

Alternates to Arbitration

Most AIA contracts have an arbitration clause. These contractual provisions require that the parties resolve their disputes through arbitration¹ instead of litigation (after first attempting mediation, which was added in the 1997 version of many documents, including A201). Courts enforce these arbitration provisions, even if one of the parties later decides that it does not want to arbitrate a particular claim. Thus, if you do not want to put your fate in the hands of an arbitrator, you need to modify the arbitration clause prior to executing the contract.

This article will address the arbitration clauses found in A201, the General Conditions of the Contract for Construction, and how they might be modified. Since the contractor generally is in a take-it or leave-it position, these modifications will be examined from the viewpoint of the owner. Many owners who have had a case brought in arbitration have had an unfavorable experience and have then found that the arbitrator's decision was final and not appealable. When next entering into a contract, those owners will often delete the arbitration clause. This is not, however, the only option. Some alternatives are as follows:

1. *Take arbitration out altogether.* Because the concept of arbitration is embedded throughout the AIA document, removing the arbitration provisions found at § 4.6 is not enough. For instance, the language of ¶¶ 4.4.5 and 4.4.6 should be revised so that the "finality" language in an architect's written determination of a claim refers to litigation in place of arbitration. In an unpublished Ohio opinion,² a court held that by simply deleting the arbitration provision, litigation was also eliminated, making the architect's determination of a claim "final" and not subject to either arbitration or litigation. While this decision has dubious merit and would likely not be duplicated by other courts, careful editing of A201 would have eliminated this problem.

2. *Set a limit on arbitration.* You might want to arbitrate cases where the aggregate amount in dispute is less than \$50,000. If you

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Sabo & Zahn
233 S. Wacker Dr.
Suite 8620
Chicago, IL 60606
312-655-8620
312-655-8622 fax
[Http://www.sabozahn.com](http://www.sabozahn.com)

modify the arbitration provisions to do this, you will also want to set some ground rules for the number of arbitrators, whether or not there will be discovery such as depositions, document productions and so on. Any claim in excess of this stated maximum amount then be subject to litigation. The advantage of this technique is that major claims have the safeguard of an appeals process, while the smaller claims are final upon obtaining the arbitrator's award. Because smaller cases are handled more expeditiously in arbitration than larger cases, the parties are assured of a faster and cheaper dispute resolution process for those cases. Also consider whether a claimant should be prohibited from aggregating a number of smaller claims in order to beat the limit.

3. *Appoint arbitrators ahead of time.* The advantage of this technique is a substantial reduction in the time required to get a decision. By naming one or three arbitrators (who agree to serve ahead of time) in the Supplementary Conditions, the parties could actually arbitrate disputes as they arise instead of waiting months or years for a hearing. These arbitrators constitute a "SWAT team" that could be called upon whenever any dispute arises. They can come out to the site to examine the problem, possibly issuing a ruling that same day. Attorneys might not be required at all. The cost savings of this faster dispute resolution procedure can be enormous.

4. *Consider allowing joinder or consolidation of all parties if there are common issues.* As set forth, the AIA arbitration provisions do not allow multiple parties to an arbitration, even if the issues are the same. For instance, the owner is required to have separate arbitrations against the architect and the general contractor even though the dispute arises out of the same issue. While this may be of strategic benefit to the architect, the owner would find this objectionable. From the owner's perspective it makes sense to include all necessary parties to a dispute in the same arbitration, so that fault can be properly allocated amongst them in one hearing.

5. *Consider adding an appeal procedure.* One of the touted advantages of arbitration is the finality of the award. This can turn into a serious disadvantage if the arbitrator ignores facts or the law, neither of which currently makes an arbitrator's award appealable. One way around this is to include a method for appealing the arbitrator's award, either to a court, or to a panel of appellate arbitrators.

6. *If there is to be a surety, bind the surety to the award and allow*

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the surety to participate. Although some courts may hold a surety to an award against the contractor, the surety will argue that it is not bound by such an award if it is not permitted to fully participate in the hearings. If the Supplementary Conditions require the surety to be bound to any award and permit participation by the surety in the conduct of hearings, the surety will be deemed to have agreed to this provision, since the owner-contractor agreement (including the general and supplementary conditions) are typically incorporated into the bond.

7. *Set limits on discovery.* This is the area where costs usually skyrocket. Attorneys and the arbitrator often agree to allow the taking of numerous depositions, exchanges of documents, site visits, testing and so on. Each attorney fears that there is some obscure fact or document that will be missed unless all of this discovery is completed. Under the AAA Rules, it is not clear exactly how much power an arbitrator has to order discovery. Experience shows that some arbitrators will use their persuasive powers to impose more, rather than less, discovery on parties in the oft-mistaken presumption that this will expedite the hearings. Language could be inserted in the Supplementary Conditions that either prohibits discovery entirely, or limits it in some reasonable way. For instance, documents intended to be introduced into evidence could be required one month prior to the start of hearings; one deposition of each expert could be permitted; other limited discovery could be allowed, with all other discovery prohibited.

With the advent of mediation in the 1997 AIA documents, owners and other parties to construction contracts may well want to rethink the role of arbitration in the dispute resolution spectrum. Because arbitration arises from the contract between the parties, the parties can tailor that process to suit their particular needs. While the form AIA language is often acceptable, the parties should consider whether certain modifications may not be appropriate.

Werner Sabo, FAIA, CSI
James K. Zahn, FAIA, CSI

1. The AIA language requires arbitration through the American Arbitration Association (“AAA”), using the Construction Industry Arbitration Rules. These Rules can be obtained from AAA or by visiting their website at
2. *Standard Electric Service Corp. v. Gahanna-Jefferson Public Schools*, No. 97APE11-1520, 1998 Ohio App. LEXIS 3905, 1998 WL 542696 (Aug. 25, 1998)

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