



Comparison of the Various Types of Alternative Dispute Resolution Specified in the AIA and Consensus DOCS Contract Documents

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In the fall of 2007, the Associated General Contractors of America (AGC), along with twenty other construction and trade organizations, created and endorsed the new ConsensusDOCS documents to be used as contracts for construction projects. "DOCS" is an acronym for designers, owners, contractors, and sureties. The ConsensusDOCS can be compared and contrasted with the similar American Institute of Architects (AIA) construction contract documents. These documents now provide parties with two sets of contract documents to choose from in construction projects. Likely, the nature of the project may determine which set of documents is utilized. This article discusses the major differences between types of alternative dispute resolution called for in the AIA A201 General Conditions Document and the ConsensusDOCS 200 General Conditions Document.

The AIA documents no longer mandate arbitration as the method of binding dispute resolution, and furthermore, if arbitration is not explicitly chosen, the default dispute resolution mechanism will be traditional litigation. Contrarily, while the ConsensusDOCS have a provision for the parties to choose their alternative dispute resolution mechanism, the ConsensusDOCS do not have an express default provision for litigation as the AIA documents do; rather they are silent as to a default mechanism. As a practical and legal matter, the default is likely litigation.

In the AIA documents, mediation is a prerequisite to binding dispute resolution such as arbitration. Arbitration takes place after mediation is proven unsuccessful. Additionally, AIA documents require a third party to assist in the dispute resolution process, whereas the ConsensusDOCS do not require a third party, rather they promote cooperation and fair dealing between the parties. After the AIA 2007 document changes, parties have the right to choose the third party to govern the alternative dispute process, called the "Initial Decision Maker" (IDM), and if the parties do not choose someone other than the

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architect, the architect will maintain the role as the IDM.¹ Pursuant to the AIA A201, the IDM must render a decision regarding the dispute prior to the issue proceeding to mediation.²

In comparison, the ConsensusDOCS do not have an initial decision requirement prior to proceeding to mediation. The ConsensusDOCS require the parties to attempt to resolve disputes first through informal negotiations referred to as “direct discussions” between representatives of the parties, and if they are unsuccessful, then discussions between senior executives of the parties; if the direct discussions are unsuccessful then the matter will be submitted to dispute mitigation and/or resolution procedures.³ Furthermore, the ConsensusDOCS allow for the parties to choose a Project Neutral or Dispute Review Board as their dispute mitigation procedure, but if neither is chosen, then mediation will be the next step after the informal negotiations.⁴ If mediation is unsuccessful, the ConsensusDOCS provide that the parties will then proceed to binding dispute resolution such as arbitration.⁵

Moreover, the AIA documents require that alternative dispute resolution processes be administered by the American Arbitration Association (“AAA”). Conversely to the AIA documents, the ConsensusDOCS do not require that the alternative dispute mechanism be administered by the AAA, rather they only require that the parties attempt to resolve the matter through mediation or arbitration pursuant to the current “Construction Industry Mediation Rules” of the AAA, unless the parties mutually agree to utilize another set of arbitration rules.⁶ The ConsensusDOCS do not specify an organization to administer the alternative dispute resolution procedures, only which rules must apply.

¹ AIA Document, *supra* note 1, at § 15.2.

² *Id.* at § 15.2.5.

³ ConsensusDOCS, *supra* note 2, at § 12.2.

⁴ *Id.* at ~ 12.3, 12.4.

⁵ *Id.* at ~ 12.4, 12.5.

⁶ *Id.* at § 12.4.