

**DRAFTING DISASTERS -
Why You Need to Sharpen Your Clause**

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Personal guarantees from an owner or parent company are relatively common forms of contractual nonperformance risk protection on construction projects. Guarantees may be requested as additional security or offered in lieu of traditional construction performance and payment bonds. For example, a contractor or subcontractor may avoid posting a bond if the owner or parent corporation personally guarantees to pay downstream debts and/or to perform under the contract.¹⁰⁵ Under such circumstances, “[a] guaranty is collateral to, and entered into independently of, the principal contract which it guarantees, and the guarantor’s liability is secondary rather than primary.”¹⁰⁶

I. Benefits of and Concerns with Personal Guarantees:

There are many perceived benefits to electing to provide personal guarantees. Of primary importance, personal guarantees provide an increased level of financial security, as creditors have assurance of payment from the contractor’s owner or parent company as well as assurance of performance of the contract and the payment of subcontractors. Thus, “[a] personal guarantee can ameliorate the risk that a thinly capitalized construction company will be unable to pay its bills by holding the owners liable for the contractor’s debts.”¹⁰⁷ A personal guarantee also allows a contractor to maintain financial control and oversight over a project without need to address the traditional concerns surrounding a surety’s involvement. “[S]ureties generally retain substantial audit rights with respect to the contractors they bond; they often impose substantial financial management and reporting obligations on the contractors; and ... they frequently require significant collateral as well as indemnification by the contractor’s owners for the bonds.”¹⁰⁸

There are also several potential risks and pitfalls with relying on personal guarantees. A personal guarantee is no more valuable than the individual assets of the guarantor (less the cost of obtaining and collecting on a judgment). Project participants may also have limited to no access to a contractor’s “financial information, performance history, and other ‘underwriting’ information, or the

option of insisting on a personal indemnity from officers and shareholders” as would a surety on a bonded project in the case of default.¹⁰⁹ Even with complete transparency, guarantors may still overextend by offering similar guarantees to a variety of creditors on other unrelated projects. As a result of these potential risks, “project participants may find it significantly more efficient and reliable to depend on sureties, banks, or insurers to assist them in hedging against the risk of contractual nonperformance and, in particular, insolvency risks.”¹¹⁰

Thus, at the outset of a project, when negotiating the terms of a personal guarantee, the receiving party must pay close attention to the scope of protection afforded. Contracting parties must also determine whether a personal guarantee will provide any meaningful protection against a contractor’s default or whether other forms of risk protection such as surety bonds or letters of credit are necessary.

II. Types of Guarantees.

Corporate guarantees are common in “joint ventures” structured as separate legal entities and for “subsidiaries” of other legal entities.

A. Joint Venture.

A joint venture is a general partnership formed for a limited undertaking. The legal equivalent of general partners, the venturers are each liable for all of the debts of the joint venture.¹¹¹ “When a joint venture is structured as a general partnership, a creditor need not obtain a separate guarantee from the venturers, as they are liable as a matter of law for the joint venture’s liabilities.”¹¹² If structured as separate legal entity, however, whose owners enjoy limited liability for the entity’s debts, in which case, a separate guarantee is necessary in order to impose venture liability on the owner.

B. Subsidiary/ Separate Purpose Entity.

Large corporations may also create subsidiary corporations, commonly referred to as separate purpose entities (“SPE”), on separate construction projects for operational and financial reasons as well as to limit exposure on the one project to that SPE.

“When a creditor enters into a construction agreement with such a subsidiary, the parent company is no more liable for the subsidiary’s debts than a shareholder is liable for the debts of a corporation.”¹¹³ Thus, without a personal guarantee, a creditor cannot rely on the financial strength of a parent company to satisfy the debts of the subsidiary. A guarantee is also necessary as there is a potential risk that a SPE will dissolve at the end of the project and may not have a history of financial stability.

While best practice dictates guarantees should be in writing, it should be noted that it is possible that an oral guarantee may be enforced if a court finds sufficient representations were made by the parent corporation in connection with the contract with its subsidiary. For example if the company represents it will stand behind the subsidiary in the performance of the agreement, a parent corporation may have difficulty denying liability for its subsidiary’s breach of contract.¹¹⁴

III. Drafting Dangers.

Issues often arise as to the scope of work governed by a guarantee and the types of damages the guarantee covers. This is due to the fact “[a] guaranty is collateral to, and made independently of, the principal contract which it guarantees, so the guarantor's liability is secondary rather than primary or original.”¹¹⁵ The party receiving the guarantee needs to make sure the contract expressly states the names and affiliated entities providing the personal guarantee; the scope of the guarantee (whether payment of downstream debt and/or performance under the contract); and how any dispute surrounding the guarantee is to be resolved.

A. Language Requiring Arbitration.

“The performance guarantor may be bound to arbitrate in a number of ways.”¹¹⁶ For example, the guarantee may include an agreement to arbitrate any dispute or the guarantee may incorporate by reference the underlying contract, which may include an arbitration clause. The guarantor may also be bound under the language of the guarantee or applicable law that claims be resolved pursuant to arbitration.¹¹⁷ Without an agreement to arbitrate, however, related parties may not be able to arbitrate.¹¹⁸ In addition, uncertainty often arises as to whether the guarantor is obligated to participate in arbitration or other dispute resolution process if required. If the contracting parties desire arbitration as the dispute resolution method, it is advisable to provide for arbitration and parties required to participate in the written guarantee agreement.

Joint Venture

For example, an owner and a joint venture entered into a contract for construction of a waste-to-energy plant.¹¹⁹ The contract included a broad arbitration clause relating to disputes arising out of or relating to the project. On completion, the owner took possession and began an arbitration proceeding against the joint venture. The project had been financed pursuant to written guarantees signed by a banking institution on behalf of a syndicate providing financing and by the corporate joint venturers. With the owner no longer making payments, the bank (non-signatory) filed an involuntary bankruptcy against the owner, thereby staying the arbitration, and sued the joint venturers. The joint venturers sought arbitration pursuant to the guarantees that, while not mentioning arbitration, gave the joint venturers the same rights and remedies as their joint venture had under the construction contract. The court incorporated those rights and remedies into the guarantees and one of those rights was the right to arbitrate, since the dispute arose out of and related to the project.

Subsidiary Corporation.

Conversely, in case involving a subsidiary, a court determined a design-builder’s parent corporation that guaranteed the design-builder’s performance was not entitled to arbitrate disputes

concerning the guarantee it had provided for its subsidiary's performance under the construction contract even though the contract required arbitration.¹²⁰ The court concluded that plaintiff's action against the parent corporation did not "arise under" the contract between the plaintiff and the defendant subsidiary.¹²¹

B. Controlling Law and Jurisdictional Concerns.

Distinctions drawn between Suretyship and Law of Guarantees

Contracting parties should be cognizant of potential jurisdictional challenges when attempting to enforce a guarantee. There is a divergence of opinion in jurisdictions as to whether a guarantee is akin to a suretyship obligation, thus, subjecting guarantors to personal jurisdiction under a state's long arm statute. While some jurisdictions have done away with distinctions between the two,¹²² others have maintained the distinction in finding

a contract of guaranty is distinguishable from a contract of surety, in that the obligation of a surety is primary, while that of a guarantor is collateral. While each is, as to the principal, collaterally liable, as to the creditor or obligee the surety is primarily and directly liable on his or her contract from the beginning, whereas the liability of the guarantor is secondary and is fixed only by the happening of the prescribed condition at a time after the contract itself is made.¹²³

The primary substantive differences between suretyship and guarantees are that (1) a "surety is generally not entitled to notice of default unless its bond so provides, whereas the guarantor is so entitled to timely notice as a condition of liability", and (2) "some states restrict the right of the plaintiff to include the guarantor in the suit with the principal obligor, in light of the secondary and separate nature of the guaranty."¹²⁴

For example, in a case where a contractor failed to pay a material supplier on a construction project in Delaware, the court had to determine whether it could exercise personal jurisdiction over the parent corporation, with its principal place of business in Pennsylvania, which had guaranteed its subsidiary's performance.¹²⁵ The parent corporation argued the distinction between a "surety" and a "guarantor" in a personal jurisdiction context to demonstrate that guarantors "fall outside the reach of

Section 3104(6) [Delaware's long-arm statute]).¹²⁶ The parent corporation "cited to Black's Law Dictionary for the proposition that a guarantee agreement is distinct and separate from the obligation being guaranteed, while a surety agreement is part of the original obligation."¹²⁷ However, in finding that the technical distinction between a guarantor and a surety to be meaningless, the court held the parent corporation was subject to Delaware's long-arm statute finding "the definition found within Delaware's own commercial Code [which states a surety includes a guarantor] as the most persuasive."

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Financial Guarantee Mandatory in Jurisdiction.

Practitioners should also be cognizant of jurisdictions that mandate financial guarantees on construction projects and whether personal guarantees are sufficient collateral. For example, in California, an owner of an interest in property who contracts for a private work of improvement must financially secure the payment obligations under the construction contract if the cost of the work satisfies certain threshold amounts.¹²⁹ This requirement, which may not be waived by the contractor, ensures that subcontractors are paid. Acceptable forms of security include a payment bond, irrevocable letter of credit, or an escrow account, designated as a "construction security escrow account," each of which is subject to specific requirements.¹³⁰ The security can only be used if and when the contracting owner defaults on his or her contractual obligations to the original contractor.

Other Jurisdictional Concerns.

Contracting parties may consider including choice-of-law and/or venue provisions in the guarantee agreement to prevent being hauled into an inconvenient forum or be subjected to the laws of an unfavorable jurisdiction. For example, one court held that "[i]n the absence of some agreement by the parties, there is nothing in the venue provisions of either Massachusetts or New York law that would make Massachusetts an improper venue to litigate contractual disputes over the construction of two

Massachusetts-located electric generating plants between a Massachusetts-based company responsible for the construction and the owners of those two Massachusetts facilities.”¹³¹

Similarly, a court held a parent corporation had sufficient minimum contacts under the long-arm statute with the state of Texas to enforce a guarantee for its Texas subsidiary for a construction project in Florida.¹³² The court explained that because the contract did not provide a place for payment (or other venue provision), payment would be at the domicile of the payor, the subsidiary (Texas), and that by guaranteeing its subsidiary’s performance on the construction project (through the mail), the parent corporation conducted business in Texas sufficient to subject it to suit in Texas.¹³³

C. Attorneys’ Fees and Costs:

Contracting parties may want to consider whether the guarantee should include a provision for the payment of attorneys’ fees and costs.¹³⁴

IV. Conclusion.

In drafting a personal guarantee, the contracting parties should consider the scope of coverage to be afforded by the personal guarantee and the financial resources of the guarantor. The parties must decide whether other forms of risk protection will be provided so that the guarantee functions as additional security or whether the personal guarantee will be the primary form of protection on the project. Thus, when drafting the guarantee, the parties can clearly articulate the scope of coverage contemplated in the event of a contractor’s default. If the personal guarantee will be the primary form of risk protection, it may be advisable to draft the guarantee to protect the creditor’s interest in manner similar to a surety obligation to act as solvent protection and/or guarantee performance. For example, the parties could require an independent examiner to conduct an investigation in the event of default as the parent or affiliate is subject to biases and will likely side with the defaulted contractor in any contested default. As there is always an underlying solvency concern, even with drafting a detailed

personal guarantee, the contracting parties should consider requiring additional forms of risk protection.

V. Example.

PARENT COMPANY GUARANTEE

This Guarantee (the "Guarantee") is made as of the ____ day of _____, 201__, by [parent entity name], a(n) [type of entity and state of organization; e.g., Arizona corporation] (the "Guarantor"), in favor of _____.

RECITALS

A. WHEREAS, Guarantor is the direct parent company of _____ ("Subsidiary").

B. WHEREAS, _____ is serving as the [insert one of the following: contractor/construction manager/design-builder] under that certain contract between _____ and _____ (the "Owner"), dated _____, 201__, in connection with the _____ Project (the "Project").

C. WHEREAS, _____ and Subsidiary are parties to that certain subcontract dated _____, 201__ (the "Subcontract"), pursuant to which Subsidiary is performing certain work and services in connection with the Project (the "Subcontract Work").

C. WHEREAS, pursuant to the Subcontract, _____ has required that Subsidiary furnish to _____ a guarantee of performance of all of Subsidiary's obligations under the Subcontract by Guarantor.

D. WHEREAS, Guarantor, by virtue of its ownership of Subsidiary, will directly benefit from Subsidiary's performance of its obligations under the Subcontract. Amongst other benefits, the anticipated profit earned from this Project by the Subsidiary will ultimately flow to the Guarantor.

NOW, THEREFORE, in consideration of the premises set forth herein and other good and valuable consideration (including the sum of Ten Dollars (\$10.00)), the receipt and sufficiency of which are hereby acknowledged, Guarantor covenants and agrees as follows:

GUARANTEE

1. Definitions. Unless otherwise defined herein, all capitalized terms used herein shall have the respective meanings assigned to such terms in the Subcontract.

2. Guarantee. Guarantor hereby unconditionally guarantees: (a) the full and timely performance of all obligations and responsibilities of the Subsidiary with respect to the Subcontract Work, and hereby undertakes that if Subsidiary shall in any respect fail to perform such portions of the Subcontract Work, Guarantor warrants the full, faithful, and timely performance of all of any such portions of the Subcontract Work, and (b) the punctual payment and performance when due of each, and every other obligation of Subsidiary pursuant to the terms of the Subcontract (collectively, (a) and (b) are the "Guaranteed Obligations"). This Guarantee is a guarantee of payment and performance and

not merely of collection. This Guarantee is in no way conditioned upon any requirement that ____ first attempt to enforce any of the Guaranteed Obligations against Subsidiary, any other guarantor of the Guaranteed Obligations, any surety or any other person or entity, or resort to any other means of obtaining performance of any of the Guaranteed Obligations. This Guarantee shall continue to be effective or be reinstated, as the case may be, if at any time any payment of any of the Guaranteed Obligations are annulled, set aside, invalidated, declared to be fraudulent or preferential, rescinded or must otherwise be returned, refunded or repaid by _____ upon the insolvency, bankruptcy, dissolution, liquidation or reorganization of Subsidiary, or upon or as a result of the appointment of a receiver, intervenor or conservator of, or trustee or similar officer for Subsidiary or any substantial part of its property or otherwise, all as though such payment or payments had not been made.

3. Guarantee Absolute.

(a) The liability of Guarantor under this Guarantee shall not be affected or discharged in whole or in part by:

(i) Any claim of any lack of authority on the part of Subsidiary to make and carry out the Subcontract and/or any claim that the Subcontract had not been duly executed and delivered by Subsidiary or are otherwise not binding on Subsidiary;

(ii) Any modification, change, extension, or waiver of any of the terms of the Subcontract by Subsidiary;

(iii) Except as to applicable statutes of limitation, any failure, omission, delay, waiver or refusal by _____ to exercise, in whole or in part, any right or remedy held by _____ with respect to the Subcontract; provided, however, that Guarantor shall be entitled to assert any defense that Subsidiary is or may be entitled to assert; or

(iv) Any change in the existence, structure or ownership of Guarantor or Subsidiary, or any insolvency, bankruptcy, reorganization or other similar proceeding affecting Subsidiary or any of its assets.

(b) Guarantor hereby waives:

(i) Any obligation of _____ to inform or advise the Guarantor of any information regarding Subsidiary; and

(ii) Any other defenses based on the principle of sureties or suretyship.

4. Subrogation. Guarantor shall be subrogated to all rights of _____ against Subsidiary with respect to any amounts paid by Guarantor pursuant to this Guarantee, provided that Guarantor waives any rights it may acquire by way of subrogation under this Guarantee, by any payment made hereunder or otherwise, until all of the Guaranteed Obligations shall have been irrevocably and indefeasibly performed in full. If any amount shall be paid to the Guarantor on account of such subrogation rights at any time when all of the Guaranteed Obligations shall not have been irrevocably and indefeasibly performed in full, such amount shall be held in trust for the benefit of _____ and shall forthwith be paid to _____ to be applied to the Guaranteed Obligations. If (a) the Guarantor shall perform and shall make payment to _____ of all or any part of the Guaranteed Obligations, and (b) all of the Guaranteed Obligations shall have been irrevocably and indefeasibly performed in full,

_____ shall, at the Guarantor's request, execute and deliver to the Guarantor, (i) appropriate documents necessary to evidence the transfer by subrogation to the Guarantor of any interest of _____ in the Guaranteed Obligations resulting from such payment by Guarantor, and (ii) a full release from and discharge of this Guarantee.

5. Demand and Payment. Any demand by _____ for payment or performance hereunder shall be in writing, signed by _____, and delivered to the Guarantor in accordance with the terms of Section 11 hereof. There are no other requirements of notice, presentment, or demand or any other conditions to the enforcement of this Guarantee.

6. No Waiver; Remedies. Except as to applicable statutes of limitations, no failure on the part of _____ to exercise, and no delay in exercising any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

7. Assignment, Successors' and Assigns. Guarantor may not assign its rights or delegate its obligations under this Guarantee without the prior written consent of _____, which may be granted or withheld in the sole and absolute discretion of _____. _____ may assign its rights hereunder to the same extent as and concurrent with any assignment of its rights under the Subcontract. Subject to the foregoing, this Guarantee shall be binding upon and inure to the benefit of the parties hereto and their respective successors, permitted assigns, and legal representatives.

8. Amendments, Etc. No amendment of this Guarantee shall be effective unless in writing and signed by Guarantor and _____. No waiver of any provision of this Guarantee or consent to any departure by Guarantor therefrom shall in any event be effective unless such waiver shall be in writing and signed by _____. Any such waiver shall be effective only in the specific instance and for the specific purpose for which it was given.

9. Warranties. Guarantor represents and warrants to _____ and its successors and assigns that:

(a) Guarantor is duly organized and validly existing corporation;

(b) Guarantor directly or indirectly owns 100% of Subsidiary and Guarantor shall derive direct and indirect benefit from the making of this Guarantee;

(c) Guarantor has authorized and has all necessary power and authority, corporate and other, to execute and deliver this Guarantee and to perform the obligations of Guarantor, and this Guarantee has been duly executed and delivered by Guarantor and is the valid, binding, and enforceable agreement of Guarantor;

(d) The execution and delivery of this Guarantee by Guarantor and its performance of its obligations under the Guarantee, do not (and, to the best of Guarantor's knowledge, will not) conflict with any law, rule or regulation, or any agreement, instrument, indenture, deed or any other restriction to which Guarantor is subject or a party, or accelerate or affect any of its obligations thereunder; and

(e) Guarantor acknowledges and agrees that _____ would not have entered into

the Subcontractor but for its receiving this Guarantee from Guarantor.

10. Dispute Resolution. In the event of any action between _____ and Subsidiary arising out of or relating to the Subcontract, in connection with which _____ seeks to initiate an action against Guarantor pursuant to this Guarantee, the parties to this Guarantee agree that such actions shall be consolidated whether in court or arbitration (at _____ sole discretion) and the parties hereby consent to the court's or arbitrator's exercise of jurisdiction where or before whom any such action is pending.

11. Notices. All notices, requests, demands, and other communications under this Guarantee shall be in writing and shall be deemed to have been duly given if delivered in person or if mailed in the United States mail, certified mail, return receipt requested, and properly addressed as follows:

If to Guarantor:

Attn:

With a copy to:

Attn:

If mailed, any such notice, request, demand, or other communication is effective on the date shown on the return receipt. From time to time either party may designate another person or address for all purposes of this Guarantee by giving to the other party not less than fifteen (15) days' advance written notice of such change of person or address in accord with the provisions hereof. Notwithstanding any other requirement hereof as to notice, any notice given concerning this Guarantee shall be effective if actually received by the recipient. The copies of notices indicated above are for the convenience of the parties and are not required for effective notice.

12. Choice of Law. This Guarantee shall be governed by and construed in accordance with the laws of the state in which the Project is being constructed.

13. Attorneys' Fees. In the event of any action or proceeding by _____ to enforce the terms of this Guarantee, _____ shall be entitled to recover its reasonable attorneys' and paralegals' fees and costs through all trial and appellate levels of litigation, and in any settlement, mediation, bankruptcy or administrative proceedings.

IN WITNESS WHEREOF, Guarantor has executed this Guarantee as of the date first written above.

GUARANTOR

By: _____
Title: _____
Date: _____

Receipt by _____ of this Guarantee is acknowledged:

[NAME OF REQUESTING PARTY]

By: _____
Title: _____
Date: _____

SECTION VII: Drafting Better Arbitration and Other Agreements

By Patricia H. Thompson & Heather M. Jonczak

There is no arbitration agreement that is perfect for every construction contract. Instead, like every important term in such a contract, the arbitration provisions should be crafted based on the parties' preferences, needs and experience. It is poor draftsmanship to insert boiler plate arbitration provisions into an otherwise carefully negotiated contract without consideration of whether those provisions will generate unnecessary litigation or cause the parties to incur unanticipated expense rather than ensure a faster, cheaper means of dispute resolution.

The purpose of this article is to identify the common issues of concern that can be avoided or minimized in the careful crafting of the ADR provisions of a construction contract. These concerns include: the manner in which arbitrators are selected and their requisite qualifications; whether a particular dispute is within the scope of arbitration and therefore "arbitrable"; choice of law provisions; procedures for discovery and motion practice; and the applicable rules that will govern the overall arbitration process.¹³⁵

By confronting such issues prospectively, construction practitioners can better ensure that arbitration will promptly and fairly resolve the any subsequent disputes between the parties. The end result and goal is to craft an arbitration process that is best designed to achieve justice for the parties. As has been explained by Thomas J. Stipanowich, "The greater part of justice may be getting the dispute over with and getting on with business, or having a clear and final decision as a foundation for forward planning; in other words, justice is about how a fundamentally good result can be achieved with speed, economy and finality."¹³⁶

I. Failure to specify exactly what types of disputes are subject to arbitration.

The first question to resolve in drafting an arbitration agreement concerns the scope or reach of the agreement: What types of disputes does it cover? What remedies can be obtained? What entities and persons does it govern? A related issue is whether the fundamental question of “arbitrability”, *i.e.* the scope of the arbitration agreement, should be determined judicially or resolved in arbitration. It is unwise not to address and define the parties’ intentions concerning these issues in the agreement itself. When arbitration agreements are indefinite, ambiguous or inconsistent as to the scope of issues subject to arbitration, the parties may find themselves in time-consuming and expensive litigation to determine whether a given dispute is to be resolved by arbitration.

Whether the parties agreed to submit a dispute to arbitration is presumptively for a court to decide, unless the arbitration provision expressly states otherwise.¹³⁷ Most courts embrace a liberal policy of enforcing arbitration agreements. Courts favoring arbitration will resolve questions of contract interpretation in favor of arbitration even when one of the parties may object on reasonable grounds.

As a result of the predilection of many judges to favor agreements to arbitrate, broad arbitration clauses may be interpreted to apply to a wide variety of claims, including those founded on torts and statutory rights. Where an arbitration clause provided that “any dispute, controversy or claim arising out of or related to” an agreement would be resolved by arbitration, claims of tortious interference with contract and inducement of breach of fiduciary duty were found to be within the scope of arbitration.¹³⁸

Thus, it is important to control the scope of arbitration by including clear and unequivocal language of the parties’ intent. If the parties prefer to arbitrate all controversies, including tort and statutory claims, the contract should include a broad arbitration provision. Conversely, the parties may limit arbitration to claims requiring a reference to, or interpretation of, the underlying construction contract.

While courts generally have authority to determine the validity of agreements to arbitrate, questions as to the validity of the entire contract,¹³⁹ preconditions to arbitration,¹⁴⁰ and procedural

questions which grow out of the dispute and bear on its final disposition are presumptively for an arbitrator to decide.¹⁴¹ For example, the timeliness of the claimant's demand for arbitration, when the agreement required demand to be made within a prescribed timeframe post the date of the contested occurrence, is a procedural issue to be decided by the arbitrator.¹⁴² An arbitrator can also determine the issues of arbitrability and enforceability, provided there is no ambiguity in the contractual language granting the arbitrator such authority.¹⁴³

To avoid any confusion as to where and how such preliminary questions of enforceability and arbitrability will be decided, the parties should expressly dictate which, if any, threshold issues will be decided by a court, as opposed to arbitrator(s). If the contracting parties would prefer to bypass the judiciary entirely, the arbitration clause can expressly require all questions involved in the dispute, including enforceability, arbitrability, and other arguably judicial issues are to be determined by arbitration, not a court of competent jurisdiction. Conversely, if the parties prefer only specific claims will be subject to arbitration, the clause should be drafted to provide the controversies subject to judicial determination.

II. Inconsistent contract language concerning scope of arbitrability.

Another common drafting error often results when the terms of a construction contract are cobbled together from different contract forms, resulting in inconsistent provisions as to whether arbitration is mandatory or as to the scope of disputes subject to arbitration. Similarly, when contracts are amended, renewed or otherwise supplemented over time, inconsistent dispute resolution clauses may be added creating ambiguity as to whether a subsequent dispute must be arbitrated. Such ambiguity may lead to the unnecessary expense of litigation to determine whether the parties are required to arbitrate.

For example, in *Bari Builders, Inc. v. Hovstone Properties Florida, LLC*,¹⁴⁴ the trial court denied a motion to arbitrate a condominium developer's claim against a subcontractor, due to conflicting dispute

resolution provisions. The subcontract contained both an arbitration provision and an arguably inconsistent clause stating the parties waived their right to a jury. The subcontractor opposed arbitration contending the jury waiver language rendered the scope of the arbitration provision ambiguous and unenforceable.¹⁴⁵ On appeal, the arbitration provision was enforced on the basis that “the presence of an additional dispute resolution clause does not render an otherwise valid arbitration clause ambiguous if the two can be read in a complimentary fashion.”¹⁴⁶ The court construed the parties’ intent to mean that any controversy or claim would be submitted to arbitration and that thereafter, any award may be reduced to judgment in court without right to jury trial.

In another case involving extensive litigation over arbitrability, the parties in *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*¹⁴⁷ filed federal court litigation and an appeal to resolve the apparent conflict between slightly different arbitration provisions in two contracts covering different time periods: one which mandated arbitration of any dispute under the contract and one which exempted from arbitration claims involving breaches of the parties’ confidentiality obligations. The Eleventh Circuit reversed a Florida District Court’s refusal to order arbitration based on evidence that the wrongdoing at issue spanned both contract periods. The Court reasoned that the earlier arbitration agreement was “susceptible of an interpretation that covers” the dispute and so sent the parties to arbitration in Washington – far away from the Florida Court chosen by the party who sought to litigate the dispute.

It must have been exceedingly frustrating for the parties in both of these cases to spend so much time and money litigating and appealing the issue of whether their underlying agreement was going to be resolved. This frustration could have been avoided had their counsel insured there were no contractual inconsistencies.

III. Failure to clearly specify the arbitration venue.

When a contract does not clearly specify the parties' choice of locale for arbitration proceedings, one party may find itself haled into a venue that is inconvenient, expensive, and not what it would have chosen had the issue been brought to its attention when the contract was drafted. If the prejudice to that party appears to be great enough, it may seek to have the venue of the proceedings changed by filing suit to compel arbitration in a more favorable forum in which case, once again, the parties would be in the unfortunate position of litigating an "ancillary logistical concern";¹⁴⁸ thereby delaying resolution of their underlying dispute.

This issue is of special importance when parties have venue choices in different countries. For example, *British-Am. Ins. (Kenya) Ltd v. Matelec Sal and Thika Power, Ltd*,¹⁴⁹ the parties entered into two related contracts. They specified in one contract they would resolve their disputes in Kenya, where one party and the subject construction project was located. However, they stated in the other contract that disputes between them would be arbitrated in London. To the dismay of the Kenyan party, a London Court ruled that their disputes under both contracts were related enough that they would have to be arbitrated in London.

Finally, it is important to avoid generic venue terms that are inconsistent with the ADR provisions, by specifying that venue will lie only in a particular court or judicial system.

IV. Inconsistent Choice-of-Law Provisions.

It is a potential drafting error to assume that a general choice of law provision of the type usually recited at the end of a construction agreement has no effect on the enforceability, scope, or procedures applicable to the arbitration agreement in that contract. To avoid unintended consequences, counsel need to carefully consider the effects or enforceability of such choice-of-law provisions as to any subsequent arbitration. For example, choosing a given state's law may divest arbitrators of the authority to enter awards, such as punitive damages, if such awards are not permissible under the law of the selected jurisdiction.¹⁵⁰

Consequently, in deciding whether to invoke the law of a specific jurisdiction for governance of dispute resolution, practitioners should consider and compare the laws of the selected jurisdiction and the jurisdiction where the construction project is located.¹⁵¹ Most states hold choice-of-law provisions in a contract to be presumptively valid and enforceable unless the law of the designated forum would contravene a strong public policy of the state where the construction project is located.¹⁵² Counsel concerned about the enforceability of a choice-of-law provision should consider including a severability clause, so an invalid provision in an arbitration agreement, which conflicts with a state statute or federal law, can be severed without rendering the entire arbitration agreement unenforceable.¹⁵³

One choice-of-law decision that merits careful consideration is the choice of whether federal or a specific state's arbitration law will apply. In the absence of a selection clause, The Federal Arbitration Act ("FAA") usually will apply as most construction contracts involve interstate commerce.¹⁵⁴ Absent the applicability of the FAA, state law will control, even when a particular jurisdiction renders the parties' pre-dispute arbitration agreement unenforceable.¹⁵⁵

If the FAA applies to an agreement, a "[g]eneric choice of law provisions cannot be used to incorporate state arbitration law which, in the absence of the choice of law provision, would be preempted by the FAA."¹⁵⁶ For example, in an international case where the FAA applied, the contract recited that the parties chose the substantive law of Texas to apply to the agreement.¹⁵⁷ The federal court, applying the FAA, determined that the choice of law clause without specific mention of the Texas Arbitration Act did not cause the Texas Arbitration Law to apply and take priority over the FAA with respect to the arbitration proceedings.

Contracting parties can still prevent application of the FAA rules in favor of state rules, however, by clearly and unambiguously mandating that a state arbitration statute applies.¹⁵⁸ Thus, to override the application of the FAA default rules, the choice-of-law provision must expressly specify the particular state arbitration statute that applies in the selected jurisdiction.

The FAA will not preempt the parties from stipulating to a state law that infringes upon or restricts an otherwise valid arbitration agreement nor will the FAA prevent the contracting parties from expressly excluding claims, including statutory claims and punitive damage claims, from the scope of the arbitration agreement.¹⁵⁹ For example, in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*,¹⁶⁰ a construction contract included an agreement to arbitrate all disputes between the parties arising out of, or relating to, the contract or the breach thereof, as well as a choice of law provision providing that the agreement would be governed by the law of the place where the project was located, which was California. Despite the parties' clear agreement in this contract to arbitrate disputes between them, when one of the parties filed for arbitration, the other brought such in state court and obtained a stay of the arbitration pursuant to a provision of the California Civil Procedure Code. The issue of whether this provision of California law applied to stay the arbitration was appealed to the U.S. Supreme Court, which ruled that the parties' stipulation to California law controlled.¹⁶¹

In summary, a choice-of-law provision either should mention the applicable arbitration statute of the selected state jurisdiction or provide for application of the FAA. Also, practitioners should ascertain the laws of both the selected jurisdiction and the jurisdiction where the construction project is located in order to contract around any potential public policy concerns that could affect the enforceability of any aspect of the ADR agreement.

V. Failure to specify the extent to which and whether a given tribunal's arbitration rules will apply.

Another drafting mistake is to fail to thoughtfully elect whether and to what extent the parties decide to subject any subsequent disputes to the rules of a given dispute resolution organization.

If an arbitration provision adopts the standard arbitration rules of an institutional administrative provider, such as the American Arbitration Association ("AAA") or JAMS, the parties have surrendered a large measure of control and discretion over the dispute to those rules and the arbitrator as empowered

by those rules. “Even AAA spokespersons don’t advocate ‘[t]houghtlessly inserting a boilerplate arbitration clause into your contract,’ but suggest tailoring the process to fit the needs of the contract parties.”¹⁶² Thus, while parties may elect to adopt standard arbitration rules, they may want to consider how best to adapt and modify the rules governing the arbitration process to fit their needs.

a. Venue Selection.

If there is no venue selection provision in the construction contract, the decision will likely be made by the arbitration provider.¹⁶³ This could be contrary to one or more of the parties’ best interests, depending on the location of the project, the witness and the arbitrators).¹⁶⁴ Thus, as discussed in more detail, above, the parties should consider including an exclusive venue provision in the arbitration agreement.

b. Arbitrator Selection.

An area that should be of particular concern in drafting an arbitration agreement is the arbitrator selection process. The parties should insure selection of arbitrators with the necessary level of construction expertise and ability to manage complex commercial disputes. Usually, arbitrators are selected on a case-by-case basis by the parties (in a self-administered case) or chosen from candidates preselected by an arbitral institution. By adopting the rules and processes of a nominated institution, the parties must follow that institution’s arbitrator selection process, unless the contract expressly provides for an alternative method. A court of competent jurisdiction will generally have no authority to question such a selection process.¹⁶⁵ If the parties do not wish to be bound by the rules of a specific arbitral institution, parties should contractually designate a mechanism and criteria for arbitrator selection.¹⁶⁶ Examples of possible provisions for selecting arbitrators include:

- **Number of Arbitrators.** There shall be [check one]
 - One arbitrator who shall be
 - — [name].
 - — appointed by [the institutional administrator].
 - — appointed by [appointing authority].

- ___ bar licensed and board certified in construction law [if certification in jurisdiction] and by appointed by [appointing authority].
 - Three arbitrators, two of whom shall be party-arbitrators and the third shall be a neutral/umpire. The neutral chairperson of the panel shall:
 - — make all procedural decisions and be [name].
 - — be appointed by the party-arbitrators and, if they cannot agree, then by [the institutional administrator].
 - — appointed by [appointing authority].
 - Three neutral arbitrators, none of whom shall be party-arbitrators. The chairperson of the panel shall make all procedural decisions.
- **Qualifications.** Any neutral arbitrator shall have the following minimum qualifications:
 - **Education** [specify, for example, bachelor degree, masters or doctorate].
 - Academic study [engineering, architecture].
 - Certification or professional licensure [specify, for example, board certified construction attorney, registered professional engineer, licensed general contractor].¹⁶⁷
 - Specific job experience [specify, for example, trial court judge, attorney specializing in construction litigation] and shall have [number] years of full-time equivalent experience on that job.]
 - **Language and Nationality of Arbitrator(s).** The arbitration shall be conducted in, and any arbitrator(s) serving must fluently read, write and speak, [English and/or other language(s)]. All documents and any testimony of a witness submitted to the arbitrator(s) or administering agency shall be delivered in their original language and must be accompanied by a translation in [language]. Any neutral arbitrator must
 - Be a citizen of [country].
 - Not be a citizen of or born in, or ever have been a domiciliary or resident of [country].
- **Disclosure.** Before appointment, a neutral arbitrator shall:
 - Disclose any circumstance likely to interfere with the arbitrator(s) conducting a sufficient number of hearings to allow the reasonably diligent issuance of an award which, in any event, shall be filed
 - — on or before [date].
 - — no later than [number] calendar days after the filing of a demand for arbitration.
 - Be disqualified if that arbitrator has any potential conflict of interest, past or present, direct or indirect, as to the parties, their representatives or witnesses, whether such conflict may be financial, professional, social, personal or of any other kind.

While practitioners can provide for express criteria tailored to the subject of the construction contract, they should be mindful to not include too many requirements or limitations; otherwise, there may not be a sufficient pool of qualified and available arbitrators from which to choose. Alternatively, in the contract, the parties can identify by name, the neutrals they want to preside over any contract

dispute. However, such a provision should make allowance for the unavailability of specific arbitrators to serve and provide for selection of alternative neutrals.

c. Discovery Process.

An arbitrator has broad discretion in streamlining the discovery process, unless the parties provide otherwise. For example, under the AAA rules, the choice of discovery procedures is within the discretion of the arbitrator. AAA rules allow arbitrators to decide whether depositions will be taken and the scope of written discovery such as third-party subpoenas. JAMS requires the voluntary exchange of all relevant documents and allows two (2) depositions per party, with further depositions controlled by the arbitrator.

Increasingly, however, discovery in arbitration has become too similar to and as expensive as discovery in litigation. The parties to an arbitration agreement can retake control of the discovery process by including any of following limitations in advance by agreement: (1) the number and type of depositions; (2) allow for or preclude issuance of third party subpoenas for documents or depositions; (3) limit the scope of document discovery, *i.e.* whether e-discovery is permitted in arbitration and the parameters of e-discovery as well as what party bears the costs of e-discovery; (4) the scope and/or parameters for the use of experts; (5) limitations on written discovery such as number of interrogatories per parties and the type and scope of documents to be exchanged; and (6) provide for expedited procedure for resolving discovery disputes. It may be particularly advantageous to decide the document discovery process beforehand as arbitrating construction contracts may necessitate the exchange of extensive documents. As exchanging all documents related to a large construction project could be expensive, the parties may want to agree they will only exchange select and particularly relevant portions of the project file. The parties may also provide that the arbitrator(s) have the authority and responsibility to limit – not expand – the discovery available to the parties, in keeping with

the parties' intent to avoid the expense and delay of the extent and type of discovery allowed by civil rules of procedure in litigation.

d. Motion Practice.

While the FAA is silent on the issue of dispositive motions, as it is on all issues of arbitration management, the arbitral institutions have enacted rules addressing dispositive motions.¹⁶⁸ The AAA's Construction Industry Arbitration Rules, for example, expressly directs the arbitrator to hear motions that "dispose of all or part of a claim."¹⁶⁹

The JAMS Comprehensive Arbitration Rules also grants arbitrators authority to rule on summary adjudication motions.¹⁷⁰ Alternatively, the CPR Institute's Rules for Non-Administered Arbitration appear ambiguous on the issue of dispositive motions.¹⁷¹ The commentary to Rule 9, however, suggests that arbitrators have authority to decide pure legal issues prior to the hearing on issues that involve undisputed issues of fact.¹⁷² Whichever arbitral rules apply, the relaxed procedural rules of arbitration proceedings provide the arbitrator some discretion in designing the procedures that will apply to dispositive motions as long as the party opposing the motion is given adequate notice and a meaningful opportunity to respond.¹⁷³

Alternatively, practitioners may expressly limit the use and type of dispositive motions or providing an expedited procedure for resolving any specific type of motion. Motions addressing the sufficiency of pleadings, for example, seem to have limited utility in arbitration proceedings as pleading requirements in arbitration are generally more relaxed than in formal litigation. On the other hand, certain defenses, such as statute of limitations should be resolved as soon as possible. Of greater concern is the process for determining motions for final summary judgment. As discovery is generally limited in arbitration proceedings, the parties may require certain discovery and/or document exchange thresholds are met before the arbitrators can decide the merits of certain summary judgment motions.

e. The Hearing.

There are many ways in which parties and the arbitrator can work together to shorten the evidentiary hearing and provide for more effective presentation of the parties' evidence than a judicial proceeding. However, unless the parties make clear in their agreement that the arbitrator will be expected to control the proceedings, sanction parties for being unprepared, and have authority to direct the parties as to how to most effectively and efficiently submit their proof, the hearings can take an unnecessarily long time. The parties may specifically authorize the arbitrator to hold specific preliminary hearings to manage and control the process, require the parties to submit written direct testimony, limit the time allowed to present testimony, and have experts for both sides testify and appear at the same time.

VI. Failure to specify the legal standards for arbitrational decision making.

One often overlooked provision in arbitration agreements is whether the arbitrator(s) must "follow the law" rather than their own sense of equity and fairness, if the latter result would be contrary to applicable law. While it is true that "arbitrator's awards are almost entirely immune to vacatur based on legal 'error'",¹⁷⁴ if the parties make clear that they intend the arbitrator to follow the law and enforce their contract rights in accordance there with, an ethical arbitrator will be less likely to feel free to "split the baby or do "rough justice" if the parties have agreed to limit his/her discretion to ignore the law. The parties can assist the arbitrator in addressing and resolving legal issues by providing for post hearing briefing and reasoned awards. Further assurance that the outcome will follow the law can be provided by allowing for specific arbitration appellate procedures.¹⁷⁵

VII. Inconsistent or non-existent arbitration agreements among all parties to a construction project.

Consolidation concerns are particularly important when a dispute implicates multiple parties, as is typical in most construction projects. It is not unusual to find different and inconsistent ADR provisions in the prime contract between the owner and general contractor, the subcontracts with the various trades, contracts with the design professionals, and those of material suppliers who provide

warranties and/or have significant input into the design-build of the project for the products they supply.

There is no guarantee that all parties to a dispute can be included in arbitration unless their contracts include an agreement to arbitrate. In order to be part of a single arbitration, all participants must also have all agreed to the same procedure. One author observed, “[I]f owner and contractor have an AAA arbitration clause in their contract but the subcontracts all requires arbitration before JAMS, complete efficiency will be impossible.”¹⁷⁶

In an effort to prevent inconsistencies, it may be advisable that all flow-down contracts include a simple arbitration provision requiring arbitration and incorporating by reference the more detailed terms of the arbitration provision in the prime contract. “Incorporation is common in the construction industry where subcontracts often incorporate prime contracts by reference and surety bonds incorporate contracts of bond principals in an effort to create uniformity of rights and obligations among numerous participants on a typical project.”¹⁷⁷

Incorporation by reference may allow consolidated arbitration even when the implicated contracts appear to have different ADR provisions. For example, in one case, arbitration was commenced to resolve a dispute involving the prime contract, which provided for arbitration in accordance with the AAA rules; the non-signatory subcontractors refused to join as their subcontracts provided for arbitration using two-party arbitrators and a neutral third.¹⁷⁸ The prime contractor sought an order compelling their participating citing a clause providing for assumption of principal contract in the subcontracts, which stated that all rights and remedied reserved to the pwner in the prime contract applied to the general contractor in its dealing with subcontractors. As the owner was involved, the court interpreted the language to mean the subcontractors were obligated to arbitrate under the prime contract’s procedure and that the procedure specified in the subcontracts was only applicable to disputes solely between the general contractor and one or more subcontractor.¹⁷⁹

Even if all project parties agree to arbitrate, under the auspices of the rules of the same arbitral organization, “the issue whether they will do so in joint or separate fashion remains cloudy unless they have provides the answer in their contract(s).”¹⁸⁰ The consolidation question may arise when one party seeks to join additional parties to pending arbitration proceedings, and when parties may want to force consolidation of two or more separate arbitration proceedings. While the arbitral rules allow for joinder and consolidation, there are no guarantees whether joinder or consolidation will be allowed unless the parties agree to joinder and/or consolidation after an arbitration demand is made.¹⁸¹ The rules on this issue differ.

“JAMS provides that unless the law or parties’ agreements provides otherwise it may consolidate new arbitration proceedings with existing proceedings, taking into account ‘all circumstances,’ and the Arbitrator may allow a party to join, or require a party to be joined, in a pending arbitration, ‘taking into account all circumstances the Arbitrator deems relevant and applicable.’”¹⁸² Alternatively, “[w]here AAA is administering a proceeding, absent agreement on joinder or consolidation, a special arbitrator [R-7 arbitrator] will be appointed to rule on this issue” who is not otherwise involved in the underlying dispute.¹⁸³

Consolidation and joinder may also present procedural concerns related to how arbitrators are selected. For example, if the prime contract includes an express and narrow selection process, will that process govern the consolidated proceedings? In the case of consolidation, JAMS provides that the parties “will be deemed to have waived their right to designate an arbitrator as well as any contractual provision with respect to site of the Arbitration.”¹⁸⁴ Conversely, AAA provides the following solution:

If the R-7 arbitrator determines that separate arbitrations shall be consolidated or that the joinder of additional parties is permissible, that arbitrator may also establish a process for selecting arbitrators for any ongoing or newly constituted case and, unless agreed otherwise by the parties, the allocation of responsibility for arbitration compensation among the parties, subject to reappointment by the arbitrators(s) appointed by the newly constituted case in the final arbitration award.¹⁸⁵

If the parties do not want to waive their rights or subject themselves entirely to the arbitral rules of institutions such as AAA or JAMS, the parties can also prescribe consolidation and joinder rules by contract. For consolidation and joinder provision to be effective, however, contractors will need to be mindful that similar provisions in lower-tiered subcontractor agreements and require those lower-tiered subcontractors to include similar provisions in each of their sub-subcontracts. In other words, all contracts related to a particular construction project must: (1) allow for arbitration; (2) permit consolidation and joinder; and (3) adopt the same arbitral rules whether by incorporation or otherwise.

An example of a contracted resolution of this issue is in the 2007 edition of the AIA A107 form contract, which allows consolidation and joinder of other parties so long as certain criteria are met. In order to consolidate arbitrations, the following factors must be present: (1) the arbitration agreement governing the other arbitration(s) permits consolidation; (2) the arbitrations to be consolidated involve common issues; and (3) the arbitrations to be consolidated are governed by similar rules and methods for selecting arbitrators.¹⁸⁶ For joinder, the parties must be substantially involved in a common question of law or fact whose presence is necessary, provided that the party to be joined consents to such joinder in writing.¹⁸⁷

VIII. Other Modification Considerations:

a. Limit Dollar Amount for Arbitration:

There are a number of reasons parties may prefer an election of remedies rather than a mandatory arbitration provision to resolve all matters of controversy. For example, in complex construction matters, if the amount of damages exceeds a certain threshold amount, it may be preferable for the parties to elect litigation over arbitration. In that case, the parties may provide in the arbitration agreement to set a dollar limit on arbitration. The provision may state, “if the claim is greater than \$_____ dollars, then the parties agree to bypass arbitration and go straight to litigation”. While

this runs the risk of tempting the claimant to artificially inflate the amount of the claim, it allows the parties to elect in advance the size of disputes better suited to arbitration or litigation.

b. Timing Provision.

Practitioners may consider including a timing provision setting how long an arbitration action can take from demand to final resolution. Such a provision may reduce costs and uncertainty from lengthy or delayed hearings. The arbitrator(s) will need to be provided authority to enforce the time limits and to sanction parties who cause unnecessary and unexcused delays.

c. Class Actions.

If class actions are a possibility, courts will not consider the enforceability of arbitration provisions unless the arbitration clause expressly specifies that it is applicable to class actions.¹⁸⁸ If the agreement is silent on the issue of class arbitration, it will not be presumed that the parties intended to permit class arbitration. Even a contract that includes broad language calling for arbitration of *any* dispute under the contract will not be construed to include less litigation, “because class arbitration changes the nature of the arbitration to such a degree it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to arbitration.”¹⁸⁹ Thus, if parties intend to allow class action arbitration they must include such express authority in the arbitration clause.

d. Attorney Fees and Cost Provisions.

It may be advisable to include a provision in an ADR clause dealing with the allocation of costs and attorney fees. Rather than leave this provision to the discretion of the arbitrator, the parties may require each party to bear its own attorney’s fees and costs or include a prevailing party fee provision. Otherwise, a dispute may arise as to whether attorney fee claims can be decided under the arbitration agreement.¹⁹⁰ Or the parties may disagree as to whether the arbitrator has a right to impose sanctions in the form of fees or costs, for discovery abuse or other perceived infractions. Again, it defeats the purpose of arbitration when the parties are forced to litigate an arbitrator’s authority, because it is not

sufficiently defined in the agreement. In drafting an arbitration fee agreement, the parties should be careful not to inadvertently use standard form language that conflicts with the specific law that otherwise governs the parties' dispute.¹⁹¹

For example, this issue arose where a subcontractor on a public project sued the prime contractor and its surety, and the trial court referred the case to mandatory arbitration under a court rule.¹⁹² The parties agreed to a settlement of the amount owed for work on the project but not the amount of attorney's fees due the claimant, but agreed that the arbitrator would decide the attorneys fees. The defendants did not like the amount of the fee award, and requested a trial de novo as to the attorneys' fees pursuant to Mandatory Arbitration Rule ("MAR") 7.1. The trial court struck the request for a trial de novo, and the defendants appealed. The issue on appeal was whether in determining the amount of the fees the arbitrator was still acting pursuant to the mandatory arbitration procedure or was a private arbitrator selected by the parties. The Court held that the fee determination was part of the mandatory arbitration procedure, MAR 7.1 allowed a trial de novo, and the prime contractor and surety were entitled to a trial de novo as to the disputed fee award. The Court refused to award fees on appeal because the Washington bond statute only provided for fees to a claimant, not to the principal or surety, and the claimant was not the prevailing party on the appeal.

e. **Clauses with "Scaled" Conflict Resolution Procedures.**

Parties may want to contract for a structured approach to conflict management. For example, the ADR provisions could first require the parties to attend an informal mediation to air their grievances; if that fails, the parties would have a mini-trial; and if that fails, the parties would undergo binding arbitration. This scaled approach can be useful for complex construction projects in that claimants, including lower-level trades and subcontractors have an incentive to reach a resolution and settle

modest sized claims before the claim proceeds to the next more expensive, time consuming step in the dispute resolution process.

¹ There are of course a variety of industry associations that have devoted substantial efforts to creating and updating standard construction industry forms. See, e.g., the Design-Build Institute of America (DBIA) and the Engineers Joint Contract Documents Committee (EJCDC). In Canada, the Canadian Construction Documents Committee (CCDC) has been more successful than American industry groups in creating national consensus forms. Outside North America, the International Confederation of Consulting Engineers (FIDIC) is a widely respected publisher of such forms.

² The belief that construction contracts are all negotiated at arm's length is almost as widespread as it is misinformed.

³ AIA Document A102-2007, Standard Form of Agreement between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, § 5.1.

⁴ *Lytle, Campbell & Co. v. Somers, Fidler & Todd Co.*, 120 A. 409, 412 (Pa. 1923).

⁵ AIA Document A102-2007, § 5.2.1.

⁶ *Lytle, Campbell & Co.*, 120 A. at 411.

⁷ AIA Document A102-2007, § 7.2.4.

⁸ *Id.*, § 7.2.5.

⁹ EJCDC C-700 (2013), Standard General Conditions of the Construction Contract, § 13.01(B)(1) (emphasis added).

¹⁰ AIA Document A102-2007, § 7.2.4.

¹¹ *Id.*

¹² *Id.*, at § 7.2.5.

¹³ See *id.*, §§ 7.2.2, 7.5.1, 7.5.2, 7.5.4, 7.6.1.

¹⁴ *Shaw v. G. B. Beaumont Co.*, 102 A. 151, 152 (N.J. Ct. Err. & App. 1917).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 152-53.

¹⁸ *Hoggson Bros. v. Spiekerman*, 175 A.D. 144, 147 (N.Y. Sup. Ct. 1916).

¹⁹ *Id.* at 149.

²⁰ *Id.* at 149-50.

²¹ *Lytle, Campbell & Co.*, 120 A. at 409-12.

²² *Id.* at 411.

²³ *Advance Auto Body Works v. Asbury Transp. Co.*, 52 P.2d 958, 958-59 (Cal. App. Ct. 1935).

²⁴ *Lenslite Co. v. Zocher*, 388 P.2d 421, 424 (Ariz. 1964).

²⁵ *Wymard v. McCloskey & Co.*, 342 F.2d 495, 499 (3d. Cir. 1965).

²⁶ *Freeman & Co. v. Bolt*, 968 P.2d 247, 252 (Idaho 1998).

²⁷ *Petersen Painting & Home Improvement, Inc. v. Znidarsic*, 599 N.E.2d 360, 362 (Ohio Ct. App. 1991).

²⁸ AIA Document A102-2007, § 7.2.2.

²⁹ *Id.*, § 7.2.3.

³⁰ EJCDC C-700 (2013), § 13.01(C)(1).

³¹ *Id.*

³² AIA Document A102-2007, § 5.2.5.

³³ *Id.*

³⁴ Janet Moore, *Vikings Stadium Budget OK'd after Team Chips in More Money*, Nov. 22, 2013, available at <http://www.startribune.com/business/233001331.html>.

³⁵ *Id.*

³⁶ AIA Document A102-2007, § 7.7.3.

³⁷ EJCDC C-700 (2013), § 13.01(B)(5)(f).

³⁸ AIA Document A133-2009, Standard Form of Agreement between Owner and Construction Manager where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, § 2.2.4.

³⁹ See e.g. *U.S. v. Spearin*, 248 U.S. 132 (1918).