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The 2007 AIA Documents: Selected Issues on Insurance and Dispute Resolution

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I. INTRODUCTION

There is little doubt of the popularity of the AIA family of documents, particularly the A201 General Conditions.[1] The number of cases citing the A201 document attests to the frequency with which parties in the construction industry utilize these standard General Conditions. In many ways, the A201 has become the "gold standard" for construction projects, generating along the way a fairly comprehensive body of case law interpreting and applying the terms and conditions. The AIA standard form contract has been in existence in one form or another since 1888, with the A201 first appearing in 1911. It has been regularly revised through the years, and was once again updated and revised in 2007.[2]

Major revisions were made to the A201 in 1987 and again in 1997. While these revisions were the product of many years of thought and consideration by many concerned individuals representing diverse interests, those revisions were not immediately embraced by the construction industry. As many practitioners can attest, and as a number of recent cases illustrate, it is not uncommon to see parties still using the 1987 edition of the A201 rather than the 1997 edition. Some clients make that choice simply out of habit while others do so deliberately.

The 2007 Edition of the A201 was officially launched in October 2007 and contains hundreds of changes from the A201-1997. From an administrative perspective, one fundamental

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[1] The author has adapted this paper from a paper she co-authored and co-presented with Mark J. Heley, Esquire, Coleman, Hull & van Vliet, PLLP at the ABA Forum on the Construction Industry Mid-Winter meeting in New York, New York and San Antonio, Texas entitled "Lessons Learned: How the 1997 Revisions to A201 Have Fared After 10 Years." Thanks are also extended to John A. Markert, Coleman, Hull & van Vliet, PLLP, and Daniel P. Wierzba, Moore & Lee, LLP, who assisted in the research and drafting of the paper.

[2] All references to the A201-2007 in this paper are to *AIA Document A201™ - 1997/2007 Comparative* (American Institute of Architects, 2007).

change made in the A201-2007 involves the labeling of the various provisions. The A201-2007 refers to "Sections" of the various Articles, compared with the more familiar references to "Paragraphs" and "Subparagraphs" used in the A201-1997. Comporting with this new stylistic change, references in this paper to any of the A201-2007 provisions will be referred to as "Sections." [3] As with earlier launches of new editions, it remains to be seen whether the latest edition of the A201 will gain the wide acceptance within the construction industry that the 1997 Edition enjoys. The A201-2007 faces the additional hurdle that, for the first time in 50 years, the Associate General Contractors of America refused to endorse the A201-2007.[4]

While there are hundreds of changes in the A201-2007 and B101 documents, this paper will focus on two areas of change – the insurance and the dispute resolution provisions.

II. 2007 CHANGES TO THE INSURANCE PROVISIONS

A. Minor Changes to The A201 Document

The insurance provision, found in Section 11, underwent both minor and major changes in the 2007 Edition.[5] Minor changes were made to the Owner's Property Insurance Obligation

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[3] The A201-2007 uses the section symbol (§) before each particular section, another change from the A201-1997.

[4] On October 12, 2007, the AGC issued a press release announcing that the AGC's Board of Directors unanimously voted not to endorse the use of the AIA A201-2007 by its members. The reasons provided were that the A201-2007 "does not fairly balance risk among the parties but instead significantly shifts risk to the general contractor and other parties outside the design profession". Construction News*, AGC MEMBERS UNANIMOUSLY VOTE AGAINST A201 ENDORSEMENT, General Terms and Conditions Document Fails to Provide Balance*, Associated General Contractors of America, *available at* http://www.agc.org/galleries/pr/07-067.doc (October 16, 2007).

[5] According to a noted commentator, despite the number and breadth of changes, the new document did not revisit much of what had been reported as lacking in its earlier iterations. *See*, James Duffy O'Connor, "The Demise of the Project Manual; Early Bird Financial Disclosures; Hazardous Haz-Mat Revisions; & Insuring the Uninsurable" at n.23, in The 2007 AIA Document: New Forms, New Issues, New Strategies, ABA 2008 (citing 2 Bruner & O'Connor,

which was newly renumbered as § 11.3.[6] The only two notable changes relate to disputes involving the Owner's adjustment of property loss claims, which now may be resolved through something other than arbitration.[7] New § 11.3.9 permits the Owner, as fiduciary of those affected by a property loss, to secure the distribution of the proceeds of a loss with a fidelity bond. The bond stands as security for the Owner's obligation to fairly adjust the loss, which if disputed, must be funded by the Owner depositing the proceeds in an account and dispersing them in accordance with the decision of an arbitrator, a court, or some other dispute resolution procedure newly provided for elsewhere in the document. The old form only allowed for the resolution of disputes through arbitration. New § 11.3.10 describes the Owner's obligation to adjust the property loss in a manner that is consistent with its fiduciary obligations to those affected by the loss. The new language in this section expressly provides for final resolution of disputes relating to the Owner's adjustments of such losses through whatever binding resolution process is chosen by the parties.

B. Major Changes to the A201 Insurance Provisions

Major changes were made to the general liability provisions in the 2007 Edition. These include requiring the contractor to provide "completed operations" coverage, extending the period of coverage beyond Final Payment, augmenting the certification requirement, expanding the additional insured provision and deleting the obsolete and unobtainable PMPL coverage.

On Construction Law §§ 5:209 – 5:236 (West 2002); Sink & Petersen, The A201 Deskbook: *Understanding the Revised General Conditions* p. 91 – 95 (ABA 1998)).

[6] Replacing the section that had been previously dedicated to Project Management Protective Liability Insurance ("PMPL").

[7] This change results from the changes to the Disputes provision. *See* Section III, *infra*.

1. Completed Operations Coverage

The most striking of the changes to the liability insurance provisions is the addition of the requirement that the contractor provide, in addition to the traditional forms of insurance, "completed operations" coverage. Earlier versions simply required coverage for claims that could arise out of the Contractor's "operations" during performance of the Work. The new language extends the scope of the coverage required by mandating coverage for claims that arise not only out of the Contractor's active construction activities, but also those that come about after the operations are complete, *i.e.*, out of the Work itself.

Despite the fact that the requirement of "completed operations" coverage only makes sense in the context of the Contractor's commercial general liability obligation, the change in the A201-2007 applies to all insurance procured by the Contractor. A noted commentator reports that the change in the language should not present a problem for most Contractors, because they have been required to provide this kind of coverage for many years.[8] The problem reported is that the shrinking current construction insurance market will make it more and more difficult to obtain coverage for property damage arising out of allegedly defective construction—which is exactly what the completed operations hazard protection is intended to secure.[9] Thus, it is not the language which is problematic, but the practical affect of the new language. In a worst case scenario, the shrinking market availability of this kind of insurance could put some contractors in breach of this provision even before the Work commences.

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[8] O'Connor at 26.

[9] *Id.* O'Connor reports that "some Contractors, especially those involved with skinning the exterior envelope of residential projects, are finding this coverage unavailable. These Contractors are able to purchase policies with completed operations coverage contained in it, but that also carry limiting language or endorsements that remove that coverage for certain types of construction, or for losses in certain geographic areas."

2. Extended Period of Coverage

A related change to the Commercial General Liability ("CGL") requirements is the extension of the coverage beyond final completion. Section 11.1.2 previously required the contractor to maintain CGL coverage between commencement of the Work until Final Completion. The 2007 revision now requires the contractor to procure "completed operations" coverage in its CGL policies at least through the "correction period" for defective or non-conforming Work, and longer if expressly required by the Contract Documents. Practically speaking, unless there is a dramatic change in the way most Contractors procure CGL insurance, the CGL form that Contractors procure to continue coverage will continue to follow the form of the expiring policy.[10] Because Contractors do not procure project specific CGL policies, but instead renew its policies focusing on coverage for consecutive time periods supported by whatever coverage may be available, the Contractor may now be faced with a dilemma if renewal policies offer different coverage or if the coverage is no longer commercially available.[11] If the new coverage is not identical, the Contractor may leave himself open to claims of default under § 11with only the defense of commercial impossibility as a shield.

3. Changes to the Certification of Coverage Requirements

The A201-1997 required the Contractor to certify to the Owner that it has procured the insurance required by § 11 and the Contract Documents. Typically, delivery of a Certificate of Insurance prior to commencement of the Work satisfied this requirement. Section 11.1.3 of the A201-2007 now requires the Contractor to make the standard initial filing, supplemented by

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[10] *Id.* at 28-29.

[11] Contractors do not typically procure CGL coverage to cover specific projects. Instead, they procure these policies to cover "losses;" and the timing of the procurement decision is irrelevant to the completion of any particular project. The Contractor's more important objective in maintaining coverage is to avoid gaps in the covered periods. *Id.* at 29.

additional filings at any time during construction that an applicable coverage is renewed or placed with a different carrier. This additional administrative requirement permits the Owner to keep track of changes in replacements or renewals of any policy, lessening the risk of a material change in coverage. The 2007 edition also struck language in this section which conditioned the Contractor's obligation to certify coverage continuation where the existing coverage was no longer available.[12] The affect of this deletion is to force the Contractor to procure identical coverage – an act which may, because of uncontrollable market conditions - be impossible. This legal construct, which, facially may make Owners feel more secure, in fact, "increases the Owner's risk of gaps in the Contractor's coverage and encourages insecurity in the insurance procurement process generally."[13]

4. Additional Insured Provision

Requiring the Contractor to name the Owner and, typically, the Architect, as "Additional Named Insureds" is a common requirement in today's construction market. Most Owners insist on this type of provision and most Contractors force their subcontractors to provide it upstream. In keeping with that common requirement, the A201-2007 added § 11.1.4, requiring the Contractor to name not only the Owner and the Architect, but the Architect's consultants, as additional named insureds. This seemingly simple requirement has far-reaching consequences.[14]

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[12] The 2007 edition strikes the following: "If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available. . ."

[13] O'Connor at 30.

[14] O'Connor cites six significant problems with requiring the additional named insured provision: "(1) fundamental fairness dictates that the Contractor (especially the Subcontractor) should not be held accountable for the negligence of others over whom it has no practical or legal control; (2) the cost of the product is hidden in insurance premiums that translate into increased construction costs across the board; (3) the tort liability exposure of Owners, Contractors, Architects and Engineers over time is one that the Named Insured cannot reasonably predict, yet it is precisely that exposure that diminishes the Named Insured's aggregate policy limits. That continuing insurance protection is an enormously important part of the trade

This clause, problematic as it may be, likely does not go far enough to suit most Owners in that it limits the scope of the additional insured protection to claims arising from the Contractor's "negligent acts or omissions." Typically, Owners seek coverage for their own negligence as well so this new language does not give Owners the protection they are looking for. Another problem with the A201-2007 provision is that it extends coverage to the Architect and its consultants, which conflicts with the typical insurance products available to Contractors which expressly exclude coverage for professional liability exposure. The fact that the coverage applies only to the Contractor's negligence means that, effectively, the Architect is not receiving any benefit at all from this provision, making its inclusion in the document a sort of nullity.[15]

Adding to the relative worthlessness of this provision is the fact that the 2007 document's requirement that "completed operations" language be grafted onto every provision applies here as well, exhibiting a "fundamental misunderstanding of the nature of completed operations coverage for additional insureds."[16] While requiring that the Contractor procure completed operations coverage for the additional insured, the document modifies the scope of the protection required to "claims arising from the Contractor's negligent acts or omissions during the Contractor's…completed operations**.**"[17] By its nature, completed operations provides coverage after all the Work is completed, thus there can not be any negligent behavior on the part of the

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contractor's risk management program. . . ; (4) the exposures of Named Insureds and Additional Insureds are by their nature conflicting, and encourage adversity and in-fighting between them in litigated matters—especially matters involving Property Damage claims arising out of defective construction; (5) the conflicting interests of the insureds adds to the cost of litigation and translates into increased costs of construction and a generally adverse construction market; (6) the differing coverages to the insureds under the same policy generates an inordinate percentage of refused tenders by insurers who favor Named Insureds over Additional Insureds, often creating additional and unwanted conflict between General Contractors and Subcontractors both on and off the job site." *Id*. at n.27.

[15] O'Connor at 33.

[16] *Id.*

[17] § 11.1.4.

Contractor during completed operations. If there are no negligent acts during completed operations, then the benefit of completed operations coverage to the additional insured is essentially meaningless.

The extension of the insurance coverage obligation to completed operations and additional insureds is so full of problems that it has been predicted that:

> sophisticated Owners and General Contractors will likely delete Article 11 entirely and insert a more coherent and complete promise to procure. Occasional purchasers of construction services would do well to send it to their brokers to modify the new language to satisfy their particular needs. General Contractors will need to modify the additional insured provisions to secure their own risk management needs. Subcontractors will live with it because the flaws inherent in the language inure to their benefit.[18]

With so cold a condemnation, it is not hard to understand why the AGC refused to endorse the A201-2007.

5. Deletion of PMPL Coverage

One positive change to the insurance provision was the deletion of the Project Management Protective Liability ("PMPL") coverage formerly contained in Section 11.3. This coverage, added in the 1997 Edition, was written around an insurance product offered only for a limited time from one carrier, has never been utilized in the industry and its continuing inclusion in the A201 only served to confound contractors and inexperienced legal practitioners who scratch their heads and try to guess whether to strike this section.

C. Unchanged Insurance Provisions Of The A201

The Waiver of Subrogation provision now found in § 11.3.7, formerly Subparagraph 11.4.7, did not change from the 1997 edition. Section 11.3.7 of the A201 provides that both parties to the contract, as well as all lower tier subcontractors and suppliers, waive rights of

[18] O'Connor at 34.

subrogation against each other to the extent that builder's risk property insurance covers the loss or damage to the "Work." This provision has been recently addressed on a number of occasions, providing clarity to how it applies to the "Work" and the duration of its application.

1. Application of the Waiver to the Work

The identical 1997 provision, 11.4.7, has recently been addressed and interpreted to define whether the waiver extends to all work covered by some sort of property insurance or only the work defined in the Contract Documents as "Work." The majority view is that there is no distinction between Work and non-Work, if the property is covered by some sort of insurance, then subrogation is waived.[19] The minority position is that the waiver is limited only to "Work," regardless of whether insurance covers the property.[20]

Waiver of subrogation was also the topic in *Federal Ins. Co. v. CBT/Childs Bertman Tseckares, Inc.*,[21] where the Court rejected application of the waiver found in Subparagraph 11.3.7 of the A201/CMa for claims of statutory violations. After the property was constructed, a fire occurred, caused by an over accumulation of trash and debris in a trash chute designed and installed by CBT/Childs. CBT/Childs defended against the owner's suit by asserting the waiver of subrogation. The court found that if the allegations had been of ordinary negligence, the waiver would have been enforceable but that the claims of violations of statutory duty, compliance with the state building code and NFPA standards, rendered the waiver void as against public policy.

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[19] *Copper Mountain v. Industr. Systems*, 2007 WL 4198390 (Colo. App. Nov. 29, 2007)(adjacent property at ski resort damaged by welding fire covered by waiver); *Jalapenos, LLC v. GRC General Contractors*, 2007 WL 443973 (Pa. Super. Dec. 19, 2007)(property damaged by fire covered by waiver, even where Owner failed to procure property insurance because Owner failed to give notice of non-procurement to Contractor).

[20] *Knob Noster R-VIII Sch. Dist. v. Dankenbring,* 220 S.W.3d 809 (Mo. 2007)(damage to adjacent roof not waived).

[21] Case No. 2004of022G, 2007 WL 1630687 (Mass. Super. May 25, 2007).

2. Duration of the Waiver – Does it Apply After Completion?

The court in *Lumbermens Mut. Cas. Co. v. Grinnell Corp.*,[22] found the waiver of rights of subrogation in Subparagraph 11.4.7 to be unenforceable to claims arising out of a fire occurring nearly 10 months after construction was completed. The court interpreted the A201 to waive subrogation "only with respect to damage occurring before final payment has been made" unless some other arrangement was made at the time of contracting that additional, post-construction policies of insurance were going to be put into place.[23] This holding is the minority view, as explained in *Argonaut Great Central Ins. v. DiTocco*,[24] which, found the wiaver to be enforceable post-construction, so long as the Owner has procured some kind of post-completion property insurance.

3. Does the Waiver Apply Against Non-parties to the Contract?

Reviewing the waiver of subrogation clause found in Section 11.3.7, the court in *Universal Underwriters Ins. Co. v. A. Richard Kacin, Inc.*[25] found that the waiver applied even as to insurers seeking subrogation who had no notice of the provision and did not consent to the provision. Universal Underwriters insured a car dealership which engaged Kacin as the general contractor under a standard AIA contract for certain work at the dealership. Kacin subcontracted some of the work to Bassett. Some time after construction was completed, a wall of the dealership collapsed and Universal Underwriters paid for the damages and then instituted suit against Kacin and Bassett. Both contractors raised the waiver of subrogation in defense of the claim. The insurer asserted that the waiver should not apply because it was void as against public policy and should not be enforced against it because it was not a party to the construction

[22] 477 F. Supp. 2d 327 (D. Mass. 2007).
[23] 477 F. Supp. 2d at 332-33.
[24] 2007 WL 4554219 (D.N.J. Dec. 20, 2007).
[25] 916 A.2d 686 (Pa. 2007).

contract and had no notice of the waiver. The court quickly resolved the public policy claim, finding that waivers are enforceable regardless whether they relate to the contractor's own negligence.[26] The court noted that the second argument was one of first impression but that since a subrogor can only assert the rights of the parties in whose shoes it is standing, and the owner clearly waived the right of subrogation, then the insurer also was deemed to have waived subrogation.[27]

D. Changes To The Insurance Provisions Of The B101

Consistent with the changes to the A201, the 2007 Edition modified the insurance requirements of the B101 document as well. Prior to 2007, the B101 did not identify any insurance requirements for the Architect. This lack has been viewed as a major weakness of the document, requiring significant modification to add appropriate insurance requirements. The new language in § 2.5 of the B101 identifies four types of common architectural insurance that the Architect is now required to carry, including General Liability, Automobile Liability, Worker's Compensation and Professional Liability. Unfortunately, the document provides no detail on the specifics of coverage limits, durations and necessary items. Thus, the laudatory goal of overcoming one of the weaknesses of earlier editions of this form was not quite met.

In addition, the new language in § 2.5 of the B101-2007 requires insurance to be carried "for the duration of this Agreement." The plain meaning of this new language is that the Architect can let the insurance lapse as soon as his services under the Agreement are completed. This language is inconsistent with the "claims made" basis upon which most professional liability policies are written. Claims made policies need to be maintained for a period of time after completion of the project, or else claims for negligent design discovered after Final

[26] *Id*. at 692.
[27] *Id*. at 693-94.

Completion will be uninsured.[28] Most Owners require the Architect to carry insurance for at least several years after project completion, sometimes through the period of the statute of limitation or repose. The failure of the B101-2007 to address this fundamental concept in the new "duration of this Agreement" language means that this lack will need to be modified before the agreement will be acceptable to Owners.

III. DISPUTE RESOLUTION IN THE A201 AND B101

Since its first edition, the A201 has required arbitration as a means of resolving disputes.[29] The arbitration section was completely revised in the A201-1997 to add mandatory mediation as a condition precedent to arbitration. Prior to 1997, mediation did not exist in the A201. In addition to adding mandatory mediation, the arbitration provisions of the A201-1987 were substantially reworked and moved into Paragraph 4.6.

The biggest change made to the A201-1997 by the A201-2007 is the reorganization and redrafting of the Claims provisions previously found in Article 4 of the A201-1997. Paragraphs 4.5 and 4.6, the mediation and arbitration sections of the A201-1997, were two of the paragraphs of Article 4 that are moved to Article 15 in the A201-2007. Both paragraphs (now "Sections") received changes, although the changes to the mediation provisions are less substantive than those made to the arbitration provisions.

In addition, a significant change was made to the role of the Architect as the "initial decision maker." The A201-1997 and prior iterations required all Claims to be submitted to the

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[28] Mark C. Friedlander, "A Practical Guide to New and Controversial Issues in AIA B101 – 2007," at 9, contained in The 2007 AIA Document: New Forms, New Issues, New Strategies, ABA 2008.

[29] Richard Korman, *AIA Forms Running Far Ahead of Rivals*, ENGINEERING NEWS-RECORD, Nov. 5, 2007, at 13.

Architect for an initial decision.[30] The trigger for mediation and/or arbitration was tied to the Architect's review of and decision on the Claim. Now, the 2007 Edition provides that someone other than the Architect may be designated as the "Initial Decision Maker" under §1.1.8. This Initial Decision Maker is empowered to "render initial decisions on Claims" and "certify termination of the Agreement. . . ." Under § 15.2.1, the Architect is the default "Initial Decision Maker" if the parties to the Contract fail to designate someone else, but this change clearly allows the parties to tailor the Contract and their resolution of disputes such that industry specific experts could be designated on a Claim by Claim basis to review and render an initial decision. This progressive concept could facilitate the resolution of highly technical disputes, or place the rendering of decisions in the hands of someone somewhat removed from the biases of the Project.

A. Changes to the Mediation Provision

The changes to Paragraph 4.5 of the A201-1997 are as follows:

> **§ ~~4.5~~15.3 MEDIATION**
> **§ ~~4.5.1~~15.3.1** ~~Any~~ Claims, disputes, or other matters in controversy arising out of or related to the Contract~~, except Claims relating to aesthetic effect and~~ except those waived as provided for in Sections ~~4.3.10,~~ 9.10.4, ~~and~~ 9.10.5, and 15.1.6 shall~~, after initial decision by the Architect or 30 days after submission of the Claim to the Architect,~~ be subject to mediation as a condition precedent to binding dispute resolution ~~arbitration or the institution of legal or equitable proceedings by either party~~.
>
> **§ ~~4.5.2~~15.3.2** The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with ~~the~~ its Construction Industry Mediation Procedures ~~Rules of the American Arbitration Association currently~~ in effect on the date of the Agreement. A ~~R~~request for mediation shall be ~~filed~~ made in writing, delivered to ~~with~~ the other party to the Contract, and filed with the person or entity administering the mediation. ~~American Arbitration Association.~~ The

[30] A201-1997 § 4.4.1.

request may be made concurrently with the filing of ~~a demand for arbitration~~ binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of ~~arbitration or legal or equitable~~ binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

§ ~~4.5.3~~15.3.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

Section 15.3.1 of the A201-2007 mandates mediation for virtually all disputes arising from or related to the Contract. Section 15.3.1 also eliminates the requirement that the Architect first render a decision on the controversy before mediation can be commenced.

Section 15.3.2 of the A201-2007 now allows the parties to conduct the mediation through an entity other than the American Arbitration Association ("AAA"). The parties are free to choose a private mediator and to choose their own rules for the mediation. If the parties decide to utilize the AAA's Construction Industry Mediation Procedures, the procedures that will apply to the mediation will be those that were in place at the time the Agreement was signed, rather than those in effect at the time the dispute arises. If the party requesting mediation is also filing for some form of binding dispute resolution, that proceeding will be stayed for 60 days unless the parties agree to extend that time. During the stay, the parties must continue to proceed with setting the schedule and the selection of the arbitrator. The language of §15.3.3 is unchanged from Subparagraph 4.3.2 of the A201-1997.

B. Changes to the Arbitration Provision

The changes to Section 4.6 of the A201-2007 are more substantive than those made to the mediation provisions. The entire section was reorganized, with the consolidation and joinder provisions being re-written to provide the ability of the parties to consolidate arbitrations and bring in other parties in an attempt to settle all claims in a single arbitration. The changes to Subparagraph 4.6 in the A201-2007 are as follows:

> **§ ~~4.6~~15.4 ARBITRATION**
> **§ ~~4.6~~15.4.1** If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, a~~A~~ny Claim ~~arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5,~~ subject to, but not resolved by, mediation shall~~, after decision by the Architect or 30 days after submission of the Claim to the Architect,~~ be subject to arbitration, which shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement, unless the parties mutually agree otherwise. Demand for arbitration must be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing the notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded. ~~Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.~~
>
> ~~**4.6.2** Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.~~
>
> **§ ~~4.6.3~~ 15.4.1.1** A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but ~~within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and~~ in no event shall it be made after the date when the institution of legal or equitable proceedings based on ~~such~~ the Claim would be barred by the applicable statute of limitations. ~~as determined pursuant to Paragraph 13.7.~~ For statute of limitations purposes, receipt of a written demand for

arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

§ ~~4.6.6~~ 15.4.2 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

§ 15.4.3 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

1. Arbitration is No Longer Mandatory

The added language in the first sentence of Section 15.4.1 is a subtle, yet monumental departure from the past editions of the AIA A201. **Arbitration is no longer mandatory – it is an option for the parties to choose.** Litigation is the default choice for dispute resolution. This change is significant because the AIA has contained a mandatory arbitration provision in the A201 since its inception. The A201-2007 is not clear when the election to use arbitration needs to be made and it may be something that can be addressed on a dispute by dispute basis. Given that many parties already attempt to strike the arbitration clause form the A201, time will tell whether this change will ultimately reduce the use of arbitration as a dispute resolution forum.

2. AAA Rules are No Longer Mandatory

Section 15.4.1 was also changed to allow the parties to use an arbitration provider other than the AAA, if they choose to arbitrate. The AAA's Construction Industry Arbitration Rules will apply to the arbitration by default unless the parties decide otherwise. If the parties do use the AAA Rules, they are the Rules that are in effect at the time of the signing of the Agreement, rather than those in effect at the time of the dispute. The notice of demand for arbitration is to be delivered to the other party and the person or entity administering the arbitration and must contain all Claims known at that time. The claimant no longer needs to provide the Architect

with the notice of demand for arbitration, as was previously required in Subparagraph 4.6.3 of A201-1997.

Section 15.4.1.1 addresses when a demand for arbitration can be filed and what the effect of that filing has on the statute of limitations. The date the party administering the arbitration receives the demand for arbitration will be considered the date that "legal or equitable proceedings" were commenced, thus eliminating the question of whether the commencement of the arbitration proceeding is sufficient to stop the running of the statute of limitations. Sections 15.4.2 and 15.4.3 deal with the enforceability of the agreement to arbitrate between the parties and the enforceability of the final arbitration award. Both are enforceable "under applicable law in any court having jurisdiction thereof." It should be noted that § 13.1 of the A201-2007 provides that the Contract shall be governed by the law of the place where the Project is located but that any arbitration will be governed by the Federal Arbitration Act.[31]

3. Consolidation and Joinder

The changes to the consolidation and joinder provisions of Subparagraph 4.6.4 of the A201-1997 also constitute a fundamental shift for the AIA. The language of Subparagraph 4.6.4 was scraped and re-written, including the title.[32] Instead of the prior language limiting the

[31] § 13.1 GOVERNING LAW The Contract shall be governed by the law of the place where the Project is located except that, if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4. AIA A201-2007.

[32] ~~4.6.4 Limitation on Consolidation or Joinder. No arbitration arising out of the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor, or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial.~~

parties' ability to consolidate and join parties, the new language contained in § 15.4.4 allows consolidation or joinder to be done unilaterally by either party, with certain restrictions. The new language reads:

> **§ 15.4.4 ~~Limitation on~~ CONSOLIDATION OR JOINDER**
> **§ 15.4.4.1** Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common issues of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).
>
> **§ 15.4.4.2** Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.
>
> **§ 15.4.4.3** The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder or consolidation as the Owner and Contractor under this Agreement.

Instead of requiring unanimous consent of the Architect, Contractor, Owner and any other party that might be involved in order to consolidate or join other parties, the language of §§ 15.4.4.1 and 15.4.4.2 now allow for consolidation or joinder on a unilateral basis. The consolidation provision in § 15.4.4.1 is especially liberal, allowing unilateral consolidation as

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~~Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.~~
~~4.6.5 Claims and Timely Assertion of Claims. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.~~

long as 1) both arbitrations involve common issues of law or fact; 2) consolidation is allowed in both agreements, and; 3) the arbitrations employ similar procedural rules and methods for selecting arbitrators. Interestingly, this right to consolidate is given to all entities that become parties to a particular arbitration through consolidation or joinder. Potentially this right to consolidate could lead the Owner and Contractor to be involved in an arbitration that involves claims that are only marginally related to the dispute between them – for example an arbitration involving a payment dispute between a subcontractor and its supplier.

The joinder language contained in § 15.4.4.2 also allows for either the Contractor or the Owner to unilaterally join another party to the arbitration, including the Architect or surety. The party to be joined must provide written consent to the joinder. This consent requirement appears to provide the Architect (and others) the ability to opt out of an arbitration between the Owner and Contractor if it so chooses. However, this consent provision may not prevent the Architect from being pulled into a larger dispute involving the Owner and Contractor. For example, if the Architect were involved in an arbitration with the Owner at the same time that the Owner was involved in an arbitration with the Contractor and its subcontractors, the Owner could consolidate the two arbitrations and the Architect could not object. Thus, the Architect is "joined" as a party to the larger arbitration even though it did not consent to being joined.

C. Courts' Recent Treatment of the "New" Mediation and Revised Arbitration Provisions

Recognizing the trend in the construction industry towards dispute resolution which was only partially satisfied by the mandatory arbitration of disputes, the 1997 Edition A201 added mandatory mediation as a condition precedent to arbitration or litigation. Remarkably, the majority of cases citing the 1997 Edition of the A201 relate to the arbitration provisions rather than to the mediation provisions. Nevertheless, the cases are instructive on when and under what

circumstances a party's obligations to mediation arise and to what extent the parties can compel or avoid mediation.

1. Mandatory Mediation

Following the addition of mandatory mediation as a condition precedent to "arbitration or the institution of legal or equitable proceedings" in Section 4.5.1, several cases have been issued in which litigants unsuccessfully sought to compel mediation or sought dismissal of a case based on a failure to mediate. For example, in *HIM Portland, LLC v. Devito Builders, Inc.,*[33] the court found that it had no power to order the parties to mediate. In the context of a motion to dismiss an action, the court found that both parties abdicated mediation as a condition precedent when they proceeded to litigation. Because neither party requested mediation, the arbitration provision was not triggered and, therefore, the Federal Arbitration Act ("FAA") did not apply and the Court had no authority to compel mediation or arbitration.[34]

Relying upon *HIM Portland*, a state court has recently found that it lacked jurisdiction to decide whether or not the failure to initiate mediation resulted in a triggering of the arbitration provision. The court in *Tekmen & Co. v. Southern Builders, Inc.*[35] determined that it lacked jurisdiction to decide whether the parties had triggered the arbitration clause based on Delaware law holding that the "'procedure for triggering arbitration. . . are matters for arbitration, not initial judicial determination.'"[36] In the absence of jurisdiction to decide whether or not arbitration had been triggered, the court dismissed the suit.

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[33] 211 F. Supp. 2d 230, 232, n.2 (D. Me. 2002), *aff'd mem*. 317 F.3d 41 (1st Cir. 2003).
[34] 317 F.3d at 44 (citing *Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002)).
[35] Case No. 04C03007, 2005 WL 1249035 (Del. Super. May 25, 2005).
[36] Id. at *6 (*citing SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 759 (Del. 1998)). The *Tekmen* court also noted that the AIA A201 makes it very clear that while the obligation to submit a claim to the architect in advance of pursuing mediation may end after final

Perdue Farms, Inc. v. Design Build Contracting Corp.[37] involved a dispute between the owner and contractor over whether the contractor was obligated to reimburse the owner for payments made to subcontractors in excess of the balance remaining to be earned by the contractor. The parties modified an A201-1997 to make mediation subject to mutual agreement of the parties and arbitration mandatory only for those claims which the parties had mutually agreed to mediate.[38] When the contractor refused to reimburse the owner for the excess amount over the contract price which the owner paid the subcontractors, the owner filed suit and the contractor moved to compel arbitration. The court denied the motion to compel arbitration, holding that the parties chose not to make arbitration mandatory and, because there was no agreement to mediate and no mediation of the dispute, there was no requirement to arbitrate.[39]

2. Cases Involving the Arbitration Provision

The cases issued involving the A201-1997 addressing the arbitration provisions of the A201 run the gamut from preemption under the FAA, to construing the scope of the clause to the applicability of arbitration to claims arising after construction or termination.

a. Federal law preemption under the FAA

Two cases issued since the 1997 Edition was issued address whether the FAA preempts contrary state law. The result in both was the application of the FAA and the overruling of conflicting state law. In the first case, *Robert Frank McAlpine Architecture, Inc. v. Heilpern,*[40] homeowners unhappy with the design and construction of their residence sued the architect and contractor. The Architect, with whom the homeowners had entered into an AIA contract with

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payment, there remains a duty to mediate and arbitrate that survives final payment. *See*, 2005 WL 1249035 at *4.

[37] Case No. 3:06cv245, 2007 WL 87667 (W.D.N.C. 2007).

[38] *Id*. at *1.

[39] *Id*.

[40] 712 So. 2d 738 (Ala. 1998).

A201 General Conditions, moved to compel arbitration. The trial court denied the motion and applied Alabama law, which prohibits enforcement of pre-dispute arbitration agreements.[41] Upon appeal, the Supreme Court of Alabama reversed, determining that the exemption for certain contracts of employment from application of the FAA did not apply to the contract between the homeowners and the architect and, therefore, federal law favoring arbitration supported granting the motion to compel arbitration.[42]

In *Blanton v. Stathos*,[43] the Court of Appeals of South Carolina held that an AIA arbitration provision in a contract between an owner and architect was enforceable, even though the contract failed to include the statutory state notice that the contract is subject to arbitration.[44] Overruling the owner's argument that the contract was not subject to the FAA because it did not involve interstate commerce, the court found that because the architect consulted with and relied upon expertise provided by individuals outside of the state in developing the drawings and specifications and the contract contemplated the use of materials and subcontractors from outside of the state, the contract "evinces a transaction involving" interstate commerce.[45] Accordingly, because the contract involved interstate commerce, the FAA preempts the contradictory state law and the arbitration award being challenged by the owner was affirmed.

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[41] *Id*. at 738.

[42] The architect's argument that the §1 exemption of the FAA was inapplicable because this was a contract for independent contractor services, not for employment, was not addressed by the appellate court. Instead, the court focused on the argument that §1 should be narrowly applied only to employment contracts for "workers directly engaged in the transportation of goods in a`n interstate market, as opposed to workers involved in the generation of goods and services for interstate markets." *Id*. at 749.

[43] 570 S.E.2d 565 (S.C. Ct. App. 2002).

[44] South Carolina law requires "[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of a contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." *Id*. at 538 (quoting S.C. Code § 15-48-10(a)(Supp. 2001)).

[45] *Id*. at 542-43.

b. ADR provisions generally apply after construction is completed and after the Architect is no longer in the employ of the owner

The A201-1997, like its 1987 predecessor, requires submission of claims to the Architect as a condition precedent to arbitration.[46] When claims can no longer be submitted to the Architect, either because the contract is completed or the contract is terminated, some litigants have contended that the duty to arbitrate is no longer mandatory. Even in the absence of submission to the Architect, courts have fairly uniformly required parties to litigate claims arising after construction is complete or after termination of the contract where the nature of the claims is such that they are the type of claims that could have been raised during construction or prior to termination. Where the claim is not related to actions arising during performance, such as indemnity actions for losses brought after performance, arbitration is not always enforced.

The *Auchter Co. v. Zagloul*,[47] court found that a mandatory ADR clause does not require any "savings clause" to survive termination of the contract. Rejecting dicta from another Florida case relied upon by the appellee,[48] the court found "[i]t is well established that the duty to arbitrate does not necessarily end when a contract is terminated, as long as the dispute concerns matters arising under the contract."[49] Citing the definition of "Claims" in Subparagraph 4.3.1, which provides that "[t]he term 'Claim' also includes other disputes and matters in question between the Owner and Contractor *arising out of relating to the Contract*," the court found that

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[46] *See* § 4.4.1 (A201-1997) and § 4.3.2 (A201-1987).
[47] 949 So. 2d 1189, 1194 (Fla. 1st DCA 2007).
[48] *Aberdeen Golf & Country Club v. Bliss Constr. Inc.*, 932 So. 2d 235 (Fla. 4th DCA 2005)(sustained an order denying a motion to compel arbitration under an A201-1987 contract, finding that the owner repudiated the contract's ADR provisions by terminating the contract instead of following the ADR provisions of the contract).
[49] 949 So. 2d at 1194 (citations omitted).

the parties did not limit "Claims" subject to arbitration to disputes arising before termination of the contract which typically must be submitted to the architect for decision.[50]

Similarly, *BFN-Greeley, LLC v. Adair Group, Inc.*[51] involved post-construction claims regarding time extensions and change orders on a contract to construct apartment complexes funded by the federal Department of Housing and Urban Development ("HUD"). After an award was entered in favor of the contractor, the owner moved to vacate the award on grounds that the arbitrators lacked the authority to resolve contract claims which were subject to HUD approval but had not been submitted for such approval (similar to being submitted to the architect for decision). The Court held that the arbitrators had authority to decide the post-construction claims notwithstanding the failure to first submit the claims to HUD because the contract gave the arbitrators broad authority to decide "any claims arising out of or related to the Contract."[52]

Alternatively, claims which do not necessarily arise "under" the contract, are not always found to be subject to arbitration. For example, in *Lopez v. 14th Street Development, LLC*,[53] a New York court found that claims which arise long after completion of the work, such as a claim for indemnity by the project owner against the contractor for damages paid on a claim for personal injury by a worker involved in renovating the property, are not subject to ADR because they cannot first be submitted to the architect for resolution. Noting that the "AIA Document A201 is not a model of clarity," because it fails to specifically address whether claims arising

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[50] The court also noted that because of the termination, the parties could not submit the dispute to the Architect for decision but that this inability to comply with Subparagraph 4.4.1 simply meant that submission to the Architect was not a condition precedent to mediation and/or arbitration. *Id*. at 1195. (*citing Manalili v. Commercial Mowing & Grading*, 442 So. 2d 411, 413 (Fla. 2d DCA 1983)).

[51] 141 P.3d 937 (Colo. Ct. App. 2006).

[52] *Id*. at 940.

[53] 835 N.Y.S.2d 186 (N.Y. App. 2007).

after completion of the work are subject to arbitration, the court found that the failure of the owner to submit its claim to the architect for decision precluded the contractor from enforcing the arbitration provision.[54] Ironically, the *Lopez* case includes a dissent which states that the contract at issue incorporated by reference the A201-1987, but the contractor submitted the A201-1997 in support of its claim to arbitration.[55] The dissent agreed that arbitration could not be compelled, not for the reasons relied upon by the majority, but because by failing to submit the correct copy of the contract, the contractor could not sustain its burden of proving a "'clear and unequivocal agreement to arbitrate.'"[56]

c. Broad Enforcement of the ADR provisions

Numerous cases discuss various aspects of the A201-1997's ADR provisions with the aim of broadly enforcing the parties' right to arbitrate. For example, in *New Concept Const. Co., Inc. v. Kirbyville Consol. Indep. Sch. Dist.*,[57] the court reversed an order staying arbitration in a contractor's claim against the School District. The District argued that the forum selection clause, which mandated that suits be filed in the local county courts, prevailed over the arbitration clause. The Court rejected that argument, holding that the two provisions could be harmonized where the forum selection clause did not specifically exclude arbitration; the two clauses, read together, meant that the contractor must file any court proceeding not precluded by arbitration in the local county courts.[58]

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54 835 N.Y.S.2d at 188.
55 *Id*. at 188-89.
56 *Id*.
57 119 S.W.3d 468 (Tex. App.-Beaumont 2003).
58 *Id*. at 471.

In *Cumberland Cas. & Sur. Co. v. Lamar Sch. Dist.*,[59] the contractor's motion to compel arbitration was granted because the supplementary conditions, which purported to amend the A201-1997, did not effectively remove the arbitration clause. Like the litigant in *Lopez* who supplied the court with the wrong version of the A201 in support of his claim to arbitrate,[60] the school district incorporated the 1997 edition in the contract but its supplementary conditions modified the 1987 edition, creating an ambiguity about whether the arbitration provision was effectively deleted.[61] Consistent with rules of contract interpretation, the Court construed this ambiguity against the owner as drafter and found that the parties had an enforceable agreement to arbitrate.[62]

Teal Const. Co./Hillside Villa Ltd. v. Darren Casey Interests, Inc.[63] held that the arbitration agreement was broad enough to include all claims between the owner and contractor, including the owner's claims for fraudulent inducement and negligent misrepresentation, because the claims were based on payment and performance provisions in the contract.[64]

In *Commonwealth v. Cornerstone*,[65] the court was faced with claims by the contractor of numerous material breaches by the owner, including non-payment of progress requisitions,

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[59] No. CA 03-961, 2004 WL 2294409 (Ark. Ct. App. Oct. 13, 2004).
[60] *See* 835 N.Y.S.2d 186, *supra* note 45.
[61] The duty to arbitrate is found in Subparagraph 4.6.1 of the A201-1997. The supplementary conditions drafted by the school district purported to "modify, delete and/or add to the General Conditions." 2004 WL 2294409 at 1. The supplementary conditions added language to Subparagraph 4.5.1 making arbitration subject to mutual agreement. Subparagraph 4.5.1 is the arbitration provision in the A201-1987, which was not part of the contract. Despite the provision of an affidavit which attempted to explain the school district's intent to make arbitration subject to mutual agreement, the court found that the reference in the supplementary conditions to the wrong paragraph (and the wrong edition of the A201) did not modify the contract's clear mandate to arbitrate. *Id.* at *4.
[62] *Id.* at *4.
[63] 46 S.W.3d 417 (Tex. App.-Austin 2001).
[64] 46 S.W.3d at 421.
[65] 2006 WL 2567916, *supra* note 11.

claims for extras, and claims for delay caused by the owner. The owner counterclaimed, asserting that the contractor caused the delays, performed defective work and otherwise breached the contract. The court found that the owner's failure to submit claims to the architect as a precondition to ADR or litigation was a material breach of the contract. Relying on *Mayfair Contr. Co. v. Waveland Assoc. Phase I Ltd. P'ship*,[66] the *Commonwealth* court found that failure to submit claims was a material breach because "it deprived the contractor of the 'bargained-for right to quick resolutions by a third party with specialized experience in construction issues[.]'"[67]

Courts construing the A201-1997 have, consistent with prior editions, resolved questions of arbitrability in favor of arbitration. *Carlin Pozzi Architects, P.C. v. Town of Bethel*[68] held that the question of whether the owner timely filed its arbitration demand was subject to arbitration because the owner's claims arose out of the contract that was subject to arbitration, and because issues of timeliness were not intended by the parties to be excluded from the arbitration agreement.

Another decision interpreting provisions of the A201's arbitration clause, *Martel v. Bulotti*,[69] involved a situation where the contractor failed to file its demand for arbitration with the American Arbitration Association ("AAA") within 30 days after receiving an adverse decision from the architect which stated it would become final and binding unless a demand was initiated. Instead of filing with the AAA, the contractor sent its demand to the architect on the thirty-first day. When the owner filed suit to enforce the architect's decision, the contractor objected, claiming that the architect's decision did not become final and binding because he

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[66] 619 A.2d 144 (Ill. App. Ct. 1993).
[67] 2006 WL 2567916, *27.

[68] 767 A.2d 1272 (Conn. Ct. App. 2001).
[69] 65 P.3d 192 (Idaho 2003).

substantially complied with the requirement to initiate arbitration by sending his demand to the architect. The Idaho Supreme Court held that, even though the architect's decision under an AIA contract is not a final arbitration award, the architect's decision in this case became final and binding when the contractor failed to substantially comply with the contractual requirements for demanding arbitration. By not "trigger[ing] the arbitration process by filing notice and demand for arbitration with the AAA," the contractor "denied [the owner] of an essential benefit of the contract – that disputes regarding an architect's decision would be settled expeditiously and efficiently through arbitration."[70]

The final A201-1997 case involving a party moving to compel arbitration, *Liberty Mut. Ins. Co. v. Mandaree Pub. Sch. Dist. #36,*[71] involved a surety. The surety filed suit against the owner, claiming that it was discharged from further performance as a result of the owner's failure to give notice, undertaking repairs and depleting the contract balance prior to allowing the surety to investigate the default.[72] The owner moved to compel arbitration under the terms of the A201-1997 incorporated by reference into the bond. The court held that the surety was not compelled to arbitrate disputes with the owner despite the performance bond's incorporation of the construction contract and A201 General Conditions because of language in Subparagraph 4.6.4 limiting who may be consolidated or joined in the arbitration and Subparagraph 6.2 which bars the creation of a contractual relationship between anyone other than the contractor and owner.[73]

IV. CHANGES TO THE DISPUTE RESOLUTION PROVISIONS OF THE B101

A. Architect as the Decision Maker

[70] *Id*. at 196.
[71] 459 F. Supp. 2d 866 (D. N.D. 2006).
[72] *Id*. at 867.
[73] *Id*. at 871-72.

Prior versions of the AIA Owner-Architect Agreements have always designated the Architect as the initial dispute decision maker. As with the A201-2007, the B101-2007 document allows the Owner and Contractor to designate someone else to fill this role. Section 3.6.2.5 states:

> Unless the Owner and the Contractor designate another person to serve as an Initial Decision Maker, as that term is defined in A201 – 2007, the Architect shall render initial decisions on Claims between the Owner and Contractor as provided in the Contract Documents.

Consistently with this new B101 language, the A201-2007 General Conditions defines "Initial Decision Maker" in Section 1.1.8 as "the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2 and certify termination of the Agreement under Section 14.2.2." Thus, the "Initial Decision Maker" serves a critical role in the administration of the Project.

One commentator has noted a curious distinction between the language employed in the B101 and the A201. Section 3.6.2.5 of B101 refers to "an" Initial Decision Maker, whereas the A201 General Conditions refers to "the" Initial Decision Maker.[74] The distinction in modifiers could be purposeful, implying that there may be more than one Initial Decision Maker for multiple decisions, or inadvertent. If purposeful, the parties could designate Initial Decision Makers specific to each dispute who have expertise in the particular to the subject matter of each disputed issue.

B. Resolution of Disputes Between Architect and Owner

Like the A201, the B101-2007 does away with mandatory arbitration and resorts to a "check-box" approach to selecting a binding dispute resolution procedure. Section 8.2.4 provides the parties with three choices for dispute resolution, arbitration, litigation or "other,"

[74] Friedlander at 18.

which the parties must specify. The instructions provide that the parties must select one of the options, but, the default, if the parties fail to choose, is litigation.

1. Changes to the Mediation Provision

Mediation is still a condition precedent to the binding dispute process selected by the parties under § 8.2.1. § 8.2.2 provides clarification and some minor modifications to its predecessor provision, § 1.3.4.2 of the B141-1997 and § 7.1.2 of the B151-1997, including: (1) the AAA is the default administrator of the mediation unless the parties agree otherwise; (2)the version of the AAA's Construction Industry Mediation Procedures that will apply to and govern the mediation will be the version in effect on the date that the B101 Owner-Architect Agreement is signed, not the version in effect when the demand for mediation is filed; (3) the request for mediation is to be filed with "the person or entity administering the mediation;" (4) the request for mediation may be filed simultaneously with a lawsuit as well as with an arbitration demand; and (5) if arbitration is selected, the parties may "proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings" while the mediation is pending.

2. Changes to the Arbitration Provision

The arbitration provision, § 8.3.1, has been modified similarly to the mediation provision, § 8.2.2, in order to accommodate the new check-box dispute options and to clarify and make some minor modifications to the predecessor arbitration provisions.[75] The new paragraph makes only those Claims that are "subject to, but not resolved by mediation" subject to arbitration in B101. Substantively, this is as broad a categorization as in previous editions of the AIA Owner-Architect Agreements because the description of claims subject to mediation in § 8.2 is as broad and inclusive as the prior edition's arbitration clause. The arbitration shall be

[75] §§ 1.3.5.1 and 1.3.5.2 of the B141-1997 and § 7.2.1 of the B151-1997.

administered by the AAA unless the parties mutually agree otherwise. Similar to the identification of which edition of the mediation rules applies in Section 8.2.2, the new B101 language specifies that the applicable Construction Industry Arbitration Rules shall be those "in effect on the date of the Agreement." Any demand for arbitration must be filed with "the person or entity administering the arbitration" rather than automatically with the AAA.

The B101-2007 provides that a demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, thus allowing the two processes to proceed simultaneously.[76] Interestingly, a new sentence has been added to the end of § 8.3.2 to address the statue of limitations:

> For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim, dispute or other matter in question.

The intent of the new sentence is to create a binding agreement between the parties establishing that the claim shall be deemed timely for limitation purposes if the arbitration demand is filed timely.[77]

3. Consolidation and Joinder Changes

Finally, the B101-2007 makes similar radical changes to the Consolidation and Joinder provisions as did the A201-2007. Prior to this edition, disputes between the Owner and Architect were kept insulated from disputes involving the Contractor, in part because of the differing standards of care. Now, however, liberal consolidation is permitted. Section 8.3.3.1 allows either the Owner or the Architect, without needing the consent of the other, to consolidate any arbitration between them with any other arbitration to which the consolidator is a party if three conditions are met:

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[76] Section 8.3.2.
[77] Friedlander at 33.

> (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common issues of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

The provision does not offer any guidance as to what would constitute "common issues of law or fact," but there is a large body of caselaw involving consolidation of claims to serve as precedent.[78] The B101-2007 also permits non-parties to the agreement to be consolidated under similar conditions.[79]

In an attempt to compliment this broad right to consolidate, the new language of paragraph 8.3.3.3 states:

> Any party to an arbitration may include by joinder persons or entities substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration, provided that the parties sought to be joined consents in writing to such joinder.

This right of joinder may be somewhat illusory, conditioning joinder upon the written consent of the party seeking to be joined. It seems unlikely that a party would voluntarily consent to be joined after the dispute arises, and somewhat unlikely that the Architect's consultants or subcontractors will consent to a blanket joinder in their subcontract.

V. CONCLUSION

The collective drafters of the new AIA documents have taken a decidedly curious turn in the A201-2007 and B101-2007 with respect to the insurance and dispute resolution procedures. With respect to insurance, the changes could be viewed as a case of too little, and in the area of dispute resolution, perhaps the changes are too much. It is safe to say, however, that the changes

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[78] Friedlander at n. ix (citing *In re Repetitive Stress Injury Litigation*, 11 F.3d 368 (C.A.2.N.Y., 1993); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (C.A.2.N.Y., 1990); *Henderson v. National R.R. Passenger Corp.*, 118 F.R.D. 440 (N.D.Ill., 1987); *Bottazzi v. Petroleum Helicopters, Inc.*, 664 F.2d 49 (C.A.5.La., 1981); *Dupont v. Southern Pac. Co.*, 366 F.2d 193 (C.A.5.La., 1966).

[79] Section 8.3.3.2

are an attempt to reflect the changes in the construction industry and whether, in total, they result in more useful document than the 1997 version, will be vetted by the users of this family of documents over the next ten years or so, when we will be once again faced with a new set of documents.