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### Drones in Construction

[JD Holzhauser](#), Associate, [Peckar & Abramson](#)

#### Introduction

Drones have become very popular among construction companies in the United States. Drones are also known as unmanned aerial vehicles ("UAV") or unmanned aircraft systems ("UAS"). UAS technology can be broadly applied in the construction industry. UASs can assist with operations such as inspections, security, surveillance, safety, monitoring progress, not to mention the use of UASs in marketing and business development.

As a result of their versatility, UASs are bound to have a larger impact on construction in the future. In 2016, the professional services firm PwC estimated that the value of labor and services prone to replacement by UASs was \$127 billion. One-third of that value is attributed to the infrastructure and construction industries. That same year, 2016, the Federal Aviation Administration ("FAA") estimated that the number of UASs in the United States was around 2.5 million. The FAA estimates that the UAS population could rise to 7 million by 2020. Needless to say, UASs are on the rise.

#### Regulation

##### Section 333

Congress passed the FAA Modernization and Reform Act of 2012 ("FMRA") in 2012 and directed the FAA to develop regulations for use of UASs. However, the FAA had to regulate UASs using Section 333 of the FMRA pending promulgation of regulations by the FAA. It is not a stretch to say that the Section 333 rules were onerous. For one, Section 333 treated all UASs like regular airplanes and helicopters, meaning an operator had to receive an exemption from the FAA to operate a commercial UAS. Another requirement was that a UAS operator had to be a licensed pilot. Speed and altitude restrictions also impeded efficient use of UASs on construction projects. But these legal requirements were to be replaced by FAA regulations.

##### Part 107

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On August 29, 2016, the FAA regulation 14 C.F.R. §107 (known as "Part 107") became effective law. Part 107 applies to UASs that weigh less than 55 pounds, including the UAS's payload. Part 107 relaxed many of the burdensome restrictions from Section 333. For instance, a UAS operator does not need to be a licensed pilot. The operator must be at least 16 years old, pass an aeronautical knowledge exam, and submit to a Transportation Safety Administration security screening. There are several other requirements in Part 107 that are important to commercial UAS operation, such as preflight inspections, weight limits, and line-of-sight requirements. There is also a waiver process in Part 107 that allows operators to be exempt from some requirements of Part 107. For example, an operator needs an exemption to operate a UAS from a moving vehicle, operate a UAS at night, or operate a UAS over people not participating in the operator's activity. But a full overview of the applicable rules and regulations is too comprehensive for this article. Visit the FAA's website for more information about the regulations governing commercial UAS operation.

### **Future Issues**

There are three main issues for UAS operation in the future—insurance, private versus public space, and state law preemption.

#### **Insurance**

Currently, Part 107 does not have a liability insurance mandate. Most commercial general liability insurance policies will not cover UASs if the policy contains an aviation exclusion. But insurance coverage for property damage and liability is something that an operator should consider. Property and liability coverage can be added to a CGL policy, or separate insurance can be acquired. Some issues that will likely affect insurance premiums for UAS coverage are trained operators, operator experience, maintenance logs, and parts or accessories records. It is possible that insurance mandates could be possible in the future. For the time being, project owners and contractors can require UAS insurance coverage in their contracts.

#### **Airspace Control**

The next issue is the relatively unsettled area of UAS airspace law—who owns the air above a piece of property. The FAA claims that it is in control of all the airspace in order to protect the safety of the national airspace system. But common law principles hold that a land owner owns the airspace above her property. Resolution of that issue is imperative with the proliferation of UAS use, both in a commercial sense and as a hobby. An opportunity to address this issue was presented by William Merideth and John Boggs in Kentucky in 2015. Boggs was flying his UAS in what he thought to be legal, public airspace. Merideth disagreed as the UAS was being flown over his private property. Merideth shot Boggs' UAS out of the air. After criminal charges against Merideth were dropped, Boggs filed a civil suit in federal court that was later dismissed for lack of jurisdiction. This conflict illustrates the civil and criminal uncertainty in UAS airspace control. This issue is likely something that will be addressed by the FAA and the court system in coming years.

#### **State Law Preemption**

The last issue is preemption of state law. The National Conference of State Legislatures says that at least 38 states considered UAS legislation in 2016. State and local governments have as much a reason to protect the safety of their citizens as the FAA. But federal law is clear that a conflicting state law is preempted by the applicable federal law. This uncharted territory could cause issues. For instance, Utah enacted a law that allowed law enforcement to jam UAS signals or shoot down UASs operating too close to wildfires. The obvious safety issue is to prevent UASs from interfering with, or damaging, firefighting aircraft. The problem is that federal law prohibits the willful damaging, destroying, disabling, or wrecking of a UAS, and prohibits the use of jamming devices in the U.S.A., even by a state government. Those conflicting state and federal laws present a preemption issue. There are other preemption issues similar to this that will affect the regulation of commercial UASs in the future. But regardless of the challenges, it appears clear that UAS use in the construction industry has a bright future.

\*AGC is part of a ConsensusDocs working group focused on drones in construction contracts. The working group is accepting volunteers. Email Brian Perlberg at [perlberg@agc.org](mailto:perlberg@agc.org) if you are interested.

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## Is Defective Work an Accident? And Why Does It Matter?

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Liability insurance provides coverage against accidents. If defective work is accidental, then maybe liability insurance will cover claims for property damage arising from defective work. But should it? This is one of the most debated issues in construction law. Courts in different states have ruled both ways. Some courts are adamant that insurance shouldn't cover damage caused by defective work. Over the last ten years, however, the majority of courts that have considered the issue have decided yes, defective work is an accident. While this trend is favorable for contractors, it's not the end of the story. Liability insurance policies begin with a broad grant of coverage and then list numerous exclusions that substantially reduce what, in fact, only appeared to be a broad grant of coverage. Some of these exclusions are then tempered by exceptions that give back some of the coverage taken away by the exclusion. In this article we'll discuss the structure of liability insurance policies, the current state of the accident debate, and the coverage hurdles that remain even in the majority of states that follow the recent trend.

### CGL Insurance

Contractors buy commercial general liability insurance to protect themselves from claims for personal injury and property damage. Coverage for personal injury caused by defective work is rarely an issue. Property damage is another story, and that is what this article will focus on. Most CGL policies begin with the following language or something similar:

We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies.

This broad coverage is then immediately limited by the following:

This insurance applies to bodily injury and property damage only if:

- 1) The bodily injury or property damage is caused by an occurrence.

CGL policies define property damage as either physical injury to tangible property or loss of use of tangible property that is not physically injured. Most CGL policies define occurrence as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. The

policies don't define accident. If a contractor or subcontractor seeks liability coverage for damage caused by defective work the first two questions are is there property damage and, if so, was the property damage caused by an occurrence/accident. If the answer to both questions is yes, then it is necessary to look at any applicable exclusions and exceptions. If the answer to either is no, that is the end of it. Of the two preliminary coverage questions, the occurrence/accident issue has received by far the most attention.

### **Defective Work Not An Accident**

Before 2004 it was probably the majority view that liability insurance was not intended to cover claims for breach of contract, and that defective work could not therefore be an occurrence. This is still the law in Oregon which the Oregon Supreme Court has explained as follows:

We do not need to definitely define 'accident'; however, we do hold that 'accident' has a tortious connotation. Damage solely caused by failure to perform a contract is not recoverable in tort. A tort is a breach of a duty created by law and not necessarily by the agreement of the parties. \* \* \* Damage caused by the negligent performance of a contract can in certain instances be recoverable in tort. \* \* \* This is because by contract the parties have entered into a relationship in which the law requires, apart from any obligation assumed by contract, that the obligor act with due care. For example, if a physician contracts to treat a patient and treats the patient negligently, he is liable in tort because the law, apart from contract, imposes a duty upon the physician to treat patients with due care. \* \* \* [However], [d]amages caused by a failure to perform 'amount to mere breaches of contract, for which no tort action will lie.' "

*Oak Crest Construction Co. v. Austin Mutual Insurance Co.*, 998 P.2d 1254 (Or. 2000) quoting *Kisle v. St. Paul Fire & Marine Insurance*, 495 P.2d 1198 (1972).

In *Oak Crest* the contractor had claimed the cost of repainting cabinets after its subcontractor's original paint job failed to cure. There was no argument that the subcontractor's defective paint job was intentional. Nor was it argued that the cabinets were not damaged by the uncured paint. Nevertheless, because the subcontractor had not committed a tort there was no occurrence. Many courts would now say that Oregon's position is based on public policy rather than the language of the standard CGL insurance policy.

Another, now minority, position focuses on the concept of fortuity. The Pennsylvania Supreme Court explains this idea as follows:

The National Union CGL policies do not provide a definition for "accident." Words of common usage in an insurance policy are construed according to their natural, plain, and ordinary sense. . . . We may consult the dictionary definition of a word to determine its ordinary usage. *Id.* Webster's II New College Dictionary 6 (2001) defines "accident" as "[a]n unexpected and undesirable event," or "something that occurs unexpectedly or unintentionally." The key term in the ordinary definition of "accident" is "unexpected." This implies a degree of fortuity that is not present in a claim for faulty workmanship.

\* \* \*

We hold that the definition of "accident" required to establish an "occurrence" under the policies cannot be satisfied by claims based upon faulty workmanship. Such claims simply do not present the degree of fortuity contemplated by the ordinary definition of "accident" or its common judicial construction in this context.

*Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Fire Insurance Co.*, 908 A.2d 888 (Pa. 2006).

In *Kvaerner* the contractor built a brick coke oven for Bethlehem Steel. The oven's roof was damaged because a subcontractor grouted the bricks in the roof too early. As in Oregon, Pennsylvania does not appear to have thought that Kvaerner's subcontractor intended to damage the coke oven by grouting too early. While the majority of courts would now say that Pennsylvania's fortuity requirement is based on policy and not the definition of accident, courts in Kentucky, Ohio, and Nebraska also rely on a fortuity analysis to hold that defective work cannot be accidental. Courts that employ the fortuity analysis do tend to recognize coverage where faulty workmanship causes damage to property other than contractor's work. This distinction based on results rather than the nature of the contractor's actions has been rejected in the majority of cases decided in the last 15 years.

### **Unintentional Defective Work Is An Accident**

One of the earliest cases to challenge the older policy driven decisions was *American Family Mutual Insurance Co. v. American Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004). *American Girl* involved a design-build contract for a large distribution warehouse. Faulty soils engineering led, after the warehouse was occupied, to more than 18 inches of settlement causing the building to buckle. The warehouse was determined to be unsafe and was dismantled. The contractor made an insurance claim for the property damage caused by the settling. The insurance company opposed the claim arguing that the owner's breach of contract/breach of warranty claim could not give rise to an occurrence. The Wisconsin Supreme Court rejected the insurer's argument explaining as follows:

American Family argues that because Pleasant's claim is for breach of contract/breach of warranty it cannot be an "occurrence," because the CGL is not intended to cover contract claims arising out of the insured's defective work or product. We agree that CGL policies generally do not cover contract claims arising out of the insured's defective work or product, but this is by operation of the CGL's business risk exclusions, not because a loss actionable only in contract can never be the result of an "occurrence" within the meaning of the CGL's initial grant of coverage. This distinction is sometimes overlooked, and has resulted in some regrettably overbroad generalizations about CGL policies in our case law.

[T]here is nothing in the basic coverage language of the current CGL policy to support any definitive tort/contract line of demarcation for purposes of determining whether a loss is covered by the CGL's initial grant of coverage. "Occurrence" is not defined by reference to the legal category of the claim. The term "tort" does not appear in the CGL policy.

The court went on to note that an accident is an event or change occurring without intention or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result. Since neither the soils engineer or the contractor intended the building to settle, the damage to the warehouse was caused by an accident. The court then went on to examine the exclusions and exceptions in the contractor's policy.

During 2007 the supreme courts of Florida, *United States Fire Insurance Co. v. J.S.U.B., Inc.*, 979 So.2d 871, Tennessee, *The Travelers Indemnity Co. of America v. Moore & Associates, Inc.*, 216 S.W.3d 302, and Texas, *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1, followed Wisconsin's holding in *American Girl*. In 2013 they were joined by the supreme courts of Connecticut, *Capstone Building Corp. v. American Motorists Insurance Co.*, 67 A.3d 961, Georgia, *Taylor Morrison Services, Inc. v. HDI-Gerling America Insurance Co.*, 746 S.E.2d 587, North Dakota, *K&L Homes, Inc. v. American Family Mutual Insurance Co.*, 829 N.W.2d 724, and West Virginia. In *Cherrington v. Erie Insurance & Casualty Co.*, 745 S.E.2d 508, the West Virginia Supreme Court overruled its recent 2005 holding that "[b]ecause faulty workmanship claims are essentially contractual in nature, they are outside the risks assumed by a traditional commercial general liability policy." The court explained its reversal as follows:

With the passage of time comes the opportunity to reflect upon the continued validity of this Court's reasoning in the face of juridical trends that call into question a former opinion's current soundness. It has been said that "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late."

In 2010 Colorado enacted a statute requiring its courts to "presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured." Colo. Rev. Stat. § 13-20-808(3) (2010). In 2011 Arkansas enacted legislation requiring CGL policies sold in Arkansas to "contain a definition of 'occurrence' that includes: ... Property damage or bodily injury resulting from faulty workmanship." Ark. Code Ann. § 23-79-155(a)(2).

The Supreme Courts of Alabama and South Carolina have ruled that defective work can be an occurrence, but both courts hold that the defective work itself is not property damage. *Owners Insurance Co. v. Jim Carr Homebuilder, LLC*, 157 So.3d 148 (Ala. 2014); *Crossmann Communities of North Carolina, Inc. v. Harleystown Mutual Insurance Co.*, 717 S.E.2d 589 (S.C. 2011). South Carolina has confirmed this interpretation by statute. S.C. Code Ann. § 38-61-70(B)(2) (2011).

### **Closing Thoughts**

Not all states have issued definitive decisions on this issue. Still the trend both legislatively and in case decisions is to find defective work not done intentionally to be accidental and, therefore, an occurrence for purposes of CGL insurance. This does not necessarily mean, however, that CGL insurance will always pay for property damage caused by defective work. Most CGL policies contain several business risk exclusions that specifically address defective work. The trend to find defective work accidental is not a trend to make CGL insurance pay for defective work. It is instead a trend to allow the terms of the CGL policy, rather than judicial policy, to determine whether property damage caused by defective work is covered. The business risk exclusions addressing defective work claims will be the subject of the next edition of this newsletter.

Property damage caused by defective work can expose contractors to substantial liability. Whether CGL insurance will cover that liability is dependent on both the terms of the contractor's policy and the law of the state where the work is done. Prudent contractors will be very familiar with both.

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**The Fight Continues in Florida:  
Must the Insurer Defend its Contractor during the  
Construction Defect Pre-suit Process?**

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A familiar process for any contractor engaged in residential building – from subdivisions to expensive high rise condominiums – is the now common statutory pre-suit process used to govern construction defect claims by an owner. As of today, well over thirty states have enacted some form of a “notice and repair” statutory scheme outlining procedures that property owners must follow prior to bringing a suit for alleged construction defects against a contractor. The goal being to cut down on the number of costly construction defect actions filed in court. Of course, following these pre-suit procedures is not without its own time and expense for the contractor. In Florida, under Chapter 558 (Fla. Stat. § 558.001 et seq.), once the owner

provides notice of the alleged defects, the contractor is expected to substantively respond, including engaging in a discovery process, whereby expert reports, photographs, and other documentary evidence is exchanged. The Chapter 558 notice is simply an initial step in what could still result in litigation and so it is no wonder that most contractors engage legal counsel upon receipt of such a notice. The question becomes, can the contractor look to its insurer to defend it during this process?

Of course the first step in answering that question requires a read of the policy terms themselves. While most Commercial General Liability (“CGL”) policies would not cover a contractor’s self-inflicted workmanship or defect issues, there are common exceptions to such an exemption, such as for defects caused by subcontractors. Additionally, if the defect is of such a nature as to cause additional damage to the property, a CGL policy could be in play, providing the contractor with the opportunity for an insurer-paid-for legal defense. But if the policy calls for the insurer to defend in the case of suits, civil proceedings, and/or alternative dispute resolution forums, can the contractor get coverage during participation in the Chapter 558 process? This question has now been brought to the Southern District, Eleventh Circuit, and Florida Supreme Court over the past three years through the case of *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Co.*, 124 F. Supp. 3d 1272 (S.D. Fla. 2015), and its ultimate outcome may have profound implications on the CGL insurance landscape for contractors in the State of Florida.

In this case, Altman was the general contractor (the “Contractor”) for a high-rise residential condominium and had procured seven, consecutive, one-year CGL policies with Crum & Forster (the “Insurer”). Following construction of the project, the condominium served the Contractor with several Notice of Claims under Chapter 558 alleging construction defects on the project, many of which the condominium contended caused additional property damage. The Contractor reached out to the Insurer to provide a defense during the Chapter 558 process. The Insurer refused, stating that the matter was not currently “in suit” so its duty to defend had not been triggered. This caused the Contractor to file suit against its Insurer seeking both a declaration that the Insurer had a duty to defend the Chapter 558 notices and also alleging the Insurer breached the terms of the policy when it failed to do so.

The first court to hear this matter was the United States District Court for the Southern District of Florida in June 2015. *Altman*, 124 F. Supp. 3d 1272 (S.D. Fla. 2015). Whether or not the Insurer had a duty to defend the Contractor hinged on the court’s interpretation of the policy language at issue, the relevant section as follows:

[The Insurer] will have the right and duty to defend the insured **against any suit** seeking those damages [bodily injury or property damage to which the insurance applies].

A “suit” is further defined by the policy as follows: **“Suit” means a civil proceeding** in which damages because of “bodily injury,” “property damage” or “personal and advertising injury” to which this insurance applies are alleged.

“Suit” includes:

- (a) An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- (b) Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

“Civil proceeding” was not further defined by the policy, nor was “alternative dispute resolution proceeding.” Therefore, the court’s analysis – which was a matter of first impression in Florida – was whether the Chapter 558 process qualified as a “suit” under the policy; i.e., a civil proceeding or an alternative dispute resolution proceeding.

The Southern District examined the Florida legislature’s notes which described Chapter 558 as a “mechanism” and not a proceeding. *Id.* at 1280. Further, the court determined that the absence of a fact finder or decision maker rendered the process distinctly different from a civil proceeding. *Id.* at 1281. Based on the foregoing, the Southern District determined the Insurer did not owe the Contractor a duty to defend.

Following the district court’s decision, the Contractor appealed to the Eleventh Circuit. 832 F.3d 1318 (11th Cir. 2016). The Contractor continued to argue that the Chapter 558 process met the CGL policy’s definition of “suit” because it is a “civil proceeding”; that the very fact that the Chapter 558 notice is mandatory prior to bringing a lawsuit makes it a “proceeding” as that term is defined as “an act or step that is part of a larger action”; or alternatively, even if it is not a civil proceeding, it constitutes an alternative dispute resolution proceeding and is therefore still a “suit” under the CGL policy. *Id.* at 1323. In contrast, the Insurer’s position was that to constitute a “suit” under the policy requires a proceeding that determines an insured’s legal liability to pay damages. Because the Chapter 558 framework provides no opportunity for a claimant to seek a determination of the insured’s legal obligations, the Insured argued its duty to defend under the CGL policy could not be triggered. *Id.*

Unlike the district court that found the definition of “suit” to be unambiguous in the CGL policy, the Eleventh Circuit, was not as convinced, noting that both sides made reasonable arguments. *Id.* at 1325. The court highlighted several important policy considerations. If insurance companies are not obligated to participate and defend during the Chapter 558 process, many contractors will opt out of process, even inviting litigation in order to obtain a contribution from the insurer. However, imposing this arguably additional duty on insurance companies may raise the cost of insurance and therefore limit its availability. *Id.*

The important policy considerations and resulting applications to the insurance industry in Florida coupled with the lack of guidance from Florida courts on the issue caused the Eleventh Circuit to certify a question to the Florida Supreme Court: does the notice and repair process outlined in Chapter 558 constitute a “suit” under the Insurer’s CGL policy; that is, is it a civil proceeding or an alternative dispute resolution proceeding?

After hearing oral arguments in April of 2017, the Florida Supreme Court finally issued its opinion to the Eleventh Circuit this past December. 232 So. 3d 273 (Fla. 2017). Relying on a previous decision that sought to define “civil proceeding” in another statute, the Court determined that the Chapter 558 notice and repair process “cannot be considered a civil proceeding under the policy terms because the recipient’s participation in the chapter 558 settlement process is not mandatory or adjudicative.” (citing *Raymond James Financial Services, Inc. v. Phillips*, 126 So. 3d 186 (Fla. 2013)). What the Court did hold, however, was that while the insurance policy defined a “suit” first and foremost as a



“civil proceeding”, it also expanded upon that definition, by specifically including arbitrations and other alternative dispute resolution proceedings into the gambit of a “suit” for purposes of providing a defense. Relying upon the very language of the statute at issue itself, the Court had no trouble coming to the conclusion that Chapter 558 is an alternative dispute resolution procedure. However, based on the policy language, the Court cautioned that in order to trigger the Insurer’s duty to defend, it would require that the Insurer consent to the Contractor’s submission to the Chapter 558 process.

The Eleventh Circuit found the Florida Supreme Court’s holding – that engagement in Florida’s Chapter 558 process does not qualify as a civil proceeding, but does fall within the definition of an ADR proceeding – as dispositive and reversed the district court’s previous ruling that the process was not a “suit” under the policy. 800 F.3d 1300 (11th Cir. 2018). The dispute now returns to the Southern District to determine whether the Insurer consented to the Contractor’s engagement in the process, leaving some important considerations under Florida law up to the district court’s determination; specifically, if an Insured’s obligation to defend in an ADR proceeding requires consent, can such consent be reasonably withheld?

Florida is one of the last states to hash out this distinction in the courts about whether or not a pre-suit construction defect statutory process constitutes a claim, civil proceeding, or alternative dispute resolution proceeding. The take away from this latest fight for contractors is to be mindful of CGL policy language and aware of the law in the jurisdiction you’re working in. If all the stars align, a contractor could still have an opportunity to seek a defense from an insurer when complying with pre-suit “notice and repair” type statutes.

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**Do You Know Who Will Decide Whether Your Next Dispute is Subject to Arbitration?**

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Courts determine whether a dispute is subject to arbitration, also known as questions of “arbitrability,” unless the parties agree to submit arbitrability disputes to the arbitrator. However, you should be

mindful that incorporating an arbitration provider's rules or a broad arbitration provision in your agreement may delegate the arbitrability determination to the arbitrator.

This article will survey the effects of incorporating an arbitration provider's rules or common arbitration provisions on who determines questions of arbitrability.

### **Unless the Parties Agree Otherwise, Courts Ordinarily Decide Questions of Arbitrability**

The Supreme Court long ago recognized that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit.<sup>i</sup> Accordingly, when a dispute arises, it must first be determined whether the parties are bound by an arbitration agreement and whether they agreed to submit their particular dispute to arbitration. These questions of "arbitrability" are ordinarily decided by a court.<sup>ii</sup> A court will review the parties' arbitration agreement, as with any other contract, with an eye to what the parties intended. When doubt exists as to the parties' intentions to arbitrate, the Federal Arbitration Act (FAA) — and similar state arbitration statutes — express a strong presumption in favor of arbitration, requiring that doubt to be resolved in favor of arbitration.

While questions of arbitrability are ordinarily decided by a court, contracting parties can agree to delegate questions of arbitrability to an arbitrator instead.<sup>iii</sup> Because an arbitrator deciding questions of arbitrability is contrary to the ordinary course of events, contracting parties must express their intent to delegate questions of arbitrability to an arbitrator "clearly and unmistakably."<sup>iv</sup> When doubt exists as to the parties' intent to "arbitrate arbitrability," the FAA's presumption in favor of arbitrability is reversed.<sup>v</sup>

Courts generally apply state law principles governing the formation of contracts to determine whether parties "clearly and unmistakably" agreed to arbitrate arbitrability.<sup>vi</sup> Courts interpreting the FAA have also developed a similar federal common law of arbitrability, which is applicable to any contract involving interstate commerce. Many courts have held that parties "clearly and unmistakably" agreed to arbitrate arbitrability simply by incorporating an arbitration provider's rules or a broad arbitration provision into their agreement.

### **Incorporating a Particular Arbitration Provider's Rules Into Your Agreement Can Be a "Clear and Unmistakable" Delegation of Authority to Decide Questions of Arbitrability**

Arbitration provisions frequently state that the contracting parties agree to arbitrate with a particular provider, and many go on to specifically incorporate the rules of the arbitration provider into the agreement. Many courts have held that specifically incorporating an arbitration provider's rules, which recognize the arbitrator's discretion to determine their own authority's scope, into an agreement is a clear and unmistakable delegation of authority to decide questions of arbitrability to arbitrators.<sup>vii</sup>

Arbitration providers' rules almost universally recognize arbitrators' discretion to determine the scope of their own authority. For example:

- American Arbitration Association (AAA) Commercial Arbitration Rule 7(a) provides that "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."
- The AAA International Arbitration Rules provide in Article 19 that "The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s), or with respect to whether all of the claims, counterclaims, and setoffs made in the arbitration may be determined in a single arbitration."

- The International Chamber of Commerce (ICC) Arbitration Rules provide in Article 6(5) that “any decision as to the jurisdiction of the arbitral tribunal . . . shall [] be taken by the arbitral tribunal itself.”
- Article 23 of the 2010 UNCITRAL Arbitration Rules states that “[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement,” and that “[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.”
- CPR Rule 8.1 provides that “The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement. This authority extends to jurisdictional challenges with respect to both the subject matter of the dispute and the parties to the arbitration.”
- JAMS Comprehensive Arbitration Rule 11(b) provides that “Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.”

Even if an arbitration provision does not expressly incorporate a provider’s rules, the rules themselves often state that merely by agreeing to arbitrate with the particular provider, the rules are deemed to be incorporated into the agreement. While many courts have held that incorporation of a provider’s rules is evidence of the parties’ intent to arbitrate arbitrability, other evidence could render this intent less than clear and unmistakable.

### **Incorporating a Broad Arbitration Provision Into Your Agreement Can Also Be a “Clear and Unmistakable” Delegation of Authority**

Some state and federal courts have found that the broad arbitration provisions recommended by arbitration providers alone are clear and unmistakable delegations of authority to decide questions of arbitrability to arbitrators. These provisions include:

- The AAA’s recommended provision, “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules.”<sup>viii</sup>
- The ICC’s recommended provision, “All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.”<sup>ix</sup>

Neither of these provisions expressly states that the contracting parties intend to arbitrate arbitrability. Nonetheless, courts have found that each represents “the paradigm of a broad clause”<sup>x</sup> and “the broadest language the parties could reasonably use.”<sup>xi</sup> A few courts have found that the broad language “any dispute” or “all disputes” must be read to include disputes about arbitrability.<sup>xii</sup> So even without an express statement that an arbitrator will decide arbitrability, these broad arbitration provisions have been interpreted to overcome the presumption that a court will decide the arbitrability issue. Courts sometimes bolster this interpretation by referencing a policy against dividing disputes into different portions, some of which are decided by arbitrators, and some of which are decided by courts.<sup>xiii</sup>

While many courts have held that broad arbitration provisions calling for arbitration of “any dispute” or “all disputes” alone do *not* clearly and unmistakably express the necessary intention to arbitrate arbitrability,<sup>xiv</sup> you should be aware that, by including broad arbitration provisions in a contract, you may unintentionally allow the arbitrator to decide the scope of your arbitration agreement.

In sum, if you want a court to decide whether, and to what extent, your dispute is subject to arbitration, you must be mindful of the impact that incorporating an arbitration provider’s rules or a broad arbitration provision into your agreement can have on the question of who will decide arbitrability. If you wish to arbitrate under a particular provider’s rules, but reserve questions of arbitrability to the courts, you should draft your arbitration provision to specifically carve out arbitrability from the arbitrator’s authority.<sup>xv</sup>

Pepper Hamilton’s Construction Practice Group has an unparalleled record of resolving complex construction disputes and winning complex construction trials. Our litigation experience – and success – informs everything we do, including translating into better results in our contract drafting and project management. Our lawyers counsel clients on some of the biggest, most sophisticated construction projects in the world. With more than 20 lawyers — including 13 partners who all have multiple first-chair trial experience — and a national network of 13 offices, we have the depth and breadth to try cases of any complexity, anywhere at any time. For more information about Pepper’s Construction Practice, visit [www.pepperlaw.com](http://www.pepperlaw.com).

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## What the Aluminum and Steel Tariffs Mean for You

On Thursday, March 8<sup>th</sup>, President Donald Trump implemented tariffs on aluminum (10%) and steel (25%) that are slated to go into effect on March 23<sup>rd</sup>. We encourage you to review your construction contracts to see what provisions are currently included, and what language you may need to include in future contracts. For Private Construction Contractors, the [ConsensusDocs 200.1 Time and Price Impacted Materials Amendment and Schedule A](#), is a relevant contractual tool that can be attached to any prime agreement potentially and can also be used for subcontract agreements. The [Guidebook for the 200.1 Amendment](#) can be found here.

As you continue to prepare for the impacts of these tariffs, please keep the foregoing in mind and contact AGC should you have any further questions.

Additional Information:

- AGC Memos for [direct federal and federally-assisted construction contracts](#) and [private construction contracts](#)
- [AGC CEO, Stephen E. Sandherr’s statement in reaction to President Trump’s announcement](#)

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## Bob Majerus Named Chair of the Year by Associated General Contractors of America

Bob Majerus, Vice President and General Counsel of [Hensel Phelps](#), was honored by the Associated General Contractors of America (AGC) as the 2017 Chair of the Year at its 99<sup>th</sup> Annual Convention in New Orleans, Louisiana.

The AGC of America Chair of the Year Award is presented to a chairperson in recognition of their outstanding achievements and accomplishments in the past year. Mr. Majerus was an integral member of the ConsensusDocs Contract Content Advisory Council (CCAC) that produced comprehensive updates to the most used ConsensusDocs contract documents in 2016/17. Most

recently, he oversaw the development of a working group that drafted a twenty-page AGC commentary on the new American Institute of Architects (AIA) A201 General Conditions Document. In addition, Mr. Majerus has made several presentations regarding the new AIA A201 as well as the new ConsensusDocs Documents.

ConsensusDocs Executive Director, Brian Perlberg commented that “Bob’s wonderful demeanor that helps facilitate consensus within the CCAC. His knowledge and insight were instrumental in making some of the most significant changes in the recent comprehensive updates that were made to ConsensusDocs contracts in 2016 and 2017”

*(Pictured Above: Left Bob Majerus, Right AGC President Art Daniel)*

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A promotional banner for the Construction SuperConference 2018. On the left, the text "Call for speakers" is written in large, bold letters, with "Call for" in blue and "speakers" in orange. Below this, it says "SEEKING EXPERTS IN:" followed by a bulleted list: "• Construction Law", "• Dispute Resolution and Litigation", and "• Risk Management". In the center, there is a black microphone on a stand. On the right, the text "CONSTRUCTION SUPERCONFERENCE 2018" is displayed in blue and orange, with a blue swoosh underline. At the bottom right, the website "WWW.CONSTRUCTIONSUPERCONFERENCE.COM" is written in white on an orange background.

## Construction SuperConference 2018 – Call for Speakers

The Construction SuperConference is now accepting proposals for the annual event to be held on December 10-12, 2018 in Las Vegas, NV at the Encore at Wynn. The Construction SuperConference is regarded as one of the leading industry events for construction owners, contractors, general counsel and construction attorneys. All presentation proposals are due no later than **Friday, March 23, 2018** at 10:00 pm EST.

The top 3 topics that attendees most look for are Dispute Resolution, Insurance and Surety and Risk Management. Considerations for acceptance includes timely and substantive content, with a reference to a case study preferred. Suggested panelists should include senior attorney, general counsel and construction firm executive.

For a list of more conference presentation topics, and details on speaking for Construction SuperConference please visit:

<http://www.constructionsuperconference.com/conference/become-a-speaker/>

To submit your proposal please complete the online form at:

<http://www.surveygizmo.com/s3/3709895/CSC-2018-Call-For-Presentations>

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<sup>i</sup> *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

<sup>ii</sup> *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002).

<sup>iii</sup> *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *see also Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 671 n.1 (4th Cir. 2016) (“empowering an arbitrator to determine arbitrability in the first instance ‘cuts against the normal rule.’”).

<sup>iv</sup> *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 649 (1986).

<sup>v</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

<sup>vi</sup> *Id.*

<sup>vii</sup> *See Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 10-12 (1st Cir. 2009); *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72–74 (2d Cir. 2012) (“Where parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator.”); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (parties’ express incorporation of American Arbitration Association rules constituted clear and unmistakable evidence that parties agreed to arbitrate question of arbitrability); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1072–1077 (9th Cir. 2013) (in arbitration agreement between sophisticated parties to commercial contract, parties’ incorporation of arbitration rules of United Nations Commission on International Trade Law delegates questions of arbitrability to arbitrator). *But see Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 751 (3d Cir. 2016) (finding that an incorporation of the AAA rules is not a clear and unmistakable delegation to the arbitrators).

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- <sup>viii</sup> See *Luzerne Cty. v. D.A. Nolt, Inc.*, No. 3:14-cv-00831, 2014 U.S. Dist. LEXIS 123994 (M.D. Pa. Sept. 5, 2014).
- <sup>ix</sup> See *Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115 (2d Cir. 2003).
- <sup>x</sup> See *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995).
- <sup>xi</sup> See *Fleet Tire Serv. v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997).
- <sup>xii</sup> See, e.g., *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996).
- <sup>xiii</sup> See, e.g., *Pettinaro Constr. Co. v. Harry C. Partridge, Jr., & Sons, Inc.*, 408 A.2d 957, 963 (Del. Ch. 1979) (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964)).
- <sup>xiv</sup> See e.g., *McLaughlin Gormley King Co. v. Terminix Int'l Co.*, 105 F.3d 1192 (8th Cir. 1997) (clause requiring arbitration of “any controversy arising out of” or “relating to” the agreement did not clearly and unmistakably evidence arbitrator’s authority to determine arbitrability”); *Spahr v. Secco*, 330 F.3d 1266, 1270-71 (10th Cir. 2003) (use of “any controversy” or “any and all disputes” does not clearly and unmistakably demonstrate an agreement to arbitrate arbitrability); *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998) (clause calling for arbitration of “any and all disputes arising out of or relating to” the contract, as applied to the question of whether an agreement to arbitrate exists or was terminated).
- <sup>xv</sup> The Supreme Court has made clear that contracting parties may expressly agree to *not* be bound by certain of the arbitration provider’s rules, including rules giving arbitrators discretion to determine the scope of their own authority. However, parties should ask their attorneys whether doing so jeopardizes the enforceability of the entire arbitration provision. For example, the National Arbitration Forum’s Rule 48(E) provides that the Forum or the arbitrator may decline to arbitrate “where the agreement of the Parties has substantially modified a material portion of the Code.”