

C o n s t r u c t i o n L a w  
A L E R TJULY  
2008IF YOU WANT TO ARBITRATE YOUR CONSTRUCTION DISPUTE,  
BE SURE TO “OPT-IN”

The American Institute of Architects’s (“AIA”) document A201 (General Conditions of the Contract for Construction) is an integral part of all construction contracts that utilize the AIA approach. It sets forth the rights, responsibilities and relationships between the owner, contractor and architect and contains the terms and conditions for the entire construction project. Other AIA documents, including the owner/architect agreements, owner/contractor agreements and contractor/subcontractor agreements, refer to and adopt A201.

As part of its ten-year periodic revision of the AIA Contract Documents, the AIA, in the fourth quarter of 2007, revised the previous version of A201, A201-1997, and released a new version, A201-2007. Based on the input from more than a dozen industry groups, the AIA made a variety of changes to A201, including several changes to the provisions governing construction claims and disputes. The drafters placed the provisions related to claims and disputes in a new article of the contract, where previously this material was dispersed among various sections.

In 1997, the AIA added mediation as a condition precedent to arbitration. Similar to the prior version, A201-2007 still requires that the parties engage in mediation prior to proceeding with any other method of binding dispute resolution. The new version requires the parties to have the American Arbitration Association (“AAA”) administer their mediation as a default, but it

permits the parties to mutually select a non-AAA mediator if desired. The process for a party to proceed with a request for mediation concurrently with any binding dispute resolution process is the same in the new version of A201 as in the previous version. The mediation proceeding begins while the binding dispute resolution proceeding is stayed for a period of sixty days from the date of the mediation filing. A201-2007 now clarifies that it does not stay the parties’ selection of arbitrators or a preliminary hearing to schedule later arbitration proceedings, despite the stay of other arbitration proceedings.

A201-2007 has not adopted the provision that required mandatory arbitration to resolve contract disputes, and parties now have the freedom to select their own binding dispute resolution method in their agreements or resort to litigation as a default. Previously, in A201-1997, if a party pursued “[a]ny claim arising out of or related to the Contract . . .” then that claim was “subject to arbitration . . .”

AIA documents have required mandatory arbitration for the past 100 years or so, because arbitration was widely considered both cost-effective and quicker than a trial. Many parties that enter into construction contracts prefer arbitration because of the belief that an overworked judge or a jury that is unfamiliar with the construction industry would not truly understand a complex design or construction dispute.

Arbitration permits the parties to choose an arbitrator who has construction industry experience. Many

*(continued on page 2)*

---

*(continued from page 1)*

parties prefer arbitration because arbitration judgments are generally final, are not subject to appeal (except in rare instances of arbitrator misconduct), and the discovery and motions practice is much more abbreviated than in traditional litigation.

Within the past decade, some parties in the construction industry have become dissatisfied with the arbitration process. As projects and methods for the delivery of construction goods and services have become ever more complex, disputes have increased within the construction industry. Some in the industry now believe that the benefits of arbitration have dissipated as that process has become more expensive and time consuming, especially in large or document intensive arbitrations. Additionally, some parties believe that the arbitration appeals process is problematic because parties are rarely allowed to appeal from a judgment, and such appeals are often unsuccessful.

In light of these different opinions regarding arbitration, the AIA revised the owner/contractor and owner/architect agreements to provide parties with an option of a binding dispute resolution method. Parties can use a check box to select which binding dispute resolution process they prefer to use if a dispute arises. The options listed are “litigation,” “arbitration,” or “other,” with a place provided for the parties to state the other method. Under A201-2007, “any claim . . . shall be subject to arbitration . . .” only “[i]f the parties have selected arbitration as the method for binding dispute resolution in the Agreement . . .”

The AIA also decided that “litigation” must be the default binding dispute resolution method, because arbitration, by its nature, is a voluntary dispute resolution process which contracting parties may agree to employ. If arbitration were the default, ambiguity and more litigation could result. If the parties failed to select any check box, a court could

---

determine that, despite a default arbitration provision, the parties did not agree to arbitrate their dispute.

Thus, parties that desire to arbitrate their disputes should be certain to check the appropriate box in their agreement. Otherwise, litigation will be the dispute resolution process by default.

If parties opt for mediation or arbitration under A201-2007, certain rule changes will govern that dispute resolution process. Under the prior version of A201, the AAA rules at the *time of the dispute* would govern the process. The AIA revised its A201-2007 to provide that the applicable rules for mediation or arbitration will be those that are in effect *on the date the parties made the agreement*. The AIA reasoned that the parties will have had no input into the AAA’s rule changes, and thus should not bear the risk that such changes would have a bearing on their dispute. ♦

*For further information, please contact the authors:*

*Gregory A. Koory*  
215-751-2636  
[gkoory@schnader.com](mailto:gkoory@schnader.com)



*Michael G. Bock*  
412-577-5213  
[mbock@schnader.com](mailto:mbock@schnader.com)



\* \* \*

*This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking legal action.*