



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

---

## WE03 - What Every Construction Professional Needs to Know about Dispute Resolution

Presented by:  
**Robert Hughes**  
American Arbitration Association

**CONSTRUCT2009**  
Conference: June 16-19, 2009  
Indiana Convention Center  
Indianapolis, IN



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

---

## **A FEW REMINDERS...**

- Please remember to mute all electronic devices.
- You must swipe your card at the door in order to receive credit for your course.
- No one under the age of 18 is allowed in meeting rooms.



**CONSTRUCT 2009**  
hanley wood SPONSORED BY 

---

## AIA/CES Credits

Hanley Wood is a Registered Provider with The American Institute of Architects Continuing Education Systems. Credit earned on completion of this program will be reported to CES Records for AIA members. Certificates of Completion for non-AIA members available on request.

This program is registered with the AIA/CES for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the AIA of any material of construction or any method or manner of handling, using, distributing, or dealing in any material or product. Questions related to specific materials, methods, and services will be addressed at the conclusion of this presentation.



**CONSTRUCT 2009**  
hanley wood SPONSORED BY 

---

## CSI CEN Credits

This program is a registered educational program with the Construction Specifications Institute of Alexandria, VA. The content within this program is not created or endorsed by CSI nor should the content be construed as an approval of any product, building method, or service. Information on the specific content can be addressed at the conclusion of this program, by the Registered Provider.

Credit earned for completing this program will automatically be submitted to the CSI CEN. Completion certificates can be obtained by contacting the Provider directly.

This logo and statement identify Provider programs registered with the CSI CEN and are limited to the educational program content.





**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

---

### **Learning Objectives:**

Upon completing this program, the participant should know how to:

1. Understand dispute resolution options in form construction agreements and other options for prompt and economical dispute resolution
2. Discuss what to expect from the different dispute resolution processes and how their involvement can help achieve the best result
3. Identify how to control and shape the dispute resolution process to achieve their goals



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

---

- **Changes to American Institute of Architects (AIA) Contracts and**
- **The New ConsensusDOCS: The Impact on AAA Clients**



- 
- **AIA Contract Changes and New ConsensusDOCS: AAA Client Impact**

#### **Agenda**

- **Introduction**
- **Background**
  - What are the specific changes in the new AIA Documents and the ConsensusDOCS?
- **What You Need to Know About AAA**
  - AAA has NOT been written out of AIA and ConsensusDOCS documents
  - If you don't choose AAA Arbitration, you and your client could be at risk
- **AAA Provides Solutions**
  - Choosing AAA will help your clients mitigate risks



- 
- **AIA Contract Changes and New ConsensusDOCS: AAA Client Impact**

#### **Introduction**

- I am here to talk to you about changes in the AIA standard form contract documents and the new uniform ConsensusDOCS.
- This presentation will provide you with important background information that will help you and your clients understand some important changes and their impact.
- This presentation will also discuss the AAA as it relates to the AIA and new ConsensusDOCS documents.
- Additionally, it will point out how, by not choosing AAA arbitration in the AIA and new ConsensusDOCS, you and your clients **COULD BE AT RISK**.
- Finally, the presentation will outline viable solutions from the AAA to help mitigate the risks.



- **AIA Contract Changes and New ConsensusDOCS: AAA Client Impact**

## BACKGROUND

### What are the Specific Changes in the New AIA Documents and ConsensusDOCS?

- **AIA Family of Documents**
  - **A201 (General Conditions of the Contract for Construction)**
    - This is the primary document within the AIA family of documents
    - Mediation and arbitration to be administered by AAA
  - **The Relevant Change:**
    - Construction claims filed with AAA will use the rules in effect on the date of the agreement (not the date of filing)



- **AIA Contract Changes and New ConsensusDOCS: AAA Client Impact**

## BACKGROUND

### What are the Specific Changes in the New AIA Documents and ConsensusDOCS? (cont'd)

- **AIA Family of Documents**
  - **A101 (Standard Form of Agreement Between Owner and Contractor)**
    - This is the secondary document in the AIA family of documents
    - A101 covers matters of project timeframes, payment amounts, and terminations
  - **The Relevant Changes:**
    - Binding dispute resolution options are selected through check boxes. If no box is checked, the resolution remedy will default to litigation



- **AIA Contract Changes and New ConsensusDOCS: AAA Client Impact**

## BACKGROUND

### What are the Specific Changes in the New AIA Documents and ConsensusDOCS? (cont'd)

- **The Construction Industry Associations' Contract Documents (ConsensusDOCS)**
  - **ConsensusDOCS 200 (Standard Agreement and General Conditions Between Owner and Contractor)**
  - **Multi-Step Dispute Resolution Process**
    1. "Discussions" or negotiations.
    2. Either dispute mitigation or mediation (selected in agreement).
    3. If neither is successful, parties proceed to binding dispute resolution through arbitration under AAA Construction Rules (unless parties agree to another set of rules), or through litigation (must choose by checking the desired option).



- **AIA Contract Changes and New ConsensusDOCS: AAA Client Impact**

## WHAT YOU NEED TO KNOW

### AAA has NOT been written out of the AIA or ConsensusDOCS documents

- **AIA documents**
  - AAA Mediation continues to be named in the family of AIA documents
  - AAA Arbitration remains an option in the AIA documents
- **The new ConsensusDOCS**
  - AAA Mediation Procedures and Arbitration Rules are named in the ConsensusDOCS
  - AAA does provide dispute mitigation services required as part of the new ConsensusDOCS
  - Parties must choose litigation **OR** AAA Arbitration for binding resolution. The matter **DOES NOT** default to AAA arbitration, litigation, or to other arbitration rules/ providers



- **AIA Contract Changes and New ConsensusDOCS: AAA Client Impact**

## WHAT YOU NEED TO KNOW

**AAA Mediation is a successful resolution option, and the AAA panel is made up of a large number of highly experienced mediators:**

- Approximately one-third of the AAA's Panel of Mediators is coded for construction
- Approximately 72% of the AAA's construction mediators have an average of 13 years of mediation experience in general and/or mediating construction cases in particular
- Approximately one-third of the AAA's construction mediators have each conducted over 100 mediations



- **AIA Contract Changes and New ConsensusDOCS: AAA Client Impact**

## WHAT YOU NEED TO KNOW

**If you do not choose AAA Arbitration, you or your clients COULD BE AT RISK**

- Litigation is time-consuming:
  - When you choose litigation, you're choosing to wait for resolution
    - For a civil case, the median timeframe from filing to trial was 23.2 months; that's 2 years of waiting to get to trial\*
  - AAA arbitration cases of any size could be completed before you even get to trial:
    - In 2006, the median timeframe to resolve a construction case was about 10 months from filing to award
    - Unlike the courts, AAA provides "tracks", based on claim size. In 2006:
      - Claims under \$75,000 (fast-track) - resolved in about 6 month
      - Regular Track cases – resolved in approximately 10 months
      - \$1M+ cases (LCC with three arbitrators) - median resolution timeframe was 19 months



- AIA Contract Changes and New ConsensusDOCS: AAA Client Impact

#### WHAT YOU NEED TO KNOW

**If you do not choose AAA Arbitration, you or your clients COULD BE AT RISK (cont'd)**

- Cases that go to litigation are rarely heard by industry experts:
  - In court, you risk getting a judge or jury that knows nothing about the construction industry
  - With the AAA construction panel of neutrals, your case is heard by an expert in the industry



- AIA Contract Changes and New ConsensusDOCS: AAA Client Impact

#### WHAT YOU NEED TO KNOW

**If you do not choose AAA Arbitration, you or your clients COULD BE AT RISK (cont'd)**

- 25% of AAA panelists are coded for Construction\*. Of those:
  - \*62% are attorneys
  - \*24% are engineers
  - \*16% are general contractors
  - \*7% are architects
- If you desire a judge who is coded for Construction, the AAA has those too
- 30% of the construction panel is also coded to serve on the Large, Complex Case Panel



- 
- AIA Contract Changes and New ConsensusDOCS: AAA Client Impact

**WHAT YOU NEED TO KNOW**

**If you do not choose AAA Arbitration, you and your clients **COULD BE AT RISK** (cont'd)**

- Without the AAA, you may not get the AAA Construction Rules
- Many “ad-hoc” and other third-party providers do not publish their administrative fees



- 
- AIA Contract Changes and New ConsensusDOCS: AAA Client Impact

**WHAT YOU NEED TO KNOW**

**If you do not choose AAA Arbitration, you or your clients **COULD BE AT RISK** (cont'd)**

- International construction cases that go to litigation face further risks:
  - It may be difficult to enforce a U.S. court decision in a foreign jurisdiction
  - However, international arbitration awards are enforceable under the New York Convention



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

- 
- AIA Contract Changes and New ConsensusDOCS: AAA Client Impact

## WHAT YOU NEED TO KNOW

### Choosing AAA will help your clients mitigate risks

- AAA provides resolution options and tools to help clients in the construction industry avoid and resolve disputes even as they occur:
  - Guide to Drafting Construction Contracts
  - The Construction Industry's Guide to Dispute Avoidance and Resolution
  - Special ADR methods such as AAA Partnering Plus, On-Site Neutrals and DRB's



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

- 
- AIA Contract Changes and New ConsensusDOCS: AAA Client Impact

## SUMMARY

- The Construction industry is making changes to the AIA standard form contracts documents and the new ConsensusDOCS
- While the industry still endorses the AAA for mediation and arbitration, users of the new contracts may now choose alternatives methods of binding dispute resolution, including AAA arbitration
- While choice is good, not choosing AAA arbitration may put their clients at risk
- The AAA provides a "continuum" of dispute resolution services and tools for the construction industry that will help mitigate the risks identified



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

- 
- In this session you will learn to:
  - Identify the characteristics of and differences between the dispute mitigation and resolution process of the ConsensusDOCS.
  - Recognize the roles and obligations of the parties in each of the dispute mitigation and resolution process of the ConsensusDOCS.
  - Identify and select the appropriate dispute mitigation and resolution process of the Consensus DOCS and their specific project needs.



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

---

## **STAGES OF RESOLUTION**

Direct Discussions  
Project Neutral/Dispute Review Board  
Mediation  
Arbitration  
Litigation



---

## **DISPUTE RESOLUTION PATH**

- DIRECT DISCUSSIONS (Party Representatives)
- DIRECT DISCUSSIONS (Senior Executives)
- PROJECT NEUTRAL/
- DISPUTE REVIEW BOARD-MEDIATION
- ARBITRATION or
- LITIGATION



---

## **What are direction discussions?**

- Party representatives who have the necessary authority discuss the matter in good faith with the intent to resolve the dispute.



---

- **DIRECT DISCUSSIONS**



---

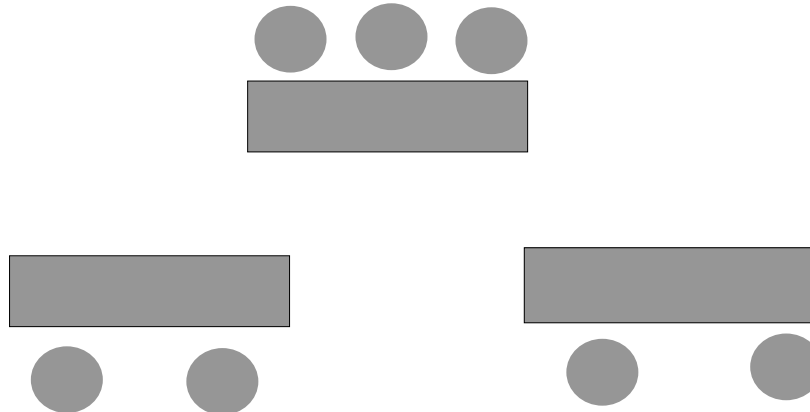
- **What is a project neutral/dispute review board?**

An individual or a panel of three experienced, respected, and impartial reviewers is presented the facts of a dispute and makes a non-binding recommendation on the basis of those facts and the expertise of the neutral/board. The recommendation can be introduced as evidence in arbitration or litigation.



---

- **PROJECT NEUTRAL/  
DISPUTE REVIEW BOARD**



---

- **PROJECT NEUTRAL/  
DISPUTE REVIEW BOARD**

- 12.3 MITIGATION If the Parties select one of the dispute mitigation procedures provided in this Paragraph 12.3, disputes remaining unresolved after direct discussions shall be directed to the selected mitigation procedure. The dispute mitigation procedure shall result in a nonbinding finding on the matter, which may be introduced as evidence at a subsequent binding adjudication of the matter, as designated in Paragraph 12.5. The Parties agree that the dispute mitigation procedure shall be

(Designate only one):

- Project Neutral
- Dispute Review Board



---

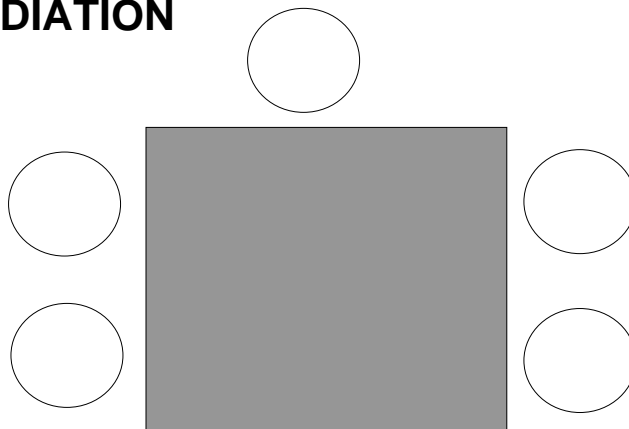
- **What is mediation?**

A neutral, third-party mediator selected by the parties facilitates a voluntary negotiation that is designed to achieve a satisfactory resolution for all parties.



---

- **MEDIATION**





---

- **MEDIATION**

12.4 MEDIATION - If direct discussions pursuant to Paragraph 12.2 do not result in resolution of the matter and no dispute mitigation procedure is selected under Paragraph 12.3, the Parties shall endeavor to resolve the matter by mediation through the current Construction Industry Mediation Rules of the American Arbitration Association, or the Parties may mutually agree to select another set of mediation rules. The administration of the mediation shall be as mutually agreed by the Parties. The mediation shall be convened within thirty (30) business Days of the matter first being discussed and shall conclude within forty-five (45) business Days of the matter first being discussed. Either Party may terminate the mediation at any time after the first session, but the decision to terminate shall be delivered in person by the terminating Party to the non-terminating Party and to the mediator. The costs of the mediation shall be shared equally by the Parties.



---

- **What is arbitration?**

A neutral, third party arbitrator or panel of arbitrators who are industry experts selected by the parties hears a dispute in a private, non-judicial context and issues a final and binding decision. Arbitration is a more efficient, less formal alternative to litigation.



• **ARBITRATION**

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 designated herein.

(Designate only one:)

Arbitration using the current Construction Industry Arbitration Rules of the American Arbitration Association or the Parties may mutually agree to select another set of arbitration rules. The administration of the arbitration shall be as mutually agreed by the Parties.

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

12.5.1 The costs of any binding dispute resolution procedures shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute.

12.5.2 VENUE The venue of any binding dispute resolution procedure shall be the location of the Project, unless the Parties agree on a mutually convenient location.



- **What is litigation?**
- After extensive fact gathering by the parties, a judge or jury receives evidence and renders a decision under state or federal law in a highly-structured public proceeding. Litigants may appeal the decision to higher authorities.



---

- **Work continuance and payment**

“Unless otherwise agreed in writing, the **Contractor** shall continue the Work and maintain the Schedule of the Work during any dispute mitigation or resolution proceedings. If the **Contractor** continues to perform, the **Owner** shall continue to make payments in accordance with this Agreement.”

ConsensusDOCS 200, Paragraph 12.1



---

- **DIRECT DISCUSSIONS**

When should discussions happen?  
The participants  
Getting the most out of discussions



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

- 
- **When should discussions happen?**
  - Prevention vs. reaction
  - As early as possible
  - Party representatives try to resolve within five days of first discussions
  - Senior executives to meet within five days of notice from party representatives



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

- 
- **The participants**
  - “Parties' representatives, who shall possess the necessary authority to resolve such matter.”
    - Project manager, superintendent, etc.
  - Senior executives
    - Vice president of operations, president



- 
- **Getting the most out of discussions**
  - Discuss the dispute
  - Discuss the cause of the dispute
    - Who, what, why?
  - Discuss similar issues that may arise
    - Prevention vs. reaction
  - Use “big picture” thinking
    - Resolution is not a “zero sum game”
    - Focus on interests instead of blame



---

- **PROJECT NEUTRAL /  
DISPUTE REVIEW BOARD**

How is the neutral/board involved?

Suitable projects

Selecting the neutral/board

Reaction to the recommendation



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

- 
- **How is the neutral/board involved?**
  - Parties set scope of involvement
  - Receives contract documents
  - Regular project visits
  - Informed of project developments
  - Hears both sides of the argument and issues a written, non-binding recommendation for resolving the dispute
  - Costs and expenses shared equally



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

- 
- **Suitable projects**
  - Large projects
  - Complex Projects
  - Projects where time is of the essence
  - Does the project justify this expense?



- 
- **Selecting the neutral/board**
  - “Mutually selected and appointed by the Parties.”
    - Select before contract is executed
  - Qualifications and Experience
    - Project type
  - Neutral vs. board
    - Does the project justify several perspectives?



- 
- **Reaction to the recommendation**
  - Accept or reject?
  - Is it better than costs going forward?
  - Does it preserve project and relationships?
  - Will it impact arbitration or litigation?



---

## MEDIATION

When should a case be mediated?

Starting the process

Selecting a mediator

Arranging the mediation



- 
- **When should a case be mediated?**
  - Potential for settlement
  - Desire to narrow issues
  - Advantage of face-to-face dialogue
  - Past pattern of non-communication
  - Desire to maintain control of outcome
  - Desire to maintain relationships



- 
- **Starting the process**
  - **Consenting parties**
    - Mediation is a voluntary process. If one or more parties do not want to participate, there is little chance of resolution.
  - **Authority to settle**
    - The participants to the mediation must have the authority to agree to a resolution or must have easy access to the authority.



- 
- **Selecting a mediator**
  - **Rosters**
    - American Arbitration Association
    - State Court Rosters
  - **Experience**
    - Experienced professional
    - Retired judge
    - Technical training
  - **Style (facilitative, evaluative, analytical)**
    - Look at the case type and your interests to determine what mediation style would be most advantageous
    - Do you want an opinion on the merits of the case?



- 
- **Arranging the mediation**
  - **Participants**
    - Include the **decision makers** and their attorneys
  - **Location**
    - Multiple rooms for caucuses
    - Is a neutral location possible or preferred?
  - **Documents**
    - Use to inform the mediator/other party
  - **Experts**
    - Typically not required or helpful to the process



---

## **ARBITRATION**

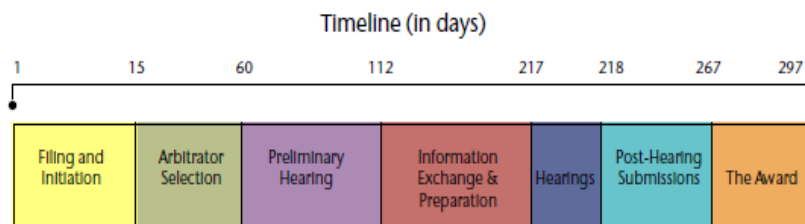
When should a case be arbitrated?  
The Arbitration Roadmap  
    Filing and Initiation  
    Arbitrator Selection  
    Preliminary Hearing  
    Information Exchange & Preparation  
    Hearings  
    Post Hearing Submissions  
    The Award



- **When should a case be arbitrated?**
- Technical issue/equal bargaining positions
  - Benefit of an educated fact-finder
- Expedited process
  - Keep it simple, keep it quick, keep it “cheap”
  - Quicker than litigation because of limited discovery and flexible scheduling
- Binding result
- Privacy



## • The Arbitration Roadmap





- 
- **Filing and Initiation**
  - **Demand for Arbitration**
    - Like a Complaint, the Demand for Arbitration gives notice of the claims
    - Include arbitration clause or other basis for jurisdiction



- 
- **Arbitrator Selection**
  - **American Arbitration Association roster**
  - **Experience**
    - Experienced professional
    - Retired judge
    - Technical training
  - **One vs. Three Arbitrators**
    - Size and complexity of Disputes
    - Look at cost of Arbitrators



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

- 
- **The Preliminary Hearing**
  - Begin information exchange before preliminary hearing
  - Parties may submit their own scheduling order
  - Pre-hearing briefs can be submitted to reduce evidentiary hearings



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

- 
- **Information Exchange and Preparation**
  - The parties are encouraged to cooperate on reasonable information exchange
  - Cooperative information exchange – early in process
  - Consider preparing joint exhibits and stipulations of fact



---

### The Hearings

- Participants
  - Parties and witnesses
- Location
  - Accommodate parties, attorneys, witnesses
  - Duration of the hearing
  - Is a neutral location possible or preferred?
- Exhibits
  - Binders for arbitrator and each attorney
- Experts
  - Recommended for technical matters
- Avoid postponements
  - Biggest source of delay



- 
- **Post Hearing Submissions**
  - Forgo or limit post-hearing briefs
  - Clarifications of evidence
  - Law supporting issues
  - Provide specific figures for damages



- 
- **The Award**
  - Simple award
  - Explanation of award
  - Reasoned award
    - Will increase cost and delay award
  - Appeal of award is highly limited



---

- **LITIGATION**

When should a case be litigated?  
A lengthy process  
Discovery  
Trial  
Appeal



- 
- **When should a case be litigated?**
  - Principle is expensive
  - Novel issues/Right to appeal
  - Jury has advantages for case



- 
- **A lengthy process**
  - Complaint & Answer (1-2 months)
  - Fact discovery (8-12 months)
  - Expert discovery (4-6 months)
  - Dispositive motions (2-3 months)
  - Pretrial conference (1-3 months)
  - Trial (1-2 months)
  - Appeal (1-3 years)



### **Discovery**

- Written discovery
  - Requests for Admission & Interrogatories
- Production of documents
- Depositions of fact witnesses
- Inspections of property
- Expert reports
- Depositions of expert witnesses



### **Trial**

- Federal or state?
- Judge or jury?
- Scheduling
- Duration
- Location (venue)



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

---

## Appeal

- An uphill battle
- Standards of review
  - Fact finding
  - Legal conclusion



**CONSTRUCT 2009**  
hanley▲wood SPONSORED BY 

---

Thank you!

***Robert Hughes, VP Construction  
American Arbitration Association  
St. Louis, MO***

***Stanley Sklar, Esq.  
Dispute Resolution Services  
Chicago, IL***

***Steven Butler, GC  
San Francisco, CA***

This concludes the American Institute of Architects  
Continuing Education Systems Program.

