

Knowledge Is Power

A Review of the American Arbitration Association's Rules for Construction Disputes

by Kristan B. Burch



Kristan B. Burch is a partner in the Norfolk office of Kaufman & Canoles PC and is vice chair of the Virginia State Bar Construction Law and Public Contracts Section. She has a bachelor's degree from the University of Virginia and a law degree from the College of William and Mary.

Many commercial construction disputes continue to be resolved through arbitration before the American Arbitration Association (AAA), based on contractual provisions in prime contracts, subcontracts, and architect contracts. Parties can adhere to the AAA rules or can modify the rules. It is important to be familiar with the AAA rules when filing and handling an arbitration before the AAA. It is also important to understand the rules when drafting construction contracts that contain AAA arbitration clauses, as your client may want to modify by contract some of the rules to better accomplish its objectives.

Most commercial construction disputes resolved through AAA arbitration apply the Construction Industry Arbitration Rules and Mediation Procedures (AAA Construction Rules), last amended on October 1, 2009.¹ The AAA Construction Rules, along with other resources, are available at www.adr.org.²

Unless the parties or the AAA determines otherwise, disputes involving no more than two parties in which the claim or counterclaim does not exceed \$75,000 (exclusive of interest, attorneys fees, and arbitration fees and costs) shall be decided under the Fast Track Procedures.³ Unless the parties agree otherwise, disputes in which the disclosed claim or counterclaim of any party is \$1 million or more (exclusive of interest, attorney's fees, and arbitration fees and costs) shall be decided under the Procedures for Large, Complex Construction Disputes.⁴ All other disputes shall be decided under the Regular Track Procedures.⁵

The AAA permits filings to be completed online through AAA Webfile, including the filing

of a demand for arbitration and a request for mediation.⁶ The forms can be completed and viewed online by the filing party, with any required filing fees paid by credit card.⁷

Initiating the AAA Arbitration Proceeding

After a demand for arbitration is filed by a claimant, the respondent has fourteen calendar days after notice of filing of the demand is sent by the AAA to file an answering statement and a counterclaim, if applicable.⁸ To the extent that no answering statement is filed within fourteen days, the respondent will be deemed to have denied the claim filed by claimant.⁹

The AAA Construction Rules permit a claimant or respondent at any time prior to the close of the hearing or the date established by the arbitrator to increase or decrease the amount of a claim or counterclaim.¹⁰ To the extent that a party seeks to add a new or different claim or counterclaim, that party must make a request in writing to the AAA, with a copy sent to the other party.¹¹ After the arbitrator is appointed for a case, no new or different claims can be submitted unless the arbitrator consents.¹²

Deciding the Location of the AAA Arbitration

Many construction contracts establish the location for AAA arbitration proceedings. When such location is established in the relevant contract, the AAA will not alter the location unless the parties agree to a different location.¹³ When a dispute exists regarding location, the parties must notify the AAA within fourteen calendar days from when the AAA initiated the case or the date established by the AAA.¹⁴ This means that respondent should include in its answering statement any dispute regarding the location specified by claimant in the demand for arbitration.¹⁵

When an agreement is silent on location and the parties cannot agree, the arbitration shall be conducted in the city nearest the site of the project in dispute subject to the power of the arbitrator to determine the location for the arbitration

within fourteen days after the date of the preliminary hearing.¹⁶

Selecting the AAA Arbitrator

Unless otherwise agreed by contract, a dispute shall be resolved by one arbitrator, except when the AAA decides that three arbitrators should be appointed.¹⁷ To the extent that a party would prefer three arbitrators, a party can request that three arbitrators be appointed when filing the demand for arbitration or the answering statement.¹⁸ Such a request shall be considered by the AAA in deciding how many arbitrators to appoint.¹⁹ To the extent that the amount of a claim is increased or decreased during an arbitration, a party can request a change in the number of arbitrators as long as the request is made no later than seven calendar days after receipt of the R-6 required notice of change of claim amount.²⁰

When an arbitrator is chosen or a method decided for appointing an arbitrator, the AAA will follow that agreement.²¹ The contract also may say when an arbitrator should be appointed. If the contract does not specify, the AAA shall notify the parties to make the appointment, and if no appointment has been made within fourteen calendar days, the AAA appoints the arbitrator.²²

If no provisions are made by contract for selecting an arbitrator, the AAA Construction Rules outline the selection process. The AAA sends to the parties the names of possible arbitrators chosen from the National Construction Panel, along with background information on each potential arbitrator.²³ The AAA prefers that the parties choose an arbitrator from the names provided. If an agreement cannot be reached, each party has fourteen calendar days from receipt of the names to strike names objected to and number the remaining names in order of preference.²⁴ A party does not have to provide its list to the opposition. From the lists returned to the AAA, the AAA appoints an arbitrator.²⁵ Such lists can be filed by the parties online through AAA Webfile or can be submitted in paper form.

To the extent that review of the lists does not result in the appointment of an arbitrator, the AAA Construction Rules grant the AAA authority to make the appointment from the other members of the National Construction Panel without seeking further input from the parties.²⁶

After being appointed, the arbitrator shall provide a disclosure to the AAA that lists any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence.²⁷ Such disclosure shall be provided by the AAA to

the parties.²⁸ If either party finds something in the disclosures that causes concern about the impartial and independent nature of the arbitrator, the party can file an objection to service of the arbitrator, and the AAA shall decide whether the arbitrator should be disqualified.²⁹ An arbitrator may be subject to disqualification for partiality or lack of independence, inability or refusal to perform duties with diligence and in good faith, and any grounds for disqualification provided by applicable law.³⁰ The AAA's decision on disqualification is conclusive.³¹

If an arbitrator cannot perform duties for a particular case, the AAA may declare the position vacant and fill the vacancy.³² For vacancies that arise after a hearing has started, the remaining arbitrators can continue with the hearing and decide the case, unless the parties agree otherwise.³³ When a substitute arbitrator is appointed, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat any part of any prior hearings.³⁴

Conducting the AAA Preliminary Management Hearing and Discovery

Following selection of an arbitrator, a preliminary management hearing is conducted by telephone. The issues to be discussed at the hearing include, but are not limited to, the issues to be arbitrated, the schedule for the arbitration — including any pretrial submissions — and the form of the arbitration award.³⁵ The parties may request a standard award, a reasoned opinion, an abbreviated opinion, findings of fact, or conclusions of law.³⁶ An arbitrator shall determine the form of an award if the parties cannot agree.³⁷

Parties' intent to engage in discovery can be discussed during a preliminary management

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hearing. The parties can request that an arbitrator sign subpoenas for witnesses or documents, and any proposed subpoena must be submitted to the other parties at the same time that the request is made to an arbitrator to issue the subpoena.³⁸

Unless otherwise agreed to by the parties, the AAA Construction Rules permit an arbitrator to direct the production of documents, the identification of witnesses, and the exchange of exhibits to be used at an arbitration hearing.³⁹ No other discovery is permitted under the AAA

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Construction Rules unless the parties agree or an arbitrator orders it in exceptional cases.⁴⁰

An arbitrator may order interim measures, including injunctive relief and measures of protection or conservation of property or disposition of perishable goods.⁴¹ An arbitrator may order interim measures through an interim award and may require security for the costs of the measures.⁴²

Navigating the AAA Arbitration Hearing

Pursuant to the AAA Construction Rules, an arbitrator and the AAA shall maintain the privacy of hearings unless the law provides to the contrary.⁴³ The AAA Construction Rules permit a stenographer to be present for the hearing if any party desires, and the requesting party shall be responsible for the costs unless the parties agree otherwise.⁴⁴

A site inspection or other investigation can be made by an arbitrator.⁴⁵ A party has the right to be present at the inspection unless another agreement is reached by the parties or proper notice is given in advance of the inspection.⁴⁶

At the hearing, a claimant presents evidence to support its claim, and a respondent presents evidence regarding its defenses to the claim.⁴⁷ Questions can be asked of witnesses by the parties and the arbitrator.⁴⁸ An arbitrator may permit evidence to be presented by live testimony, video-conferencing, Internet communication, telephone, and other remote means.⁴⁹ An arbitrator may receive and consider evidence of witnesses by declaration or affidavit.⁵⁰

Evidence offered by parties at a hearing should be relevant and material to the dispute, but an arbitrator is not required to conform to

the legal rules of evidence.⁵¹ The AAA Construction Rules direct an arbitrator to take into account applicable principles of legal privilege, such as those involving confidential communications between lawyers and clients.⁵²

Unless the parties agree otherwise, an arbitrator has thirty calendar days from the closing of the hearing to issue an award.⁵³ The hearing may be reopened by an arbitrator at any time before an award is issued.⁵⁴ If the hearing is reopened, an arbitrator has thirty calendar days from the close of the reopened hearing within which to issue an award unless the parties agree otherwise.⁵⁵

An arbitrator's award shall be issued in writing and shall provide a concise written financial breakdown of any monetary awards or a line-item disposition of each nonmonetary claim or counterclaim.⁵⁶ An award may contain equitable relief and specific performance of a contract.⁵⁷ In addition, an arbitrator may assess and apportion fees, expenses, and compensation among the parties, and an award may include interest and attorneys fees.⁵⁸

Within twenty calendar days after transmission of an award, an arbitrator or a party may request that the arbitrator correct any clerical, typographical, technical or computational errors in the award, but the arbitrator cannot redetermine the merits of any claims already decided.⁵⁹ After such a request is made, the other party shall have ten calendar days to respond to the request, and the arbitrator shall dispose of the request within twenty calendar days after transmittal of the request and any response.⁶⁰ ⚡

Endnotes:

- 1 The AAA also has a set of rules specific to home construction called Home Construction Arbitration Rules and Mediation Procedures. While this article does not focus on the home construction rules, they are available at <http://www.adr.org/sp.asp?id=32399>.
- 2 The AAA Construction Rules are available at <http://www.adr.org/sp.asp?id=22004#large>.
- 3 AAA Construction Rule R-1(b). These rules are available at <http://www.adr.org/sp.asp?id=22004#ftpr>.
- 4 AAA Construction Rule R-1(c). These rules are available at <http://www.adr.org/sp.asp?id=22004#ftpr>.
- 5 AAA Construction Rule R-1(e).
- 6 The AAA Webfile portal is available at <https://apps.adr.org/webfile/>.
- 7 Filing demands for arbitration through AAA Webfile is not mandatory. Parties still can initiate an arbitration by a paper filing with the AAA office.
- 8 AAA Construction Rule R-4(c).

- 9 *Id.*
10 AAA Construction Rule R-6.
11 *Id.*
12 *Id.*
13 AAA Construction Rule R-12.
14 *Id.*
15 *Id.*
16 *Id.*
17 AAA Construction Rule R-18.
18 *Id.*
19 *Id.*
20 *Id.*
21 AAA Construction Rule R-15.
22 *Id.*
23 AAA Construction Rule R-14.
24 *Id.*
25 *Id.*
26 *Id.*
27 AAA Construction Rule R-19. The AAA Construction Rules state that in order "to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-19 is not to be construed as an indication that the arbitrator considers that the disclosed circumstances is likely to affect impartiality or independence." *Id.*
28 *Id.*
29 AAA Construction Rule R-20.
30 *Id.*
31 *Id.*
32 AAA Construction Rule R-22.
33 *Id.*
34 *Id.*
35 AAA Construction Rule R-23.
36 AAA Construction Rule R-44.
37 *Id.*
38 AAA Construction Rule R-33.
39 AAA Construction Rule R-24.
40 *Id.*
41 AAA Construction Rule R-36.
42 *Id.*
43 AAA Construction Rule R-25.
44 AAA Construction Rule R-28.
45 AAA Construction Rule R-35.
46 *Id.*
47 AAA Construction Rule R-32.
48 *Id.*
49 *Id.*
50 AAA Construction Rule R-34.
51 AAA Construction Rule R-33.
52 *Id.*
53 AAA Construction Rule R-43.
54 AAA Construction Rule R-38.
55 *Id.*
56 AAA Construction Rule R-44.
57 AAA Construction Rule R-45.
58 *Id.* See also AAA Construction Rules R-52 (Administrative Fees), R-53 (Expenses), and R-54 (Neutral Arbitrator's Compensation).
59 AAA Construction Rule R-48.
60 *Id.*

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