CONSTRUCTION AGREEMENTS

(Mainly, allocation of risk)

John R. Miller
John R. Miller, PLLC – Charlotte, North Carolina
(704) 222-3382
jmiller@johnrmillerpllc.com

INTRODUCTION

- Construction has always been a tough business
- During the recent downturns, a slower construction market and tighter credit put greater stress on construction contracts as developers, lenders and builders tried to limit liability and ensure timely, on-budget completion of projects

Even in a period of recovery…...

- The Construction process = complicated and fraught with risk (financial and otherwise)
- There are so many moving parts
    - So much money, muscle and machinery in motion = recipe for risk
- Tension – between low cost and quality.

  Between speed and care

CHALLENGE = manage risk effectively

FOCUS IN THIS PRESENTATION = allocating and managing risk via construction contract document

[NOTE – *using mainly the owner-contractor relationship*]

The ability to effect a mutually agreeable allocation of risk will be affected by 2 somewhat conflicting jurisprudential forces—

(1) freedom of contract [a court will not rewrite the agreement of the parties, even if a harsh one] and

(2) public policy [some agreements will not be enforceable As Written because they are deemed to be contrary to public policy]

HOTBUTTON ISSUES -- IDENTIFYING RISKS IN CONSTRUCTION CONTRACTS

A Checklist of some of the more important provisions in construction contracts that represent potential risk:

1. Consequential Damages – Does the contract contain a waiver of consequential damages? *[later in this seminar we will talk more about What are consequential damages in the construction context?*]

- Is the waiver mutual or is it a one-sided provision?
- From the Contractor's perspective, are the subcontracts in harmony with the provision in the general contract?

2. Indemnity – To what extent is risk shifted from one party to another through the mechanism of indemnification? More importantly, to what extent does the provision cover negligence of the indemnitees*? [later in this seminar, we will drill down on the subject of the indemnity clause and break down the components and the issues]*

3. Notice Provisions – Are the notice provisions reasonable or unreasonable, *i.e.*, do they involve very short time periods or impractical content requirements?

> *EXAMPLE -- In a typical construction contract, a contractor would be required to give notice to the owner in the event the contractor experiences a delay. All too frequently, this contractual obligation is ignored by contractors, leaving them unnecessarily open to damages for failure to complete the work on time. Although courts have demonstrated some leniency in such situations, courts often state that they will not rewrite a contract for the parties and will enforce the contract as written. Because construction is such a complex process and the demands on all of the parties are frequently great, many parties*

do not take the time to follow the contract, keep contemporaneous records and send notices to other parties as required. These practices expose the party to unnecessary risk. ***It is not sufficient just to write a good contract—the client must abide by it.***

4. Payment – Are the payment terms reasonable—time periods, etc.?

    - Are the conditions precedent to payment, such as producing affidavits from subcontractors and suppliers, workable?

    - Is the Owner adequately protected from double payment or non-performance by the Contractor?

The Contract usually provides that the Contractor is required to submit applications for payment, which are verified by the Owner's representative (usually the Architect or Engineer) in order to ascertain the status of the work. The Owner retains an agreed portion from the progress payment as security for the continued performance of the Contractor. In addition, the Contract often contains provisions permitting the Owner to withhold additional amounts for specific problems. ***More on this later***

5. Design Liability – Under the traditional construction structure, the Owner furnishes the design to the builder (indeed, Owner makes an implied warranty of the adequacy of the plans and specifications). In reviewing a construction contract, consider-- Are there provisions requiring the Contractor to review plans and specifications and to assume responsibility for unreported defects? Are there provisions shifting the risk of design errors to the Contractor or allowing the design professional to dictate the result when design documents conflict?

6. Subsurface/Concealed Conditions – Does the contract provide protections in case the Contractor encounters unexpected subsurface or concealed conditions, as is typical in industry-standard forms? Are there unreasonable site inspection provisions?

e.g., NC Case—

> Contract provided: "There is no subsurface information available on this project except as may be shown in the plans. The contractor shall make his own investigation of the subsurface conditions."

The information in the plans proved to be inaccurate, and the contractor encountered substantial, unanticipated difficulty in excavation work. The court held (i) that a contracting agency which furnishes inaccurate information as a basis for bids may be liable on a breach of warranty theory, and (ii) that instructions to bidders to make their own independent investigation of the conditions to be encountered *cannot be given full literal reach*.

Hazardous materials are sometimes discovered on site. Does the contract purport to shift responsibility for hazardous materials that are already on the site to the Contractor? Is the owner obligated to indemnify the Contractor against pre-existing conditions?

7. Warranties – What is the period of duration of the construction warranty and when does it commence? Are the warranty provisions in the general contract in harmony with the warranty obligations of the subcontractors?

> A201 12.5 .. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

In guaranteed maximum price contracts, does the contract allow the Contractor to use savings to cover corrective work?

8. Delay and No Damage for Delay – Are there liquidated damages in the event of delays caused by the Contractor? Is there a cap on LDs?

Is there a provision that purports to limit the Contractor's remedy for delay to an extension of time but allows no additional compensation? *Usually strictly construed*.

9. Insurance Requirements – Is the insurance coverage required by the contract documents obtainable? Is there a waiver of subrogation provision, and is it mutual?

ROLE OF MAJOR FORM AGREEMENTS

- Construction Process is so complex
- It involves Multiple parties

(Therefore, contract documents are complex and multi-dimensional)

Therefore, Use of Industry Forms = Common practice: *Cannot reinvent the wheel*

AIA, AGC, EJCDC, ConsensusDOCS (all industry forms)

AIA Form = Industry leader due to longevity and comprehensive treatment

- But does it favor architects? - *JA Jones* case

All industry forms stake out a position = the "default position" in negotiation

Counsel must consider:

- interests of the client
- state law concerns

Owner Forms (often one-sided) are also commonly used, especially by developers or owners who regularly procure construction services

PRICE MECHANISMS

There are several standard platforms for the delivery of construction services with different pricing mechanisms:

- Lump sum or fixed price
  - Clarity
  - contractor assumes risk of cost overruns except for change orders

- profit margin less transparent
- works well with competitive bidding

- cost plus a fee
  - transparent – "open book"
  - must define COST of the work – requires care
  - owner assumes risk of unknown variables
  - able to competitively bid subcontracts
- cost plus GMP
  - with a cap, the risk of cost overrun is on contractor
  - GMP = maximum amount to be paid by owner except for changes
  - consider sharing savings
- unit price method
  - unit prices are locked in, thus contractor assumes risk of rising costs
  - owner takes risk of quantities
  - used in site work and for change order work
- design build
  - inherently difficult to price the job before the design is complete
  - some commentators maintain that the only fair price mechanism is the cost-plus approach unless there is a renegotiation

CHANGES

- contracts should contain a mechanism to adjust contract price and contract time for changes
- usually this requires a written agreement of both parties; absent agreement there is usually a default procedure such as time and materials

- often there are some harsh **notice** provisions regarding changes
- another clause in the contract requires all amendments or waivers to be in writing
- in some states (e.g. North Carolina), a party's oral agreements or conduct might be regarded as effecting a change to the contract—

- Mechanisms to Manage Payment and Overpayment Risks
  - Progress Payments and Retainage
  - Mechanics liens and lien waivers
  - Surety Bonds *et al*
  - Insurance Products

PAYMENT RISK

Owner's goal = Contractor to complete the Work according to the terms and conditions of the Contract.

Contractor's goal = get paid for the work.

Generally, the Contract Sum is paid as the Work progresses

Progress Payments and Retainage

- applications for payment, verified by the Owner's representative (usually the Architect) in order to ascertain the status of the work.
- Owner **retains** an agreed portion from the progress payment as security for the continued performance of the Contractor
- Contract often contains provisions permitting the Owner to withhold additional amounts for specific problems.
- Contractor, in turn, withholds retainage from Subs

Payments to Subcontractors

- In some States, subcontractors may have payment rights that are superior to the prime contractor--some State legislatures have enacted statutes to the effect that when a subcontractor has performed, it is entitled to payment by the prime contractor even if the prime contractor has not been paid by the Owner. *See, e.g.*, N.C.G.S. §22C-1 through N.C.G.S. §22C-6.

- Clauses in the subcontracts that provide that a subcontractor will be entitled to payment only if the Contractor is paid by the Owner **("pay-if-paid" clause)** or only when the Contractor is paid by the Owner ("**pay-when-paid" clause**) may not be enforceable under the laws of a particular jurisdiction. For a survey of such laws, *see* "50 State Survey Pay-if-Paid / Pay-When Paid, and No Damage for Delay," published by Woods & Aitken LLP http://www.woodsaitken.com/wp-content/uploads/2011/12/PayIfPaid_PayWhenPaid_NDFD-Provisions.pdf

Mechanics liens

- contractor and its subcontractors usually have the right to file a lien against the Owner's property or funds that may become due under the Contract as a means of securing payment
- construction lien claimant has a security interest that general creditors do not have
- Lien waivers in connection with progress payments

Financial Security and Surety Bonds

- Contractor usually has the right before commencing work to some assurance that the Owner has the requisite funds to finance the job
- There may be a surety bond to insure payment in the event of default, thus shifting the financial risk to a third-party surety.
- Bonds are usually required on public jobs.

Insurance Products + Other Mechanisms

- Sub guard programs = insurance policies purchased by construction managers that obligate the insurance company to reimburse for costs incurred because of subcontractor default.
    - lower premium costs and greater flexibility in addressing and resolving subcontractor defaults – which in turn avoids potential delays and related problems.
    - Deductible
- Joint Check – new AIA forms allow; Owner gets more control. Is it a good idea?

LICENSURE

- The applicable General Contractor Licensing Law can represent a major risk, although this is not a matter of contract drafting but contract enforcement. Any party, including any out-of-state builder, should take special note of the applicable licensing laws because the consequences for violation of the statutes can be severe. Definition of "construction" = complicated and not uniform. Difficult interpretive issues.

- An increasing number of states have contractor licensing laws that vary in complexity and difficulty in compliance. Among others, NC, FL, CA, TN, MS, GA. Surprisingly, a number of other states including some major commercial states do not have licensure at the state level. E.g., NY, NJ, PA, ILL, MN; the contractor needs to check at the local level to see if there are requirements of the local jurisdiction.

- *Why is this a concern?*

- In North Carolina, for example, the General Contractor Licensing requirement has broad application and has engendered more litigation than any other area of construction law. The reason for this is that the North Carolina courts have determined that when an unlicensed contractor – in disregard of the licensing statute intended to protect the public – enters into a contract with an owner to perform construction work costing more than the minimum sum specified in the licensing statute, the contractor **may not recover for the owner's breach of that contract.**

- Likewise, in California and Florida, an unlicensed contractor cannot enforce the contract; more significantly, the Contractor may be subject to the remedy of **disgorgement** in those States—i.e., the Contractor may have to repay all sums collected even if the Work is satisfactory.

- Other points:

    - Licensure of trade—plumbing, electrical

    - In CA, subs must be licensed.

- In some States, the courts have also held that the licensing requirement cannot be waived by the parties.

►*Practice Pointer* --Pay attention to the contractor licensing provisions in the state where the project is located **before** the contract is signed. After execution of the contract, any deficiency may not be curable.

END OF FIRST SESSION

TECHNIQUES FOR RISK MITIGATION

Methods to manage contract risk:

Mechanisms to Control Potential Liability of a Party

- Indemnification
- Exclusions of Specific Remedies
- Exclusions of Types of Damages
- Limiting Liability (Cap)
- Insurance

Drafting and Negotiating Contract Provisions

Indemnity

- *Indemnification is the obligation of one party ("indemnitor") **to reimburse** another party ("indemnitee") for losses the indemnitee incurs or for the damages for which it may be held liable. Indemnification clauses are a method of shifting certain risks from one party to the other, and these provisions have been used in the AIA forms for more than half a century. There are many dimensions to contractual indemnity and multiple ways to allocate risks by use of an indemnification clause. For example, the risk of liability can be shifted from one party to the other regardless of the party at fault or it can be allocated on the basis of a comparative fault. The indemnity may include a duty to defend, reimbursement of attorney's fees and other costs. The indemnity provision may be accompanied by procedural requirements such as notice provisions and the right to participate in the proceeding and in any settlement.*

Definition --**Indemnification** = obligation of one party ("indemnitor") to reimburse another party ("indemnitee") for losses the indemnitee incurs or the damages for which it may be held liable.

  - A method of shifting certain risks from one party to the other

- It should apply to third party claims (in the M&A world, it has evolved as covering the direct claims mechanism also—very confusing)

Drafting and Negotiating the Indemnity Clause: *A properly drafted indemnification clause should take into account potential defenses that might render the indemnification obligation unenforceable.*

- Scope of indemnity obligation
  - Who are the Indemnitees? – Owner, **Architect,** consultants, agents, employees, etc. …. *be careful here*
  - Type of claims [most important feature]? broad (all claims) or tailored?
    - Bodily injury, sickness, disease, death
    - Injury to or destruction of tangible property (other than the Work)
    - Other damages (e.g. economic loss)?
  - Degree of fault
    - …only to extent caused by the negligence of Contractor, etc. … regardless of whether or not caused in part by an indemnitee …
    - An alternative: "only to extent caused by the sole negligence of Contractor…"
  - Attorneys' fees?
- Procedural requirements
  - Notice
  - Right to participate
- "Savings Language"
  - *One technique is to include "savings language" in the indemnification provision (e.g., "to the fullest extent permitted by law…."). The AIA indemnification provision contains a savings clause, which courts have used as a basis to enforce the indemnification provision to the extent allowed by applicable law.*
- Severability Clause
  - *In addition, the construction contract should contain a severability clause that would permit a court to sever the language in the contract that would render the*

provision unenforceable. Courts are reluctant to make a new contract for the parties but will sever an unenforceable provision if the contract so provides.

Anti-Indemnity Statutes [counsel must know applicable state law + judicial interpretation]

- *Many states have enacted statutes that limit contractual indemnity or render such provisions unenforceable as against public policy. These state statutes are by no means identical. Some statutes merely prohibit indemnification clauses for the sole negligence of the promisee while others prohibit indemnification to the extent caused by the negligence of the promisee in whole or in part. Florida has a unique statue that prohibits indemnification of both types unless the contract contains a monetary limitation that bears a reasonable relationship to the contract, which cap must not be less than $1,000,000 per occurrence when indemnity is provided to the owner of real property. Some statutes do not allow indemnification for certain types of conduct, such as gross negligence of the indemnitee or its agent. Counsel negotiating the construction contract must take into account the applicable law regarding the limitation of contractual indemnification.*

  - ***Concept is that it is contrary to public policy for the incentive to use due care to be removed***

- Over 40 states regulate indemnity / define what is permissible
  - For example -- NY

§ 5-322.1. Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases. 1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

- Scope of the disallowance
    - Comparative negligence --- invalid to extent loss caused by indemnitee's negligence
    - Strict -- invalid except to extent caused by indemnitor's sole negligence (NC)
    - Combination – *e.g.* Florida – Cap [a reasonable amount] of not less than $1M
    - Penna. – prohibits indemnity of designer (exculpation from own negligence)
- Carve outs – gross negligence; willful misconduct
- Application of savings language
- Severability clause needed
    - Courts will strike language but not re-write contract
- **§ 3.18.1** To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

Exclusion of Specific Remedies or Types of Damages

Again, a matter of agreement between parties

- Most common = the Exclusion of **consequential damages**

Although it is difficult to articulate a universal definition of consequential damages, it is basically any damage or loss that does not result in the ordinary course of events from the breach as determined in any manner that is reasonable, i.e., damages that are not direct damages. Most notably, lost profits and loss of use are frequently seen as consequential damages. There is no accepted definition of either type of damage nor is it possible to define them precisely because the application of the relevant principles depends heavily on the facts and circumstances.

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

The 1997 edition of the AIA General Conditions included a mutual waiver of consequential damages provision. The AIA stated that the purpose of this new clause was to provide predictability and to remove some of the uncertainties and risks inherent in construction contracts. The 2007 and 2017 editions of the General Conditions retained this provision. This provision reads as follows:

§15.1.7 CLAIMS FOR CONSEQUENTIAL DAMAGES

The Contractor and Owner waive claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

Although characterized as "mutual," this provision has been criticized by owners as favoring the contractor because many observers believe that the owner is giving up more

potential damages while the contractor retains the right to recover lost profits on the Contract itself.

Note: Any agreed **liquidated damages** are NOT waived.

- AIA form
    - The Contractor and Owner waive claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver <u>includes</u>

      .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

      .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.
  - "mutual"
  - ConsensusDOCS –"limited waiver"
    - The primary difference appears to be that the ConsensusDOCS would allow for certain delay damages.

- <u>DELAY DAMAGES:</u>
  - <u>Use of Liquidated Damages</u> = very common approach. Can benefit both parties
    - Usually the <u>exclusive</u> remedy for delay [otherwise it seems unfair and acts as a penalty]
  - <u>No damage for delay</u> (owner protective clause)
    - In derogation of common law and thus must be strictly construed

ANOTHER FORM OF MITIGATION OF RISK =

<u>Limitation of Liability</u>

- Basically, a cap on monetary damages
- Different approaches:

- Specific dollar amount (e.g., contract sum)
- Liability capped at amount of insurance
- Combination
- Carve outs
- Some courts have determined that a state's anti-indemnification statute should likewise constitute a public policy against a limitation of liability and that such clauses might be unenforceable on that basis (Alaska)
- More commonplace in contracts with design professionals (profession maintains that uncapped risk is disproportionate to compensation)
- Note: best source on drafting and understanding LOL clauses = Guide Sheet for Including LOL in the standard form of agreement between O. and E. – EJCDC 1920-9 (1988)
- Are these provisions enforceable?
    - Generally, yes (freedom of contract)
    - Some states consider that a professional should not be able to exculpate itself from its own negligence by contract

Insurance

Shift risk to a third-party insurer = another common mechanism for allocating risk (indeed, this is at the heart of the concept of insurance)

- well-drafted construction contract will describe in detail the insurance requirements + minimum limits
    - often including the requirement that the contractor name the owner as an additional insured (gives owner greater rights)
    - the contract will often provide that the parties shall enter into a mutual waiver of subrogation in order to maintain the agreed allocation of risk.

Subrogation = the assignment to an insurer, after payment of a loss, of the rights of the insured to recover the amount of the loss from a party legally liable for it.

- Waiver of Subrogation =the insurer's relinquishment of right to assume the insured's place, after payment of loss to the insured, to recover the amount of the loss from a party legally liable for it.

- especially important-- the parties are collectively looking to the insurance provided by one or more of the parties to cover particular losses.

- *E.g.,* builder's risk or property insurance where one party provides the builder's risk insurance, and the various parties involved in the project all look to the insurance to cover the loss, regardless of fault.

- If there is a fire, and the insurance carrier providing the builder's risk insurance covers the loss.

    - under insurance law the insurance carrier would ordinarily then be subrogated to the rights of the insured under the policy and could proceed against any party who is legally responsible (in whole or in part) for the loss (standing in the shoes of the insured who suffered the loss).

    - If the parties and the insurance companies have agreed to a mutual waiver of subrogation, the insurance companies have waived their rights to proceed against any party responsible for the loss. If the waiver of subrogation is not mutual, then the party who does not have the benefit of the waiver of subrogation would be exposed to the subrogation claim but the other parties would not be liable.

        - Must address in contract and in the policies and align the subcontracts

- Consult insurance advisor

DISPUTE RESOLUTION

- When drafting the contract, need to specify the method of dispute resolution. Basically, arbitration versus litigation (with or without mediation)

- AIA forms tie to the AAA

AAA issued new construction rules effective July 1, 2015

Key features:

- **Consolidation and joinder time frames and filing requirements** to streamline these increasingly involved issues in construction arbitrations.

- **Information exchange measures** to give arbitrators a greater degree of control to limit the exchange of information, including electronic documents, including approving search parameters and cost allocation

- **Availability of emergency measures of protection** in contracts that have been entered into on or after July 1, 2015.

- **Enforcement power of the arbitrator** to issue orders to parties that refuse to comply with the Rules or the arbitrator's orders.

- Permissibility **of dispositive motions** to dispose of all or part of a claim or to narrow the issue in a claim.

Arbitration Pros

- **Cost**: Historically, arbitration has often been seen as a cheaper way to resolve disputes, on average, than litigating in court. However, this is not always the case
- **Speed**: With some exceptions, arbitrations tend to follow more specific and defined timelines toward resolving a dispute, and arbitrators do not always face crowded work and caseloads, resulting in quicker final decisions.
- **Fairness**: Often arbitrators are selected by agreement of both parties, by a third-party arbitration service, or via an outlined method where input is allowed from both parties. This means that in many cases, no single party controls who the arbitrator (or arbitrators)

will be. AAA arbitration—arbitrators are skilled in construction industry matters. BUT arbitrators not obligated to follow the law

- **Finality**: For the most part, it is very difficult to appeal arbitration rulings, even if glaring mistakes have been made by an arbitrator. This finality can be a positive factor in relation to ending a dispute, one way or the other, and allowing the parties to move on.
- **Simplified procedures**: Litigation can involve mounds of paperwork, multiple hearings, depositions, subpoenas, and similar processes. An arbitration may eliminate some or many of those time-consuming and expensive tools of litigation. BUT – more trial by ambush?
- **Confidential**: Arbitration hearings do not take place in open court and transcripts are not part of the public record. This can be very valuable for parties in some cases.

Arbitration Cons

- **Cost**: Filing fees are considerably higher. This is because arbitration can vary in complexity and can take many forms, some of which may actually be more likely to increase the costs versus litigation.
- **Fairness**: Tendency to split the baby? Lack of appeal?
- **Speed**: Just like they aren't always cheaper, arbitrations are not necessarily always faster than litigation. This is particularly possible in cases with multiple parties, multiple arbitrators, and complicated legal disputes.
- **Location**: Within the same small print in a contract that can require consumers to arbitrate their issues, there can also be language specifying exactly where an arbitration will take place. This location can sometimes be very inconvenient to the average consumer, as it could even be in another state, raising the cost and requiring time off from work.
- **Finality**: As noted above, **it is very difficult to appeal arbitration rulings**, even if an arbitrator has made a blatant mistake. Although not common, this can sometimes result in what may be seen as an unfair result (certainly from the losing party's perspective!), with only a small chance that a court can step in to correct it.
- **No jury**: From most consumers' and individuals' points of view, having a jury of their peers is an important right not easily given up. Arbitration does away with juries entirely, leaving matters in the hands of an arbitrator, who essentially plays the role of both judge and jury.

<u>Drafting the arbitration clause</u>

- AIA clause is a good one; also, the AAA has good clause building resource material
- consider including provisions for consolidation and joinder, specifying the locale and the allocation of costs
- AIA form includes:

- **§ 15.4.1.1** A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations

- absent any such statement or reference to a time limit, the right to arbitrate is not barred by any statute of limitations, as statutes of limitations apply only to court "actions" and "judicial proceedings," of which arbitration is neither. NC Case

- Award--- In all construction cases, unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any monetary awards and, if there are non-monetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each non-monetary claim or counterclaim.

Practical Advice-- from the perspective of an arbitrator

- read and follow the Rules
- organize your case, tell your story, help the arbitrator find the truth of the matter
- refrain from excessive evidentiary objections
- don't count on disposition by dispositive motions—
- Arbitrator takes Oath – very serious responsibility