



# The Legal Landscape of Hospitality: Key Perspectives and Considerations

## *Part 3: Adapting Standard Construction Forms for Use in Overseas Hospitality Renovations*

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# Agenda

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## **I. Overview**

## **II. Selection of the Construction Project Forms**

- A. Bespoke contracts of the hotel owner or brand
- B. Canadian and European industry forms – CCDC, FIDIC, JCT, NEC
- C. US construction industry forms – AIA, ConsensusDOCS
- D. Selection of Local Counsel

## **III. Local Law Requirements/Key Provisions**

## **IV. Drafting the Dispute Resolution Provision**

- A. Arbitration v. Litigation
- B. Arbitration
- C. Litigation

## II. Selection of the Construction Project Forms

### A. Bespoke contracts of the hotel owner or brand

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- Developed by sophisticated owners, contractors and suppliers
- Construction contracts often similar in framework to the AIA's contract documents
- Sometimes use AIA or other published forms as compromise

## II. Selection of the Construction Project Forms

### B. Canadian and European industry forms – CCDC, FIDIC, JCT, NEC

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- CCDC
- FIDIC
- JCT
- NEC (Institute of Civil Engineers New Engineering Contract)

## II. Selection of the Construction Project Forms

### C. US construction industry forms – AIA, ConsensusDOCS

American Institute of Architects (AIA)	ConsensusDocs / Design-Build Institute of America + others	Bespoke Contracts
<ul style="list-style-type: none"> <li>• Standard form suite of contracts</li> <li>• Intended to reflect industry standard risk allocation</li> <li>• Do not address state-specific issues</li> <li>• Frequently used in the industry but usually with heavy mark up</li> </ul>	<ul style="list-style-type: none"> <li>• Other standard form suites of contracts</li> <li>• ConsensusDocs not as common as AIA but gaining market share</li> <li>• Do not address state specific issues</li> </ul>	<ul style="list-style-type: none"> <li>• Frequently used in construction projects</li> <li>• Often loosely based on AIA framework</li> <li>• Particularly customized for industrial</li> </ul>

## II. Selection of the Construction Project Forms

### C. US construction industry forms – AIA, ConsensusDOCS

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#### **AIA (American Institute of Architects)**

- Headquartered in Washington, D.C.
- Begin publishing in 1911
- Updated every 10 years on the sevens
- Long body of case law interpreting the AIA contracts
- 2007 - first time when some major industry associations did not endorse them
- AGC not invited to provide input to AIA's 2017 documents
- AGC formed AIA A201™ working group in 2017

## II. Selection of the Construction Project Forms

### C. US construction industry forms – AIA, ConsensusDOCS

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#### **Approximately 80 contract documents – commonly used forms are:**

- A101™ – Owner-Contractor Agreement (Stipulated Sum)
- **A102™ – Owner-Contractor Agreement Cost Plus (with GMP)**
- A104™ – Owner-Contractor Agreement (Abbreviated Form) (formerly A107™)
- A312™ – Performance Bond/Payment Bond
- **A201™ – General Conditions**
- A401™ – Contractor/Subcontractor Agreement
- B101™ – Owner-Architect Agreement



## II. Selection of the Construction Project Forms

### C. US construction industry forms – AIA, ConsensusDOCS

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#### **ConsensusDocs suite of published contracts – were introduced in 2007:**

- 20 endorsing industry association in 2007 – grown to approximately 41 design and construction industry endorsing organizations
- Active owner participation in development of contract forms
- Goal - fair and best practices for allocation of risk
- Written in plain English
- Not many published court decisions yet interpreting a ConsensusDocs contract
- Gaining some market share as an alternative to the AIA contract documents

## II. Selection of the Construction Project Forms

### C. US construction industry forms – AIA, ConsensusDOCS

ConsensusDocs templates – more than 110 standardized construction contract forms designed to reflect “fair risk allocation and best practices to represent the project’s best interests.”



### III. Selection of Local Counsel

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- Early involvement in formation of project agreements
- Working with hotel owner client's in-house counsel
- Key considerations for selection of local counsel

## IV. Local law requirements/key provisions

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- Choice of Currency: US\$ versus Local Currency
  - Anti-Corruption, Human Trafficking and Anti-Money Laundering Laws
  - Employment Laws: What responsibility does the Project Owner Have with regard to Contractor Employees?
  - Supervision of Work and Licensing Laws; Local Practices and Division of Responsibility
  - Local, Regional and National Building Codes and Standards
  - Mechanic's Lien Laws and Direct Payments To and Claims From Subcontractors and Suppliers
  - Payment Provisions and Payment and performance Security
    - Surety Bonds
    - Bank Guarantees and Letters of Credit
- Insurance, Indemnity and Limits of Liability
- Dispute Resolution: Local Courts versus National Arbitral Tribunal versus International Tribunals

## VI. Drafting the dispute resolution provision

### A. Arbitration v. Litigation

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- Often litigation in U.S. courts is protracted and expensive - because of the broad rules of discovery
- Litigation carries the risk of greater cost, time and expense
- Challenges to the arbitrability of claims - can involve a great amount of time and legal fees before the substantive merits are even addressed

## VI. Drafting the dispute resolution provision

### A. Arbitration v. Litigation

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- Courts – have long favored arbitration for resolution of disputes.
  - 1925 - liberal policy favoring arbitration agreements is codified in the Federal Arbitration Act (FAA).
  - 1970 – the U.S. ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), implemented through promulgation of Chapter 2 of the FAA (9 U.S.C. § A201™- 208).
  - Judicial rulings that claims are subject to an arbitration agreement – especially where the arbitration agreement arises under a contract concerning an international commercial transaction.

## VI. Drafting the dispute resolution provision

### A. Arbitration v. Litigation

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- International disputes often involve specialized legal issues
- Arbitration permits appointment of arbitrators with expertise in the issues in the case
  - antitrust
  - construction
  - intellectual property, etc
- Ample opportunity to present your case
  - Civil law courts typically limit testimony and discovery
  - Arbitration allows full hearing of issues and cross-examination
  - Experts allowed

## VI. Drafting the dispute resolution provision

### A. Arbitration v. Litigation

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- Finality
  - decision is typically final, with very limited appeal or other challenge
- Recovery of Fees/Costs
  - much more common in arbitration than court litigation
- Ability to join multiple parties who have all signed the agreement and arbitration clause
  - this can be more difficult in civil litigation
- Applicable law set forth in the agreement



## VI. Drafting the dispute resolution provision

### B. Arbitration

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#### **Growing “internationalization of arbitration”**

- Traditionally international cities such as New York, London, Paris and Hong Kong have been regarded as the world centres of arbitration - but now more cities offer competing venues.
- ATLAS - Atlanta International Arbitration Society, which was formed to promote Atlanta as a new destination of choice for parties pursuing arbitration in the US.
- National Arbitral Tribunals for local projects

## VI. Drafting the dispute resolution provision

### B. Arbitration

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#### **International Arbitration Options in the U.S.**

- International Chamber of Commerce (ICC)
- AAA/International Centre for Dispute Resolution (ICDR)
- Ad Hoc Arbitrations - using the United Nations Commission on International Trade Law Rules (UNCITRAL)
- Atlanta International Arbitration Society (ATLAS).

## VI. Drafting the dispute resolution provision

### B. Arbitration

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- During contract negotiations - negotiate uniform provisions in all of the agreements on a particular subject
- ICC or AAA – often stipulate that the rules of the ICC or AAA will apply
  - ICC arbitration rules - allow each party to nominate an arbitrator who will declare that she or he will act as a neutral party.
  - ICC will then appoint the chair of the arbitral tribunal
  - AAA rules are similar

## VI. Drafting the dispute resolution provision

### B. Arbitration

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- Consider also whether the courts of that country historically favor arbitration and have a reputation for respecting and enforcing both the arbitration agreement itself and the final arbitral award.
- Avoid winning the arbitration but not being able to actually enforce the award if money damages are obtained in the final award.
- Political stability of the regions where the players are located - issues may arise when witnesses need to travel to or from a particular region.

## VI. Drafting the dispute resolution provision

### C. Litigation

#### Civil Law

- Derived from Roman legal codes compiled under Emperor Justinian around 600 C.E.
- Judges play the role of investigator. Constitution, codified statutes, and ordinances are the governing authority. Decisions not binding on future cases.
- Civil law countries include China, Japan, and most of Africa, South America, and Europe – approximately 150 countries.

#### Common Law

- Derived from the English monarchy's issuance of writs and establishment of equity courts.
- Attorneys for the litigants are advocates before judge and/or jury. Judicial decisions have precedential effects on future cases in same jurisdiction.
- Common law exists in United States, England, Australia, Canada and India – approximately 80 countries.

## VI. Drafting the dispute resolution provision

### C. Litigation

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## VI. Drafting the dispute resolution provision

### C. Litigation

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- Litigation in Foreign Courts
  - Bound by local civil or common law and rules
  - Wide variation in customs and doctrines between countries
  - Language and translation issues
  - Retention of local counsel admitted to the courts
  - Service of process
  - Jurisdiction limitations
  - Discovery and Evidence limitations
  - Damages limitations
  - Enforcement limitations



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