

## 2 Dispute Resolution Choices For Construction Contracts

By **Stacy La Scala** (May 7, 2018, 2:41 PM EDT)

It was the best of provisions; it was the worst of provisions, crafted by the wise and well-meaning alike. For years, construction documentation has been primarily sourced from the American Institute of Architects. The AIA provided guidance through the publication of contractual provisions involving many aspects of the construction process, including alternative dispute resolution, or ADR. It has been observed that the documentation provided by the AIA generally favored both owners and architects, whose forms, as used by contractors, typically required amendment and modification. So much so that in 2007 a group of owners, contractors, subcontractors, designers and sureties came together and published their own set of construction contract documents called ConsensusDocs, and updated it in 2017.



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For construction practitioners, serious consideration must be paid to the ADR provisions up front, as a failure to understand and allocate the tail risk can have dire consequences; hence, a tale of two approaches to ADR.

### ConsensusDocs — ADR

The ConsensusDocs ADR provisions provide a multistep process by which party representatives are initially required to negotiate with one another. Failing resolution, senior executives are then required to meet in good faith to attempt resolution of the dispute. The ADR path in the ConsensusDocs then forks depending upon the needs of the parties at the time of contracting. One path sends the parties a mitigation procedure involving a nonbinding finding by either a project neutral or a dispute review board, whose determination may be introduced in subsequent litigation.

If the parties did not choose to go through the mitigation procedure at the time of contracting, the second path leads to mediation. The mediation option includes the ability to select mediators from AAA, JAMS or a body of the parties' choosing. The provision provides that the parties choose mediation through one of the following:

- The current Construction Industry Mediation Rules of the American Arbitration Association, or AAA, administered by the AAA
- The current Mediation Guidelines of JAMS, administered by JAMS
- The current rules of [\_\_\_\_\_] administered by [\_\_\_\_\_]

If the mediation or mitigation processes fail to resolve the dispute, the ADR paths merge, sending the parties to binding arbitration or litigation. If arbitration is selected, the parties are given the option to determine which rules will be applied to their dispute. Article 12.5.1.2 provides that the arbitration shall use one of the following:

- The current AAA Construction Industry Arbitration Rules administered by the AAA; AAA Construction Fast-Track Rules shall apply to all two-party cases when neither party's disclosed claim or counterclaim exceeds \$250,000. If arbitration is selected but no rules are selected, then this subsection shall apply by default.
- The current JAMS Engineering and Construction Arbitration Rules and Procedures, administered by JAMS
- The current Arbitration Rules of [\_\_\_\_\_] administered by [\_\_\_\_\_]
- AIA ADR

Like the ConsensusDocs ADR provisions, the AIA ADR provisions were also updated in 2017. Of particular interest in the new AIA ADR provisions are new time restrictions, which, if not followed, may severely restrict a party's rights, including a potential waiver.

In contrast to ConsensusDocs, there are no requirements that the parties meet in order to resolve the matter. Instead, the AIA ADR provisions have two separate dispute resolution paths determined by the time that a claim arises. Claims are defined broadly to include all disputes and matters in question between the owner and contractor arising out of or relating to the contract.

For claims that arise prior to the first year following substantial completion, the owner and contractor are required to submit their dispute to an initial decision-maker, or IDM, "within 21 days after occurrence of the event giving rise to such claim, or within 21 days after the claimant first recognizes the condition giving rise to the claim, whichever is later." The AIA form, by definition and default, designates the architect of record as the IDM.

If a dispute remains following the IDM's decision, there is a demand-shifting procedural step, new to the 2017 form, that gives either party the power to compel the other party within 30 days to proceed to mediation. Failure to timely proceed to mediation signifies a mutual waiver of rights for that claim.

For claims that arise after the first year following substantial completion, the parties go directly to mediation. This new demand-shifting provision appears once again in the mediation provisions. Should the matter fail to resolve at mediation, either party may demand, within 30 days following mediation or 60 days following the demand to mediate, that the other party proceed with arbitration or litigation. Should the party receiving the demand fail to file a demand or suit, then both parties waive their rights to proceed to arbitration or litigation.

It should be noted that, where neither party triggers the demand-shifting provisions contained within the AIA ADR provisions, there is apparently no waiver of the right to proceed to future mediation, arbitration or litigation. Of course, this does not foreclose later arguments that known claims may be barred by shortened statute of limitations periods.

## Comments and Considerations

The new AIA ADR provisions appear to build upon case law enforcing modified and “agreed upon” time-bar limitations of actions between the owner and contractor. In particular, in *Brisbane Lodging LP v. Webcor* (2013), limitations on the “delayed discovery” rule<sup>[1]</sup> were upheld in the 1997 version of the AIA standard form agreement between the owner and contractor. The same provision found enforceable in Brisbane has been renumbered as Section 15.1.1 and relocated within the ADR provisions of the 2017 form. In conjunction with the broad-based definition of claim, and the new “demand shifting” provisions discussed above, there appears to be a clear intent by the AIA drafters to further identify and restrict potential future claims among the contracting parties.

Parties considering the use of either ConsensusDocs or AIA forms need to understand that each set of construction documents requires thoughtfulness and upfront risk assessment. The decisions at the time of contracting will have a significant impact on both the timing and resolution of any future dispute.

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[1] prior Section 13.7

[2] Section 15.1.1