

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

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

- 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

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

American Institute of Architects (AIA)	ConsensusDocs / Design-Build Institute of America + others	Bespoke Contracts
 Standard form suite of contracts Intended to reflect industry standard risk allocation Do not address state-specific issues Frequently used in the industry but usually with heavy mark up 	 Other standard form suites of contracts ConsensusDocs not as common as AIA but gaining market share Do not address state specific issues 	 Frequently used in construction projects Often loosely based on AIA framework Particularly customized for industrial

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

<u>Approximately 80 contract documents – commonly used forms are:</u>

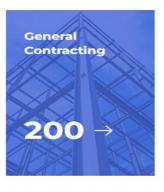
- A101[™] Owner-Contractor Agreement (Stipulated Sum)
- A102[™] Owner-Contractor Agreement Cost Plus (with GMP)
- A104[™] Owner-Contractor Agreement (Abbreviated Form) (formerly A107[™])
- A312™ Performance Bond/Payment Bond
- A201[™] General Conditions
- A401™ Contractor/Subcontractor Agreement
- B101[™]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

<u>ConsensusDocs suite of published contracts – were introduced in 2007:</u>

- 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

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."





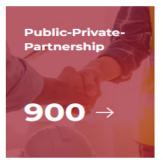












III. Selection of Local Counsel

- 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

- 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

- 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

- 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

- 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

- 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

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

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).

- 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

- 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.

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.

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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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