INTRODUCTION

The American Institute of Architects (AIA) published its first form contract in 1888. The document, referred to as the "Uniform Contract," was an agreement between an owner and a contractor and consisted of a mere three pages. As the industry evolved, however, so did the AIA's Contract Documents. Since the AIA first published the Uniform Contract, the AIA's Contract Documents have expanded in scope, length, and complexity to respond to industry needs. The AIA now publishes over 100 Contract Documents, which are the most widely used standard form agreements in the design and construction industry.[1]

In order to keep the documents current and fair in terms of the modern construction industry, the AIA periodically revises the Contract Documents, generally on a 10-year cycle. In doing so, the AIA solicits and receives input from numerous organizations within the design and construction industry. The AIA thoroughly addresses the comments it receives, and periodically meets in person with industry representatives to clarify their positions. Through this inclusive process, the AIA endeavors to achieve a fair balance among the various interests affected. In recent years, the AIA Documents Committee has undertaken the substantial effort of reviewing and revising the Conventional (A201™) Family (hereinafter "A201 Family") of documents. As a result, the AIA is set to roll out its latest edition of the A201 Family in late 2007.

As was the case with the 1997 edition, the AIA designed the latest iteration of the A201 Family to define and control the responsibilities of the various parties involved in a typical design-bid-build construction project. The A201 Family consists of a standard

general conditions document, as well as standard form agreements between the owner/contractor, owner/architect, contractor/subcontractors and architect/consultants. Within the A201 Family, however, it is the general conditions document and the owner/architect agreements that largely define the role of the architect on a design-bid-build construction project. In the 1997 documents, AIA Document A201™-1997, General Conditions of the Contract for Construction served as the general conditions document, while AIA Document B141™-1997, Standard Form Agreement Between Owner and Architect and AIA Document B151™-1997, Abbreviated Standard Form Agreement Between Owner and Architect served as the owner/architect agreements. In the 2007 iteration, the general conditions document will retain the A201 title, however, the B141 and B151 titles will be retired in favor of AIA Document B101™-2007, Standard Form Agreement Between Owner and Architect.

As the intent of this article is to discuss how the changes to the 2007 A201 Family will affect architects, the article will focus primarily on the A201-2007 and the B101-2007. The article will begin by briefly describing the major changes in the A201-2007 and the B101-2007 affecting architects. Thereafter, this article will explore each substantive change focusing on the perceived issues that necessitated the change, how the documents were altered as a result thereof, and, where necessary, how the changes affect architects.

The Changes – In Brief

The 2007 documents represent the culmination of a four-year long drafting process in which the AIA Documents Committee solicited, received, considered, and addressed comments from dozens of organizations in the construction industry,

including owner, contractor, subcontractor, legal and design organizations. Based on these comments, as well as internally identified issues, the AIA Documents Committee edited and revised the A201 Family with the goal of creating a set of documents that reflects current industry practices and is fair to owners, contractors, subcontractors, architects, and consultants. As a result, the 2007 documents have undergone a number of changes.

Prior to addressing more substantive changes, however, it is worth noting that one of the most obvious changes is merely a formatting change. The B101-2007 is a one-part document for design and contract administration services, no longer taking the two-part form of the B141-1997.[2] While this formatting change is expected to be well received, the changes in the 2007 documents are certainly not limited to format.

Substantively, the A201-2007 and the B101-2007 contain a number of novel additions to the A201 Family. These additions include the potential existence of a party other than the architect who will render initial decisions on Claims between the owner and contractor, a specifically defined standard of care pursuant to which the architect shall perform its services, an explicit requirement that the architect carry insurance, and a recognition that environmentally responsible design must be a part of every construction project. In addition to these new additions, the existing provisions of the documents have also received substantial attention. Arbitration is no longer the default form of dispute resolution, although the parties may still select it. Additionally, the 2007 documents are much less restrictive with respect to consolidation of arbitrations and the joinder of third parties. Finally, the AIA has substantially revised the provisions relating to the running of the statutory limitations periods to follow state law more closely.

THE INITIAL DECISION MAKER

In response to comments from owner and contractor groups, the AIA is introducing a new concept into the 2007 A201 Family with regard to the Claims resolution process in the form of a third party initial decision maker. Under the A201-1997, the owner and the contractor are required to seek the architect's decision with respect to disputes between them as a condition precedent to mediation and arbitration. Under the new 2007 documents, however, the owner and the contractor will have the option of naming a third party to render these decisions. If the owner and contractor do not elect to use such a third party, the architect will continue its traditional role in this regard. In either event, an initial decision on Claims remains a condition precedent to mediation and arbitration. Before addressing the specific changes in the new documents, however, it is necessary to understand the old AIA process for Claim resolution, and the reasons for that process.

The Old AIA Way – Architect as Initial Decision Maker

A Claim, according to A201-1997, is "a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief . . . ."[3] Additionally, a Claim includes "other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." Given the fact that the definition is extremely inclusive and Claims arise in virtually every construction project, efficient resolution of Claims is important to the orderly and timely progression of a project. The quicker Claims can be resolved, the smoother a project will run, which is in everyone's best interest. Numerous unresolved Claims, however, can potentially paralyze a project, sour the

relationship between the owner and contractor, and cause an extensive interruption in the work, which is in no one's best interest.

Formal means of dispute resolution, however, cannot always respond quickly enough to facilitate continuation of the work on a project. In mediation, arbitration and litigation, the decisions makers are unfamiliar with the background and circumstances of a particular project. Therefore, the parties must educate the relevant decision makers, and that takes time. Additionally, each process is subject to various procedural requirements that further delay the rendering of any decisions. As a result, the AIA has traditionally sought to provide a mechanism to resolve Claims quickly without bogging the project down with unresolved Claims. Historically, that mechanism has been to require an initial decision to a Claim that is rendered relatively quickly and as a condition precedent to formal dispute resolution. As for who is best suited to render such an initial decision, the AIA has taken the position that the owner and the contractor are inappropriate as they are either the proponent or opponent of the Claim. Therefore, the AIA Contract Documents have traditionally required that the architect provide the initial decision.

AIA Document A201-1997 sets forth the old AIA Claims resolution procedure in Article 4. Specifically, section 4.4.1 of Article 4 reads as follows:

> Claims, including those alleging an error or omission by the Architect . . . shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner.

Pursuant to Section 4.4.2, the architect will review the Claim and either reject or approve it, suggest a compromise, request additional information from the parties, or advise the parties that it is unable, or inappropriate for the architect, to render a decision. The architect will render any decision in writing within 30 days of receiving the Claim, and Section 4.4.5 makes the architect's decision final and binding on the owner and contractor, subject to mediation.[4]

As a result, the owner and the contractor receive a decision on a Claim in a reasonably expeditious manner that is arguably untainted by bias. The decision is rendered by the architect who is impartial, intimately familiar with the circumstances surrounding the Claim, and who conducts an independent review of the Claim.[5] While it is true that either party may subsequently submit the Claim to mediation and arbitration, the owner and the contractor are nevertheless presented with a viable opportunity to allow the project to continue. Essentially, the initial decision requirement serves as a check on the needless escalation of disputes between two parties. By no means is this mechanism successful in resolving all Claims, but it does provide a realistic chance to resolve a Claim before the parties are embroiled in lengthy formal dispute resolution proceedings.

Despite the beneficial role of the old AIA Claims procedure, it has received criticism from both owner and contractor groups. Owner groups rightfully note that it is their money that makes construction projects happen. Further, owner groups argue that their money, and more importantly how that money is spent, should not be subject to the architect's discretion. Rather, they suggest that the owner should decide Claims

with the contractor and, if the contractor does not agree with the decision, it may proceed to mediation and arbitration to seek further relief.

Contractor groups also express unease with the architect providing initial decisions, although their reasoning differs from that of owner groups. Contractor groups argue that the architect is not properly situated to render a fair and impartial decision with respect to disputes between the owner and contractor. In the A201 Family, the architect has a contractual relationship with the owner. According to contractor groups, this creates a potential conflict of interest. The implication being that it would be difficult for the architect to give a contractor's position due consideration in fear of a negative impact on the architect's relationship with its client, the owner. As for the owner groups' suggestion that the owner provide initial decisions on Claims, it is safe to say that contractors would not find this procedure acceptable either. If contractors are reluctant to have architects decide Claims due to a potential pro-owner bias, it is impossible to believe that contractors would accept the owner, the very party they are in a dispute with, providing the initial decision.

The New AIA Way – Potential Third Party as Initial Decision Maker

In drafting the AIA Document A201-2007, the Documents Committee considered the owner and contractor groups' concerns and attempted to draft the A201-2007 in a manner that would be beneficial and fair to all. The owner groups' suggestion that the owner provide the initial decision, however, is not viable. An owner rendered decision on a dispute with a contractor will inevitably favor the owner.[6] Even if the decision were just, it is hard to imagine that a contractor would view the owner's decision as such. More likely than not, the contractor will feel obligated to proceed to formal dispute

resolution proceedings to obtain a "fair" decision on the matter. This is exactly the result the old AIA Claims resolution process was designed to discourage, potentially needless escalation of Claims. Where the architect renders the initial decision, the owner and the contractor are presented with an independent and impartial evaluation of the Claim. The impartiality of the decision is what creates the opportunity for the owner and contractor to pause, reevaluate the strength of their arguments, and potentially resolve a Claim quickly. By the owner rendering the decision, and the resulting ire such a decision would garner from the contractor, this potential is lost and the likelihood that a project will be bogged down in formal dispute resolution increases. While the AIA could not justify the substitution of the owner for the architect as the initial decision maker, it did, nevertheless, recognize the owner groups' desire to have greater control in choosing the party that will render initial decisions.

As an alternative, the AIA Documents Committee considered replacing the architect as the initial decision maker with a third party selected by the owner and contractor. By allowing the owner and contractor to select a third party, the owner would have greater freedom in selecting the initial decision maker. Additionally, the contractor's interests would be addressed because the architect is removed from the process. Further, substituting the architect with a third party would preserve the impartiality of the initial decision, and thus the related benefit. This approach, however, would not be feasible on all projects, not to mention the fact that it would substantially alter the traditional role of the architect. An initial decision lacks value if it is not rendered relatively quickly and in a manner taking into accounting the actual circumstances of the project. The architect is able to provide such a decision because it

is already familiar with the project's specific circumstances when Claims arise. In order to provide the same benefit to the Claims resolution process, a third party must be equally familiar with a project's particular circumstances. Therefore, to be affective, a third party decision maker would have to spend substantial time and effort reviewing and evaluating the project's circumstances on an on going basis. Otherwise the third party's decisions would lack the appropriate context to be useful or be so delayed as to negate their value and purpose. Given the time and effort required of a third party decision maker to become sufficiently familiar with the project, which undoubtedly would carry an associated fee, a third party decision maker may become quite expensive. Depending on the parties' interests and financial means, that cost could be prohibitively expensive and undesirable to the owner, contractor or both. The involvement and expense of a third party initial decision maker, therefore, cannot be justified on every project. As such, a blanket replacement of the architect as the initial decision maker with a third party in the A201 Family is not a viable alternative either.

As neither of the Owner's suggested revision nor the blanket replacement of the architect with a third party was feasible, the AIA Documents Committee drafted the 2007 A201 Family to provide the owner and contractor with the option to have a third party or the architect render initial decisions on Claims. Specifically, the 2007 AIA owner/contractor agreements will provide sections in which the parties can identify such a third party if they so choose. If the owner and contractor do not name such a third party, the architect will render the initial decisions.

In providing this option, the AIA has attempted to serve two main purposes: (1) to maintain the traditional mechanism for an impartial and expeditious review of Claims

that promotes Claim resolution; and, (2) to allow the owner and the contractor, if interested, to choose an individual they are more comfortable with rendering initial decisions. In order to address both purposes, however, the AIA had to make the use of a third party initial decision maker an option, recognizing that the associated expense would not be feasible for every project. As a result, regardless of whether the architect or a third party serves as the initial decision maker, the 2007 documents will maintain the procedure for, and the benefit of, the initial decision.

To implement this new system, rather than describing the initial decision making process as an architect provided service, the A201-2007 creates the "Initial Decision Maker" (IDM) and defines the IDM as a person, not a party to the agreement between the owner and contractor, who will render initial decisions on Claims. If the owner and contractor agree on a third party IDM, that third party, rather than the architect, will provide the initial decision making services. If the owner and the contract do not name a third party IDM, the architect will serve as the IDM, and in so doing provide the same initial decision making services it has traditionally rendered.

Regardless of who serves as the IDM, however, the procedure for submitting a Claim and receiving an initial decision as a condition precedent to formal dispute resolution remains largely unchanged. Claims are submitted to the IDM who will then have 30 days in which to render a written decision. Upon the IDM rendering a written decision, or 30 days having passed without a decision, the owner and the contractor may proceed to mediation. Accordingly, where the architect serves as the IDM, the Claims resolution procedure will be business as usual.

The AIA anticipates that under the 2007 documents the architect will commonly serve as the IDM, thus preserving the architect's traditional role in that regard. Under the B101-2007, where the architect serves as the IDM, it shall provide initial decision making services as a Basic Service and without additional compensation, as was the case in the B141-1997 and the B151-1997. There will be instances, however, where the owner and the contractor see fit to name a third party IDM.

When the architect is not acting as the IDM, it is very likely that the architect will be asked to provide assistance to the IDM in evaluating Claims, which is a service the B141-1997 and the B151-1997 do not address. The architect will be more familiar with the contract documents, the circumstances surrounding the Claim, and may be uniquely aware of relevant background issues. Without the involvement of the architect, therefore, the IDM could reach incorrect or inconsistent conclusions. The AIA believes that the Architect will commonly be asked to make presentations to the IDM regarding the project and/or contract documents or meet with the IDM to discuss the architect's interpretations of the documents. The extent to which the architect will be asked to provide such assistance, however, cannot be predicted and will vary depending on the circumstances and individuals involved. Therefore, given the unpredictable scope of this service, the AIA Documents Committee included language in the B101-2007 whereby any assistance the architect provides to the IDM will be an Additional Service, entitling the architect to additional compensation.

The optional third party IDM will hopefully prove to be the best of all worlds. Both owner groups and contractor groups expressed unease with the architect always making initial decisions on Claims, although both had different reasons for their unease.

With the addition of the optional third party IDM, the owner and contractor are free to agree to a third party IDM where it makes sense on a particular project. Where it is not worthwhile to name a third party IDM, however, the AIA's new Claims procedure allows the architect to retain its initial decision making duties. The optional nature of the third party IDM thereby provides flexibility to the owner and the contractor, preserving the benefit of the initial decision, and avoids the dangers of a blanket substitution of a third party for the architect in the Claims resolution process.

THE ARCHITECT'S STANDARD OF CARE

The next novel addition to the A201 Family of documents arises in the owner/architect agreements. The B101-2007 includes a statement of the standard of care pursuant to which the architect shall perform its services. In large part, this is an entirely new addition to the owner/architect agreements. The B141-1997 and the B151-1997 only contain a vague reference to a standard of care, noting that "[t]he Architect's services shall be performed as expeditiously as is consistent with professional skill and care and the orderly progress of the Project."[7] While the clear implication from this language is that the architect's services are subject to a standard of care, the 1997 documents do not contain any statement as to what that standard of care is.

Generally speaking, like all professionals, an architect must perform its duties consistent with the degree of care and competence generally expected of a reasonably skilled member of the profession.[8] This standard of care applies in any professional activity an architect undertakes, regardless of whether or not the standard of care is stated in the contract for services.[9] The Documents Committee found, however, that parties often added standard of care language to contracts irrespective of this fact. The

Documents Committee also discovered that, in many cases, the general standard of care was misstated. The high occurrence of misstating the standard of care troubled the Documents Committed because it could lead to a general misunderstanding as to the actual standard of care. More seriously, however, the Documents Committee was concerned that the misstatements could lead to architects unknowingly agreeing to standards of care greater than the standard to which they would normally be held.[10]

Accordingly, the Documents Committee saw fit to include a clear and explicit statement of the generally applicable standard of care in the B101-2007. With respect to the standard of care, the B101-2007 states that the architect will perform its services consistent with that level of skill and care ordinarily provided by architects practicing under the same or similar circumstances. It is true that from state to state the applicable standard of care is quite nuanced and may be stated slightly differently, however, the above definition is generally accurate nationwide. Additionally, the definition is sufficiently flexible to adapt to each state's particular standard of care. As a result, and through this broad definition, it is the AIA's intent that the B101-2007 will provide the owner with a better understanding of the common law standard of care for an architect, that of a reasonable architect practicing under the same or similar circumstances. Practically speaking, however, the inclusion of this standard of care language provision in the contract will have essentially no impact on the nature of the architect's services, as those services have always been subject to this standard of care.

ARCHITECT REQUIRED TO CARRY INSURANCE

Another new addition to the A201 Family is the requirement in the owner/architect agreements that the architect maintain insurance. The B101-2007 contains a provision wherein the parties must specify the types and limits of insurance the architect is required to maintain. Where those requirements exceed the types or levels of insurance the architect normally maintains, the owner shall be required to reimburse the architect for the costs of obtaining such excess insurance. The B141-1997 and the B151-1997 contained a similar requirement that excess insurance the owner requires the architect to obtain be a reimbursable expense, however, those documents did not contain an explicit duty on the part of the architect to maintain any minimum levels or types of insurance.

The AIA Documents Committee added this provision after considering a number of factors. Owners groups were demanding such a provision be added to the B101-2007, and many architects had requested that a similar provision be added as well. Traditionally, the AIA has omitted a provision regarding insurance requirements based on the understanding that many architects did not carry insurance. In evaluating the status of the current construction industry, however, the AIA reconsidered its position. The Documents Committee found that a vast and overwhelming majority of architects already maintained insurance as part of their regular practice. Additionally, the Documents Committee recognized that it was commonplace in today's construction industry for owners to require such a provision in the owner/architect agreement, and for the most part architects capitulated. As such, the inclusion of this requirement merely makes the B101-2007 consistent with the current business climate, and promotes responsible practice on the part of architects.

ENVIRONMENTALLY RESPONSIBLE DESIGN

> The AIA recognizes a growing body of evidence that demonstrates current planning, design, construction, and real estate practices contribute to patterns of resource consumption that seriously jeopardize the future of the Earth's population. Architects need to accept responsibility for their role in creating the built environment and, consequently, believe we must alter our profession's actions and encourage our clients and the entire design and construction industry to join with us to change the course of the planet's future.[11]

Such is the AIA's position in support of its stated public policy that architects must be environmentally responsible in performing their work and advocate for the sustainable use of Earth's resources in the creation and operation of the built environment in which we live.[12] In furtherance of this public policy, the AIA has undertaken a number of initiatives to promote sustainability and to shape the landscape of environmentally responsible design and construction. Pursuant to one such initiative, the AIA is promoting the adoption of design methods that will result in a 50 percent or greater reduction in the consumption of fossil fuels used to construct and operate new and renovated buildings by the year 2010. Additionally, the AIA has adopted a benchmark goal that by 2030 all new and renovated buildings will consume no fossil fuels, thus making them carbon neutral.

In order to reach these goals, however, the construction industry, and those involved in it must change. As the most widely used standard form agreements in the industry, the AIA contract documents must also change. Accordingly, the B101-2007 requires the architect, during the schematic design phase and as part of its Basic Services, to discuss the feasibility of incorporating environmentally responsible design approaches into the project. Through this discussion, the owner and the architect are to reach an understanding with regard to the project's overall requirements, and how

environmentally responsible design will be incorporated therein. The architect is thereafter required to consider environmentally responsible design alternatives, such as building orientation and material choices, in preparing a schematic design to the extent the alternatives are appropriate to the project and consistent with the owner's stated program, schedule and budget. If the owner requests extensive design alternatives such as unique system designs, in-depth materials research, energy modeling, or LEED® certification, those services will be provided as an Additional Service, entitling the architect to additional compensation.

The B101-2007, however, does not place the burden or duty of achieving environmentally responsible design solely on the architect. The burden falls upon the owner and the architect together. In the end, owners decide the ultimate level of environmentally responsible design that will be incorporated into their buildings. Architects will be required to consider environmentally responsible design alternatives only to the extent consistent with the owner's wishes. The intent of these provisions is to bring environmentally responsible design into the minds of the owner and the architect while the project's specific parameters are being developed. As such, the B101-2007 provides a platform for the architect to fulfill the AIA's public policy that architects advocate for responsible use of Earth's resources. Once an owner has decided on the practical parameters of the project with respect to schedule, program and budget, the architect's scope of environmentally responsible design services must be consistent with those parameters. As such, the B101-2007 does not in and of itself impose stringent requirements on the architect to make all buildings they design environmentally responsible, rather it imposes on the architect the job of advocating for

such a goal. In this respect, the B101-2007 is consistent with, and endeavors to further, the AIA's public policy by providing an opportunity for architects and owners to create a more environmentally friendly construction industry.

ARBITRATION

Arbitration has long been the required form of binding dispute resolution in the AIA contract documents. In soliciting and reviewing comments from the industry, however, the Documents Committee recognized that arbitration is not right for everyone, nor is it desirable in ever instance. Rather than making arbitration mandatory, there was substantial support for allowing the parties to choose the applicable means of dispute resolution. Additionally, the AIA Documents Committee received numerous critical comments with regard to the 1997 documents' extensive restrictions on consolidation of arbitration proceedings and joinder of third parties. Accordingly, the provisions relating to arbitration in the 1997 documents have seen two substantial revisions in the A201-2007 and B101-2007.[13] First, arbitration will no longer be the default form of binding dispute resolution. Rather, the parties to all of the agreements in the 2007 A201 Family have the option of choosing litigation, arbitration or some other form of binding dispute resolution upon which they agree. Second, where parties choose arbitration, the AIA documents are much more permissive in terms of allowing the consolidation of arbitrations and the joinder of necessary parties.

Flexible Dispute Resolution Provisions

Under the 1997 documents, as in all previous editions of documents in the A201 family, all disputes are subject to arbitration rather than litigation as the exclusive means of dispute resolution. For nearly 100 years, few in the design and construction industry

questioned the wisdom of substituting arbitration for litigation. Today, however, not everyone prefers arbitration to litigation. Those who favor arbitration point to the difficulties of presenting the facts of a design or construction dispute to a judge with a crowded docket or a jury of individuals unschooled in the ways of the industry. The very hallmark characteristics of arbitration that attract many to it, such as limited discovery and motions practice, lower expense, accelerated overall proceedings, arbitrators experienced in the construction industry, and the relative finality of judgments, however, often make arbitration unattractive to others.

One party may prefer and benefit from more thorough discovery and an opportunity to develop a complicated set of facts over a longer period of time, which traditional litigation offers. In addition, many parties shy away from the one-and-done nature of arbitration where, except for a few exceptions, appeals are rarely permitted or successful. Further, arbitration can meet or exceed the cost of litigation, especially in a large and document intensive arbitration with a three-member arbitration panel. Not only do the parties incur fees for their own attorney's time in evaluating and digesting an extensive record, so too must they incur fees for the arbitration panel's time in this regard. Additionally, it is also possible that such an arbitration proceeding will take nearly as long as litigation, thus decreasing the incentive to accept limited discovery and relatively non-appealable decisions. As such, the attractiveness of arbitration as a means of final dispute resolution is dependent upon a number of factors, including the particular parties involved and the nature of the project at issue. Given that these factors will necessarily vary from project to project, the AIA Documents Committee recognized that uniformly requiring arbitration would no longer be desirable.

Therefore, the AIA Documents Committee has drafted the 2007 documents in a manner that allows the parties to choose the method of dispute resolution that they prefer. Through a "check the box system," the parties to the agreement may select as their method of binding dispute resolution either arbitration, litigation or some other method upon which they both agree. The parties' failure to select any method of dispute resolution will result in a default choice of litigation. Of course, if the parties choose litigation, they may always agree later to subject any disputes to arbitration instead. As was the case in the 1997 documents, however, mediation will remain a condition precedent to the selected method of binding dispute resolution. If the parties choose arbitration, the American Arbitration Association will administer the proceedings by default, but the parties may mutually agree otherwise. While this is consistent with the 1997 documents, A201-2007 includes minor changes to clarify that the entity administering the arbitration is a choice for the parties to make. As such, with respect to binding dispute resolution, the A201 Family is now more adaptable to the unique characteristics of the particular parties and project involved.

Consolidation and Joinder

The A201 Family contains a substantial change with regard to the consolidation and joinder provisions as well. The 2007 documents are much more permissive in allowing consolidation of arbitrations and joinder of third parties than the 1997 documents are. A common and pervasive complaint about the 1997 A201 Family that the AIA Documents Committee encountered related to the 1997 documents' effective prohibition on consolidating arbitrations and joinder of third parties in the owner/architect agreements. Pursuant to the B141-1997 and the B151-1997,

> [n]o arbitration arising out of or relating to this Agreement shall include, by consolidation or joinder or in any other manner, an additional person or entity not a party to this Agreement, except by the written consent of the Owner, Architect and any other person or entity sought to be joined.[14]

As a result, if the owner were engaged in arbitration proceedings with the architect and contractor on a project, the owner could not consolidate the arbitrations absent written consent of the contractor and architect. Such universal written consent would be required even if both proceedings were rooted in the identical facts and circumstances. Similarly, if the owner were engaged in an arbitration with only the contractor, the owner could not join the architect to the arbitration without the written consent of contractor and the architect. As such, the architect could force the owner to conduct multiple arbitration proceedings relating to the same facts and circumstances. Owners generally view the prohibition as an entirely unfair provision that requires them needlessly to incur the substantial cost of two arbitration proceedings.

Architects, on the other hand, generally view the prohibition of consolidation and joinder as a useful tool to avoid involvement in frivolous proceedings. Further, architects view the costs and expense of multiple arbitrations as an expense that owners will bear primarily. In reality, however, the threat of two arbitrations is not necessarily beneficial to the architect. If two arbitration proceedings end up going forward, the architect will be substantially involved in both. In the arbitration between the owner and the contractor, the architect will necessarily be a primary witness. As the architect is not a party, however, it would be unable to defend itself from attacks by the parties to the arbitration. Thereafter, and potentially after the owner has already developed a substantial record and/or evidence against the architect through the first arbitration, the architect would be a party to a subsequent arbitration with the owner.

Therefore, the owner is not the only party that incurs substantial additional costs from two arbitrations. Not only is the architect harmed financially due to the substantial time needed to prepare for testimony and having to retain an attorney in the first arbitration, the architect is also potentially harmed strategically. As a non-party to the first arbitration, the architect is disadvantaged because the parties to the arbitration are able to point the finger at the "empty chair" with the architect largely unable to present a case in its favor.

In addition, the Documents Committee also found that, in light of the perceived inequity of the consolidation and joinder provisions, owners often insisted that the AIA arbitration provisions be struck entirely from the documents. By striking the arbitration provisions, owners could take advantage of the consolidation and permissive joinder rules available in litigation, thus allowing them to bring one action against all the relevant parties. Therefore, architects that favored arbitration were losing that option, not because of the owner's preference for litigation, but because the consolidation and joinder provisions were perceived as unfair.

As explained above, the 2007 documents allow the parties to choose between arbitration and litigation as the method for binding dispute resolution, which presents another concern with the 1997 consolidation and joinder provisions. In the 2007 documents it will be even easier to select litigation over arbitration and therefore arbitration must be a viable and desirable option to all parties, otherwise it will not be used. If the prohibition to consolidation and joinder remained, owners would certainly perceive arbitration as a less viable option, given the inability to resolve all of its Claims in one proceeding.

Therefore, in light of the apparent inequity caused by prohibiting consolidation and joinder, and the impediment such a prohibition would present in selecting arbitration as the method for binding dispute resolution, the AIA Documents Committee substantially re-wrote the 2007 documents as they relate to consolidation of arbitrations and joinder of parties. With respect to consolidation of arbitrations, in the B101-2007 both the owner and the architect will be permitted to consolidate an arbitration with any other arbitration they are engaged in so long as certain conditions are met. First, the agreement from which the other arbitration arises must not preclude consolidation. Second, the other arbitration and the arbitration between the owner and architect must involve common issues of law or fact. Finally, both arbitrations must employ materially similar procedural rules and methods for selecting arbitrators. If any of these conditions are not met, the proceedings may not be consolidated. Therefore, consolidation is no longer subject to the written consent of all involved and is now merely subject to reasonable conditions. Also under the 2007 documents, once an arbitration is consolidated into an arbitration between the owner and the architect, any party to the consolidated arbitration may then further consolidate the proceeding with any other arbitration it is involved in subject to the same three conditions set forth above. The A201-2007 contains similar provisions providing the owner and the contractor, and any subsequently consolidated party, with the similar freedom to consolidate arbitrations subject to the above conditions. As a result, under the 2007 A201 Family, the potential exists for the architect and its consultants, the owner, the contractor, and the subcontractors to participate in one consolidated arbitration.

In a further effort to remove the 1997 impediments to choosing arbitration, and therefore maintain arbitration as a viable option for dispute resolution, the AIA Documents Committee also revised the joinder provisions in the 2007 A201 Family. Specifically, in the B101-2007, a party to an arbitration may join a third party so long as the issue with third party involves a common question of fact or law, the third party's presence is necessary for complete relief to be accorded in the arbitration, and the arbitration panel agrees to such joinder. As such, the AIA documents now more closely resemble the rules for permissive joinder found in litigation. The A201-2007 contains a similar provision with regard to joinder of third parties in arbitrations between the owner and the contractor.

Accordingly, the owner, architect, and contractor may now consolidate arbitrations at their option rather than being forced to engage in multiple and redundant arbitration proceedings. Additionally, the parties may join any necessary third parties without the need for universal written consent. While these changes primarily address owners' concerns, the architect and contractor will benefit from the same increased freedom to consolidate proceedings and join necessary third parties. Additionally, these changes allow arbitration to be a viable choice for binding dispute resolution in the 2007 documents for those who favor arbitration.

COMMENCEMENT OF STATUTORY LIMITATIONS PERIODS

The 2007 iteration of the A201 Family contains a marked change in the provisions addressing the running of the applicable limitations periods. The 2007 A201 Family now follows state law much more closely. Additionally, in the new documents, the same language governs the running of the relevant time periods for disputes

between the architect and the owner and disputes between the contractor and the owner.

In making the changes to the relevant provisions, the AIA Documents Committee was primarily responding to complaints from owner groups that the B141-1997 and the B151-1997 caused the statute of limitations to run too quickly. Under those documents:

> Causes of action between the [owner and architect] pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed.[15]

Owners argue that this language often causes the applicable statute of limitations to run before the owner even has an opportunity to discover any potential cause of action.

Where owners seek to bring a cause of action against an architect, they must initiate it within the applicable statute of limitations. In many states, owners have the benefit of the discovery rule, which states that the time period within which a cause of action must be initiated begins to run when the alleged injury is discovered or should have reasonably been discovered. Under the above language, however, that time period begins to run at either Substantial Completion, issuance of the final Certificate for Payment or upon substantial completion of the Architect's services depending on the circumstances. This is the case regardless of whether or not the owner has, or should have, discovered the alleged injury. Owners view this evisceration of the discovery rule as a substantial and unfair loss of rights in states that follow the discovery rule. Owners therefore propose that the AIA Contract Documents avoid establishing a contractual limitations period and merely follow the applicable state laws. Owners also noted that

the provisions affecting the running of the statute of limitations should be consistent for causes of action between the owner and architect and those between the owner and contractor.[16]

While recognizing the impact the 1997 language had on owners, the AIA Documents Committee also recognized the benefit this language brought to architects. By tying the running of the applicable time period to a date certain, thus avoiding the uncertainty surrounding the discovery rule, architects have a date certain beyond which they know they are no longer exposed to potential liability. Accordingly, the AIA Documents Committee has revised the B101-2007 to follow state law more closely in recognition of owner groups' complaints, but it has not completely removed the contractual language affecting the running of the applicable time periods for instituting a claim.

Pursuant to B101-2007, causes of action between the owner and architect must be initiated in accordance with applicable state law, but in no event more than 10 years after the date of Substantial Completion. As a result, the owner will have the benefit of the discovery rule in states that follow it. Architects, however, will have the benefit of knowing that they will not be exposed to potential liability for more than 10 years from the date of Substantial Completion even if the applicable state law follows the discovery rule. In addition, disputes between the owner and contractor will be subject to the same limitations period language, thus removing the inconsistency noted above. The result, therefore, is that the 2007 A201 Family is more even-handed to all parties with regard to the running of the applicable limitations period than is the 1997 iteration.

CONCLUSION

The revisions to the A201 Family are certainly not limited to those addressed in this article, although, the revisions presented here represent some of the more significant changes affecting the role of the architect. A number of changes affecting the architect represent entirely new concepts, while others modify existing ones to reflect current industry practices or to respond to the owner's and, in some case, the contractor's concerns, as expressed in comment the AIA received on the A201-1997. Whatever the change, however, the 2007 A201 Family represents the Document Committee's extensive efforts to draft balanced and fair agreements by seeking, reviewing, analyzing and discussing industry feedback from all parties whose interests may be significantly affected by the individual agreements. As a result of this process, the A201-2007 and the B101-2007 continue the AIA's tradition of striving to produce contract documents that fairly balance divergent interests, and accurately reflect the modern construction industry.

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[1] *See College of Notre Dame of Maryland, Inc. v. Morabito Consultants, Inc.*, 132 Md. App. 158, 174, 752 A.2d 265, 273-74 (Md. App. 2000) (citing 1 Steven G.M. Stein, *Construction Law,* ¶ 3.02[1][b] at 274 (Matthew Bender 1999)).

[2] In drafting the two-part B141-1997, the AIA Documents Committee recognized that not all architects perform traditional design and construction administration services and some projects do not even require those services. Part One was designed to serve as the agreement between owner and architect regardless of the scope of services the architect performed. Part Two was designed to serve as the scope of services portion of the agreement, or the scope document. Subsequently, the AIA published alternative scope documents. Currently, the AIA publishes 10 alternative scope documents allowing architects to offer, negotiate and perform services in certain specialized areas, such as historic preservation, value analysis, security evaluation and planning, facility support, commissioning, and LEED certification. *See generally* AIA, *New in 2005: Six AIA Contract Documents* (Dec. 2005) *at* http://www.aia.org/docs_newtitles_2005.

The AIA will, however, continue to maintain a two-part format to provide contracting flexibility for users of its 11 existing scopes of service documents. The terms and conditions document formerly numbered B141-1997 Part 1 will be revised and re-

numbered as B102™-2007. The former B141-1997 Part 2 will be revised and renumbered as B201™-2007.

[3] *See* AIA Document A201-1997 § 4.3.1.

[4] Technically the A201-1997 does not require the Architect to render a decision within 30 days of receipt of the Claim, but if 30 days have passed without a decision from the Architect, the proponent of the Claim may proceed directly to mediation.

[5] Both the A201 and the AIA Code of Ethics require the architect to act impartially in this role. *See* AIA Document A201-1997 § 4.2.12; AIA Office of General Counsel, *2004 Code of Ethics and Professional Conduct*, Rule 3.202 (2004), http://www.aia.org/SiteObjects/files/codeofethics.pdf.

[6] The likelihood that an owner rendered decision will be favorable to the owner is only increased where the owner is an entity. Where the owner is a corporation, for example, the individual making the decision will likely be an officer or agent of the owner/corporation and therefore owe a fiduciary duty to act in the best interest of the owner/corporation. While there may be some instances where an officer could argue that it would be in the owner/corporation's best interest to render a decision favorable to the contractor, those instances would be few and far between.

[7] See AIA Document B141-1997 § 1.2.3.2; AIA Document B151-1997 § 1.2.

[8] *See Barnett v. City of Yonkers*, 731 F. Supp. 594, 601 (S.D.N.Y. 1990).

[9] *See id; Kerry Inc. v. Angus-Young Associates, Inc.*, 694 N.W.2d 407, 411 (Wis.App. 2005). *See generally* STEVEN G.M. STEIN, CONSTRUCTION LAW, ¶ 5A.04 (2006).

[10] *See Mississippi Meadows, Inc. v. Hodson*, 299 N.E.2d 359, 361 (Ill. App. 1973) (noting that an architect owes a duty to perform with reasonable skill and care absent a special agreement otherwise).

[11] AIA Board of Directors, *Directory of Public Policies and Position Statements*, 2005 Am. Inst. of Architects 16, *at* http://www.aia.org/SiteObjects/files/Public_Policy_Directory _revised_1205.pdf. *See also* U.S. Dep't of Energy, *2006 Buildings Energy Data Book*, Table 1.1.3, http://buildingsdatabook.eere.energy.gov/docs/1.1.3.pdf (noting that in 2004, buildings accounted for nearly 40% of the total energy consumption in the United States).

[12] *See id.* (the AIA's relevant public policy: "The creation and operation of the built environment require an investment of the earth's resources. Architects must be environmentally responsible and advocate for the sustainable use of those resources.").

[13] The Documents Committee has made similar edits to the owner/contractor agreements to allow the parties to choose the method of binding dispute resolution via check boxes.

[14] *See* AIA Document B141-1997, § 1.3.5.4; AIA Document B151-1997, § 7.2.4. *See also* AIA Document A201-1997, § 4.6.4 (containing a similar provision specifically excluding the architect from consolidation or joinder in any arbitration between the owner and contractor).

[15] *See* AIA Document B141-1997, § 1.3.7.3; AIA Document B151-1997, § 9.3.

[16] Disputes between the owner and the contractor are subject to different language. While the affect of the language is to provide a date certain beyond which the owner and contractor will not be subject to a claim, the mechanism for establishing that date is

a phased commencement of the limitations period generally tied to the warranty period. *See* AIA Document A201-1997, § 13.7.1.