American Arbitration Association®
Discovery Best Practices for Construction Arbitration

Recommendations for AAA Construction Advocates and Arbitrators

Introduction

The American Arbitration Association ("AAA") is committed to the principle that construction arbitration should provide a less expensive, more expeditious and final form of dispute resolution than that offered in state or federal litigation. While costly and time consuming, pre-trial discovery devices such as depositions, interrogatories and requests for admission are readily available in litigation, their use in arbitration should be limited consistent with the goals of arbitration as a speedy, cost effective and final means of resolving disputes. Absent specific agreement by the parties regarding the scope of pre-hearing discovery, the arbitral process the parties have chosen does not allow them to engage in unlimited discovery. Therefore, arbitrators should, consistent with their authority, manage arbitration proceedings to achieve the goal of providing a simpler, less expensive and more expeditious process, and discovery decisions should be proportional to the size and complexity of the matter being heard. The arbitrator should stress how, due to the number of documents, discovery in a construction dispute is different than in a typical commercial dispute.

These best practices, developed in conjunction with the AAA's National Construction Dispute Resolution Committee ("NCDRC"), advocates, arbitrators and construction industry professionals, are intended to educate advocates and arbitrators to better manage pre-hearing exchanges of information in construction disputes. They are recommended for use in all construction cases administered by the AAA under the *Construction Industry Arbitration Rules* or *Commercial Arbitration Rules (Rules)*. It is incumbent on the arbitrators and parties to understand that these best practices are not intended to replace the Rules, and to the extent possible, references to the applicable Rules are provided.

Document Exchange

Construction disputes are typically document-intensive, and except for privileged or possibly proprietary documents, each side should be afforded the opportunity to examine the other party's project files that are relevant and material to the resolution of the issues in dispute, thereby enabling each party to efficiently prepare for the hearings. This is not intended to be a Federal Court-style document exchange, as the language of the Rules (Construction R24, R25 and F8/Commercial R23, R24 and E5) makes clear. Rather, the scope of document requests and the exchange of documents should be narrowly tailored and proportionate to the disputes at hand.

As an initial matter, it is often beneficial for the parties to submit a detailed statement of claims and defenses as early as possible in order to narrow the issues and identify critical documents prior to determining what discovery is necessary. The parties should meet and confer prior to the preliminary hearing in order to limit or avoid disputes over what documents are to be produced. In addition, parties should only seek documents not already in their possession,

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custody and control. The arbitrator should consider ordering that the parties immediately initiate a litigation hold, if they have not done so already, to avoid later fighting about document-retention issues. Finally, whether and to what extent documents are to be exchanged depends upon the AAA rules track applicable to the dispute.

Document Exchange Practice Tips:

- Arbitrators have discretion over the scope of document exchange and should consider the language of the rules limiting document exchange to documents that are material and relevant to the outcome of the dispute. Arbitrators should also consider the size and complexity of the case when issuing any decisions as to the scope or extent of document exchange in order to ensure that the document exchange is proportionate to the value and/or complexity of the disputes at issue.
- With respect to document subpoenas to third parties, the parties and the arbitrator should also consider the burden imposed on third parties who are outside the arbitration agreement, and the parties should be required to identify why requested documents are material and relevant to the outcome of the dispute and cannot be obtained from the parties to the case. The arbitrators should also advise the parties that there may be legal limitations on the enforceability of subpoenas to third parties (depending on the jurisdiction) and that the arbitrators are without power to enforce third-party subpoenas.
- For those cases that exceed $100,000, in lieu of the parties serving formal document demands and to save the time and expense associated with preparing and responding to such demands, consider requiring that parties disclose 1) the identity of persons likely to be witnesses or who have discoverable information, 2) a copy or full description of all documents the party is likely to present at hearing, and 3) a computation of damages claimed with supporting documentation. The parties should be encouraged to exchange candid statements of claims/damages and counterclaims/damages and defenses to promote full disclosure of disputed issues to expedite the hearings. If the issues involve discrete scopes of work within the construction project, then only those documents relevant to the scopes of work at issue in the arbitration should be discoverable. Under unusual circumstances, upon a showing of good cause, an arbitrator can order more expansive discovery and may order the requesting party to pay for it.
- The scheduling order should establish a deadline for exchanging the documents fairly early in the case to avoid delay. Deadlines can and should be enforced unless there is good cause to deviate.

Applicable Rules: Construction R24, R25, L4 and F8/Commercial R23, R24, L3 and E4

Site Inspections

In construction disputes, it may be beneficial for the arbitrator to ask for, or agree to, an inspection of the project at issue. Nonetheless, before agreeing to a site inspection, the arbitrator(s) should consider whether the current condition of the project is such that an inspection would help them better understand and resolve the issues at dispute. For example, if the issue in arbitration involves allegedly faulty workmanship and the work was remediated

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prior to the arbitration, then it may be more reasonable and cost effective for the arbitrator to review photographs and/or digital and electronic documentation of the site and hear testimony regarding the work.

Site Inspection Practice Tips:

- Site inspections can consume significant amounts of time and thus be costly to the parties. Therefore, before agreeing to a site inspection, the arbitrator(s) should carefully weigh the costs of conducting such an inspection against the benefit obtained from such an inspection and alternative, less costly means of obtaining the same information.
- A protocol for the site visit should be established prior to the visit including issues to be considered by the arbitrator.
- A guide with photos should be provided to the arbitrator prior to the visit so they may be familiar with the issues and know in advance what needs to be seen.
- A site visit may be held before, during or after the hearing.
- The tour of the site should be conducted by the parties without attorney commentary or argument.
- If the arbitrator(s) wish for their observations or any drawings distributed during the site visit be considered as evidence, then the arbitrator(s) may request the parties submit a joint submission stating same.

Applicable Rules: Construction R37/Commercial R37

E-Discovery

When documents to be exchanged are maintained electronically (Electronically Stored Information, or "ESI"), the parties should make them available in the manner they were kept in the most convenient and economical way possible, unless the arbitrator determines after hearing from the parties that there is a compelling need for the documents to be produced in a different manner. In light of the growing use and sheer volume of email, CAD drawings and scheduling information in construction projects, request for documents maintained in electronic form should be crafted to make searching the electronic data as economical and expeditious as possible.

E-Discovery Practice Tips:

- At the pre-hearing conference, the arbitrator(s) should ask a number of questions about the type of information maintained electronically and its location and accessibility, so that the arbitrator will have a better understanding of what data should be produced.
- The parties should consider the size and complexity of the matter when deciding on an ESI protocol. Prior to the pre-hearing conference, parties should discuss the ESI protocol and attempt to come to an agreement. Follow-up conference calls may be scheduled if the ESI protocol is not confirmed in the pre-hearing conference.

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- Arbitrators may wish to maintain a template or sample ESI protocol to share with parties who don't have their own or for when parties cannot agree to terms. This could include the number of custodians, appropriate search terms for emails, format, etc. and provide discretion to deviate from same based on the size or complexity of the matter.
- If the cost of producing electronic documents appears excessive, the arbitrator(s) may consider requiring the party demanding it to pay for the cost to produce it, subject to a possible re-allocation of the costs in the final award. It may be helpful to require the parties themselves be involved so that they understand the cost implications.
- Arbitrators should direct the parties to keep their electronically stored information requests narrowly focused and structured to make searching for them as economical as possible. The arbitrator may also shift costs by conditioning receipt of such information on the payment of costs, in whole or in part, by the party who requested it.

Applicable Rules: Construction R24, R25/Commercial R23, R24

Depositions

Depositions are generally time consuming and costly and frequently give rise to additional disputes regarding the parties' conduct at the deposition itself. Their use in arbitration generally should be authorized only when clear and compelling grounds are demonstrated that depositions will promote (and not compromise) the speed and efficiency of the arbitration. Indeed, depositions can be helpful where they can decrease hearing time or otherwise save time and money for the parties. In large hearings, depositions may help cut down on a lengthy process.

Depositions Practice Tips:

- Absent extraordinary circumstances, the scope of the depositions should be proportional to the size and complexity of the matter. Arbitrators may consider requiring a formal request for depositions.
- If the arbitrator finds depositions are merited, consider placing limits with respect to both the number of individuals to be deposed and the length of each deposition.
- On smaller cases, parties and the arbitrator(s) may wish to consider imposing a time limit on depositions, rather than a numerical limit.
- When one party insists upon depositions and the other opposes, the party in favor of the depositions should explain how permitting them will save time and expense and narrow the issues, for example, why the questions to be posed at a deposition cannot simply be asked at the hearings themselves.
- Consider limiting the depositions to the main fact-witness each party intends to call and imposing costs of deposition on parties insisting to go beyond main fact-witnesses.

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- The arbitrator(s) may consider denying the request to depose an expert witness when the expert witness furnishes a written report in advance of the hearings.
- With virtual hearings, a limited number of depositions may be presented using videotaped depositions. Videotaped depositions may also be utilized in lieu of live testimony where a witness is "unavailable" (as that term is defined in the Federal Rule 32, and various state rules).

Applicable Rules: Construction L4/Commercial L3

Discovery Disputes

If not handled properly, much time can be consumed resolving discovery disputes. Discovery disputes often involve unnecessary correspondence and briefing by counsel for the parties. To limit or avoid this wasteful exercise, the arbitrator should make clear at the pre-hearing conference, and include in the initial scheduling order, that parties are to engage in good-faith discussions ("to meet and confer") to resolve discovery disputes before bringing them to the attention of the arbitrator. Thereafter, whenever a discovery dispute arises, a telephonic conference should be scheduled so the arbitrator may hear from each party and, if possible, resolve the dispute at that time. If additional briefing is necessary, the timing and extent of the briefing may be established at the conference.

Discovery Disputes Practice Tips:

- Establish that the parties are to try to resolve all discovery disputes before bringing them to the arbitrator by requiring meet and confer among counsel before submitting a dispute to the arbitrator. It is recommended that this "meet and confer" requirement be written into the Initial Procedural Order governing the proceedings.
- Any resolution or determination by the arbitrator should be confirmed in writing as quickly as practicable.
- In order to reduce expense, the parties should be made aware of options, including AAA's Streamlined Panel Option, in which one arbitrator, rather than the full panel, may decide discovery disputes.

Applicable Rules: Construction R25, L4, F8, F9/Commercial R24, L3, E5

Sanctions

Arbitrator(s) are vested with the authority to administer and conduct a hearing in a fair and expeditious manner. When a party's conduct fails to comply with its obligation under the Rules or with an arbitrator's order, upon a party's request, the arbitrator may order appropriate sanctions.

Sanctions Practice Tips:

- When sufficient cause exists, courts have upheld arbitrators' awards and sanctions imposed against parties who have obstructed the hearings, but a drastic sanction such as precluding proof should be considered only

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in the most extreme cases and after carefully reviewing the authority granted to arbitrators in the jurisdiction where the arbitration case is pending.

- While sanctions should be judiciously exercised, in appropriate circumstances, when parties or counsel are being unnecessarily litigious, a reminder that the arbitration process envisions sanctions is sometimes all it takes to induce the parties to exercise restraint and responsibility.
- If the arbitrator(s) decides that sanctions are appropriate, after hearing from all parties, they may be imposed at the time of the action in order to discourage the behavior giving rise to the sanction. Alternatively, sanctions can be imposed in the final award in the form of cost shifting associated with the sanctionable conduct.
- Arbitrators do not have the authority under the Rules to enter a default award as a sanction.

Applicable Rules: Construction R60/Commercial R60

Third-Party Discovery

A non-party to a construction arbitration may have documents or knowledge that is material and relevant to the arbitration. For example, in a dispute between an owner and a contractor, the design professional, the lender or a subcontractor may possess important documents or information relevant to the disputed issues. When such third parties are reluctant to cooperate voluntarily, a party may ask the arbitrator to execute a subpoena directed to the third party.

Generally, the AAA rules do not contemplate third-party document discovery. This discovery guideline recommends that third-party document discovery should only be considered in a Regular Track or Large Complex case and only if the party requesting the information demonstrates that the information sought is material and relevant to the resolution of the issues in dispute and cannot be obtained from other sources (such as from the other party). When a party demonstrates that certain documents in the possession of a non-party or a non-party's testimony is required, it is appropriate to sign a subpoena requiring testimony and/or documents at the hearing. The more controversial issue is when the subpoena requires a party to produce documents or to appear for a deposition outside the arbitrators' presence. Courts construing Article 7 of the Federal Arbitration Act are divided as to whether an arbitrator is permitted to issue a subpoena to a third party to produce documents prior to a hearing (i.e., a "*subpoena duces tecum*" that does not call for the witness to appear at a live hearing where one or more arbitrators will be present). Arbitrators should be aware this area is constantly evolving and is subject to different interpretations depending upon jurisdiction. It is appropriate to require the parties brief the issues relating to enforceability of subpoenas in the relevant jurisdiction. When an arbitrator finds such discovery is necessary and material to a dispute, they may execute a subpoena ordering a third party to appear at a hearing in the locale where the documents are located. However, because of the increased costs this procedure entails, it should be exercised only in extraordinary circumstances.

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Third-Party Discovery Practice Tips:

- Generally, third-party discovery should only be considered in Regular or Large Complex cases.
- Discuss during the preliminary hearing conference call whether third-party subpoenas will be contemplated and, if so, their enforceability.
- Before authorizing a third-party subpoena, the arbitrator should ask counsel for the parties to present cause why (or why not) the document/testimony is material and relevant to the resolution of the disputes. If the arbitrator concludes it is, and a subpoena is necessary, the party requesting it should also provide legal support for its enforceability.
- Give consideration to cost and burden on the third party. The subpoena should be narrowly tailored, and the party requesting the subpoena also may bear responsibility for cost to compile documents.

Applicable Rules: Construction R25, R35/Commercial R24, R35 – Depends on applicable law

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