AIA
Contract
Documents

## AIA Document B561™ – 2022

# Guide to International Practice and Contracting for U.S. Architects



050423

# TABLE OF CONTENTS

Article 4 - Scope of Consultant's Services
Contract Administration
Article 5 - Change in Services
Article 9 - Copyrights and Licenses
Moral Rights
Article 10 - Claims and Disputes
Lien Rights
§ 10.2 Mediation
§ 10.3 Arbitration
Administered Arbitration
Unadministered Arbitration
Civil and common law courts
Article 11 - Termination or Suspension
Article 12 - Miscellaneous Provisions
§ 12.3 Design Location
§ 12.4 Anti-Corruption Laws
§ 12.4.1 Foreign Corrupt Practices Act (FCPA)
Antiboycotts
Politically Exposed Persons
§ 12.9 Limitation of Liability and Consequential Damages
Limitation of Liability
Consequential Damages
Force Majeure
Article 13 - Compensation
Payment
Tax

## Chapter 3. Additional Resources

# Introduction

## Purpose of This Guide

This Guide is written as a companion to the B161™–2022 Standard Form of Agreement Between Client and Consultant for design consulting services where the Project is located outside the United States. It is intended for U.S.-based and U.S.-licensed architects who are considering performing design services from the U.S. for a foreign Client whose Project is located outside of the U.S. For the purposes of this Guide, a foreign Client is one who is located outside the United States and makes payments from a country outside the United States. Users should be aware that even when U.S. laws govern, the laws of the country where the Project is located may also apply. This Guide is intended to inform and identify some of the key risks that U.S. architects may face when working on a Project located in a foreign jurisdiction and/or contracting with a foreign Client. It is a primer on common issues and risks but is not an exhaustive list of all aspects, issues, and risks of international contracting.

Information in this Guide is not offered, and should not be construed, as legal advice. Laws regarding the use and enforceability of information in this Guide may vary among jurisdictions. Users of this Guide are encouraged to familiarize themselves with laws and regulations applicable to the jurisdiction in which the Project is located and engage counsel experienced with those laws and regulations who should review the architect's contract and assist with risk assessment. A U.S. attorney may need to consult with local counsel in the country where the Project is located, as laws in that other country may override some standard contract provisions in B161. U.S. attorneys may locate a reliable law firm in the country where the Project is located through referrals, a legal directory, the American Bar Association, or the International Bar Association (located in London). Additionally, it is paramount for the U.S. architect to work closely with its insurance broker to obtain worldwide and any other required coverages, a tax advisor regarding potential tax and withholding impacts on payments received from other countries, and legal counsel regarding permanent establishment (see Article 13, Tax) because the risks presented in specific countries and the nuances of individual legal systems can be dramatically different from those in the U.S.

## Language and Terminology

To retain familiarity for U.S. architects, B161 uses the same language and terminology as other standard form AIA Contract Documents, except as described below.

The vocabulary of some terms in American English carries a corollary usage or meaning in an international setting. For example, AIA standard form documents default to *Owner*, but the international equivalent is *Client*. In some manuscript or non-U.S. standard form contracts, the *Owner* is known as the *Employer*. Another example is that *Architect* in the U.S. is replaced by *Consultant* for international design.

Besides usage, there are words whose meaning carries different legal consequences, such as *architect*. Like the U.S., most foreign countries have rules and regulations governing or affecting the practice of architecture. Without being licensed in a specific foreign jurisdiction, a U.S. architect is not viewed as an architect able to comply with local licensing laws. Some countries view architecture as synonymous with engineering, and so, do not use the term architect.

License requirements to provide architectural services vary greatly by country. Many countries' laws allow a foreign architect to provide "design consultancy" services. The general rule is that "design consultancy" is the U.S. equivalent of schematic design and design development. Any applicable licensing or practice requirements in the foreign jurisdiction should be verified with local counsel prior to commencing work in that jurisdiction. So that the U.S. architect is not viewed as practicing architecture without a license in the Client's country, it should not refer to itself as an architect, but instead, as a **Consultant** *(this term will be used for the remainder of this Guide)*. Due to its U.S.-only licensure, the Consultant should avoid preparing, signing, sealing, or stamping the equivalent of AIA Construction Documents for the foreign Project or providing typical AIA Construction Phase Services, as these are almost certainly regulated professional services and should be performed by the Local Architect or its designated equivalent. In addition, the Consultant should refrain from holding contracts with the Local Architect or any consultants in the country of the Project, as such a contractual arrangement may be viewed as the unlicensed Consultant attempting to practice architecture in the foreign jurisdiction, and consequently, a violation of law.

While B161 carefully defines terms in the Agreement, there are some commonly used words that have a different meaning outside the U.S. For example, *program* in American English, spelled *programme* in British English, refers to the Project schedule. *Program*, as used in standard AIA Owner-Architect Agreements, has been modified (and defined) in B161 to *Design Brief*, which is a term that is more familiar to a foreign Client. Overseas, the term *schedule* refers to attachments to the contract, such as tables of rates, insurance requirements, scope items, and similar items. In contracts written using British English, the equivalent of *Work* (from AIA Contract Documents) is *Works*. Instead of using the American English term of *Substantial Completion*, non-AIA international construction contracts employ the terms *Substantial Performance* or *Practical Completion*. Given that there are other variations in the spelling and meaning of common American English words, a Consultant contracting with a foreign Client should modify language carefully when editing B161.

## Chapter 1. Before Entering the Client-Consultant Agreement

Standard form agreements for use in the U.S. are a common and successful approach for design professionals because, while there are 50 different states, the culture and laws for interstate commerce share a common basis and established rules for interpretation and conflict resolution. It is challenging to create a standard form international agreement due to cultural and legal systems, as well as the availability of other standard form international agreements. B161 provides a good framework for establishing the obligations of the parties, but there are other variables that the Consultant should consider when providing design services for a foreign Client and for which it should familiarize itself prior to signing on the dotted line. The following are some of those important considerations.

### ✓ Understand the culture of the country in which you'll be doing business

Consultants should be aware that international Clients have different cultural norms and expectations for working relationships. Some foreign professionals view the North American style of quickly "getting down to business" to be very abrupt. Every country functions differently from a business standpoint. The Consultant should approach this

with an open mind. The United States Department of Commerce, International Trade Administration's "Business Culture" web page https://www.trade.gov/business-culture is an excellent source of information on this topic.

### ✓ Understand the legal structure of the country in which you'll be doing business

The common law legal system of the United States, while not unique in the world, is by no means the most common system of law that a Consultant may encounter when undertaking projects in foreign countries. Specific issues related to the differences between the two most prevalent systems, common and civil law, are discussed in the "Civil and common law courts" section in Article 10 – Claims and Disputes. These systems of law affect Intellectual Property rights, the extent and duration of Professional Liability insurance, and Dispute Resolution, to name a few. Additionally, the CIA's website provides information about legal systems by country at https://www.cia.gov/the-world-factbook/.

### ✓ Understand the legal requirements of visiting and doing business in the country

Just as architects who work across state lines encounter different rules and laws that they must follow, internationally, there are potential immigration, taxation, and regulation issues that the Consultant should be aware of before pursuing and undertaking a Project in a foreign country or for a foreign Client.

For example, in addition to requiring a U.S. passport, the country may require a visa just to meet with the Client or visit the Project site. Obtaining a visa can take time and money. The Consultant must understand if a visa is needed to travel into the Client's country, what type – such as an entry, work, long stay, or other type – and the length of time for which the visa is valid. An entry visa may be sufficient for a short meeting in the foreign country. Sometimes an entry visa can be obtained upon entering the country, but in many cases, must be obtained months in advance of the Consultant's trip. For a work visa, and at times an entry visa, the Client may be required to write a letter explaining the nature of the Consultant's work or visit to the country so that the Consultant may obtain the required visa. A Consultant should plan its time accordingly, as many steps may be involved working with a foreign consulate to obtain a visa or business passport, and ensure that a personal passport is not nearing its expiration date.

While the Consultant's personnel might choose to use a tourist visa for a business trip, problems may arise with this practice. In particular, a customs official may stop a Consultant carrying models, drawings, or other work materials. A Consultant who explains that it is in the country for work and presents a tourist visa could be detained and require assistance from the U.S. Embassy. In certain situations, it may be easier to find a missing person through a visa rather than a passport. There are other rules of which a Consultant should be aware, for example, some countries do not admit individuals with a passport stamp from a country with which it does not have diplomatic relations. Researching these details prior to executing a contract with the foreign Client is beneficial to the Consultant. Other legal restrictions applicable to the foreign Project may exist, for which the Consultant should seek guidance from the International Trade Administration at https://www.trade.gov/us-export-controls, as well as the U.S. Treasury at https://home.treasury.gov/.

The Consultant should also consider enrolling in the Smart Traveler Enrollment Program (STEP) offered through the Department of State. This is a free service that allows U.S. citizens and nationals traveling and living abroad to enroll their trip with the nearest U.S. Embassy or Consulate. More information is available at https://step.state.gov/.

Additionally, the Consultant should review advisories prior to traveling to a foreign country, which are also available through the Department of State at https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html/.

Apart from requiring a visa, some countries may require a work permit, which serves a different purpose than a visa. While a business visa typically allows holders to only participate in tasks that are not considered work or gainful employment, a work permit grants holders the ability to perform services that would be considered a job or labor. The definition of what constitutes work or gainful employment varies with each country, so it is advisable to learn about specific requirements in advance of traveling. There may also be individual and corporate income taxes associated with visas and work permits. One should consider speaking with an immigration attorney and tax advisor located in or familiar with the laws of the country of the Project.

Other topics relevant to this issue are discussed elsewhere in this Guide.

## ✓ Understand the selection process

A foreign Client may select the Consultant for international design services through direct selection or a Request for Proposal process like that in the U.S. However, some Clients hold international competitions when searching for a designer. Competitions can unfold differently based on the country; there are both paid and unpaid competitions. Paid competitions generally provide only a stipend, often nowhere near the expenses incurred by the Consultant in creating its proposal. Some competitions require the Consultant to transfer its intellectual property rights at submission, running the risk that the Client could choose a preferred design and declare a "winner" without ultimately retaining the Consultant responsible for the design.

A global Client may seek a Consultant to serve a global account under a Master Services Agreement (MSA). Such a Client may either issue an RFP, usually through a program manager, for a global "on call" or call-up agreement (effectively an MSA), or directly select an architect with whom it has a good U.S.-based relationship, which could apply anywhere the Client does business globally. This is often enticing to Consultants who view it as a long-term relationship leading to cash flow and assume they can retain a Local Architect and engineering consultants to fulfill professional licensure requirements but are uninformed about those risks and other issues discussed in this Guide.

Clients, in some countries, may require the Consultant to provide various types of guarantees and bonds. A Consultant is most likely to see these where the foreign Client is a governmental body or quasi-governmental organization. In the U.S., a bond for a construction Project is an agreement by a Contractor, the principal, to complete a contractual obligation to an Owner, the obligee. As part of the bond, the Contractor's surety promises to complete the Work, or alternatively, compensate the Owner for its loss, if the Contractor defaults. More information about bonds for U.S. construction projects is available through The National Association of Surety Bond Producers at https://www.nasbp.org. Foreign bonds/guarantees typically come in the form of a bid bond/guarantee, a performance bond/guarantee, and/or an advance payment bond/guarantee. Unlike traditional surety bonds that are common in the U.S., each of these instruments is typically an unconditional form of financial security that ensures the Consultant will act or perform in a manner consistent with the Client's interests.

**Bid Bonds/Guarantees:** While they may be different, bonds typically mean guarantee. A bid bond/guarantee may be required at the time the Consultant submits its proposal and is intended to secure execution of a contract for services if the Project is awarded to the Consultant. The Client may require that a bid bond/guarantee be written for any amount from 1-25% of the Consultant's proposed fee. If the Consultant fails to enter into a contract for services after award, the Client may "call" the bid bond/guarantee, and the amount is paid to the Client upon demand. Bid bonds/guarantees are highly discouraged (unless written for a nominal amount the Consultant is willing to give away), as they significantly tilt the bargaining power during contract negotiation in the Client's favor. While it is very common for international design consultants to insist on bid bonds/guarantees being removed for their participation, sometimes, the only recourse when considering whether to submit a proposal on a project requiring a bid bond/guarantee is to not submit a proposal.

**Performance Bonds/Guarantees:** A performance bond/guarantee is typically required at contract execution and must be in place prior to commencement of services or first payment to the Consultant. A performance bond/guarantee secures the Consultant's performance of services for the duration of the contract. It is quite common to see requirements for performance bonds/guarantees that are written for amounts between 5-10% of the contract price. However, Clients may require performance bonds/guarantees for as much as 25-30% of the contract price. On smaller projects, Clients quite often agree to delete or waive the requirements for performance bonds/guarantees. It is important for Consultants to understand that, depending on the terms of the contract and the bond/guarantee itself, these instruments may need to remain in place from the date they are issued (contract execution) until the Client is satisfied the terms of the contract have been performed. Consequently, performance bonds/guarantees have a long tail and may remain in place for years after the Project is complete. It is possible to negotiate or point to alternative means of providing security, such as retention and insurance, but these will require an active conversation with the Client.

**Advance Payment Bond/Guarantee:** An advance payment bond/guarantee is exactly what it sounds like. A Client will often agree to an advanced payment to the Consultant, so long as the Consultant provides an advance payment bond/guarantee to the Client for the same amount. These instruments offer security to the Client that the Consultant will not take the advance payment and walk away from the Project. However, collateralizing an advance payment bond/guarantee typically requires that the Consultant place the advance payment in a bank account and not use the funds until the Client releases the advance payment bond/guarantee, which it may do at its discretion. Given this, it rarely makes sense to provide this security in exchange for an advance payment, as the Consultant has little to no discretion on when it can use the secured funds.

These bonds/guarantees, as mentioned above, are typically unconditional financial obligations that the Client may call at any time. As such, each type of obligation is satisfied with a standby letter of credit ("SLC") issued by a bank, acceptable to the Client. The SLC provides the Client with an instrument that allows the Client to demand payment of the amount for which the SLC is written, without notice to the Consultant, and without any ability of the Consultant to contest payment to the Client. It is, therefore, very important that the term of the guarantee,

conditions for release, notice requirements, opportunity to cure, and recourse for wrongful use of the guarantee be written in the contract for services. Consultants considering issuing these forms of guarantee should talk to their financial institution and a lawyer familiar with these practices in the country where the Project is located.

Less commonly, bid and performance bonds may be available for use with contracts for international services, but differ from how bid and performance bonds are used in the U.S. In the U.S., a bid bond ensures that the Consultant complies with its bid if it is selected for design services, and a performance bond ensures that the Consultant will fulfill its contract. International bonds are true financial guarantees where the nature of the obligation is for the surety to make a payment to protect the Consultant's funding, rather than ensuring completion. They are either purchased through a U.S. surety that issues bonds abroad or through a surety in the foreign country. International trade associations are re sources for the Consultant, including the Panamerican Surety Association (PASA), which serves Latin and South America; the International Credit Insurance & Surety Association (ICISA) in Europe; and the Surety Association of Canada. Bonds vary as to being conditional, unconditional, or on demand. Foreign Clients are less likely to accept a bond written by a financial institution that is not located in the country where the Project is located and governed by its laws.

The Consultant should use caution on Projects where these bonds/guarantees cannot be negotiated away. Whenever they are used, the Consultant should seek guidance from a financial institution familiar with issuing international SLCs, legal counsel who are experienced in writing these instruments, as well as legal counsel experienced in drafting contracts for design services where these instruments are used.

### ✓ Do your due diligence

It is important to strike a balance with due diligence – that is, learning about a potential Client, its history, and its reputation – prior to signing a contract. Too little due diligence can increase the Consultant's risk exposure and liability, while too much can waste time, money, and resources.

There are different ways to conduct due diligence and identify potential red flags. One way is by requesting that the potential Client complete a background questionnaire. This should include questions that identify the foreign business (such as date and place of incorporation); the foreign business' representative; information about parent companies, shareholders and other beneficial owners, and relationships to government officials (this is important in terms of anti-corruption requirements, discussed later in this Guide); references; disclosure of civil or criminal matters; and history of bankruptcy or insolvency. While this is a valuable approach, many Clients may not agree to complete a questionnaire; others may complete it but provide selective answers. Information from the questionnaire can be supplied to a risk intelligence screening company, such as Refinitiv™ World-Check®, to further research the potential Client.

Other options for conducting due diligence are to perform a lien search; public records and litigation search; insurance and liability review; supplier and customer review; and operations, organization, environmental, and real estate reviews. In various Middle Eastern countries, another way to research a Client is by its commercial registration number. This is a unique number assigned to a company when it is formed. Information, such as disputes and complaints to governmental authorities about the Client, are tied to its commercial registration number.

Additionally, the Consultant's due diligence should include a review of the Foreign Corrupt Practices Act (FCPA) violations by the Client and individuals listed on a Politically Exposed Persons (PEP) list or the Office of Foreign Assets Control (OFAC) sanctions list, which can be accessed at https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists. The Consultant's due diligence should be thorough enough to understand the risk of doing business with the Client, its related entities, and its bank from which payments will be made to the Consultant, as well as the respective officers, directors, employees, and beneficial owners of any of them. The Department of State and the U.S. Embassy's commercial service for a particular country are also sources of assistance and referrals; so too are professional societies in the U.S. and overseas.

It is valuable to understand a prospective Client's corporate organizational structure and their financial wherewithal. Regarding the former, a Client's entity that is a shell will be impossible to collect from for nonpayment. The Consultant should determine whether the potential Client has assets or operations in the U.S. or Canada. This can be helpful if assets need to be frozen as the result of a lawsuit. Another resource to learn more about a Client is the commercial staff of the U.S. Embassy in the Client's country. Additionally, Dun & Bradstreet can provide data, analytics, and other information about a business.

As to financial means, less developed countries often obtain loans or grants from international institutions, such as the World Bank (the World Bank, managed by 188 member countries, consists of the International Bank for Reconstruction and Development and the International Development Association). This is particularly common for infrastructure projects where the Client is the government. A Consultant can learn about the potential Client's ability and history of making payments through credit checks and speaking with firms who previously worked with the Client. The Export-Import Bank, a U.S. agency, can provide foreign credit risk protection, including the assessment of a Client's assets and credit rating. In particular, the Export-Import Bank can assure payment from a Client in a developing nation to the Consultant, which enables the Consultant to provide generous payment terms (e.g., several months). To better understand the Client's financial arrangements, the Consultant should inquire whether private investors are funding the Client's project, as it is possible that the investors may stop their funding.

## ✓ Understand practice differences and why a Local Architect is needed

The role, responsibilities, and even the title of an entity providing the services of an architect vary greatly around the world. U.S. standards for project milestones and the deliverables that are provided at those milestones are not common practice in other countries. For example, Consultants who are selected to contract with the foreign Client for a paid design should anticipate that many foreign Clients expect more design work to be done in the schematic design phase than might be typical in the U.S. Variations to this expectation exist, such as in Japan where an outside architect prepares documents that, in lieu of traditional U.S. schematic and design development documents, serve as bridging documents for design-build, which is then taken over by a contractor-led design-build team. Other practice-related differences are discussed throughout the Guide, and it is important that the Consultant understand what the expectations are and adjust its scope of services and compensation accordingly.

So that the Consultant is not viewed as practicing, and does not practice, architecture as an unlicensed individual or entity in the foreign jurisdiction, it is important to involve a Local Architect on the Project. The Consultant should

*work with* – and **not** *contract with* – a Local Architect in the Client's country or the country where the Project is located. Reasons not to contract with the Local Architect include, but are not limited to: 1) increasing the Consultant's legal and insurance liabilities (see associated Chapter in this Guide, especially pertaining to decennial liability); 2) adding a layer of due diligence checks; 3) raising concerns about the FCPA (see associated Chapter in this Guide); 4) being subject to contractual and other laws of the Local Architect's country; and 5) increasing joint and several liability exposure (parties are held independently liable for a full amount of damages, regardless of their individual fault).

B161 is drafted so that there is no contractual relationship between the Consultant and Local Architect. Rather, B161 is between the Client and Consultant and stipulates the Local Architect's services as they relate to the Consultant, which the Client is to incorporate into its agreement with the Local Architect. Sometimes Clients ask the Consultant to allow the Local Architect to be a signatory to the B161 agreement. This is not recommended. B161 is drafted so that the Consultant handles Pre-Design, Schematic Design, and Design Development. Because B161 contemplates that the Local Architect is responsible for compiling, signing, and sealing the Construction Documents (or applicable equivalent), the Consultant retains a smaller role during the Construction Documents Phase and minor involvement during Construction Contract Administration. Where the Consultant has a reduced role after Design Development, the Local Architect takes on a more active role. The Consultant should take care that any edits it makes to B161 do not expand the Consultant's scope of services beyond what is legally permissible in the foreign jurisdiction.

Although it is not recommended, some Clients will require the Consultant to retain the Local Architect. This contracting method exposes the Consultant to many complications, such as being responsible for the Local Architect's services, which may be viewed as practicing architecture without a license in the foreign jurisdiction. None of AIA's Agreements are structured to allow for such a contracting method. If the Client insists on the Consultant carrying the Local Architect's contract, the Consultant should confer with legal counsel to verify that such a relationship is acceptable under all applicable laws, regulations, and codes.

## Chapter 2. The Contract: B161-2022 Standard Form of Agreement Between Client and Consultant for design consulting services where the Project is located outside the United States

AIA's B161 is written in American English. If the Client requires that the contract be translated, the translator should be knowledgeable about design, construction, and legal terminology, in addition to non-technical language. However, if the entire contract is being translated into the Client's language, the Consultant may wish to obtain a translator's certification/affidavit that the foreign-language version is identical in meaning to the English version, and that it is complete and accurate. Another option is to attach the English-language version with the translated contract. If there will be dual-language contracts, the Consultant should request that the English version govern, as English is the common language for international contracts. However, it is not unusual for the foreign language version of the contract to govern. The language of the contract can also be significant because it is typically also the language in which any future dispute resolution must be conducted, barring contract provisions to the contrary.

Standard form contracts may not be well received in all countries, due to varying procurement systems in other countries. Even if a foreign Client is not receptive to using a standard form contract, the Consultant may still wish to present and reference B161 as a basis for explaining certain concepts and negotiating an agreement with fair and balanced terms and conditions.

Project delivery methods for international construction projects have changed over the years. For instance, Construction Manager as Constructor with Contractor involvement in the design phase was common in the 1980s, but later evolved to Construction Manager at Risk with Design Assist and Delegated Design. Design-Bid-Build and Design-Build are other common delivery methods used on international projects.

The information below follows the order of topics presented in B161 and is intended to expound on topics related to B161.

## Article 2 - Initial Information

**§ 2.1.3 Budget**. A foreign Client's budget can be a complicated subject. While the Consultant is likely accustomed to a U.S. Owner disclosing its budget and subsequently designing to that budget, foreign Clients may be unwilling to disclose their budget. Rather, a foreign-based Client may prefer that the Consultant supply the design before the Client will address cost. If the Client shares its budget in the local currency, it can be difficult for the Consultant to design to that budget without knowing the cost impact of design, material, and labor in the Client's country. Furthermore, foreign material and labor costs can vary greatly from the value of the U.S. dollar, which may go farther in one country than another. Additionally, many Consultants are unfamiliar with the value and conversion rates of a Client's local currency.

Sophisticated Clients form budgets themselves. Other times, a Cost Estimator or Quantity Surveyor (discussed below) prepares a detailed budget for the Client. If the Client does not hire a Cost Consultant, the Client should have its Local Architect assist it in establishing a budget for the Cost of the Work, which the Local Architect can communicate to the Consultant. To inform itself, the Consultant should ask the Client how the Client determined its budget. Ultimately, if the Client does not disclose its budget, the Consultant should document in writing that it requested the budget on previous occasions and did not receive it.

As with a domestic Client, a foreign Client's budget should include adequate contingencies for escalation, design, and construction issues. These contingencies usually diminish as construction progresses.

Also, like domestic projects, various approaches may be taken when the Project exceeds the stated budget. In some cases, Clients may be able to obtain additional funds for their Project; other times, they may remove elements from their Project. More often than not, the Design Brief is modified to meet budget. In turn, this can affect the quality of the features and finishes and may increase the lifecycle costs of the building. Still, other Clients opt to redesign and modify functional arrangements, such as maximizing rentable space and minimizing wasted space to conform with their budget.

**§ 2.1.10 Cost Consultant**. In many parts of the world, a Cost Consultant is known as a Quantity Surveyor. The Client and jurisdiction where the Project is located determine whether the Client, Local Architect, or Contractor hires the Quantity Surveyor; in most cases, the Client hires the Quantity Surveyor. While working with the Client,

the Consultant may hear the terms Bill of Quantities and Cost Estimate, which have different meanings. A Bill of Quantities is assembled by a Cost Consultant, known as a Quantity Surveyor in many parts of the world, after design is complete and is measured to a national standard (a standard method of measurement). The Bill of Quantities is produced by performing a quantity take-off from design and contract documents (such as BIM, CAD, and printed drawings) and excludes waste. A Bill of Quantities is viewed as a contract document when the Client affirms that the Bill of Quantities contains all quantities to bid the Project. Then, it is provided to the Contractor for bidding, who prices an amount for waste into its cost. Needless to say, both the Client and Contractor rely heavily on the Bill of Quantities. When not provided as a contract document, the Bill of Quantities may be provided "For Information Only" and used for cost control to assess pay applications and value the cost of change orders.

Unlike a Bill of Quantities, a Cost Estimate in international construction is viewed as an *estimate* of the cost of the Project *prior* to contracting with a Contractor. A Cost Estimate *should* include costs for labor and material, General Conditions, bonds, other fees, and taxes. The Cost Estimate *may* include costs for FF&E, architects and engineers, and civil works. Unlike a Bill of Quantities, a Cost Estimate is not produced according to a national standard. Rather, the Cost Estimate is organized according to a trade-based system or CSI division such that concrete, formwork, and rebar might all be included as one item (whereas a Bill of Quantities breaks down each item).

The cost and productivity of a labor force are huge factors, as both vary widely among countries. In addition to labor, a Contractor's General Conditions costs, taxes, bonds, transportation, and insurance factor into construction cost by location. As with labor and bonds, material costs can fluctuate greatly and present a significant concern. It is helpful for the Consultant to understand the relative cost of construction in the Client's currency compared to U.S. dollars, on which, the Quantity Surveyor or Cost Consultant can advise. To keep the Consultant apprised of Project costs, there should be close coordination and communication with the Quantity Surveyor throughout design. The Cost Consultant, or Quantity Surveyor, remains a participant on the Project through the end of construction for change orders and pay applications.

**§ 2.3 Building Information Modeling (BIM)**. BIM language in B161 prompts the parties to agree on protocols that will govern transmission and use of Instruments of Service or other information or documentation in digital form. As such, the Consultant and Client can edit B161 to specify how they will treat digital data and BIM or attach an exhibit with these details. The AIA Contract Documents program publishes a number of documents that can be used to establish and memorialize these protocols.

It is common practice for the Consultant to share its BIM with the Local Architect and other consultants. However, when doing so, it is important to formalize protocols and reliance expectations in writing beforehand.

## Article 3 - Consultant's Responsibilities

**§ 3.2 Standard of Care**. In the U.S., the Consultant must provide design services that meet the common law standard of care for the architectural profession. AIA Owner-Architect Agreements describe this standard of care as "provided by architects practicing in the same or similar locality under the same or similar circumstances" and performed "as expeditiously as is consistent with such professional skill and care and the orderly progress of the

Project." Professional Liability Insurance (PLI) is tied to the standard of care – if a Consultant is found not to have met the standard of care, e.g., performed an error or omission or was negligent, its PLI policy responds.

The Consultant should not agree to an enhanced standard of care, as it may not be covered by its PLI policy. A foreign Client may request that the Consultant enhance its standard of care to an "expert standard" or "highest international standard," which would be uninsurable. B161 states that the Consultant's standard of care when designing for a foreign Client is to "perform its services consistent with the reasonable skill, care, and diligence ordinarily provided by other consultants experienced in performing the same or similar services on projects of similar size, complexity, and circumstances." Modifying the governing law in B161 from U.S. law to another country's law may be complicated in a civil law jurisdiction. This is because the laws of some civil law jurisdictions override contractual provisions while other civil law jurisdictions recognize the contract as the law of the parties. Care should be taken to review the standard of care and any changes to the standard of care in B161 with the Consultant's legal and insurance counsel.

## § 3.5 Insurance.

The Consultant should work with an insurance broker who is knowledgeable about international coverage and has worldwide resources. It is recommended that the Consultant confer with its insurance broker early in the design contract negotiations to verify whether its existing policy (or policies) would cover a foreign Project, or whether additional coverage would be available.

### Professional Liability Insurance

A PLI policy provides coverage for each claim with a policy aggregate limit on the liability of the insurer. PLI covers negligent acts, errors, and omissions in the performance of professional services. Consultants should carefully review their PLI coverage and definitions and verify that their PLI policy provides worldwide, or otherwise sufficient, coverage. Some policies offer worldwide coverage but require that the claim be made in, or suit brought back to, the U.S. (Note that a PLI policy will not apply to countries, companies, organizations, or individuals named on the OFAC list (see FCPA section for more information)).

Some jurisdictions require the Consultant to purchase insurance through a local carrier, which can be accomplished through a fronting policy. A fronting policy is provided by a third-party insurer and is reinsured by the Consultant's practice policy (i.e. the Consultant's insurer "fronts" the policy via the third-party carrier). A fronting policy may be required by the Client – or government – to purchase in-country insurance. Large U.S. insurers can offer contacts with insurers in other countries where fronting policies are needed.

For its protection, the Consultant should not disclose more insurance coverage in its contract with a foreign Client than necessary. Instead, the Agreement should only disclose PLI via a certificate of insurance (that reflects the type and amount of required coverage) when requested by the Client. Additionally, in some countries, "certificates of insurance" may be known as "broker's letters" whereby the insurance broker provides a letter certifying the insurance that the Consultant holds.

### Professional Indemnity Insurance

The Consultant will want to obtain Professional Indemnity (PI) Insurance if its PLI policy does not cover the Consultant for international design services - or if the Client requires the Consultant to carry PI coverage. PI insurance is like PLI in that it indemnifies a professional from financial loss by paying legal costs and expenses to defend the Consultant, as well as damages or costs when the Consultant is found to be negligent. But PI differs from PLI in that it generally pays for 'each and every' or 'every one' claim - rather than paying in the aggregate, as PLI does (however, PI often has caps on coverage, so, effectively, it acts like an aggregated limit). An 'each and every' policy provides coverage up to the full limit for each individual claim made in the period of insurance, whereas an 'aggregate' policy provides coverage up to the full limit for all claims made in the period of insurance. For example, if a Consultant has a $250,000 'each and every' policy and there are three claims of $100,000 made, the PI insurer will pay out each $100,000 claim because each one is less than the $250,000 policy. By contrast, if a Consultant has a $250,000 'aggregate' policy, the PI insurer will pay up to the $250,000 aggregate limit, and the Consultant (or any other supplemental policies) would pay the remaining $50,000. A Consultant should be cautious about agreeing to PLI or PI that is not quoted with aggregated limits.

PI insurance also differs from PLI because it pays for reputational damage (although some U.S. PLI policies do cover this), including breach of confidentiality, defamation, and loss of documents. Another difference is that most U.S. PLI policies pay on behalf of the policyholder – in this case, the Consultant - and do not indemnify the policyholder after payment. Traditionally, PI policies were indemnity policies that put the firm at risk first and then paid the firm the coverage amount, however, PI policies are trending toward U.S. PLI policies that pay on behalf of the policyholder but do not indemnify the policyholder.

### Local Insurance

Some countries will not accept an insurance policy that was issued outside of their jurisdiction and may require the Consultant to carry types that can only be obtained in the Client's country – and thus, are only recoverable in the Client's country. Local insurance can be a Client requirement or a foreign government requirement, and may be a condition precedent to executing a design services contract. In such cases, the Consultant should work with an insurance broker to understand the required local policy terms, duration of coverage, policy limits, and any special conditions. Additionally, the Consultant should include the cost of the local policy under Section 13.7 as a type of insurance that it does not normally maintain, but must obtain, due to the Client's requirement.

### Collateral Warranty

Collateral warranties are a complex subject. In addition to involving an insurance broker, the Consultant may choose to involve legal counsel with experience in the local jurisdiction for any collateral warranties.

A collateral warranty, sometimes called a "Duty of Care Agreement" or "Step-in Agreement," is a direct contract between the Consultant and a present or future third-party beneficiary who has an interest in the Consultant's services, such as a purchaser, tenant, funder, facilities manager, or contractor. A collateral warranty provides that the beneficiary may rely on the Consultant's warranty that it has performed the services for the Client in accordance with the terms of the Client-Consultant Agreement. The warranty avoids the need for a beneficiary to prove it is

owed a duty of care (or other non-contractual test for entitlement) by providing privity of contract between two parties that would otherwise not be contractually linked. If the beneficiary suffers a loss caused by the Consultant's faulty services, the beneficiary does not need to rely on a statutory or tortious route of redress. The requirement to obtain a collateral warranty is not a requirement at law in any particular jurisdiction, but is customary in the UK and Australia, with it also becoming more common in the Middle East and Singapore who have adopted UK/Australian contracting structures. Often, the Consultant must deliver a collateral warranty as a condition to providing services. Collateral warranties seek to provide the beneficiary with the same contractual right of redress that a Client has for the same duration and limitation period as stated in the Client-Consultant Agreement. The Consultant should confirm with its insurance broker whether its standard policy will cover this exposure.

When providing a collateral warranty, the Consultant should grant only to beneficiaries with an initial legitimate interest in the Project. Collateral warranties should be stated to be the exclusive route of redress for any beneficiary, to the exclusion of all non-contractual claims or rights of action. They should also state that they do not expose the Consultant to greater liability than exists under the Client-Consultant Agreement in the absence of the collateral warranty and should include equivalent rights in defense language and provide that all limitations in the Client-Consultant Agreement can be relied upon in the event of a claim. Finally, a collateral warranty should be clear that the Consultant's duty of care is to the Client and not to the beneficiary, and therefore, the Consultant should not be required to act in the interest of any beneficiary.

Usually, the Consultant is asked to consent to assignments of the collateral warranty and should not agree to more than two assignments. Collateral warranties are usually appended as exhibits to the Contract with other less legally problematic exhibits and are generally form documents; as such, some Consultants do not give them appropriate attention. However, collateral warranties are very important to review.

**Decennial Liability Insurance**

Both designers and contractors are impacted by decennial liability in jurisdictions that recognize it. Derivations of French decennial liability are present in Africa, the Middle East, Europe, Asia, Latin America, and South America. French decennial liability attaches as soon as the Consultant executes its contract with the Client and does not depend on the design phase(s) for which the Consultant is responsible. In France, decennial liability occurs when part of a building is unusable or unfit for purpose, as well as when a building collapses or there is a structural defect–whether caused by design, construction, or the soil. For example, there may be a finding of a decennial liability claim in theory for poor acoustics in an auditorium, which would attach to design services. In actuality, French insurers pursue those involved in the substantive design and construction phases. In countries with derivations of French decennial liability, such as the U.A.E., liability arises due to site works that result in a partial or total collapse of the building, rather than attaching at the time of contract execution or upon a finding that the building is unusable or unfit for purpose. In jurisdictions where decennial liability exists, it cannot be waived or limited.

Decennial liability applies for ten years after transfer of the Project to the Client, but if the country of the Project recognizes a three-year statute of limitations period, this liability will apply for 13 years after a Project is turned over to the Client. France requires designers and contractors to carry decennial liability insurance, while other jurisdictions that recognize decennial liability may not have the same requirement. Various jurisdictions impose

strict liability (no analysis of fault is needed) on designers, which may not be covered by traditional PLI or PI policies, as those require a finding of the Consultant's negligence, errors, or omission. In France, decennial liability insurance will cover a decennial liability claim; in some Middle Eastern and North Africa countries, Clients do not require specific decennial liability insurance, and PLI or PI insurance may respond to a decennial liability claim. In Australia (a common law jurisdiction), the Consultant must be mindful of Fit for Purpose liability under the Commonwealth's Competition and Consumer Act 2010.

These strict liabilities ensure that the Client is protected, regardless of who was responsible and is still present to make the Client whole again. Consultants should always verify with counsel and insurance professionals who are experienced with when decennial liability applies and to what extent in the country where the Project will be built.

Generally, Decennial liability insurance provides compensation to the Client to correct a structural defect or repair a collapsed building. In many countries, decennial liability insurance is purchased by the Contractor - not the Consultant – to cover all project participants. Because decennial liability does not exist in the U.S., insurance covering that risk is not offered by U.S. Professional Liability Insurers. If the Client or jurisdiction where the Project is located requires the Consultant to purchase decennial liability insurance, the Consultant must purchase it from an insurer in the country where the Project is located or through a fronting arrangement with another insurer. Consultants should be wary of insurers who state that they can offer a Project-specific decennial liability policy – or a PLI policy with a decennial liability extension. As a caution, both are inaccurate and do not truly exist. A project-specific policy is not the same as decennial liability coverage. A Client who accepts such a policy may violate the country's decennial liability requirements.

**Commercial General Liability (CGL) and Automobile Liability**

AIA's Standard Owner-Architect Agreements, such as the B101™-2017, prompt users to complete information about the Architect's CGL insurance policy. This covers bodily injury, property damage, personal injury, and medical payments. However, CGL is not recognized outside of the U.S. and Canada. Combinations of primary and excess or umbrella liability insurance are also inapplicable for an international design contract.

Some Clients and countries, such as Australia, require Public Liability Insurance. This insurance is like CGL and covers the cost of claims made by the public that occur in connection with a business activity. It pays for personal injury, property damage or loss caused by an event of the building practitioner's business. The payment excludes punitive and exemplary damages.

Auto liability is another type of insurance presented in AIA's Standard Owner-Architect Agreements. Foreign countries, however, do not recognize U.S. auto insurance policies; likewise, U.S. insurers do not extend coverage to drivers who drive outside the U.S. and Canada. Consequently, the Consultant should not mention auto liability in its contract with the international Client but should obtain insurance through the car rental company in the foreign country. Additionally, if the Consultant is involved in an accident while driving in the foreign country, they may not be able to leave that country until all claims related to the accident have been resolved. Jail time may also be a possible outcome for a car accident in some countries. The U.S. Consulate can provide further information on specific countries' laws and policies regarding foreign drivers involved in accidents.

Another feature of Standard AIA Owner-Architect Agreements is to state that the Architect names the Client as an additional insured on the Architect's CGL and Auto Liability policies. A foreign Client, however, will likely not recognize the additional insured concept since it does not recognize CGL and U.S. auto policies. Therefore, a Consultant should not name the foreign Client as an additional insured, which would either result in an increase in the Consultant's insurance premium or lack of coverage and breach of contract terms.

**Workers' Compensation**

As provided in AIA's Standard Owner-Architect Agreements, the Architect is to obtain Workers' Compensation at U.S. state statutory limits. Workers' Compensation pays for an employee's medical bills and partial lost wages when the employee is injured on the job. It is unnecessary for the Consultant to disclose information about Workers' Compensation in its international design services agreement, as this has no impact on a foreign Client. In fact, including information about it may create confusion concerning any local Workers' Compensation in the Client or Project's location, which the Consultant may have the option of purchasing. Another option may be for the Consultant to confer with its U.S. insurance broker on whether it offers a Global Policy that includes Foreign Voluntary Workers' Compensation coverage and fills the gap.

**Employer's Liability**

Employers' Liability coverage pays for attorneys' fees, court costs, and settlements or judgments when an employer is found negligent for its employee's work-related injury or illness (Workers' Compensation pays for the employee's medical bills and partial lost wages). In many U.S. states, a Workers' Compensation policy includes Employer's Liability Insurance, but in a handful of states, Employers Liability must be purchased separately. An important distinction is that Employers' Liability is not an endorsement to a Professional Liability policy. Unlike a standard AIA B101 agreement, it is unnecessary to disclose Employer's Liability in an international contract as it 1) has no bearing on the Client's contractual activities and 2) will generally create confusion for the Client, who is likely unfamiliar with this type of insurance.

**Kidnap, Ransom, and Extor tion Insurance**

This is not a type of insurance for the Consultant to disclose in its contract with an international Client. However, depending on the Client's country or country where the Project is located to which the Consultant will travel, the Consultant may make the business decision to purchase this insurance.

**Other Insurance**

Consideration should be given to health insurance when outside the U.S. Although this would not be included in the design services Agreement, the Consultant should investigate the availability of supplemental health insurance, business travel insurance, and universal healthcare in the foreign country.

Cyber liability insurance is frequently required by international clients. Various countries will require various coverages for the Consultant to obtain. Consultation with a knowledgeable insurance broker is advised to discuss the types and limits of coverage.

## Article 4 – Scope of Consultant's Services

Many terms and conditions that seem commonplace in a domestic agreement, including verbiage and processes, should be clarified and described in detail to avoid confusion about what is part of the Consultant's scope of services. B161 uses U.S.-based terminology, so the Consultant will have a clear understanding of the expectations. Foreign design phase terminology may not align with domestic term conventions. The Consultant should not assume that terms such as Schematic Design, Design Development, Construction Documents, and Contract Administration are understood to be the same scope of service in foreign jurisdictions. B161 provides for the Consultant's standard scope of services, but one particular area where the Consultant should expound is in providing a detailed description of the level of development of its deliverables in each phase of design services. The Consultant should carefully address the meaning and scope of each project phase within that respective section and explain these items to the Client.

B161-2002 contained an exhibit for each phase of the Consultant's services. It also offered an optional Responsibility Matrix in a separate exhibit to allocate responsibilities and define the schedule and deliverables for the Project. B161-2022 moved each phase of the Consultant's services from individual exhibits into the body of the Agreement, consistent with B101-2017 and other AIA Owner-Architect Agreements. Because the 2022 version clearly delineates the Consultant's services in each phase of the Agreement, the Responsibility Matrix was eliminated. Depending on project complexity, the parties may find it prudent to include a Responsibility Matrix to further detail responsibilities of the Client, Consultant, and Local Architect. Responsibility Matrices are project specific and difficult to create in a standard form document to suit all project types, however, the Consultant may find sample matrices in the AIA Global Practice Primer helpful when creating one for their Project.

**Contract Administration (CA)**. B161 contemplates that the Consultant and Client will determine the Consultant's scope of services during the Construction Phase. Typically, the Consultant's Construction Phase services are limited to design integrity review, that is, reviewing the Local Architect's Further Design Documents to ensure that they consist of, and further, the intent of the Consultant's Design Development Documents. CA in other countries is not necessarily the same as in the U.S. In many international locations, CA is more synonymous with supervision and should always be avoided by the Consultant. B161 assumes that the Consultant will provide limited CA services (design integrity, as mentioned above) on an hourly basis, as these can be difficult to estimate as part of basic services.

## Article 5 – Change in Services

Clients may interpret the Agreement as including comprehensive services and disagree with an increase to the Consultant's fee when there is a change in the Consultant's services. A safeguard for the Consultant is to include a contingency amount in its Basic Services fee to account for a change in services costs that the Client refuses to recognize. Aside from understanding the Client's view about a change in services, it is also important to understand the Client's decision-making process, so that timing can be incorporated into the Consultant's services schedule. Often, a foreign Client's decision-making process is much lengthier than U.S.-based Clients. Additionally, in many

countries, Clients do not adhere to a schedule of approvals, yet still expect the Consultant to perform timely. The Consultant should resist eliminating the list of Change in Services in B161, as it provides clarity as to what is and isn't part of the Consultant's scope of services.

## Article 9 – Copyrights and Licenses

Common law countries treat the Consultant's documents as instruments of service whereby the Consultant retains ownership. Under this arrangement, the Consultant grants the Client a nonexclusive license to use its documents, so others can construct the building. Civil law countries that follow Napoleonic Code require the Consultant to hand over its documents to the Client after the contract concludes, and the documents become the Client's property. In common law countries, the Consultant is the proprietor of the intellectual property and the actual documents; in Napoleonic Code jurisdictions, the Consultant is the owner of the intellectual property, and the Client is the owner of the actual documents.

**Moral Rights**. A concept that is prevalent internationally is moral rights. For the Consultant, this pertains to its personal rights to a copyrighted design. This topic can be further divided into an architect's moral rights in the design documents and the building constructed from the architect's design. Generally, when an architect owns the copyright for its design, the architect's moral right is to be identified as the author of the building[1]. However, when more than one building is constructed to the architect's design, the architect has a moral right to be identified as the author on the first building only. Moral rights also protect the architect when there is derogatory treatment of the architect's model or design and derogatory treatment of the building. This protection is also known as the right of integrity, which, under the Berne Convention, allows the author "to object to any distortion, mutilation, or other modification of the said work…which would be prejudicial to his honor or reputation."

The Berne Convention governs international copyright law, as well as moral rights, for countries that are signatories to the treaty. Regarding moral rights, the author of a work retains "the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honor or reputation." The Berne Convention was first accepted in 1886, and most countries are signatories to the Convention.

International Clients regularly ask U.S. designers to grant the Client moral rights in the design so the Client, or another party who the Client authorizes, can later alter the Consultant's design. A Consultant can grant moral rights to a Client, but the Consultant should reserve its right of attribution. When granting moral rights, the Consultant should memorialize this in writing and may draft it subject to a condition taking place (e.g. payment), as well as subject to revocation.

## Article 10 – Claims and Disputes

There are certain conventions of practice and contracting to which the Consultant is likely accustomed, such as the approach to claims and dispute resolution in standard form AIA Owner-Architect Agreements where mediation is a condition precedent to binding dispute resolution. Those binding dispute resolution options are arbitration via the American Arbitration Association (AAA), litigation, or another method that the parties select. These steps unfold

[1] *Ash von Schwan and Emily Dickson, "Moral rights: why should developers care?", (Sep. 10, 2020) https://www.bclplaw.com/en-US/insights/*

somewhat differently in an international setting, which B161 recognizes. One example is the time in which the parties agree to bring claims (statute of limitations): in B101, this is 10 years after the date of Substantial Completion of the Work; in B161, it is two years after the earlier of the date of completion of the Consultant's services on the Project or Substantial Completion of the Project (see the Instructions accompanying B161 for a detailed explanation). Another example is the Architect and Owner's agreement in B101 to waive consequential damages, whereas B161 omits this provision (explained in the *Limitation of Liability and Consequential Damages* section later in this Guide).

Additionally, in B101, the parties engage in mediation and arbitration through AAA; in B161, mediation and arbitration default to administration by the International Centre for Dispute Resolution® (ICDR®), an internationally recognized, impartial body that is the international arm of the AAA. Mediation in B161 also differs from that in B101 by prompting the parties to select the place of mediation. The default cities listed in B161 are internationally recognized centers of neutrality. Additionally, the default cities listed in B161 are part of countries who are contracting states to the New York Convention, which allows for a properly issued and compliant international arbitral award against the Client to be enforced in a signatory state, subject to that state's jurisdiction over the Client. While the ICDR Rules allow for mediations to be conducted virtually, designating a city for mediation also determines the seat of arbitration, pursuant to Section 10.3.2 of B161, which establishes the seat of arbitration as the same place as mediation that the parties select in Section 10.2.2 Designating the seat results in application of that location's procedural law to the arbitration as a supplement to any arbitration rules that the parties have selected in their agreement and when the selected rules are silent on a particular issue. Under ICDR, regardless of the seat selected, hearings can be held anywhere. When the award is issued, it will include language that the Award was made in the city selected as the seat, regardless of where the hearings took place.

During arbitration, a concept known as *lex loci* arbitri will apply. This term means "the law of the place where arbitration is to take place" will govern when there is a question or conflict about which law applies to the claim or dispute. When parties have not specified a law to decide their dispute, lex loci arbitri may apply. Lex loci arbitri is also used to apply procedural law of the arbitration. Additionally, lex loci arbitri governs the role of the local court, how it may intervene, and on what grounds an award may be challenged. As such, it is important to review B161's Claims and Disputes article in conjunction with the governing law provision with qualified counsel and agree upon a location and set of rules for arbitrating with the Client.

It is likely that the Client may pressure the Consultant to modify B161's default Claims and Disputes language. If that happens, the Consultant must consider:

1. How the dispute will be administered (in lieu of the ICDR default in B161);
2. The rules that will be applied to the dispute (in lieu of the default ICDR Rules);
3. The governing law that will apply (in lieu of the default principal place of business of the Consultant – the importance of this is also discussed in *Standard of Care* and *Miscellaneous Provisions*);
4. The seat of arbitration, as described above.

The following topics pertaining to Claims and Disputes are discussed in the order in which they are presented in B101 and B161.

**Lien Rights**. AIA Owner-Architect Agreements provide for the Consultant to evaluate, give notice of, and enforce its lien rights. However, liens are not a recognized concept in most countries outside of the U.S. Jurisdictions that recognize some form of mechanics' liens include Bolivia, Japan, Canada, and New Zealand. Because mechanics' liens were developed in the United States, their mention should not be drafted into international contracts, as they will generally be unenforceable.

**§ 10.2 Mediation**. Mediation is a common form of dispute resolution, especially in the United States, because it is efficient, timely, and inexpensive compared to arbitration and litigation. Internationally, mediation is not widely used, but is gaining some acceptance in Europe and other parts of the world. International mediation settlement agreements are binding but may be difficult for the Consultant to enforce an award. Other aspects of a mediation settlement agreement are more broadly recognized and respected internationally, such as waivers and releases. B161 requires mediation as the first level of dispute resolution, and the parties may file a request for mediation concurrent with the request to file for arbitration. Additionally, the parties can edit B161 to apply the Singapore Convention, which results in enforceable mediation settlement agreements, when both parties are from countries that have signed and ratified the Convention.

The U.N. General Assembly adopted the U.N. Convention on International Settlement Agreements Resulting from Mediation, better known as the Singapore Convention on Mediation, on December 20, 2018, to recognize the need for a cohesive method to resolve and enforce international commercial disputes across countries with various legal systems. The Singapore Convention opened for signature on August 7, 2019, and as of the date this Guide was published, has more than 50 countries as signatories. The Convention went into full force on September 12, 2020, six months after three signatory countries ratified the instrument. Although more than 50 countries have signed the Agreement, the Convention will not become effective for any of them until they ratify it. As of the date this Guide was published, six countries have ratified the Convention. Before the treaty is ratified by and becomes effective in the U.S., Congress must revise the Federal Arbitration Act to incorporate the treaty. The Convention applies to international mediation agreements when both parties are from countries that ratified the Convention and the parties have not declared that the Convention shall not apply to their mediation settlement agreement. Further, the Convention applies to international commercial transactions, which includes construction of the works, consulting, engineering, licensing, and joint ventures.

The Singapore Convention provides judicial support for international mediation settlement agreements that are in writing. Each party enforces a settlement agreement pursuant to its country's rules of procedure and under the conditions provided by the Convention. Terms of the Convention detail evidence that a party must provide to the competent authority. The mediator is permitted to disclose the substance of information it receives from one party to any other party to the mediation. However, if the party providing information to the mediator requests that it be kept confidential, the mediator is not to disclose that to any other party to the mediation. Additionally, information pertaining to mediation proceedings remains confidential, unless the parties agree otherwise or disclosure is required by law or to effect or enforce a settlement agreement.

**§ 10.3 Arbitration**. Various types of disagreements may arise between the Consultant and Client. Similar to disputes in the U.S., a common disagreement internationally is the Consultant trying to collect fees for services performed and the Client refusing to pay.

This and other disputes are generally resolved in one of two formats: arbitration or the courts. The former can be divided into two categories: administered arbitration by an internationally recognized neutral institution and unadministered arbitration. Administered arbitration is advantageous because 1) the institution and its arbitrators are generally unbiased in the application of procedural rules; 2) the Consultant typically participates in establishing the qualifications for and selection of the arbitrator; and 3) it enhances the potential for fair outcomes for both parties. However, unlike the courts, there are no appeals in arbitration. Unadministered arbitration is generally not desirable because of the difficulty in resolving procedural disputes, which are a natural part of the arbitration process. These disputes are sometimes resolved in the local courts, which may be partial to the foreign Client. If the parties elect an unadministered arbitration, they should still designate the "rules" that will apply to their dispute so that there is no disagreement over that threshold issue.

Litigation of international contracts is often disfavored because of the belief (rightly or wrongly) that the local courts will favor the foreign Client. Also, foreign courts outside of the U.S., Canada, and Europe may lack the established jurisprudence that parties expect in the U.S. and other advanced legal systems. If a foreign court finds in favor of the Consultant, the Consultant may find it difficult to collect payment or enforce judgment. Whether resolving a dispute through arbitration or the courts, the Consultant may wish to engage foreign and domestic counsel.

Barring any laws of the Client's country, parties are free to negotiate the location where dispute resolution will be held. (On this point too, it is important for the Consultant to consult an attorney experienced in the laws of the Client's country, or country of the Project, regarding any local laws that may override this contractual default.) International parties often compromise on a location to hold the arbitration by selecting a neutral forum outside both of their countries. London, New York, Paris, and Singapore are generally recognized as the most neutral forums for international disputes and have well developed and well received arbitration laws.

Prior to COVID-19, video conferencing for domestic arbitration proceedings was limited, though more common internationally. Virtual arbitration proceedings may be appealing due to their lower costs and scheduling ease but may be unappealing when discerning witness expressions or body language, having multiple individuals speak concurrently, and presenting evidence. During the pandemic, video conferencing became mainstream worldwide, and arbitral institutions took steps to ensure the privacy of proceedings, such as verifying that improper parties were not present by requiring participants to turn their screens for a 360° view of their room. Most court reporting services can provide transcription services through an online platform. Regarding technology, video conference platforms allow parties to utilize break-out rooms. The International Institute for Conflict Prevention and Resolution (CPR), the AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties, JAMS, and ICC offer guidelines for video arbitration.

**Administered Arbitration.**

B161 defaults to cross-border dispute resolution that is administered by ICDR in accordance with ICDR Rules. If this default is modified, parties should select an alternate administrative body and institution rules that are internationally recognized as providing neutral, fair, and efficient administration of arbitral proceedings. Before selecting an alternate international institution, the Consultant should read the institution's rules to familiarize itself with the processes. Note that the parties can choose arbitration that is administered by one body and applies rules from another. For example, an ICC-administered arbitration can apply the UN Commission on International Trade Law (UNCITRAL) rules. Common international arbitration institutions include:

**ICDR**: Established in 1996, ICDR, is the international arm of the American Arbitration Association® (AAA®), founded in 1926. ICDR maintains offices in New York City, Mexico City, Singapore, and Bahrain. Case administration is handled in New York, Houston, Miami, and Singapore. Its rules are available in nine languages and apply to common and civil law jurisdictions. Final award is due to the parties within 60 days of the closing of hearings, unless expedited procedures apply, in which case, the award is due within 30 days from closing of the hearing. (Expedited procedures typically apply to cases with disputes less than $500,000 USD but can be applied in larger cases by agreement of the parties.) An emergency arbitrator can be appointed for emergency measures of protection in one business day to prevent irreparable harm to the Consultant. An example of an emergency measure is injunctive relief to stop a Client from circulating the Consultant's design to those who aren't part of the Project. ICDR regularly hears construction cases and has a well-vetted roster of international neutrals available to parties.

**JAMS**: Founded in 1979, JAMS offers customized, in-person, virtual, and hybrid dispute resolution. Besides domestic services, JAMS provides mediation and arbitration services for international disputes. In addition to working with JAMS' International Mediation and Arbitration Rules, the institution also works with the rules of other major institutions. Stateside, their international arbitration centers are located in New York and California, and internationally, in London.

**LCIA**: The London Court of International Arbitration (LCIA) has existed since 1891 and is highly regarded and respected. LCIA hears disputes of parties – mostly of non-English nationality - regardless of their location and system of law. The LCIA also has a well-established set of international arbitral rules, although they tend to be more akin to English Court procedures than other international rules.

**ICC**: The International Chamber of Commerce (ICC) was formed in 1919. Its arbitral institution, the International Court of Arbitration®, was created in 1923. Requests for arbitration can be filed at ICC's headquarters in Paris or its regional offices in Hong Kong or New York. ICC also maintains close relations with the United Nations (UN). Arbitration through ICC is typically very expensive for small to medium-sized firms and is generally pursued for claims that are at least $5-10M. The high costs can be attributed to the institution's fee structure, which is ad valorem (a percentage of the amount of the claim). Construction and engineering disputes comprise nearly 25% of all ICC arbitration cases.

Other well-known international arbitral institutions include the Swiss Arbitration Centre, the Singapore International Arbitration Centre, and the Hong Kong International Arbitration Centre.

With each institution, the parties choose a one or three-person arbitral panel. A one-person panel is less expensive and preferred when there is not a lot of money in dispute. With a three-person panel, which is more prevalent, the typical arbitrator selection process is for each party to select a party-appointed arbitrator, and then those two arbitrators select the third neutral arbitrator to act as Chair of the tribunal. There are also other options available, including the "list method" that is commonly used by the AAA domestically. A large Client or project will probably warrant a three-person panel, as will disputes where $10M or more is at stake. When considering an arbitrator's qualifications, the Consultant should choose an arbitrator with a strong grasp of the English language, subject matter expertise in construction, and significant experience with international construction disputes and arbitration. Additionally, the Consultant should ensure that the arbitrator has a reputation for fairness and does not have a conflict of interest with any party to the arbitration. Most arbitral institutions and ethics rules require arbitrators to disclose personal or professional connections to the parties, their advocates and/or witnesses, or any other information that might call into question the neutrality of the arbitrator. Notably, the rules on conflicts of interest tend to be more lax internationally than in the U.S. Parties should not expect the same level of disclosures that have become common with domestic arbitrators who often over-disclose in an abundance of caution.

**Unadministered Arbitration.**

Parties who do not select administered arbitration, such as through ICDR, JAMS, LCIA, or ICC, may opt for an unadministered (or ad hoc) arbitration. An unadministered arbitration applies rules that the parties select for administration of their arbitration. The number of arbitrators is at the parties' discretion; so too are who the parties appoint as arbitrator(s), a set procedure to conduct the arbitration, and the number of document requests. To select the arbitrator(s), the parties may start from a blank slate and have their attorneys generate a short list. If the parties disagree about the arbitrator(s) to appoint, they can designate an institution (such as ICDR, etc.) to act as an appointing authority. Regardless of how the arbitrator(s) is selected, the parties should, during contract formation (but can after arbitration has commenced), agree on a set of model rules to apply to their unadministered arbitration. Examples of some model rules are UNCITRAL, the IBA Rules, or the Prague Rules, which are described below. Other options for choosing rules include having the parties' attorneys draft their own rules or creating a hybrid of drafting rules and procedures along with incorporating model rules.

In addition to specifying details about the selection of the arbitrator(s) and rules to apply, the parties' contract should also specify the location where arbitration hearings will occur and the seat of arbitration (as discussed earlier in this section, designating the seat results in application of that location's procedural law to the arbitration as a supplement to any arbitration rules that the parties have selected and when the selected rules are silent on a particular issue). As an example, the parties can choose London as the seat, hold their hearing in Paris, and apply unadministered rules from the CPR. When the parties choose arbitration with no administrative body, no rules, and no seat, arbitration will default to the country of the Project. Some countries, such as the U.K., have a well-established arbitration act that serves as the default (similar to the U.S.).

Advantages to unadministered arbitration are its lower cost, more flexible proceeding, and faster decision. Disadvantages, though, are that the outcome of an unadministered arbitration may not always be neutral and a foreign court may become involved if there are disagreements about deciding/interpreting arbitration procedures, etc.

UNCITRAL provides Model Laws on International Commercial Arbitration that countries or parties can adopt and customize for their unadministered arbitration. The UN General Assembly, based in Vienna, Austria, established UNCITRAL in 1966 as its core legal body. The UNCITRAL Arbitration Rules were written in 1976 and revised in 2010.

The International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules) were published in 1999 and updated in 2010 for parties to establish procedures for taking and presenting evidence in an international arbitration. They reflect the procedures used in many different legal systems and are designed to be used in conjunction with and adopted with, institutional, ad hoc, or other rules or procedures governing international arbitrations. The IBA Rules provide mechanisms for presenting documents, fact and expert witnesses, inspections, and conducting evidentiary hearings and contain more detailed procedures than appear in most institutional arbitral rules.

The Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules) were published in 2018. The Prague Rules, adopted by parties/tribunals in many Eastern European countries, were developed by civil law practitioners and use procedures similar to civil law (inquisitorial style). As such, they do not adopt procedures with which most common law practitioners are familiar. While the IBA and Prague Rules are alike in structure, the Prague Rules are more restrictive. The parties may decide to apply the rules in their entirety or only certain provisions of the rules.

The successful party in arbitration will want to enforce their award. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention, permits enforcement of international arbitral awards in signatory states, subject to very limited exceptions. Specifically, it recognizes private agreements that name arbitration as their dispute resolution mechanism and recognizes and enforces arbitration awards made in other countries that are parties to the Convention. There are also other conventions/ treaties that offer similar award recognition, although the New York Convention is the most widely adopted convention.

**Civil and common law courts**. If a Client insists on using their local court system to resolve disputes, the Consultant should be aware that the law in most foreign countries is very different from U.S. law. While the U.S. is a common law jurisdiction, most countries are civil law jurisdictions. Civil law derived from Roman legal codes but was heavily rewritten by Napoleon and became effective in 1804 and known as Napoleonic law. Other countries, such as Germany and the Nordic states, also have a version of civil law that is used in their home countries and elsewhere throughout the world. The overall result is that a civil law country is governed by its Constitution, statutes, codes, and ordinances, and its judges act as investigators. Civil law exists in Latin America, South America, China, Japan, most of Europe and Africa, and the Middle East (which is also heavily influenced by Sharia law). Some locations, such as Puerto Rico and Ethiopia, follow a combination of common and civil law. Several countries

observe mixed systems of law that overlap with religious, custom, civil, and common law. When a Consultant contracts with a foreign Client, it is extremely important that the Consultant retain counsel knowledgeable about the laws of the country where the Project is located, as the Consultant will likely be subject to certain local laws that cannot be waived. Local counsel can also advise the Consultant when civil laws, such as those in Germany, override contract provisions. Additionally, some aspects of local civil law may apply to the Consultant even when the contract stipulates U.S. law.

Common law relies on stare decisis, or cases that have been decided by a court that serve as precedent for how future cases with similar facts (and application of law) should be determined. U.S. common law is founded on the English common law system. Australia, Canada (except Quebec), and most former colonies of England are also common law jurisdictions.

Parties should be cautious about proceeding with disputes in foreign courts, as those local courts may favor the local party, who is often the Client. Additionally, some local courts tend to employ procedures that are unfamiliar to practitioners in a common law jurisdiction, which can make trial preparation difficult and outcomes uncertain. Further, it may be difficult for the Consultant to enforce judgments abroad. For these reasons, the Consultant should refrain from agreeing to litigation as a form of dispute resolution in a foreign jurisdiction.

Article 11 – Termination or Suspension

While most civil law jurisdictions respect freedom to contract, there are some that specify conditions when a party can terminate services, which overrides contract language. In such cases, strict compliance is required. Consultants and their legal advisors should research whether the law of the jurisdiction where the Project is located will affect the Client-Consultant contract.

## Article 12 – Miscellaneous Provisions

The Consultant may wish to draft exclusions for its services into B161, such as disclaiming its responsibility for performance bonds, bank guarantees, client-mandated training or mentorship programs, and study tours.

While B161 defaults to governing law as the *principal place of business of the Consultant*, this will often be negotiated to the *location of the Client*, as many countries' laws require that the law of the Client's country (or law of the country where the Project is located) will apply. It is very important for the Consultant to seek legal advice if agreeing to the governing law of the Client's country or country of the Project.

In B161, §§ 12.9 and 12.10 limit the length of time in which the Client has to bring a claim against the Consultant, as well as the amount of money for which the Consultant may be liable. On these points too, some countries' laws may override these contractual provisions. In Australia, for example, the Consultant may be unable to limit contractual liabilities. In countries where it is determined that the contract violates public policy, the entire contract – not just the provision in question – may be declared void, and in some cases, the Consultant's company may face criminal and civil penalties in the foreign country. Thus, consultation with knowledgeable legal counsel on these matters is important.

### § 12.3 Design Location

B161 presumes that the Consultant will perform all design services from a U.S.-based office. If the Consultant performs services offshore for the Client, the parties should, in consultation with legal and tax counsel, write a separate scope for those services, as they may result in taxes specific to the offshore location. Note that site office expenses are not reimbursable under B161.

### § 12.4 Anti-Corruption Laws

The Consultant and Client must abide by all U.S. antiboycott laws and the U.S. Foreign Corrupt Practices Act (FCPA) in addition to any foreign corrupt prohibitions in the foreign jurisdiction.

#### § 12.4.1 Foreign Corrupt Practices Act (FCPA)

A U.S. entity doing business with a foreign country is automatically required to comply with the FCPA, which prevents U.S. persons and entities from engaging in bribes and paying a foreign government official to influence the official's decision. FCPA extends to any other actors performing services for the U.S. entity and for whom the Consultant is responsible, such as subconsultants and joint venture partners. The FCPA is available in many foreign languages, which enables sharing it with foreign Clients. A detailed Resource Guide to the FCPA is available on the Department of Justice's website.

Under the FCPA, it is illegal for U.S.-based individuals and entities to offer, pay, promise to pay, authorize payment of money, or offer anything of value to any person under certain circumstances. U.S. entities include issuers (including banks) and domestic concerns (including corporations and partnerships). It is a violation of the FCPA for a U.S. entity to conduct one of these actions while knowing that some or all of the money or thing of value will be offered, given, or promised (either directly or indirectly) to a *foreign official* for any of the following reasons:

- To influence any act or decision of a foreign official in their official capacity;
- To induce the foreign official to do or omit to do an act in violation of his or her lawful duty;
- To induce a foreign official to use their influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; or
- To secure any improper advantage.

A *foreign official* may include a foreign government official, a representative of a foreign political party, a foreign candidate for political office, or an official of a public international organization.

For compliance, it is important to know what connections the Client's company has with their government. When the foreign government is the Client, the Consultant should exercise additional caution to ensure there is no corruption and bribery.

The FCPA does permit minimal payments, typically $50 or less, of a "facilitating" or "expediting" nature to *low-level* employees to expedite or secure performance of routine governmental action. Examples of these actions include mail delivery, phone service, trash collection, and driver's licenses. Note that many companies' internal policies prohibit even minimal payments.

It is important for U.S. individuals and companies to track their expenditures. Under the FCPA, companies with securities held in the U.S. must satisfy accounting and record-keeping provisions pertaining to expense reports, invoices, and commission payments. Failing to implement appropriate controls is a violation of the FCPA. Individuals and companies who violate the FCPA face criminal and civil penalties. While companies can face harsh fines, individuals can too, in addition to imprisonment. For example, an individual can incur fines up to $250,000, up to five years imprisonment, or both. Companies can incur fines up to the greater of $2,000,000 or twice the gross gain resulting from the improper advantage or twice the gross loss under an alternative fine provision. Companies and employees may be subject to additional civil penalties, such as a shareholder derivative action. Even harsher criminal penalties are applied for improper accounting offenses: fines equal to or greater than $1,000,000 or twice the economic gain; imprisonment up to 10 years; or both a fine and imprisonment.

The customs and practices of some countries may blur the lines of exactly who is a foreign official. For instance, China does not delineate clearly between private and public entities, making it difficult to know if they are state-owned enterprises, and thus, run by the Chinese government. Similarly, family-owned firms, most of which are private companies, are often supported by the Chinese government. Large corporations may be state-owned in some countries, and public officials may expect payment for state-issued licenses or government contracts. In some countries one may be approached by a sponsor to assist with visas. This could constitute a violation of the FCPA, which prohibits hiring a third party to convey a benefit on one's behalf. It may also be considered an illegal activity in that country. For these reasons, the Consultant should not agree to engage sponsors.
In researching a potential foreign Client, the Consultant must thoroughly conduct its due diligence to determine if the Client:

- is a government-owned entity;
- has partners, officers, directors, employees, agents, consultants, or contractors who hold government positions or serve on any boards of directors of government-owned entities;
- has partners, officers, directors, employees, or agents who have been the target of any bribery, money laundering, or anti-kickback investigation by any government authority; and
- has received, accepted, or been promised anything of value, including hospitality, entertainment, or other gifts in exchange for awarding the Agreement to the Consultant.

It is not a bar to doing business with a Client who discloses one of these activities, though it does require the Consultant to take greater care in doing business with the Client.

The Consultant should recognize that these conditions do not offer any protection if a Client is on the sanctions list. The U.S. Office of Foreign Assets Control maintains sanctions lists of designated nationals and blocked persons and entities with whom U.S. persons or entities are prohibited from interacting in any way. The sanctions lists include some banks, so payments to U.S. persons or entities can't be made to or through such banks. To comply with the FCPA, a U.S. entity must not do business with an individual or company named on the sanctions list. Acts of the Consultant, such as paying for the Client (government or non-government) to fly around the U.S. to view

the Consultant's stadium projects, will be viewed as a violation of the FCPA. Additionally, healthcare workers in countries where there is government-run healthcare are considered foreign government officials pursuant to the FCPA definition. Each country also has its own sanctions list.

The United Kingdom's corollary to the FCPA is the U.K. Bribery Act (UKBA), which was passed in 2010. UKBA is, in many respects, stricter than FCPA and extends beyond government officials. Canada's equivalent is the Corruption of Foreign Public Officials Act, and France's anticorruption law is known as the Sapin II Law, which was adopted in 2016.

The Corruption Perception Index (CPI), published by Transparency International at https://www.transparency.org/cpi, generally defines corruption as "the misuse of public power for private benefit". The 2020 CPI, published in 2021, ranks 180 countries "on a scale from 100 (very clean) to 0 (highly corrupt)."

**Antiboycotts**

The Office of Antiboycott Compliance within the U.S. Department of Commerce's Bureau of Industry and Security administers and enforces federal antiboycott laws. Prohibited measures include, but are not limited to, U.S. companies agreeing not to conduct business with a boycotted country, as well as implementing letters of credit (from U.S. banks) containing prohibited boycott-related terms or conditions. U.S. antiboycott laws prohibit U.S. companies and their foreign subsidiaries from participating in or cooperating with any boycott against a nation that the U.S. has not sanctioned. This applies to the Arab League's boycott against Israel and any foreign country's boycott against another country that is friendly to the U.S. The Arab League consists of several Middle Eastern and African countries, and each member country's laws require compliance with the boycott. Any U.S. person who violates antiboycott measures may face administrative and criminal penalties. Federal law requires a person to report foreign antiboycott language in its contract or proposed contract to the U.S. Department of Commerce. For additional information, the Consultant should confer with legal counsel that specializes in antiboycott compliance.

**Politically Exposed Persons**

Also related to the FCPA and other international business restrictions is a category of individuals that financial institutions classify as Politically Exposed Persons (PEP). While there is no official definition, PEPs are recognized as individuals who serve in a high-profile political role or prominent public function: government officials, senior politicians, executives of state-owned corporations, political party officials, judicial and military officials, and family members of the aforementioned. The designation of PEPs originated in the late 1990s after the Abacha Affair — a money-laundering scandal in Nigeria. PEPs are a risk to the global financial system due to their position and influence for bribery, money laundering, and financing terrorism. To determine the level of risk that an individual poses, the Consultant should research individuals of the Client who may be on a PEP list, as well as relatives, during its due diligence period. The Consultant may still do business with the Client when a 'sanctioned' person is on a PEP list, so long as the PEP, in his/her individual capacity, is restricted from doing business with the Consultant. If a financial institution in the U.S. discovers suspicious activity, it must report that activity to the U.S. Treasury's Financial Crimes Enforcement Network.

The Consultant may insert the model language below into Article 12 of B161 to confirm that the Client is not in violation of the FCPA and is not a PEP.

**Model Language:**

Client represents that:

1. Client's signatory below is authorized to sign this Agreement;
2. none of Client's personnel are politically exposed persons (PEP) or barred from entering into this Agreement by United States sanctions;
3. Client received no money paid or thing of value from Consultant or its employees that influenced its decision to enter into this Agreement;
4. neither Client nor any of its employees are in material violation of any laws, rules, or regulations which apply to the conduct of its business;
5. no citation, fine, or penalty has been imposed, asserted, or threatened against Client under any law or regulation related to foreign or domestic corrupt practices or the avoidance of bribery (including the FCPA); and
6. Client is aware of no current circumstances likely to result in the imposition or assertion of any such citation, fine, or penalty. Client will promptly notify Consultant in writing if circumstances arise that would cause any of the foregoing representations to be false at any time during performance of the Consultant's Services.

## § 12.9 Limitation of Liability and Consequential Damages

**Limitation of Liability**. A Limitation of Liability provision prevents or limits the transfer of risk between parties. Without a limitation of liability provision in a contract, there is no limit to the amount of damages a party can seek. A limitation of liability exists to limit, or cap, the amount of money (damages) that the Architect must pay the Owner when the Owner suffers a loss caused by the Architect. Amounts of liability can be limited to a percentage of fees; all fees; fees over time; a fixed dollar amount; or an amount covered by insurance. Before modifying B161 to limit liability to an amount covered by insurance, the Consultant should discuss the effects of such a change with its insurance carrier. If the Consultant does modify the default Limitation of Liability in B161 to an amount of insurance, below is model language that can be used:

**Model Language:**

*To the maximum extent permitted by the law, the Consultant's liability to the Client for any loss or damage shall be limited to the direct costs recoverable from applicable insurance coverage available to pay the award at the time of settlement or judgment or, in the event of an uninsured claim, to the amount of payment received by the Consultant under this Agreement.*

This model language can be modified to suit the above examples of limiting liability to a percentage of fees, and so on.

A finding of gross negligence, willful misconduct, or fraud on the part of the Consultant may void a limitation of liability clause. To be enforceable, a limitation of liability clause must be reasonable; therefore, if the parties alter

the default clause in B161, they must be careful to edit it in such a way that a fact finder will determine its conditions to be reasonable. Some countries' laws restrict contractual limitations of liability, so it is important to consult an attorney knowledgeable about the laws of the country where the Project is located to understand if any local statutes will override a limitation of liability provision. For example, decennial liability cannot be limited by contract, and so, is exclusive of a limitation of liability.

**Consequential Damages**. Consequential damages may include loss of use, profit, income, financing, savings, facilities and core equipment, goodwill, opportunities, and damage to reputation and business. While common law jurisdictions typically recognize a waiver of consequential damages, civil law jurisdictions do not recognize the concept of consequential damages, which are often not recoverable. If the Consultant knows that the Client's country is a common law jurisdiction, the Consultant may use the model language below to waive consequential damages. Additionally, a waiver of consequential damages can be added to the contract if governing law remains as the Consultant's U.S. location.

**Model Language:**

*The Consultant and Client waive consequential damages for claims, disputes, or other matters in question, arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement.*

**Force Majeure**

A Force Majeure provision is common in international contracts. It is not included in B161 because the concept to seek additional time and money for circumstances beyond one's control are handled by other provisions in the Agreement, such as through suspension and termination. Where a jurisdiction recognizes force majeure clauses, common characteristics of an enforceable provision generally include:

1. defining the force majeure event giving rise to relief;
2. providing notice for relief;
3. describing the parties' responsibilities to mitigate damages; and
4. determining the consequences when the force majeure event no longer impedes the affected party's performance.

Timeframes identified in a force majeure provision are strictly adhered to in civil law jurisdictions. If the Client requires a force majeure provision to be included in the contract, below are samples of model language that may be incorporated:

**Model Language:**

**§ 12.12 Force Majeure**

Neither party shall have any liability under or be deemed to be in breach of this Agreement for any delays or failures in performance of this Agreement which result from any event beyond the reasonable control of that party. The party affected by such an event shall promptly notify the other party in writing when such an event causes a delay or failure in performance and when it ceases to do so. If such an event lasts for a continuous period of more

than eight weeks, either party may terminate this Agreement by written notice to the other party.

**§ 12.12 Force Majeure**

**§ 12.12.1** A Force Majeure event is an act of God, an act of terrorism or war, an act by a governmental authority, or any other circumstance beyond the control of the parties that temporarily or permanently impedes the Client or Consultant's performance.

**§ 12.12.2** When the Client or Consultant is unable to perform its responsibilities under this Agreement due to such an event, it shall notify the other party within 14 days of the occurrence. Such notice shall state, at a minimum:

1. the event;
2. the date the event occurred;
3. how the event affected the party providing notice; and
4. the estimated duration that the affected party will be unable to perform its responsibilities under this Agreement.

**§ 12.12.3** The affected party shall be relieved of its responsibilities under this Agreement during the time that its performance is impeded by the event. The affected party shall mitigate its damages and use reasonable efforts to resume performance as soon as practicable.

**§ 12.12.4** When the event no longer impedes the affected party's performance, that party shall resume its responsibilities under this Agreement.

**§ 12.12.5** If the event permanently impedes the affected party's performance under this Agreement, either party shall have cause to suspend or terminate this Agreement in accordance with Article 11.

## Article 13 - Compensation: Payment and Tax

**Payment.** There are several things for the Consultant to consider when negotiating payment from the Client. The first is to refrain from allowing a Client request to add language into the contract stating that the Client will only pay the Consultant if the Client is satisfied. Second, pursuant to B161, the Consultant should always seek payment in U.S. dollars. Payment in any other currency is risky due to currency fluctuations and currency types that may only be recognized in that country to buy goods or services. Additionally, some currencies are not convertible to U.S. dollars. Special issues can arise in countries where their form of payment is not a convertible currency but is a medium of exchange. Depending on the foreign country, there can be a series of approvals to pay the Consultant in U.S. dollars. Third, exchange rates favor payment in U.S. dollars. Repatriating funds, or converting foreign currency to the currency of one's country (here, U.S. dollars), may result in less money. Fourth, Consultants should avoid setting up a bank account in the Client's country to receive their payment. If there is a dispute, the Client may have the account locked. Fifth, payments should only be made by wire transfer to a U.S. bank account. Other options to secure payment include a bond, money held in an escrow account, agreeing upon a fixed schedule of monthly payments for a fixed amount of money, export-import bank trade financing, and transferring funds through the U.S. government or World Bank.

In international design contracts, payments are often based on milestones that may be spaced many months apart. Nevertheless, it can be common for a Consultant to receive payments much later than the payment due date. To

preserve its cash flow, the Consultant may request advance payments to cover costs until the next scheduled payment, or structure appropriate billing and payment schedules, such as monthly payments based on estimated percent complete. There is also the issue of Clients who refuse to make the final payment. A possible solution is to collect an upfront retainer that can cover work between payments and be applied to final payment. However, if the Client does not make the next scheduled payment, the Consultant should consider exercising its right under the contract to suspend or terminate its services. In some parts of the world, such as the Middle East, the Consultant may be required to provide an advance payment bond or bank guarantee to the Client to secure the retainer.

**Tax**. There are various types of taxes of which the Consultant should be aware. These include the well-known withholding and income taxes and the lesser-known Value-Added Tax (VAT), which most countries outside of the U.S. have. In the Client's view, withholding is a down payment on taxes, so it will be necessary to markup withholding on the Consultant's invoice to account for the actual cost of the withholding. (It may be simpler for the Consultant to include the cost of withholding in its fee and let the Client take it out.) Because Clients do not always view withholding as a tax, they may still deduct withholdings from payments even when "net of tax" language exists in the contract. Some countries require Clients to withhold a fixed percentage for local tax liability; then, it is up to the Consultant to hire a local tax consultant, file the necessary annual returns, and attempt to reclaim the withheld fees. In other countries, the Client or Consultant can apply for a waiver of withholding. Still other countries allow the Consultant to avoid the withholding if the Consultant's firm has a business license in the country; the withholding is then recoverable by filing tax returns in the country.

VAT is applied to a product at each stage of the supply chain as its value increases. In most countries, VAT is levied when importing services from outside the country and is generally paid by the Client. Other taxes are triggered by issuing an invoice. If the Consultant's compensation is subject to taxes or fees imposed by a foreign tax authority, the Client should increase ("gross up" to an amount before taxes are deducted) the Consultant's compensation to the amount set forth in Section 13.2.

There can be various taxes that the Consultant must pay to the Client's country for design services provided in-country, and other taxes the Client may have to pay its country when the Consultant provides in-country services. If the Client remits tax for the Consultant's services to its country, the Consultant should request a copy of the Client's tax payment to ensure that 1) the tax was paid and 2) the Consultant will not be required to pay the same tax to the foreign country. After performing services in-country for the number of days prescribed by the IRS and applicable treaties, the Consultant will be deemed to have a permanent establishment in that country, requiring the Consultant to pay U.S. and foreign taxes. Be aware that if a company has more than one contract for services in a country, the time spent in the country on either Project counts toward a permanent establishment. Consequently, all services that the company performs in the country will be subject to tax (not just the contract that caused the permanent establishment). The types and amounts of taxes vary by country, as well as by tax treaties between the U.S. and foreign countries. Therefore, it is important to consult a tax professional who is knowledgeable about U.S. tax laws, tax treaties, agreements between the U.S. and the Client's country, and how to pay each type of tax.

Many factors affect tax obligations when contracting with a foreign Client. A notable factor is traveling into the Client's country for meetings or visiting the Project site or other related venue (see *Understand the legal requirements*

*of visiting and doing business in the country* earlier in this document regarding visas). In this case, the Consultant's company should expect to pay income tax to the foreign country, absent a treaty or other federal agreement. The individual Consultant should not stay in the Client's country for more than the prescribed period of time established in the applicable tax treaty, as this can create a permanent establishment (a fixed place of business), causing the Consultant to owe tax to the Client's country. Some countries classify travel there for a project meeting as working in their country, thus requiring the Consultant to pay tax to that country. The Consultant should respect local foreign laws, as well as U.S. law: a Consultant's employer who hides its professional services to avoid paying foreign tax can be discovered in various ways, one of which can be publicity about a project. There have also been instances where U.S. employees, although present in the Client's country temporarily, were detained because they did not pay tax. For all of these reasons, it is important for the Consultant to price foreign and domestic taxes into its fee.

## Chapter 3. Additional Resources

Following are other resources that are available to U.S. architects who contract for design services with foreign-based Clients:

To gauge the ease of doing business in a foreign country, reference the World Bank's ranking list at: https://www.doingbusiness.org/en/rankings

The National Association of Surety Bond Producers: https://www.nasbp.org

The Department of State's Smart Traveler Enrollment Program (STEP) for U.S. citizens and nationals traveling abroad: https://step.state.gov/

Travel advisories issued by the Department of State: https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html/

The Corruption Perception Index (CPI): https://www.transparency.org/cpi

The U.S. Department of Commerce can provide information about a given country's business and payment practices: https://www.commerce.gov/

The Office of Foreign Assets Control (OFAC), which "administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries": https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information

Legal restrictions that may apply to a foreign Project: https://home.treasury.gov/

OFAC's sanctions list: https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists

The AIA Global Practice Primer discusses legal issues and provides sample Responsibility Matrices: https://www.aia.org/resources/25876-aia-global-practice-primer

The AIA International Committee, including Resources for Practicing Overseas and links to other international topics: https://network.aia.org/internationalcommittee/home

AIA Best Practices Checklist: https://www.aia.org/best-practices?query=

Perkins, Bradford. (2021). An Architect's Guide to Developing and Managing an International Practice. Wiley.

CIA World Factbook by country: https://www.cia.gov/the-world-factbook/

United States Department of Commerce, International Trade Administration's "Business Culture":

https://www.trade.gov/business-culture

International Trade Administration: https://www.trade.gov/us-export-controls

The Bureau of Industry and Security , U.S. Department of Commerce, Office of Antiboycott Compliance:

https://www.bis.doc.gov/index.php/enforcement/oac

Instructions to B161: https://acdoperations.zendesk.com/hc/en-us/articles/6042140308627