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Navigating the Concealed or Unknown Conditions Clause

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The following is a practical guide to getting paid for a concealed or unknown site condition when you are using the ConsensusDocs 200 contract. The primary takeaways will be to take charge if you can. If not, pursue payment for an Interim Directive and avoid making a claim, at least until the very end of the project.

Like most standard forms, the CD 200 recognizes what are commonly referred to as Type 1 and Type 2 differing site conditions. A Type 1 condition differs from what is shown in the contract documents. A Type 2 condition differs from what should ordinarily be expected or recognized as inherent to the contract work. Regardless of the type of condition encountered, the path to recovery is the same. It begins with Article 3, ¶ 3.16.2 Concealed or Unknown Site Conditions, but then goes to Article 8, Changes, and possibly to Article 12, Dispute Mitigation and Resolution. Article 12 should be avoided, at least until the end of the project.

For purposes of illustration, say that a contractor hits water several feet above the level shown on boring logs included in the contract documents. The contractor believes this will significantly increase the cost of placing foundations for the project. What should the contractor do? According to ¶ 3.16.2, the contractor should stop work and give prompt written notice to the owner and architect or engineer. The owner is then to investigate, agree or disagree that a differing condition exists, and direct the contractor how to proceed. But is this the best path for the contractor? Probably not, if followed literally. Rather than rely on the owner to do an investigation, the contractor should do its best to take control of the situation from the very beginning. Rather than simply notify the owner of the differing condition, the contractor should compile, as quickly as possible, a complete package of information documenting, as thoroughly as possible, the nature of the condition encountered, how it differs from the contract documents, and, most importantly, the contractor's recommended course of action. A contractor who successfully takes control of the investigation greatly increases its chances of resolving the issue without further dispute. If the owner accepts the contractor's position, a Change Order should be issued.

Unfortunately, the take control approach will not always work. The owner may not agree that a differing condition exists, or may not agree with the contractor's proposed remedy, or may not agree with the contractor's projected cost. Regardless of the nature of the disagreement, per ¶ 3.16.2, the owner is obligated to "issue an Interim Directive specifying the extent to which Owner agrees that a concealed or unknown condition exists and directing how Constructor is to proceed." Paragraph 3.16.2 also states that the contractor cannot be required to perform any work related to the differing condition without the written mutual agreement of the parties. But this provision appears to be trumped by ¶ 8.2.1 which requires the contractor to proceed with an Interim Directive to perform disputed work. This interpretation is reinforced by the final sentence of ¶ 3.16.2 which provides that any dispute as to the existence or nature of a differing condition is to be determined as provided in Article 8.

Assume the worst condition for the contractor— the owner's Interim Directive states that there is no differing condition and the contractor is to proceed according to the contract documents — Article 8 offers the contractor two choices at this point. Because the owner is obligated to issue an Interim Directive even if it believes no differing condition exists, the contractor can furnish the owner with an estimate of the cost to perform the disputed work pursuant to ¶ 8.2.1. Alternatively, the contractor could give notice of a claim pursuant to ¶ 8.4.

Referring back to our boring logs example, if the owner disputes the existence of a differing condition, the owner is essentially saying that the contractor should have included dewatering and other costs of dealing with the existing condition in its original price. If the contractor provides the owner an estimate of increased costs, ¶ 8.2.2 allows the contractor to begin invoicing for the disputed work and requires the owner to pay 50% of the contractor's actual cost to perform the disputed work. If the contractor gives notice of a claim, the contractor is required to provide supporting documentation, but the owner is only required to respond in writing denying or approving the claim. Of these two alternatives, the first is far better. A savvy contractor will avoid any use of the word "claim" during the course of the project.

But it is easy to misstep at this point. Many project managers and project superintendents are guilty of putting their written contract in a fireproof safe and then administering the project based on their prior experience and without reference to the safely-stored written contract. In such instances, it is all too easy for the project manager or superintendent to fire off a letter, or more likely an e-mail stating the intent to make a "claim" for the contractor's increased costs. At that point, a savvy owner, desiring to avoid the cost sharing provisions of ¶ 8.2.2, will simply deny the claim and invoke Article 12 to insist that the contractor continue work while the dispute is resolved.

In the final analysis, the practical approach to resolving a concealed or unknown site condition involves three relatively simple steps. Step one—take control of the situation if at all possible. Step two, if step one doesn't work—take advantage of the owner's obligation to issue an Interim Directive to be paid half the cost of any disputed extra work. Step three—avoid the word "claim" until the end of the project at which time a claim may be necessary to recover the unpaid half of the cost of the extra work.

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The 2018 Update to the CPR's Non-Administered Arbitration Rules: A Reflection of Current Trends in Arbitration

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I. Introduction

On March 5, 2018, the International Institute for Conflict Prevention & Resolution (**CPR**) unveiled its revised Non-Administered Arbitration Rules (the **CPR Non-Administered Rules**). The 2018 revisions mark the first update to the CPR Non-Administered Rules since 2007 and generally reflect ongoing trends in arbitral practice.

Although the CPR began offering administered arbitration services in 2013, the CPR is best known for its Non-Administered Rules for *ad hoc* domestic business-to-business arbitration. The 2018 revisions to the CPR Non-Administered Rules include, among others, provisions concerning multiparty arbitration, the apportionment of costs, and emergency arbitration—features that are relatively common among leading arbitration rules.[i]

There are, however, a pair of revisions that are worth a second look: the "screened selection" process and cybersecurity measures. While the CPR's "screened selection" process and cybersecurity measures are not entirely new to the arbitration community, they reflect efforts by arbitral institutions to address concerns with the dispute resolution process. As a result, arbitration users within the construction industry are well advised to familiarize themselves with these trends.

II. Screened Selection Rule

In its inaugural Administered Arbitration Rules from 2013, the CPR incorporated a "screened selection" process for party-appointed arbitrators. At its core, the CPR's screened selection process enables the parties to select party-appointed arbitrators without informing the arbitrator-candidates of the appointing party in order to eliminate perceived bias by party-appointed arbitrators to their appointing party.[ii]

The 2018 revisions allow parties to select the CPR's screened selection procedures in the CPR Non-Administered Rules. According to Rule 5.4, if the parties have opted into the CPR's screened selection process, the CPR will invite the parties to provide a list of potential arbitrators to the CPR, drawn in whole or in part from the CPR's Panels of Neutrals, to be circulated between the parties by the CPR. At the time the CPR circulates the parties' list of potential candidates, the CPR also provides a confirmation of the candidates' availability and the disclosure of any circumstances that might give rise to concerns over the candidates' lack of impartiality or independence. From the list of candidates, the parties select three candidates, in order of preference, for their party-appointed arbitrator and notify the CPR and opposing party of their selections in writing. If there are no objections to the most preferred candidate on either parties' list, then each party's first choice is appointed by the CPR. If a party reasonably objects to the opposing party's first choice, the CPR then moves down the list of potential arbitrators until an unobjectionable candidate is selected. Importantly, throughout this process, the CPR ensures that the potential party-appointed arbitrators remain unaware of the party that selected them.

While other institutions have utilized similar procedures, the CPR's 2018 revisions suggest that "blind" or screened selection procedures are gaining greater acceptance in the marketplace.[iii]

III. CPR's Cybersecurity Measures

The 2018 update to the CPR Non-Administered Rules also includes a new provision concerning data protection and cybersecurity measures. With reference to the initial pre-hearing conference, Rule 9.3(f) provides that the parties *may* consider a variety of matters concerning the administration of the arbitration, including "[t]he possibility of implementing steps to address issues of cybersecurity and to protect the security of information in the arbitration." By including an explicit reference to cybersecurity, the 2018 revisions suggest that tribunals consider adequate measures to ensure the protection of the parties' confidential information.

The CPR's efforts to focus attention on cybersecurity in arbitration are commendable, as the need to protect confidential information is among the most pressing issues facing the legal community and its clients. Rule 9.3(f) takes a significant step forward from prior rules by explicitly reminding all tribunals to discuss data protection and cybersecurity issues at the outset of the arbitration.

The arbitral institutions, including the AAA, ICC, CPR, and others, have made significant investments in recent years toward securing their IT systems, and the data provided to them, during the course of an arbitration. [iv] Law firms and their clients have similarly made significant investments in cybersecurity and data protection. The weakest link tends to be the arbitrators, many of whom are sole practitioners who lack the technical support provided by larger organizations and many of whom may not have "grown up" with a computer on their desk. Certainly, arbitrators are mindful of their duty to protect the confidentiality of the arbitration information, and they secure their arbitration papers in their office or home office. However, they may not always fully consider the policies needed to secure the electronic data of the parties to the arbitration. The days of boxes of binders and paper have been replaced with thumb drives, hard drives, cloud storage, and secure drop boxes. Data may be downloaded or viewed in hotels or coffee shops or on other public or non-secured networks. Some or all of the data may accessible on the arbitrator's personal desktop, laptop, tablet, phone, thumb drive, hard drive and/or other portable devices. In short, the security of this arbitration data rests with the arbitrator who possesses or has access to it, and that protection may only go as far as the arbitrator's own technological savvy.[v]

The CPR should be commended for reminding arbitrators to discuss issues of cybersecurity and data protection at the initial pre-hearing conference. Rule 9.3(f) facilitates the discussion between the tribunal and the parties from the outset of the case and, as best practices would suggest, may ultimately produce an appropriate confidentiality and data protection protocol for each case.

IV. Conclusion

While the CPR's 2018 revisions generally reflect features that are relatively common among leading arbitration rules, they are an indication of where future arbitral practice is headed. As a result, construction industry leaders should be mindful of these developments in alternative dispute resolution.

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Steel and Aluminum Tariffs

In light of new and possibly more tariffs impacting construction, we are getting questions. Fortunately, ConsensusDocs offers some helpful tools for you and your members that can potentially help new and even existing contracts. The ConsensusDocs 200.1 Time and Price Impacted Materials Amendment and Schedule A provides language to consider using in new contracts that is flexible, and allows prices to escalate up or down based on objectives indexes that you choose. Also, for existing contracts you should inspect contract language in regard to changes. ConsensusDocs is the only standard contract that includes explicit language that a change in the law, including taxes merits a change in contract price (more info below).

A relevant contractual tool in light of tariffs is the ConsensusDocs 200.1 Time and Price Impacted Materials Amendment and Schedule A. The document can be attached to any prime agreement potentially and then can be also be used for subcontract agreements as well. The Guidebook for the 200.1 Amendment can be found here.

- The 200.1 Amendment is flexible for any material so a specific index is not listed. Also note that prices can escalate or descend, which is one of the reasons why construction owners' groups like the National Association of State Facility Administrators, the Construction Users Roundtable and Construction Owners Association of America, have endorsed this document as part of the ConsensusDocs in 2007 (along with AGC). Members can download sample of the 200.1 just by registering on the ConsensusDocs website.

- Lastly, provisions in ConsensusDocs standard construction contract are relevant to this discussion. Unlike other standard contract document produced in the industry that are all silent on this issue, ConsensusDocs explicitly says that a change of law after contract signing merits a price adjustment through change order. Under the ConsensusDocs 200 Owner/Constructor Agreement and General Conditions ©2016, §3.21 requires the Constructor (General Contractor) to comply with all applicable laws at their costs. However, §3.21.1. explicitly states: "The Contract Price or Contract Time shall be equitably adjusted by Change Order for additional costs or time needed resulting from any change in Law, including increased taxes, enacted after the date of this Agreement (emphasis added)." The 200 is for design-bid-build, but this provision is flowed down consistently to other applicable ConsensusDocs lump sum agreements, such as the ConsensusDocs 415 Design-Build Agreement (Lump Sum).

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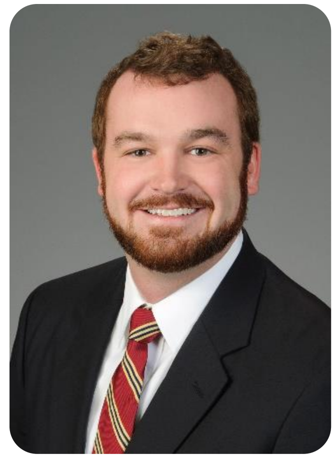
The Federal False Claims Act: Even Routine Pay Applications Can Be a Trap



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Violations of the False Claims Act ("FCA") (31 U.S.C. Code § 3729) can lead to devastating penalties, both civil and criminal, for contractors. This article is limited to the risk that seemingly routine payment applications can be the basis for finding FCA violations through the "Implied Certification Theory" developed by U.S. federal courts. The scope of that FCA risk extends beyond contracts with the Federal government to include federally funded state and local projects.

In 2018, if a FCA claim is successfully brought against a contractor, that contractor is likely going to be liable for a civil penalty of not less than $11,181.00 and up to $22,363.00 for each FCA violation. In addition to these civil penalties, FCA violations also entitle the government to recover treble the damages actually sustained as a result of the contractor's violation. The costs associated with a FCA violation rack up quickly, and beyond those dollars, civil FCA violations often generate suspension or debarment actions or criminal investigation. No contractor can afford to fail to understand the scope of this FCA risk in the payment application process or fail to take proactive and reasonable steps to avoid such violations.

The categories of false claims under the FCA include, among others, (1) factually false claims (i.e., contractor billing for services not provided); and (2) legally false claims (i.e., a contractor certifying a claim that violates an applicable statute, regulation or contract provision). Although it may seem easy for a contractor to avoid submitting such defective claims for payment, both factually and legally false claims can be difficult to detect and may require extra scrutiny and resources to avoid. This is especially true given the development of the FCA legal doctrine known as the Implied Certification Theory.

Under the Implied Certification Theory, upheld by the Supreme Court in *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), a contractor certifies its compliance with all applicable statutes, regulations, and contract provisions simply by submitting a claim for payment. This means that an explicit certification of compliance with a law is not required for liability to attach under the FCA. In order for a misrepresentation to be actionable under the FCA (note that such claims can be brought by the government AND by an individual on the government's behalf) using the Implied Certification Theory, a claimant must show two things: (1) that the misrepresentation was material; and (2) knowledge of the misrepresentation on the part of the contractor.

There is a great deal of confusion and debate surrounding the materiality aspect of implied certification FCA claims. In upholding the Implied Certification Theory, the Supreme Court indicated that to be material a payment claim must "make those representations [to the government] misleading with respect to those goods or services [for which payment is requested]."[vi] Following the Supreme Court's reasoning in *Escobar*, implied certification liability under the FCA turns on whether the misrepresentation had the ability to influence the Government's decision-making regarding payment of the contractor's claim. Thus, any misrepresentation, regardless of how small, that influences the Government's decision to pay the contractor, may be actionable under the FCA.

After the *Escobar* decision, several lower courts have dealt with implied certifications and the materiality requirement articulated by the Supreme Court. In *United States ex rel. Wood v. Allergan, Inc.*, the Southern District of New York indicated that to determine whether the alleged false certifications of compliance were materially false, a court must examine whether the Government consistently refuses to pay claims based upon non-compliance with some particular provision or requirement.[vii] In other federal courts, defendants facing FCA claims have tried to argue that *Escobar* raised the bar on the FCA's materiality requirement. The Eastern District of Virginia expressly rejected such an argument and instead found that *Escobar* clarified the materiality bar through examples but did not alter the requirement itself.[viii] According to at least this Court, the definition of "material" remains unchanged in the wake of the *Escobar* holding. However, the decision in *Oberg* is not binding on other jurisdictions, and the full breadth of *Escobar* and its impact on the materiality requirement of an FCA claim is still unknown. It will take some time for the Federal Circuit Courts of Appeals to reach consensus on the question of materiality in implied certification FCA claims, if they ever do. Until further clarification is provided, contractors should err on the side of caution and treat any and all claims on government projects and the information contained therein as material for purposes of the FCA.

The other key aspect of an FCA claim, which is applicable to Implied Certification Theory claims, is the requirement that the contractor have knowledge of the misrepresentation in its claim to the government. "Knowing" is a defined term in the FCA (31 U.S.C. § 3729(b)), and it provides for three forms of knowledge: (1) actual knowledge of the information; (2) acting in deliberate ignorance of the truth or falsity of the information; and (3) acting in reckless disregard of the truth or falsity of the information. Contractors should also note that the FCA and courts do not require a showing of specific intent to defraud the government on the part of the contractor. This means that if a FCA claimant shows that a contractor had one of the forms of knowledge listed above at the time it submitted a payment claim to the government, no further scienter, meaning "guilty knowledge," showing is necessary.

In *United States v. DynCorp. Int'l, LLC*, the court applied the scienter requirement for a valid FCA claim brought under the implied certification theory.[ix] That court held that the scienter requirement under the implied certification theory of recovery, demanded that the plaintiff must prove the defendant knows: (1) it violated a contractual obligation; and, (2) its compliance with that obligation was material to the Government's decision to pay.[x] At first glance, it may seem easy for a contractor to argue it did not "know" it violated a contractual obligation, but that is not the case. First, there is the expansive definition of "knowing" in the FCA, which greatly increases the likelihood a contractor will be found to have knowledge regarding the violation. Second, the broad nature of modern construction contracts, including provisions requiring contractors to abide by all applicable laws and regulations, greatly increase the chances of a contractor "knowing" it in some way violated the terms of a contract.

To avoid a claim under the FCA, a contractor should take several important steps. First, it should dedicate resources on the front end of a project to ensure it understands all of its responsibilities under the contract. This goes well beyond understanding and properly bidding the scope of work and should also include a thorough review of all applicable federal statutory, regulatory, and contractual requirements. Contractors should make sure that no unique legislation (such as environmental regulations protecting bird mating seasons) will impact their ability to perform their scope of work in the contractually agreed on time period. Contractors should also dedicate resources to thoroughly review and document the payment claims they submit to the government. Theoretically getting paid for work already performed should be the easy part for the contractor; however, in reality there are detailed contractual and statutory requirements that payment claims must adhere to. Additionally, the backup documentation that must be submitted along with the claim can be extensive and complex. Strict compliance with these requirements can help a contractor if a FCA claim arises in the future. Both of these steps will command resources a contractor could undoubtedly use elsewhere or save to increase its profit margin, but committing to such practices will be advantageous to help avoid the penalties associated with a FCA violation.

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Potential Risks of Taking Equity Stakes in Construction Projects

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In our practice, we have seen a number of our contractors' clients take equity stakes in projects to be developed. The equity is usually in the form of equity in a limited liability company (a "Company") which owns, or will own, the real property on which the project will be built and the improvements. Owning equity in a project can certainly have a financial upside, but it can also come with risks. The following issues should be considered before taking any equity stake project:

Management. Who will be managing the Company? Will the management of the Company have authority to make all decisions on behalf of the Company, or will management's authority be limited to day to day management? Does management have the requisite qualifications to manage a project of such scope, size and complexity? Will major decisions, such as sale of assets, entering into a mortgage and/or construction loan and/or dissolution require the consent of equity holders, and if so, what percentage vote is necessary? Will management fees be paid to a manager and if so, are those fees market-rate fees? Is the management also equity holders of the Company, and if so, does the management have the right to pay themselves and/or their affiliates other fees and/or reimbursements? If the management is not performing, do the equity holders have the right to remove the management for cause? On what other grounds should equity holders have the right to remove management? Not having a voice in at least major decisions, or understanding how a management and/or affiliates of management are paid, or having the ability to remove management for cause, could lead to management depleting the Company of cash (and having to call on equity holders for additional capital or loans) or entering into transactions which put the company, its assets, and a contractor's investment at risk.

Capital Calls and Loans. What is the budget for development of the project? Does the Company have sufficient capital to satisfy the equity requirements of a construction lender? If not, how will the Company raise cash to fund the development budget and equity requirements, by loans from equity holders or capital calls? Will the capital calls or loans be mandatory or voluntary? If loans from equity holders, will interest be paid on the loans and if so, what is the rate? Will such loans be paid off, with interest, before any distributions to equity holders are made? What if one or more equity holders do not make the loan or capital contribution? Will their ownership interests be diluted? Will they be deemed to owe the funds to the Company anyway, with interest? Will other equity holders be given the opportunity to make the loan or contribution on behalf of a defaulting equity holder?

Distributions. When will distributions of available cash to equity holders be made? Do any equity holders have a priority return of capital, or other priorities in distributions? If so, how does that priority affect the return the contractor will ultimately receive? Are equity holder loans paid before distributions, and if so, how might this affect an equity holder who does not make a loan? Upon completion of the project, will the Company sell the project and if so, will there be enough funds to pay off equity holder loans and return capital to the equity holders? If not sold, will the project generate sufficient cash flow to meet debt service obligations to the construction lender?

Transfers. What if the contractor wishes to sell its assets, merge with another entity, or transfer its equity interest to an affiliate or third party? Are transfers of equity restricted in any way? If so, how does this affect the contractor's exit strategy?

Type of Investments. For example, contractors are making long term investments today in public-private partnerships (P3s). In addition to being paid for constructing the asset, contractors are now seen, on occasion, putting equity into the sponsor's Limited Liability Company (LLC), known as the Special Purpose Vehicle (SPV). The SPV contracts with the owner, normally under a Project or Concession Agreement, to design, build, finance, operate and maintain the asset. The owner makes payments to the SPV in form of availability payments or otherwise shares the revenue stream from user fees like rental payments or tolls. Joining the SPV, the contractor is both in privity with the owner, which gives more clarity into items like scope and changes, and has the opportunity to earn a return on their equity over the life of the project or for however long they stay in the SPV. This approach has been seen in the transportation sector (roads, bridges, airports) and social infrastructure like public buildings, schools and courthouses. The contractor may also perform work beyond the initial construction of the asset, including during the 35 to 90 years operation and maintenance period. Contractors should seek counsel on the challenges of acting as both a service provider and equity partner as conflicts may arise regarding profit incentives. Other challenges may exist between risks and investment periods. Equity sponsors would typically be invested in a project for the mid-to-long-term. But construction companies may not want to remain invested in a project after substantial completion.

The foregoing issues should be addressed in the operating agreement of the Company, which should be carefully reviewed and negotiated by any contractor taking equity in a project.

If the project is to be developed, it will likely require construction financing. Construction financing can also pose risks to a contractor taking equity in a project:

Guarantees. Will the lender require a personal guaranty from the contractor and/or other equity holders? If so, what is the scope of the guaranty? Will it be unlimited and unconditional for all amounts due to the lender under the construction loan? Will the contractor's liability under such a guaranty be joint and several, even if the contractor owns a minority stake in the project? Will it be limited to damages and amounts due under the loan as a result of "bad boy acts" of the Company (i.e.-fraud, waste, misappropriation of funds)? Will the lender also require the contractor and/or other equity holders to provide a completion guaranty pursuant to which they guarantee completion of the project? Are there adequate contribution and indemnity agreements to ensure that guaranty payments are spread equitably amongst the equity holders?

Pledges. Will the lender require the contractor and other equity holders to pledge their equity in the company as collateral for the loan? If so, the contractor must be aware that in the event of default under the loan, the contractor may lose its entire equity interest in the project.

These are just a few of the issues and risks a contractor should consider prior to taking equity in any project. A contractor would be wise to consult with their attorney to minimize the risks described above.

*Special thanks to Frank M. Rapoport for his contributions to this article regarding P3s.

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[i] *See, e.g.,* American Arbitration Association (AAA) Commercial Rules (updated in 2013); AAA Construction Industry Rules (updated in 2015); International Centre for Dispute Resolution Rules (updated 2014); ICC International Court of Arbitration (ICC) Rules (updated in 2017); London Court of International Arbitration (LCIA) Rules (updated 2014).

[ii] Whether such bias actually exists is the subject of some debate. *See* Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID Rev. 339 (2010); Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (2011); Charles Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-Van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 6 WORLD ARB. & MED. REV. (2012); Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, ARIZ. LEGAL STUDIES DISCUSSION PAPER NO. 16-31 (2016).

[iii] While the AAA has informally offered list and appointment services on non-administered matters for a long time, it formally began offering the AAA's "À La Carte Services" for non-administered cases, including similar assistance with the screening, selection and "blind" appointment of arbitrators, in 2016.

[iv] It has been reported that the Permanent Court of Arbitration at the Hague was hacked in 2016 during the course of a contentious and widely reported arbitration it administered between the Philippines and China involving historic rights and maritime entitlements in the South China Sea. This event has contributed to the speed with which arbitral institutions have addressed their cybersecurity issues.

[v] Additional training for arbitrators and their staff in data protection and cybersecurity has been the subject of discussion at many arbitral institutions. For example, the AAA recently announced a cybersecurity training initiative for arbitrators. It is likely that other providers will also make data protection and cybersecurity training a priority for arbitrators.

[vi] *Escobar*, 136 S. Ct. at 1993–1994 (emphasis added).

[vii] *United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 811 (S.D.N.Y. 2017), *motion to certify appeal granted*, No. 10-CV-5645 (JMF), 2017 WL 1843288 (S.D.N.Y. May 4, 2017).

[viii] *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 2017 U.S. Dist. LEXIS 68616, at *2 (E.D. Va. May 3, 2017).

[ix] *United States v. DynCorp. Int'l*, LLC, 253 F. Supp. 3d 89, 102-03 (D.D.C. 2017).

[x] *Id.*