra-contractual remedies to contractors for non-payment. The lien laws allow an unpaid contractor, including subcontractors and often sub-subcontractors and suppliers, to place a lien on the property improved by the contractor's labour, services, and/or materials. State lien laws also frequently authorise the lien claimant to recover its attorney's fees in a court foreclosure action.

A lien claimant may bring a lawsuit against the property owner to foreclose the lien and sell the property to pay the amounts owed to the contractor. Lien rights and requirements are a matter of state law. There is no federal or national lien law. The substantive rights and required procedures vary significantly from state to state. A general survey of state lien laws can be found here: www.agc.org/industry-priorities/contracts-law/state-law-matrix.

Federal, state and local public construction projects are generally not subject to liens; payment protection for subcontractors and suppliers, but not contractors, comes through statutorily required payment bonds.

Payment Bonds

Payment bonds, whether required by state and federal law or at the direction of the owner, pro-

vide protection to subcontractors for non-payment. A payment bond is an agreement between a contractor and a surety where the surety guarantees payment for the labour and materials to be employed on a project. Claimants may be subcontractors, suppliers or labourers who perform work for a contractor on the bonded project.

To protect subcontractors and suppliers, the Federal Miller Act requires that federal government construction contractors on projects over USD100,000 provide a payment bond, typically with the required value or "penal sum" equal to the value of the construction contract (40 U.S.C. §§ 3131-3134). The Miller Act also requires the contractor to provide a separate performance bond equal in value to the contract price. The performance bond is generally for the protection of the federal government as project owner.

Many states have enacted laws similar to the Federal Miller Act that require payment and performance bonds from contractors on state and local construction projects. The state statutes are generally referred to as "Little Miller Acts". A general survey of state laws addressing payment and performance bonds can be found at the state law matrix site listed directly before this.

Private owners may also require payment bonds from the contractor. Such bonds are not required by statute and are generally governed by traditional state commercial or contract law, or state statutes separate from Little Miller Acts.

Payment Schedule

A construction contract is typically invoiced:

- on a monthly basis for the percentage of work completed during the invoiced period, based on a schedule of values;
- as equal monthly payments over the construction period; or
- based on the contractor achieving certain project milestones.

Monthly payments based on percentage completed against an agreed-upon schedule of values is the most widely used method. Milestone payments are usually restricted to large industrial projects. Advance payments are not typical in construction contracts, however, contractors are generally paid an upfront amount for mobilisation.

4.3 Invoicing

As discussed in **4.2 Payment**, monthly payments based on percentage completed against an agreed-upon schedule of values, is the most widely used method. Most construction contracts and many state and federal laws stipulate the time by which payment must be made after invoices are submitted. This is usually as soon as 15 days after receiving the contractor's invoice. Otherwise, late payments will incur interest and entitle a late-paid contractor to other remedies (AIA Document A201 – 2017 § 13.5; ConsensusDocs 200 § 9.9 (2011, Revised 2019)).

5. TIME

5.1 Planning

The project owner generally dictates the planning of projects in the United States. The project delivery method selected by the owner will largely dictate how project planning is organised, especially the choice between design-bid-build, design-build or engineering, procurement and construction (EPC), and construction manager at risk.

The transition from project planning to project execution is generally tied to development of the design. In the United States, the progress of the design is typically measured against the following milestones:

- programming phase of design;
- schematic design;
- design development;
- construction documents; and
- bidding phase.

These phases or milestones are tied to the design-bid-build project delivery system. In design-build or EPC contracting, drawing up a contract with the designer-builder or EPC contractor will take place long before final construction documents are completed. In design-build, EPC contracting, and construction management at risk, parts of the design can be fast-tracked, meaning that parts of the design are finalised early to release fabrication and installation and construction before the entire design is complete.

5.2 Delays

Most construction contracts and all standard construction contracts include detailed requirements for the contractor to provide notice, explanation, and documentation of delays anticipated or experienced.

Generally, contracts oblige the contractor to provide written notice to the owner in the event of delay. Such initial notice and documentation may be the first step in the contract change order-claim-disputes procedures if the parties disagree over entitlement to relief. See, for example, ConsensusDocs 200 § 6.3.3 (2011, Revised 2019).

Under the FAR, a contractor's claim for government-caused delay may not be allowed "[u]nless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the contract" (FAR 52.242-17).

In addition to initial notice, the process to determine the cause and responsibility for delay also generally requires the contractor to document the events giving rise to the delay, related communications, the effects of the delay, and efforts to mitigate the delay. If the contractor fails to provide timely notice and otherwise fails to comply with contract procedures to seek a time extension, the contractor may lose the right to an otherwise valid request for a time extension.

5.3 Remedies in the Event of Delays

Owners have several remedies against the contractor for delays that do not merit a time extension (inexcusable delays). including:

- demanding acceleration to meet the schedule;
- actual costs of the delay or liquidated damages (discussed in **9.3 Sole Remedy Clauses**); and
- in certain cases, the right to terminate the contract for default.

Under FAR 52.249-10, for example, the government may "terminate the right to proceed with [a contract] that has been delayed" (FAR 52.242-17).

A contractor may be able to defeat or reduce an owner's claim for liquidated or actual delay damages if there is a separate, excusable delay that is concurrent with all or part of the contractor's delay. In the event of concurrent delays, the owner and contractor typically each bear their own costs for the delay and the contractor is entitled to a time extension for the duration of the concurrent delays.

5.4 Extension of Time

Typically, when requesting a time extension, a contractor must provide formal notice to the contract administrator in the manner and within the timeframes specified in the contract, as well

as all documentation supporting the claim. After the request has been sent, the owner's designated representative will determine if the evidence is sufficient to justify a time extension.

If the owner's designated representative agrees and grants an extension, a change order is issued to the contractor. If the request is denied, the contractor may escalate or appeal in accordance with the dispute resolution provisions in the contract. These procedures are generally set forth in the standard industry contracts. See, for example, ConsensusDocs 200 §§ 6.4, 8.4 (2011, Revised 2019).

5.5 Force Majeure

Under United States law, "force majeure" commonly refers to natural and unavoidable catastrophes that affect contract performance. Most standard form construction contracts do not specifically use the term "force majeure". Instead, relief for force majeure events is addressed in delay and time-extension remedial clauses. See, for example, AIA Document A201 – 2017 § 14.1.1.2.

For public projects, the relevant FAR provision (Excusable Delays) includes examples of force majeure events, such as, "(1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather" (FAR 52.249-14 May 2007).

It is also possible to contractually limit or exclude certain circumstances from being qualified as force majeure or what the AIA describes as "unavoidable casualties" and "other cause beyond the Contractor's control" (AIA Document A201 – 2017 § 14.1.1). One way to do so is for the contract to contain a very specific list of qualifying events (eg, epidemic, earthquake, or hurricane) or other certain terms. In that case, the precise language of a force majeure clause may be interpreted to exclude events that are not specifically identified.

5.6 Unforeseen Circumstances

Standard form construction contracts, such as AIA and ConsensusDocs, do not have specific clauses to address "unforeseen circumstances". These contracts do however contain excusable delay clauses that may cover unforeseen circumstances. The relief offered in these contracts could be a time extension, and for either party, the opportunity to terminate the contract.

Even if a contract does not contain an express clause addressing "unforeseen circumstances", "force majeure" events, or other similar language addressing "acts of God" or unanticipated delays beyond the contractor's control, a contractor may still have a legal right to relief against the owner under the common law doctrines of frustration of purpose or impracticability.

6. LIABILITY

6.1 Exclusion of Liability

Contract clauses that limit or relieve parties from liability are generally referred to as "exculpatory clauses". In the United States, exculpatory clauses are not favoured and will generally be narrowly construed. At a minimum, for exculpatory clauses limiting liability to be enforceable, they must be clear, unambiguous, unmistakable, and conspicuous. Even when these criteria are met, state law, whether by statute or court precedent, may prohibit or limit certain exculpatory clauses as against public policy. Examples of impermissible exclusions of liability include indemnity of a party against a claim caused by the sole negligence, gross negligence or intentional misconduct of the party claiming the indemnity. Many states have enacted specific

statutes that limit such indemnities in construction contracts. A general survey of state anti-indemnity clauses can be found here: https://www.agc.org/industry-priorities/contracts-law/state-law-matrix.

6.2 Wilful Misconduct and Gross Negligence

The concepts of "wilful misconduct" and "gross negligence" exist under United States law. The definitions of gross negligence and wilful misconduct also vary from state to state and the conduct that the courts consider as falling under those definitions depends on the facts of each case. Typically, states prohibit limiting liability in construction cases if the conduct giving rise to the claim constitutes wilful misconduct or gross negligence. A general survey of state laws prohibiting limiting liability if the conduct involves wilful misconduct or gross negligence can be found here: https://www.agc.org/industry-priorities/contracts-law/state-law-matrix.

6.3 Limitation of Liability

Limitations of liability are considered exculpatory clauses that are disfavoured and narrowly construed under United States law. Nonetheless, limitations of liability are enforceable if they are clear and unambiguous and do not violate an applicable law or public policy.

Construction contracts in the United States limit liability by waiving liability consequential damages. By establishing a ceiling for damages for delay, liquidated damages provisions can also serve as limitations of liability. Other limitations often found in construction contracts include limiting liquidated damages to a specific cap and limiting all damages to another specific cap, whether expressed as a specific dollar value or percentage of the contract price. If clear and unambiguous, such limitations of liability in construction contracts are regularly enforced.

Many states have anti-indemnity statutes, which limit and make void certain liability-shifting agreements as being against public policy, to the extent that the provision requires an indemnitor to indemnify a party against a claim caused by negligence or intentional misconduct, a violation of statute, or breach of the contract by the indemnitee.

7. RISK, INSURANCE AND SECURITIES

7.1 Indemnities

Indemnity clauses – sometimes referred to as "hold harmless" clauses – are key components of a construction contract to help manage and mitigate liability and risks. Indemnity clauses can address a broad range of risks on a construction project including but not limited to breach of contract, negligence, personal injury, property damage, third-party claims, and loss of profits. A general survey of state anti-indemnity clauses can be found here: https://www.agc.org/industry-priorities/contracts-law/state-law-matrix.

7.2 Guarantees

Parties on a construction project are sometimes required to obtain guarantees of performance from other parties that may take the form of a personal guarantee by a corporate shareholder or a guarantee by a parent of a subsidiary company. However, on United States construction projects, surety bonds are the most common form of guarantees used to limit risk for parties.

A surety bond, which is not insurance, is a guarantee in which a third party – often an insurance company – agrees to assume a defaulting contractor's performance or financial obligations under the construction contract. The key difference between sureties and insurance is that sureties can seek reimbursement from the defaulting contractor if the surety is forced to

take over and fulfil the defaulting contractor's obligations under the contract.

An owner can require the contractor to guarantee its bid commitments, payments to subcontractors, and performance of the work by requiring the contractor to obtain a (i) bid bond, (ii) payment bond, and (iii) performance bond, respectively, from a licensed and financially responsible surety experienced in the needs of the construction business. Whether a public or private project, these three bonds generally protect the owner against the following risks.

- Bid bond – this guarantees that the contractor with the winning bid meets the requirements to enter into the construction contract, and in the event that the contractor fails to meet the requirements, the surety agrees to pay the owner the difference between the winning contractor's bid and the next lowest bidder up to the amount of the bond.
- Performance bond – this guarantees that the contractor will perform in accordance with contract conditions and state regulations, and in the event of default by the contractor, the surety agrees to step in, investigate, and if necessary ensure completion of the project and payment of the associated costs up to the amount of the bond.
- Payment bond – this works in conjunction with a performance bond to guarantee that labourers and suppliers are paid by the contractor, and if the contractor fails to pay its labourers and suppliers, to pay amounts owing up to the penal sum of the bond; on private projects, a payment bond also prevents liens on a project, which can impact the owner and the success of the project.

Contractors may also require subcontractor payment and performance bonds to obtain the security of the same type of financial guarantees.

Lastly, letters of credit may also be used as financial guarantees on construction projects in the United States, however, their use tends to be fairly rare as compared to surety bonds. In fact, most statutes requiring payment and performance bonds on public construction contracts require surety bonds rather than letters of credit.

7.3 Insurance

There are many different types of insurance tailored to protect owners, contractors, and other project participants through all phases of a construction project. The insurance coverage typically required under United States construction contracts is reflected in standard contracts (eg, Section 10.2 of ConsensusDocs) and includes:

- builder's risk insurance for coverage of damage to buildings and other construction during the course of construction;
- commercial general liability insurance to provide liability protection to the insured in case of bodily harm or property damage;
- automobile and truck insurance for business vehicles; and
- worker's compensation insurance to protect businesses and contractors if employees are injured on the job.

7.4 Insolvency

Insolvency of any important player on a construction project can have significant consequences for the project and all the participants.

Standard industry contracts such as the AIA and ConsensusDocs do not provide generally for any consequences if a party ceases to pay its debts in the ordinary course of business, cannot pay its debts as they become due, or seeks bankruptcy protection under federal bankruptcy laws.

Furthermore, United States bankruptcy law restricts enforceability of "termination-on-bankruptcy" provisions if conditioned on the insol-

vency of the debtor or its financial condition, or the commencement of a bankruptcy case. Importantly, when an owner, contractor or other project participant in the United States seeks bankruptcy protection, federal law and other applicable laws will affect, and in many cases dictate, the parties' remaining obligations under the construction contracts at issue, including obligations related to surety bonds.

7.5 Risk Sharing

Reasonable and equitable risk-sharing is common practice and a core principle for modern-day construction projects in the United States.

Standard form contracts such as those offered by ConsensusDocs and the AIA, as well as government contracts, seek to equitably allocate project risks to the party in the best position to control the risk and also to permit the parties to concentrate on key variables when negotiating the construction contract.

Provisions of critical importance to risk-sharing include: time extensions and time for completion, differing site conditions, damages for delay, change orders, excusable delays, defects in design, notice requirements, dispute resolution procedures and terms of payments.

8. CONTRACT ADMINISTRATION AND CLAIMS

8.1 Personnel

Construction contracts in the United States typically include contractual provisions regarding the contractor's personnel. These provisions typically address project oversight and supervision, safety, quality control, removal of personnel, and the supply of adequate labour forces. Much less frequently, construction contracts may also limit the contractor's ability to remove or replace the contractor's own key personnel.

Project Oversight and Supervision

Parties will typically be required to designate a single project supervisor, such as a project manager or superintendent, who is regularly present at the project work site with full responsibility for the oversight, supervision and management of the contractor's workforce. This designated supervisor will often have authority to make decisions for the contractor and bind the company to change orders and other contractual matters (AIA Document A201 – 2017 §§ 3.1, 3.9). Other key personnel are safety and quality control managers, who can be required under the contract.

Labour Force

Contractors and subcontractors are generally required to provide adequate labour forces to carry out their work as necessary to achieve substantial completion within the time allowed by the contract (AIA Document A201 – 2017 § 8.2.3). Schedules incorporated into construction contracts typically do not establish a specific head count for the contractor's labour force, unless the schedule is resource loaded.

Right to Require Removal of Personnel from the Project

The employer/owner regularly retains the right to require removal from the project of any employee of the contractor or subcontractors who does not follow safety procedures, or is unfit or unskilled for the assigned work (ConsensusDocs 200 § 3.4.3 (2011, Revised 2019)). Contractors typically maintain in their subcontracts the same right to remove subcontractor personnel.

8.2 Subcontracting

Contractors in the United States are generally free to employ subcontractors to execute the work, provided the subcontractor has a licence

to perform its scope of work and is authorised to do business in the location of the project. Employers/owners are generally given the right to reasonably and timely object to selected subcontractors (AIA Document A401 – 2017 § 5.2.3; ConsensusDocs 200 § 5.1 (2011, Revised 2019)).

Some limitations on the contractor's ability to subcontract may come in the form of the requirement that all subcontractors be pre-approved by the owner or that the contractor utilises subcontractors from an owner pre-approved list or uses a subcontractor or supplier specifically designated by the owner. In state and local public contracting, the contractor may be required to list their subcontractors in their bid proposal.

8.3 Intellectual Property

In the United States, intellectual property that may be at issue in a construction contract includes patents, copyrights, trade marks, and trade secrets. Federal law alone governs patents and copyrights. What constitutes trade secrets or proprietary information is generally a matter of contract or state law. Construction contracts typically address intellectual property issues on two fronts:

- ownership of the intellectual property associated with the design, and construction or fabrication techniques; and
- liability for violating the intellectual property rights of third parties who are not involved in the design and construction of the project.

Federal copyright law typically governs ownership of intellectual property in design documents. Copyright in a work vests initially in the author or authors of the work. Authored works include the engineering and architectural drawings and specifications that are typically the basis of all construction contracts. Federal law provides the owner of a copyrighted work the exclusive right to reproduce, adapt, publish, use, or display the copyrighted work (17 U.S.C.S. § 106).

Ownership of intellectual property can be modified by contract. As a result, a designer can grant the owner a perpetual licence to use the design for the intended project while simultaneously retaining the copyright or the rights to any patents or trade secrets developed during the project.

Ownership of the Design on Design–Bid–Build Projects

On design-bid-build projects in which the owner provides a complete design for the contractor to construct, the contractor is typically authorised to use and reproduce the drawings and specifications for the execution of the construction (AIA Document A201 – 2017 § 1.5.2). The rights to the ownership of the design are determined by the contract between the owner and the designer.

On design-build projects, the design–build contract typically addresses the disposition of intellectual property rights over the design. For example, the design-build contract will outline the ownership of the electronic design documents (ie, the drawings and specifications), the copyright over the designs, and whether the parties can reuse the designs for other projects (ConsensusDocs 400 §§ 3.1-3.4 (2007, Revised 2011)).

9. REMEDIES AND DAMAGES

9.1 Remedies

Breach of contract is a cause of action available to two contracting parties in direct privity with one another. Contract damages available to parties for breach of contract include direct, indirect, and consequential damages. The aggrieved party has an obligation to mitigate damages and

typically cannot recover damages that could have been avoided through reasonable diligence and ordinary care.

Owner's Remedies against the Contractor or Design Professional

Contractor's breach

In the event of a contractor's breach, an owner typically has the right to carry out the work, terminate for cause, the right to withhold payment (set-off), and the right to recover direct, indirect, and/or consequential damages, subject to any remedy waiver or limitation of liability language expressly agreed to in the contract. See, for example, ConsensusDocs 200 § 11 8 (2011, Revised 2019); AIA Document A201 – 2017 § 14.

Design professional's breach

If the design professional is in breach, the owner may seek similar remedies as against the contractor, as well as seek economic loss if the construction is unusable or defective. The design professional owes a duty of care generally defined as the professional skill and care that other professionals in the profession would use under similar circumstances in that area or jurisdiction. The design professional can be held liable to the owner if the design professional fails to meet the requisite standard of care.

Contractor's Remedies against the Owner

A contractor's breach of contract claims against the owner are typically based on contract changes from changed conditions or additional work, as well as requests for extensions of time for issues such as owner delays, change orders, design errors, or delays outside the contractor's control (eg, weather and force majeure). If an owner refuses to acknowledge impacts to the contractor's work caused by the owner or an owner's representative, or the parties cannot agree on a price, the contractor may assert a breach of contract claim in accordance with the dispute resolution provisions of the contract. Common contractor claims for breach of contract against the owner include wrongful termination, delay and disruption, defective drawings, and loss of productivity. Subcontractors have similar breach of contract remedies against the general contractor that the general contractor has against the owner as part of the flow-down rights and obligations in the subcontract.

9.2 Restricting Remedies

Remedies may be limited by contract or statutory law. For example, both the AIA A201 – 2017 and the ConsensusDocs 200 form agreements mutually waive consequential damages against the other party (AIA Document A201 – 2017 § 15.1.7; ConsensusDocs 200 § 6.6 (2011, Revised 2019)). Consequential damages do not flow directly from a breach of contract, but may indirectly relate to the breach, eg, loss of profits and loss of bonding capacity. It is inherently difficult to prove consequential damages, which is why it is common for the parties to agree to a mutual waiver.

9.3 Sole Remedy Clauses

Liquidated damages clauses are an example of sole remedy clauses common in construction contracts that define the owner or contractor's damages if a project is delayed. Liquidated damages clauses provide for the recovery of a fixed sum specified by the contract (typically a certain sum applied on a daily basis) for the party injured by a delayed project. Liquidated damages clauses are generally enforceable but cannot be a penalty, and must be based on a reasonable estimate of a party's anticipated damages at the time of contract execution if a project is delayed.

9.4 Excluded Damages

With some exceptions, punitive damages are typically excluded from liability in construction contracts. Punitive damages are not compensatory, but are rather intended to punish the wrong-

ful actor. Punitive damages can be awarded in the context of intentional acts of fraud, malice, or wanton and wilful conduct. Punitive damages are rarely awarded in the construction industry and are typically specifically excluded from construction contracts.

9.5 Retention and Suspension Rights

Suspension rights are generally available in construction contracts. For example, an owner will generally have the right to suspend a project for convenience or for any reason the owner finds necessary (AIA Document A201 – 2017 § 14.3; ConsensusDocs 200 § 11.1 (2011, Revised 2019)).

Retention is typically withheld at a rate of 5% or 10% of monthly invoices or progress payments. Upon achievement of substantial completion or final completion, the owner is typically required to pay the withheld retention to the contractor; however, the owner will generally have the right to withhold retainage if the contractor is in breach of the agreement and the owner's claim exceeds the value of retainage (AIA Document A201 – 2017 § 9.8.5; ConsensusDocs 200 § 9.2.4 (2011, Revised 2019)).

10. DISPUTE RESOLUTION

10.1 Regular Dispute Resolution

In the United States, disputes concerning construction contracts may be adjudicated before federal courts or state courts. Parties also frequently agree to arbitration in lieu of courts. Disputes on construction contracts with the federal government and with some state and local governments must be adjudicated before specialised administrative boards.

Jurisdiction and Venue

Personal jurisdiction and subject matter jurisdiction are necessary predicates for determining which court, whether federal, state, or either, is proper. Personal jurisdiction requires that the parties have certain geographic or transactional minimum contact with a court's geographic boundaries for the court to exercise jurisdiction over the parties.

Subject matter jurisdiction requires a court to have the legal authority to hear the claim brought before it. To be in federal court, the dispute must arise under federal law, or there must be diversity of citizenship jurisdiction, in that the parties are from different states. Diversity is usually the basis of construction disputes in federal courts with two major exceptions:

- the federal government is a party to the contract; or
- a subcontractor or supplier asserts claims pursuant to the Federal Miller Act.

Unlike federal courts, state courts are courts of general jurisdiction, meaning there are no requirements for special statutory or citizenship bases for subject matter jurisdiction.

Another issue that determines the appropriate court for a dispute is proper venue – whether the court is the proper court based on its physical location. In order to avoid venue issues, construction contracts frequently stipulate the venue and such stipulations are generally enforceable.

Controlling Law

The procedural rules of the court hearing a construction dispute generally control the litigation proceedings. The question of which state's substantive law controls a dispute can be and is often stipulated in construction contracts. Many standard form contracts refer to the law of the state where the project is located as being the controlling law. Parties also frequently stipulate by name the laws of a particular state that may or may not also be the location of the project.

Right to a Trial by Jury and Waiver of That Right

Parties to construction disputes generally have a near absolute right to have their dispute heard by a jury, whether in federal or state court. The major exceptions to the right to a jury trial are an arbitration agreement and federal, state and local government construction disputes that must be heard by special courts that decide cases without juries or before specialised administrative boards.

Based on the concerns about a jury of lay people deciding large and complex construction disputes, parties often stipulate in construction contracts to the waiver of the right to jury trial.

Federal Boards of Contract Appeals

Construction disputes with the United States federal government must be brought in one of two specialised forums: the United States Court of Federal Claims or in the corresponding administrative board. The two boards that handle the vast majority of construction disputes are the Civilian Board of Contract Appeals and the Armed Services Board of Contract Appeals.

10.2 Alternative Dispute Resolution

Arbitration and mediation are regularly used for construction disputes in the United States, as alternative means of dispute resolution. Arbitration is a matter of contract and requires the agreement of all parties to the dispute. Construction contracts frequently establish an agreement to arbitrate, but the parties can agree to arbitrate at any time. Mediation is also generally required by agreement of the parties, but some court rules and state statutes may mandate mediation at some point in the proceeding.

United States Law Favours Arbitration

United States law enforces arbitration agreements under the Federal Arbitration Act (FAA). For the FAA to apply, the relevant contract must evidence a transaction of interstate commerce – meaning transactions across two or more states. Because of the extensive movement of construction services, and especially materials, across state lines, this is typically an easy hurdle to overcome on almost any construction contract.

In addition to the FAA, each state maintains a separate set of laws regarding arbitration. The majority of states have adopted either the Uniform Arbitration Act or the later Revised Uniform Arbitration Act. The FAA and state law generally align. When in conflict, however, the FAA supersedes state law in both federal and state court. The standard form contracts most widely used in the construction industry routinely include arbitration clauses enforceable under these laws (AIA Document A201 – 2017 § 15.4.1; EJCDC C-700 ¶ 17.01B (2018 ed.); ConsensusDocs 200 § 12.5 (2011, Revised 2019)).

Dispute Review Boards

Dispute review boards or DRBs are sometimes used on major construction projects in the United States to offer non-binding assistance and "recommendations" for resolving disputes during the course of construction. Although the use of DRBs is growing, their use is still relatively limited, even on major projects. Large public infrastructure projects utilise DRBs more frequently, especially transportation projects. Use of DRBs is a matter of contract and is not required by statute or regulation, even on public construction projects. The AIA standard form construction contract incorporates procedures for the use of an "Initial Decision Maker", who serves a similar function to a DRB (AIA Document A101 – 2017 § 6.1, AIA Document A201 – 2017 §§ 1.1.8, 15.2).

Jones Walker LLP has more than 30 construction attorneys who deliver comprehensive legal services to clients throughout the construction industry. The firm's national footprint, the depth and breadth of the team, and the scale of the projects on which they work enable them to provide effective counsel on virtually every issue their clients may face. Members of the construction team regularly represent clients across the USA and abroad, and excel at handling large-scale construction and infrastructure projects across industries such as aviation, energy, natural resources, healthcare, retail, and education. The firm is familiar with the full scope of US and international procurement and government contracting regulations, and the lawyers regularly help negotiate and close agreements involving economic development funding, tax incentives, and P3s. They also advise on environmental regulation and permitting, real estate, finance, government relations, labour and employment, and other areas involved in planning and executing projects. The construction litigation team helps clients identify potential risks and minimise disputes. When conflicts do arise, the team offers trial lawyers with experience in litigating construction disputes in state and federal courts, in arbitration, and before administrative and industry panels worldwide.

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Trends and Developments

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Resolving Construction Disputes before or outside the Courts in the United States

Introduction/Overview

Many perceive the United States as much more litigious than most countries, especially when it comes to construction disputes. Statistics and direct experience in the US confirm that perception. The volume of construction in the US and the frequency of disputes and claims in construction generate a tremendous amount of litigation in US courts.

Despite its reputation and statistics about construction and litigation in the US, the US construction industry has made substantial strides toward early, informal dispute resolution on the project level and to otherwise reducing the volume of litigation or to staying out of court completely. This article describes and summarises some of the approaches to dispute resolution during projects and soon after project completion, as well as the use of arbitration as an alternative to the US courts.

Partnering

Partnering in construction is a process that seeks to facilitate open communication among the many project participants and to focus on their shared interests in a successful project. An important goal of partnering is to identify problems in advance, often referred to as "rocks in the road", and to address those problems proactively in order to quickly resolve or avoid disputes completely. The ultimate goal of partnering is to reduce claims and disputes, and to reduce delays and costs in construction.

Partnering typically features an outside facilitator who meets with key project representatives on a regular basis, typically starting with a kick-off meeting near mobilisation, and then on a regular basis thereafter. Regular meetings are usually quarterly but may be monthly.

Partnering received a big push in the US in the late 1980s and early 1990s when it was embraced by the Construction Industry Institute, the US Army Corps of Engineers, and the Associated General Contractors of America. Partnering was initially presented with much fanfare and some overselling as a cure for construction disputes. While partnering is not a cure-all, it can be extremely helpful in requiring project participants to focus on important issues and potential problems that threaten the project.

Despite its effectiveness, parties must recognise that partnering does not change the legal and technical obligations and responsibilities embodied in a contract. Even though there may be positive and candid discussions in partnering sessions, parties must comply with contract claim notices, documentation, and disputes procedures.

Notice and Claims Procedures

Construction contracts in the US increasingly include more robust and detailed provisions about notice and documentation requirements in the event of claims. These requirements frequently involve strong language about waiver of claims if the requirements are not met. This trend is more pronounced in bespoke private construction and state and local public construction contracts. Enhanced contract notice and

claim procedures may not sound like a positive development towards early resolution of construction disputes, but the requirements can be very helpful.

The sooner the parties are required to identify documents and investigate claims, the greater the opportunity for mitigation of impacts on the project as well as the greater the opportunity for early resolution. When early resolution cannot be achieved, that contemporaneous documentation will better position parties for later negotiation or formal dispute resolution, whether litigation or arbitration.

A party that waits until litigation to figure out how to prosecute or defend a claim may have lost the opportunity to avoid litigation and will have a difficult time succeeding in litigation. A party without real-time understanding and contemporaneous documentation of what actually transpired during the project must rely on lawyers and consultants to reverse-engineer the project and re-create history. This dangerous and very costly approach can degrade a party's ability to demonstrate entitlement to relief and to prove with reasonable certainty the time and cost impact of an issue.

Complying with contract claim notice and documentation requirements can be very challenging for contractors. Best efforts under the circumstances are required to avoid the risk of waiving rights. Parties should also make the most of these requirements to educate themselves, as well as to inform, educate and persuade the other party about the validity of the claim.

The parties should use notice and documentation requirements to provide factually and technically correct and precise written communications that carefully explain and document the issue without emotion, inflammatory accusations or personal attacks. Such documentation enhances the prospects of early resolution and is helpful at trial.

Project-Level Step Negotiations

Many construction contracts in the United States, including the most widely used standard form construction contracts, now go beyond requiring paperwork on claims. The parties are required to meet face to face at escalating management levels to attempt to resolve claims. This requirement to meet in person (even if virtual) requires the participants to be better prepared on the key issues of the claim. The step negotiations may also provide a little extra motivation for the participants to try to reach an agreement rather than leaving it to their superiors in the next step to handle.

As the dispute escalates, the step negotiation procedure also introduces individuals who were not directly involved in the dispute and who are able to bring a fresh and, hopefully, more objective perspective. When a partnering facilitator or dispute review board is part of the project-level disputes process, the need to face a neutral party can supercharge the motivation of the parties to understand, assess and articulate their respective positions. Even if the neutral party's efforts fail, the parties gain greater understanding that may mitigate the scope of the dispute and will certainly streamline formal dispute resolution.

Dispute Review Boards

Dispute tribunals, generally referred to in the United States as dispute review boards or DRBs, were first used on large civil and infrastructure projects beginning in the 1970s, but the benefits of a DRB extend equally to major building projects, particularly hospitals, and industrial projects and should be used in those sectors. While a DRB cannot guarantee elimination of post-project litigation, when used properly, a DRB can be

an enormously effective tool to avoid and resolve disputes rapidly and during construction.

DRBs offer the opportunity to shorten the life cycle of a dispute by requiring the principals to confront and address the merits of their dispute, rather than focus on posturing and preparing for arbitration or litigation. When a DRB does not resolve a dispute, the DRB process can still facilitate subsequent settlement and prepare both parties for formal adjudication. DRBs can also enhance communications and help the parties avoid and resolve problems before they spiral into disputes.

DRB specifications

DRBs are a creature of contract; the scope and authority of the DRB as well as DRB procedures are set forth in the construction contract and generally referred to as "DRB specifications". Despite standardisation and general similarities across standard and bespoke DRB specifications, minor differences in detail can have considerable practical, legal and risk implications. Some examples are provided by the DRB Foundation (drb.org) and ConsensusDocs that publish standard DRB specifications (Dispute Review Board Addendum Specification – ConsensusDocs). Key elements of DRB specifications include the DRB member selection process, the scope of the DRB's authority, who can directly participate in the DRB process, and the impact of a DRB decision.

Using the DRB to avoid rather than decide disputes

Most of the focus on DRBs is directed at DRBs deciding disputes by rendering written decisions on disputes following a DRB hearing. DRBs can also be extremely helpful by requiring that the parties communicate and deal with problems long before they come to a formal hearing and decision.

DRB members are experienced industry professionals or construction attorneys. They regularly visit the site and meet with project personnel, typically at least quarterly, but this can be monthly on an as-needed basis. DRB members become generally aware of the nature and progress of the work and familiar with the project representatives. DRBs are most effective when used in these informal interactions, rather than limiting DRB involvement until after a problem has degenerated into a polarising dispute that the DRB must decide.

These regular site visits and meetings provide the opportunity to identify and discuss potential problems in a friendlier context, and before they become disputes. In this way, problems are more likely to be addressed and disputes avoided, or at least mitigated, before the situation degrades and a formal DRB hearing and decision is required.

Formal DRB hearings and recommendations

Once the DRB is asked formally to resolve a dispute, the dispute will be "judged" and a decision will be rendered, and the parties will no longer have the control they maintained in negotiations. DRB decisions are generally non-binding; however, the DRB decision as well as the process leading up to a decision can be tremendously valuable to both parties. A DRB decision frequently leads directly or indirectly to the resolution of the dispute and avoidance of litigation or arbitration. The written submissions and hearings before the DRB are far less formal than a court or arbitration proceeding, but they are an instructive "dry run" that provides great insight to the parties and what might lie before them if the dispute is not settled short of litigation or arbitration.

Attorney participation in DRB hearings is a recurring issue. Extensive experience with DRB hearings teaches that DRBs are most effective with

minimal-to-no direct attorney participation in the presentations. DRB hearings in which project personnel make detailed and extensive presentations require project personnel to be more invested in developing support for a defence to a claim. They also get a taste of what litigation or arbitration would be like. If the DRB hearings are outsourced to attorneys, those benefits will be lost. Limiting attorney participation appears to reduce adversarial tensions and formality.

Even if attorneys are prohibited from directly presenting in DRB hearings, when the stakes are high and the dispute is destined for litigation and arbitration, attorneys should be consulted to assist in preparation for the hearings and of written submissions to the DRB. In those circumstances, the parties and the DRB will often agree to have attorneys attend the hearings, even if the attorneys do not present and do not talk unless called upon by the DRB.

Parties should vigorously prepare written submissions and presentations for the DRB hearing as they will only get one opportunity. If a party approaches the DRB half-heartedly and waits for the DRB decision before digging into the issue and investing serious effort into evaluating and supporting their position, it will be too late. If a party receives an adverse DRB recommendation, the DRB is unlikely to allow a "do-over", especially if the problem was lack of preparation. The consequences of not properly preparing for a DRB hearing are compounded when the adverse DRB recommendation is admissible in court or arbitration.

Impact of a DRB recommendation

A DRB decision is generally called a recommendation because the decision is not binding on either party, unless both parties accept the recommendation. Whether a DRB recommendation is admissible in a subsequent litigation or arbitration is an important consideration and is typically addressed in the DRB specification. Even if the DRB recommendation is not binding, if the DRB recommendation is admissible, it will likely be given great weight by the judge, jury or arbitrator formally deciding the dispute. Those in favour of the admissibility of DRB recommendations, such as the DRB Foundation, recognise the heavy weight the recommendation will carry if admissible. They believe that by knowing that weight, the parties will be more likely to fully invest in and make the most of the DRB process.

Unlike a dispute adjudication board under FIDIC documents, the decisions of DRBs in the United States are generally not binding even on an interim basis.

When properly understood and employed, DRBs offer tremendous benefit and value on any major project to help avoid, mitigate and resolve disputes in an expeditious and cost-effective manner.

Mediation

Mediation is frequently used in US construction disputes. Mediation is a regular element of most construction contracts, including the most-used standard industry forms (AIA Document A201 – 2017 § 15.3.1; ConsensusDocs 200 §§ 12.2–12.5 (2011, Revised 2019)). An important distinction is whether the reference to mediation is permissive ("the parties may mediate" or "may agree to mediate") or mandatory and established as a condition precedent to proceeding with litigation or arbitration.

Outside of contract commitments, mediation is not a prerequisite to litigation or arbitration. Some court rules, however, require the parties to mediate and will provide a court-appointed mediator.

Some construction contracts contemplate mediating disputes during construction and the par-

ties are always free to agree to mediate at any time. There may be circumstances that make mediation during construction productive; however, mediation during construction is a relatively rare occurrence.

After construction is complete, the best time to mediate is a significant strategic decision for the parties. Contract provisions that make mediation a condition precedent to litigation or arbitration are well intentioned, but mediation that early is often not optimal. Engaging in mediation too soon puts the parties at risk of being unprepared for meaningful negotiations. At the other extreme, waiting to mediate until just before trial and after the parties have already sunk costs into completing documents discovery and depositions may not be cost effective.

The best time for mediation is often after at least some document discovery, but before running up time and expenses to complete all discovery and depositions.

Arbitration

Arbitration is considered an "alternative" dispute resolution method. In the US construction industry, the use of arbitration is so extensive and arbitration so often assumes many of the features of in-court litigation, that arbitration is often considered to be not much different to litigation.

United States law favours arbitration

US law enforces construction arbitration agreements and favours arbitration under the Federal Arbitration Act (FAA). For the FAA, the relevant contract must evidence a transaction of interstate commerce (across two or more states), but that is an easy threshold to satisfy on any construction project.

In addition to the FAA, each state maintains a separate set of laws regarding arbitration. The majority of states have adopted either the Uniform Arbitration Act or the later Revised Uniform Arbitration Act. The FAA and state law generally align. Where they are in conflict, however, the FAA supersedes state law in both federal and state court. Contracts standard in the construction industry routinely include arbitration clauses enforceable under these laws (AIA Document A201 – 2017 § 15.4.1; EJCDC C-700 ¶ 17.01B (2018 ed.); ConsensusDocs 200 § 12.5 (2011, Revised 2019)).

Arbitration forums and rules

Construction contracts generally identify the organisation to administer arbitration and that organisation's rules are controlling. The American Arbitration Association (AAA), is used most frequently for construction disputes. The next most-used is Judicial Arbitration and Mediation Services (JAMS).

Parties may specify self-administered arbitration. The International Institute for Conflict Prevention and Resolution (CPR) provides services for self-administered arbitration. Despite choosing to self-administer proceedings, the parties are also free to apply AAA, JAMS or another provider's procedures.

Mandatory/optional arbitration and mediation

Under the AIA Documents, the default mechanism for contract dispute resolution is litigation. The parties must opt in to arbitration by checking a box on the signature page (AIA Document A201 – 2017 § 15.4.1). The EJCDC provisions use the same approach (EJCDC C-700 ¶ 17.01B (2018 ed)). The ConsensusDocs provide no express default mechanism for dispute resolution (ConsensusDocs 200 § 12.5 (© 2011, Revised 2019)). The parties must check either a litigation or arbitration box. As arbitration is a creature of contract, a specific agreement to arbitration is required. Therefore, if there is no

affirmative election to arbitrate, the default is litigation.

Before entering arbitration, parties may be required to mediate under the terms of their contract. The AIA Documents require parties to engage in mediation before arbitrating a claim unless the claim is waived and relates to final payment or consequential damages (AIA Document A201 – 2017 General Conditions of the Contract for Construction § 15.3.1; ConsensusDocs 200 Standard Agreement and General Conditions Between Owner and Constructor (Lump Sum) §§ 12.2–12.5 (2011, Revised 2019)).

Discovery in arbitration

The US construction industry has long since adopted arbitration as its go-to alternative dispute resolution mechanism principally because it allows parties to tailor their dispute resolution procedures. Perhaps the most debated arbitration procedure is the extent of discovery. The discovery practice is vastly different under international arbitration rules versus under US arbitration rules.

Despite attempts to break free, US arbitration practice is heavily influenced by US federal and state court procedures. For better or worse, the practical result is a tacit acceptance of broad document exchanges, interrogatories, requests for admissions, and multiple depositions. On the other hand, international arbitration discovery practice is significantly limited, with hyper-targeted document exchanges and no expectation of depositions, interrogatories or requests for admissions.

Discovery: US v international arbitration rules

This stark contrast on how discovery is handled has come into focus as US construction projects are now much more frequently invoking international arbitration rules. More and more international companies are providing equipment, materials and services on mega construction projects in the US, hence the introduction of the ICC, ICDR or LCIA international rules in an increasing number of construction contracts. Clients must know the differences, however, before citing the international rules.

Inevitably, in any US dispute under international arbitration rules, the US party seeks broad discovery as is the practice in US arbitration. Meanwhile, citing the international arbitration rules, international parties demand extremely limited discovery. Unfortunately, international rules hardly, if at all, address the scope and extent of discovery; it is presumed there will be no, or very limited, discovery. Without written guidance, US arbitrators are left to reconcile the parties' divergent expectations.

This tension between the parties' discovery expectations and how the arbitrators decide the scope of discovery can have meaningful consequences. US arbitrations – even those governed by international rules – are governed by the Federal Arbitration Act (FAA). And while there still remain a few stated grounds for vacating an award, practically speaking, the most likely basis on which to vacate an arbitration award in the US is if the arbitrators improperly exclude relevant evidence.

A hybrid discovery approach

In an attempt to reach a compromise between the parties' expectations, US arbitrators who apply international arbitration rules have been known to employ a hybrid discovery approach. US arbitrators look primarily to the international practice of using the Redfern Discovery Procedure and the International Bar Association (IBA) Rules on the Taking of Evidence. The Redfern Procedure involves the preparation of a schedule that lists each party's requests for documents in a table that sets forth:

- a description of the document being requested;
- the requesting party's justification for the document request;
- the opposing party's objection, if any; and
- the arbitrators' decision on the request.

Often, international arbitrators require the party seeking the documents to show good cause why the specific document being requested is germane to the dispute and why it cannot obtain the same information from another more readily available source. This Redfern Schedule is usually exchanged in international arbitrations after both parties produce their Statement of Claim, which includes all the documents they intend to rely upon.

US arbitrators also look to the IBA Rules on the Taking of Evidence. These IBA Rules are not arbitral rules, but are instead intended to backfill the international rules that are mostly silent on disclosure and discovery. International parties commonly ask arbitrators to use these IBA rules as guidelines in international arbitrations. The IBA Rules try to reach a compromise between customs and practices from many different countries. So while the IBA Rules expressly contemplate a limited exchange of documents (typically using the Redfern Schedule), these rules are completely silent regarding depositions, interrogatories and requests for admission.

Many US arbitrators employing international arbitration rules have struck a balance between the broad US discovery approach and the use of the Redfern Schedule and IBA rules. In this firm's practice, we have seen no requests for admissions and no interrogatories being granted by a US tribunal. However, a more liberal approach to the exchange of documents is evident. Parties are usually requested to exchange routine project records and a limited number of custodians (the number of custodians being driven by the size of the dispute). With respect to depositions, in the authors' experience we have seen arbitrators move more towards the US arbitration style of allowing depositions. However, this is typically limited to a corporate deponent, expert depositions and, usually, only a very limited handful of fact witnesses. So, while in document production the US panel seems to lean more towards the international rules in limiting document productions, the use of depositions is more akin to the US arbitration approach. Either way, it's a hybrid approach.

It is important for US and international clients to fully understand these issues before they enter into a US arbitration agreement invoking international arbitration rules. Discovery will be a hybrid approach. US clients will not get the typical, broad discovery. Meanwhile, international clients should expect to have some depositions and more discovery than they may be comfortable with. By citing international arbitral rules, there will be a different approach to discovery. It is as a result of the internationalisation of arbitration that we are seeing these changes in the US.

Conclusion

The United States is extremely litigious and construction generates many disputes that go to court. The US construction industry, however, continues to take important steps towards keeping disputes out of court through early resolution techniques or by relying on arbitration for formal, third-party dispute resolution.

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Jones Walker LLP has more than 30 construction attorneys who deliver comprehensive legal services to clients throughout the construction industry. The firm's national footprint, the depth and breadth of the team, and the scale of the projects on which they work enable them to provide effective counsel on virtually every issue their clients may face. Members of the construction team regularly represent clients across the USA and abroad, and excel at handling large-scale construction and infrastructure projects across industries such as aviation, energy, natural resources, healthcare, retail, and education. The firm is familiar with the full scope of US and international procurement and government contracting regulations, and the lawyers regularly help negotiate and close agreements involving economic development funding, tax incentives, and P3s. They also advise on environmental regulation and permitting, real estate, finance, government relations, labour and employment, and other areas involved in planning and executing projects. The construction litigation team helps clients identify potential risks and minimise disputes. When conflicts do arise, the team offers trial lawyers with experience in litigating construction disputes in state and federal courts, in arbitration, and before administrative and industry panels worldwide.

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