

**Risks, Damages and ADR in:
Green Construction**
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What Does Green Mean?

- Design & Construction:
 - Driven by energy standards

- Goal: Sustain the Environment
 - Reduce pollution
 - Improve air quality
 - Promote energy efficient building components
 - Protect wildlife & eco-systems

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How is Green Measured?

- By Rating Systems: LEED, most well known
U.S. Green Building Council's Leadership in
Energy and Environmental Design ("LEED")

- Voluntary Measurement Systems
 - Overall design & construction
 - More points = higher degree of compliance

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**Green Construction
Application and Growth Projections**

- Residential, commercial, and government buildings
- U.S. Market in 2010 projections
 - More than \$30 billion, new construction
 - More than \$240 billion, renovations

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**Potential Contract Risks
in Green Construction**

- Standard clauses, but potential non-standard risks
 - Scope of work
 - Changes clauses
 - Payment clauses
 - Notices of claims

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**Potential Contract Risks
(continued)**

- Standard clauses, but potential non-standard risks
 - Substantial completion procedures
 - Final payment procedures
 - Warranties and latent defects

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Who's Responsible for Certification?

- Owner?
- Designer?
- Contractor?

- Who is in the best position to control the risk?

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The Certification Process Impacts

- Building Component approvals, delivery and installation

- Substantial Completion Date

- Interim and Final Payment

- Funding approvals

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Types of Potential "Owner" Damages

- Owner Damages, examples:
 - Loss of tax incentives or funding
 - Loss of building sale or tenant
 - Loss of enhanced value of building
 - Increased utility and maintenance costs

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Types of Potential “Owner” Damages

- Owner Damages, examples, continued:
 - Delay or liquidated damages
 - Consequential damages
 - Civil fines or penalties, if not per code

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**Types of Potential
“Contractor” Damages**

- Contractor Damages, examples:
 - Delay and/or Disruption costs
 - Lost business opportunities
 - Delayed commencement of warranty obligations
 - Heightened exposure to latent defects
 - Other Consequential damages

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Beware:

- Form Documents & Form Releases
- 3rd Party Lender Documents
- Exclusions in Insurance Policies
 - CGL and E&O coverage
- Exclusions & Disclaimers downstream
 - Supplier, Subs’ proposals and purchase orders
- Limitations of Liability

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**Resolving Disputes in “Green”
Construction Projects**

**Best Practices for Dispute
Resolution**

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Consider “Step” ADR Clauses

Step 1 – Field personnel try to resolve

Step 2 – Project executives try to resolve

Step 3 – Company CEOs try to resolve

Step 4 – Parties Mediate

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Mediation: The Process

- **MEDIATION IS:**
 - Confidential
 - Voluntary
- Maximizes opportunity for parties to resolve disputes on their own
- Allows parties to suggest settlement options rather than a third party dictating result

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Mediation: Experience Shows

- Most construction disputes not resolved by the parties **are settled in mediation**
- Even if mediation is unsuccessful – the process normally narrows the disputed issues
- Mediations that aren't successful at first will often succeed closer to the trial or hearing

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The Mediator: Facilitative vs. Evaluative

- What is the difference?
- How do you find what you want?
- What kind is best for construction disputes?

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The Last ADR "Step":

- **Step 5 – Parties should submit disputes to Arbitration in lieu of litigation**
- Why?
 - More control over process
 - Greater flexibility
 - Faster result
 - Decision makers with expertise

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Arbitration

- Written agreement
- Private Process
- Less discovery than in litigation
- Faster result than in litigation
- Costs less than litigation if parties comply with the arbitration rules

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Where to Find Draft ADR Clauses?

- Drafting guide at AAA website:
www.aaonline.org/download.aspx?id=36
- Remember:
 - Arbitration must be in writing to be entitled to arbitrate one's disputes
 - Checklist for drafting arbitration clauses on page 23 of materials

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Tips for Drafting Arbitration Clauses

- Broad enough to include “any claim arising out of, from or relating to the contract...”
 - Narrow language creates risk
- Mediation or other “steps” should be a **condition precedent** to arbitration
 - AAA mediation required in AIA & ConsensusDocs

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Tips for Drafting Arbitration Clauses

- In AIA documents and ConsensusDOCS:
 - Parties **must check** arbitration as the preferred dispute resolution method
- Identify the rules and organization that will govern the arbitration proceeding
 - Identify the date of the rules in effect at the time of the contract

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The Arbitration Process

Best Practices
for the
Preliminary Hearing Stage

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Arbitration – The Prehearing Phase

- Preliminary Hearing – sets the ground rules
- Case Management Conferences
- Dispositive Motions
- Discovery Parameters

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Arbitration – The Prehearing Phase

- Date, Length of Hearing and location
- Bifurcation
- Joinder of other parties, including non-signatories or related proceedings

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Overview of Arbitration Process

- Preliminary Hearing
- Limited Exchange of Information
- Case Management Conference(s)
- The Final Hearing
- The Award
- Confirmation of the Award

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