

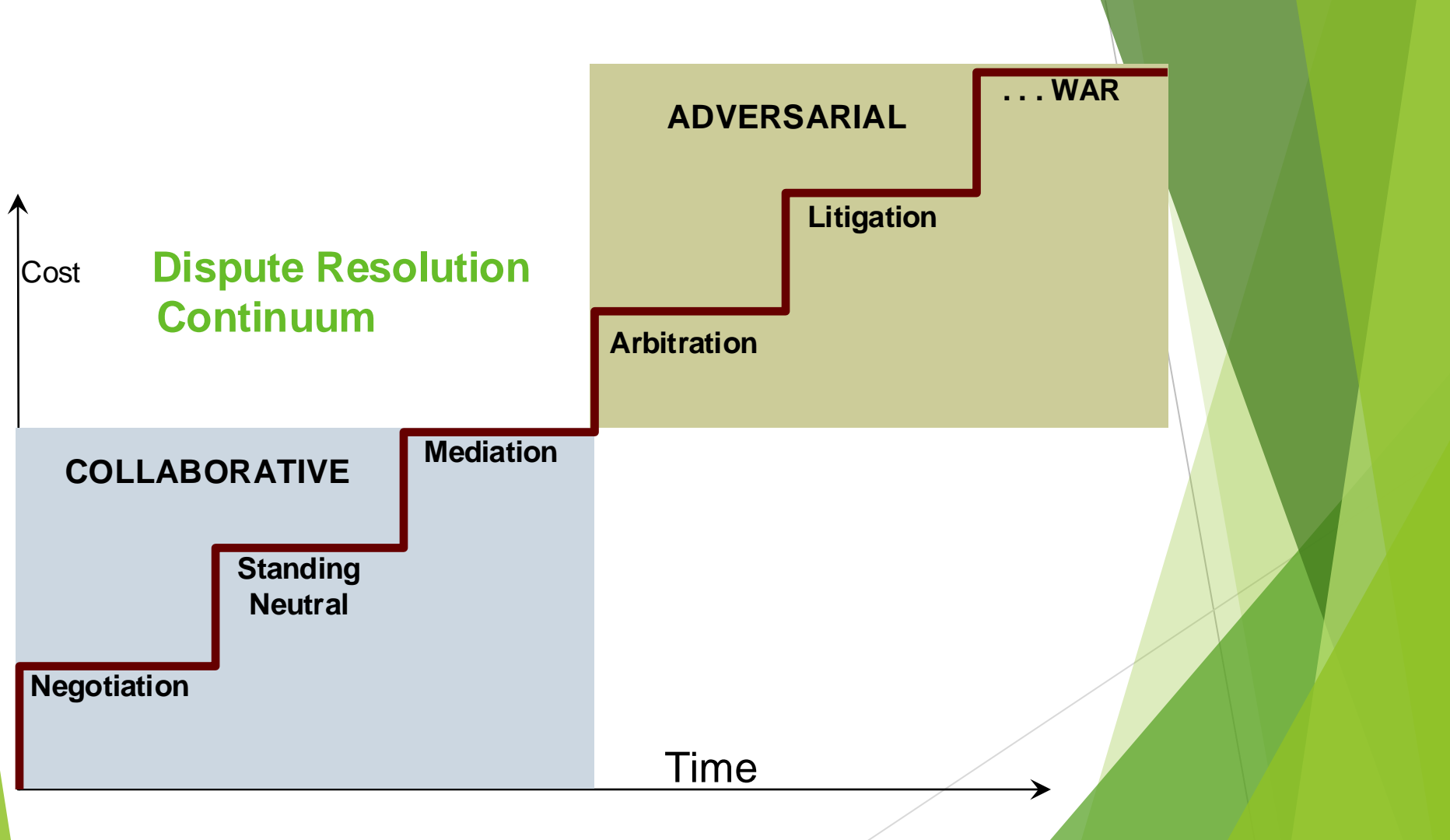


AMERICAN ARBITRATION ASSOCIATION®

# Construction Alternative Dispute Resolution 101



# **What is Dispute Resolution**



# Axioms of Dispute Resolution

- A dispute belongs to the parties involved.
- The parties most directly affected by a dispute are, given the right circumstances, those best able to resolve it.
- Therefore, the best resolution is likely to flow directly from the parties.
- As a neutral's involvement increases, greater and greater decision-making power flows from the parties to the neutral.

# Starting with Collaborative Process

- Create opportunity to intervene and facilitate a solution
  - Avoidance of claims = primary goal
  - Mitigation of impacts = secondary goal
- Continue working on a project without interruption
- Plan B: Dispute Resolution

# Getting to Dispute Resolution

Dispute Resolution Clauses should be drafted into your contract.

Industry Use of Form Documents such as

- AIA Contract Documents
- ConsensusDOCS
- EJCDC
- DBIA
- Others

# www.clausebuilder.org

## Free

on-demand online tool created to help parties draft efficient and **enforceable** arbitration clauses with **clear, concise language**.



# What is Mediation?

## *Understanding How Mediation Works*

Mediation is essentially a negotiation facilitated by a neutral third party. Mediation doesn't involve decision making by the neutral third party.



# Example from AIA Document A201- General Conditions

## §15.3 Mediation

§15.3.2 – Owner & Contractor “shall endeavor to resolve” claims by mediation, administered by American Arbitration Association in accordance with Construction industry Mediation Procedures.

§15.3.4 – Agreements made during mediation are enforceable as settlement agreements.

# The Fundamentals of Mediation?

- The Objective & Goal of Mediation

- ↳ Objective - to improve communication between the parties in order to facilitate negotiations
- ↳ Goal - to reach a settlement *or* to reach an impasse

# The Mediators Role

- Facilitator
- Encourager
- Translator
- Mover
- Influencer
- Guide

# The Phases of Mediation

- Phases of the Mediation Process
  - ❖ Pre-mediation
  - ❖ Initial Joint Session
  - ❖ Caucusing
  - ❖ Closure & Formalization

# Advantages and Perceived Disadvantages of Mediation

## Pros

- Nothing to lose: Voluntary, Private
- Much quicker than litigation and arbitration
- Opportunity to hear each other in a non-Confrontational setting
- Opportunity to test the theories and strengths of your case
- Opportunity to describe the dispute from client's perspective
- Parties actively participate & retain control of the outcome
- Better at preserving relationships than litigation and arbitration
- Opportunity for creative remedies

# Advantages and Perceived Disadvantages of Mediation

## Perceived Disadvantages

- One or both of the parties may be completely unwilling to cooperate
- One or both of the parties may be completely unwilling to negotiate
- Both parties must agree to a resolution
- May not end in a resolution
- There may be concerns about the enforceability of a mediation agreement
- Mediation may not save time or money (if the parties don't settle or narrow the issues)

# What is Arbitration?

## *Understanding How Arbitration Works*

Arbitration is the private determination of a dispute, by an independent third party.  
Arbitration is generally final and binding.

# AIA Form Documents

## § 6.2 BINDING DISPUTE RESOLUTION

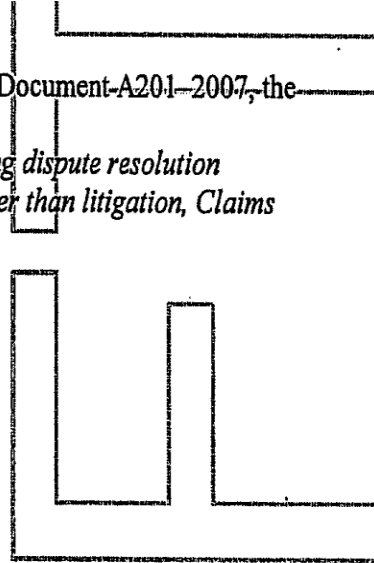
For any Claim subject to, but not resolved by, mediation pursuant to Section 15.3 of AIA Document A201–2007, the method of binding dispute resolution shall be as follows:

*(Check the appropriate box. If the Owner and Contractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)*

☒ Arbitration pursuant to Section 15.4 of AIA Document A201–2007

☐ Litigation in a court of competent jurisdiction

☐ Other *(Specify)*





# AIA Form Documents

## § 15.4 ARBITRATION

§ 15.4.1 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

# ConsensusDOCS

**12.5 BINDING DISPUTE RESOLUTION** If the matter is unresolved after submission of the matter to a mitigation procedure or to mediation, the Parties shall submit the matter to the binding dispute resolution procedure selected below:

☐ Arbitration using:

- ☐ the current Construction Industry Arbitration Rules of the AAA and administered by the AAA;
- ☐ the current JAMS Engineering and Construction Arbitration Rules and Procedures and administered by JAMS; or
- ☐ the current arbitration rules of ☐ and administered by ☐.

Unless the Parties mutually agree otherwise in writing, if arbitration is selected as the binding dispute resolution procedure and this Agreement does not specify the arbitration rules to be utilized, then the arbitration shall be conducted using the current Construction Industry Arbitration Rules of the AAA and the arbitration shall be administered by the AAA.

☐ Litigation in either the state or federal court having jurisdiction of the matter in the location of the Project.

# What is Arbitration?

## *Creature of Contract*

- Parties agree to arbitrate in the contract – before the dispute arises
- Parties can also *agree* to submit their existing dispute to arbitration – but this is rare
- Agreements to arbitrate are enforceable

# Drafting to Meet Your Needs









- General choice of law provision
- Procedures for Large, Complex Construction Disputes (or Fast-Track Procedures)
- Specialized rules, e.g. construction, patent, securities, employment
- Customize and refine the basic arbitration procedures/rules
- Step Clauses (Mediation-Arbitration)

# AAA® ARBITRATION ROAD MAP

## REACHING RESOLUTION



Arbitration is the out-of-court submission of a dispute to an impartial third party or parties for a binding decision. The AAA arbitration administration process comprises a well-defined set of steps by which most commercial cases proceed.

							
FILING AND INITIATION	ARBITRATOR SELECTION	PRELIMINARY HEARING	INFORMATION EXCHANGE AND PREPARATION	MEDIATION STEP	HEARING	POST-HEARING SUBMISSIONS	THE AWARD
<b>DAY 1 - 15</b>	<b>DAY 15 - 44</b>	<b>DAY 44 - 85</b>	<b>DAY 85 - 222</b>		<b>DAY 222-223</b>	<b>DAY 223 - 258</b>	<b>DAY 258 - 288</b>
The AAA typically commences administration of an arbitration case when one party submits a <b>Demand for Arbitration</b> , a copy of the arbitration provision from the contract between the parties, and the appropriate filing fee to the AAA. The AAA acknowledges receipt to all parties and sets a deadline for the respondent to answer and/or to file a counterclaim. If no arbitration clause exists or the AAA is not named as the resolution provider in the parties' contract, cases may commence with the <b>consent of all parties, a filed Submission to Dispute Resolution</b> , and the appropriate filing fee to the AAA.	Based upon the parties' expressed criteria of qualifications, the AAA identifies arbitrators from the <b>AAA National Roster of Arbitrators</b> and provides their curriculum vitae to the parties. If parties are unable to agree upon the arbitrator(s), the AAA establishes a deadline for each party to independently state its preferences from the list. The AAA invites the most mutually agreeable arbitrator(s) to serve on the case.	Conducted by the arbitrator often via conference call, this management meeting is the first time the parties and arbitrator discuss the substantive issues of the case and procedural matters, such as exchange of information, witness lists, and dates. The <b>Scheduling Order</b> , which serves as the framework for hearing preparations, is established.	The parties work within the time frames set forth at the Preliminary Hearing to exchange information and prepare their presentations. The arbitrator addresses any impasses or challenges related to information sharing.	<i>Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds \$75,000, the rules provide that the parties shall mediate their dispute with the AAA concurrently with arbitration, at no additional fee. The mediator assists parties in reaching a settlement but has no authority to make a binding decision or award.</i>	Parties present testimony and evidence to the arbitrator.	If the arbitrator allows, parties may submit additional documentation, usually shortly after the hearing.	The arbitrator closes the record and, no more than 30 days later, issues a decision addressing all claims raised in the arbitration. The award may direct one or more parties to pay another party a monetary amount, or it may direct parties to take specific actions. Aside from any administrative matters unrelated to the merits of the case, the services of the arbitrator and the AAA are completed when the award is issued.
<b>EXPECTED COSTS AT THIS STAGE</b>  Filing fees are based on claim amounts and are paid by the party that asserts the claim or counterclaim.	<b>EXPECTED COSTS</b>  Partial refunds of filing and counterclaim fees are available under some AAA fee schedules. No refunds are available after an arbitrator has been appointed.	<b>EXPECTED COSTS</b>  Parties will incur compensation charges by each arbitrator for time spent before and during the Preliminary Hearing and in preparation of the Scheduling Order.	<b>EXPECTED COSTS</b>  The time spent by the arbitrator in this phase is proportional to the number of procedural matters needing resolution. Additionally, the arbitrator will spend time reviewing the parties' pre-hearing submissions, if any.	<b>EXPECTED COSTS</b>  The parties are responsible for the mediator's compensation plus an AAA fee of \$75 for each hour charged by the mediator.	<b>EXPECTED COSTS</b>  The arbitrator is compensated for time spent in hearings, reviewing evidence, and reasonable expenses, such as mileage and tolls.	<b>EXPECTED COSTS</b>  The arbitrator is compensated for reviewing evidence and any post-hearing submissions, as well as drafting the award. Any unused deposits are returned to the parties.	<b>EXPECTED COSTS</b>  The arbitrator apportions arbitrator compensation and expenses and AAA fees among the parties.

# Why Not File Suit and Fight It Out?

The court process can be long: nationwide average of **35.6 months** until trial in U.S. District Court!

- During this time the lawyers fees are growing
- Could be subject to adverse publicity or adverse prequalification requirements or find yourself on a blog!
- At the end of which, a jury or judge (all citizens with or without knowledge or expertise) will decide your fate
- Directed by a judge who may have never in his life seen wet concrete and is often bored by these cases

# Why Select ADR?

ADR is **significantly faster** & can be significantly **less expensive**

- Mediation can be completed, start to finish, in 30 – 60 days
- Arbitration in a typical case of \$100,000 - \$1M in claims can be completed in 11.3 months
- Final, binding awards means you don't have to wait through an appeals process (which can add another year!)

# Why Select ADR?

- ADR allows for expert neutrals
- ADR is private and can be confidential
- ADR benefits your project:
  - ADR can allow projects to keep going forward while the dispute is being resolved
  - ADR allows for the integrity of the project schedule to be maintained
  - ADR allows business relationships to be maintained



# Why Select ADR?

Early dispute resolution and prevention options

- Independent decision makers
- Dispute Avoidance and Resolution Boards
- Standing/Project neutrals

Customized resolution options to suit individual party needs

- Input in selecting the arbitrator
- Select an arbitrator with subject-matter expertise





AMERICAN ARBITRATION ASSOCIATION®

Thank You!!!

Name  
Vice President  
Construction Division  
Phone Number  
Email