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[Home](#) > [Publications](#) > [Litigation Committees](#) > [Alternative Dispute Resolution](#) > [Articles](#) > [2016](#) > [American Arbitration Association Revises Construction Arbitration Rules](#)

## American Arbitration Association Revises Construction Arbitration Rules

Edward Lozowicki – March 7, 2016

The American Arbitration Association (AAA) Construction Industry Arbitration Rules (Rules) are widely used in a variety of construction industry contracts, such as the standard contract forms published by the American Institute of Architects (AIA). *E.g.*, AIA Document A201-2007, General Conditions of the Contract for Construction § 15.4. The Rules are fairly comprehensive and comprise both substantive and procedural provisions that are deemed incorporated into the parties' agreement to arbitrate. Rule R-1(a). The AAA recently revised the Rules and made significant changes to the prior edition issued in 2009. The revisions are intended to make the arbitration process more efficient and cost effective. The changes also include several completely new rules that provide expanded authority for the arbitrator to control the course of the arbitration.

By way of example, the new rules provide: (1) express authority for the arbitrator to hear and rule on dispositive motions; (2) strict deadlines and filing requirements for consolidation and joinder motions; (3) express authority for the arbitrator to award sanctions for noncompliance with AAA rules or orders of the arbitrator; (4) mandatory mediation to run concurrent with the arbitration, subject to opt-out; (5) new procedures for an arbitrator to issue emergency protective measures such as restraining orders; (6) an early preliminary management hearing to establish prehearing procedures and timelines; and (7) greater control over the discovery process by arbitrators, including criteria for exchange of electronically stored information (ESI).

The revised rules apply to any construction arbitration case initiated by demand or submission agreement on or after July 1, 2015, provided the administrative fees and filing requirements of

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the AAA have been met. Note that the revised rules apply retroactively if the contract containing the arbitration clause was entered into prior to July 1, 2015, and if the arbitration clause incorporates, or is subject to, the AAA Construction Industry Rules. This article discusses the more significant changes in the revised Rules.

### Dispositive Motions

Several courts have held that arbitrators have discretion to decide cases by means of summary proceedings, to determine which evidence to consider, and to streamline the process. *See, e.g., Sherrock Bros. v. Daimler-Chrysler Motors Co., LLC*, 260 F. App'x 497 (3d Cir. 2008) (holding that under the FAA and AAA Commercial Rules, arbitrator did not deny party a fundamentally fair hearing by basing award on motion for summary judgment); *Schlessinger v. Rosenfeld, Meyer & Susman*, 47 Cal. Rptr. 2d 650 (Ct. App. 1995) (holding that under state act and AAA rules, arbitrator has implicit authority to award based on motion for summary adjudication); *Brooks v. BDO Seidman, LLP*, 917 N.Y.S.2d 842 (Sup. Ct. 2011) (confirming arbitration award that rendered summary judgment, and rejecting argument that rendering summary judgment on the merits constituted arbitrator misconduct). New Rule R-34 expressly provides that "[u]pon prior written application" the arbitrator may permit motions that dispose of all or part of a claim, or narrow the issues in a case. This new rule gives the arbitrator discretion to hear dispositive motions such as a motion to dismiss or motion for summary adjudication or summary judgment. For example, a party could move for summary judgment based on a statute of limitations issue, or for summary adjudication regarding a limitation of liability provision in the underlying contract. The Rule does not state what showing, if any, is required in the "prior written application." However, AAA Commercial Rule R-33, which has a similar provision, provides some guidance in that it requires the moving party to make a prior showing of likely success for the proposed dispositive motion.

### Consolidation and Joinder

Construction arbitration cases become more complex if a party moves for consolidation of another case or joinder of other parties, which may reduce the efficient and timely resolution of the case. To address this concern, revised Rule R-7 provides express deadlines and filing requirements for consolidation and joinder motions. Such motions now must be made prior to the appointment of the merits arbitrator or within 90 days of the date of the demand and payment of initial filing fee, whichever is later. Late motions are not permitted unless the merits arbitrator makes a good cause finding. As in the previous version of the Construction Industry Rules, an independent Rule R-7 arbitrator is appointed to rule on a motion for consolidation or joinder. In addition, the moving party must provide supporting reasons for consolidation or joinder and serve such on all parties involved, who

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then have 10 days to provide written responses to the motion for consolidation or joinder. If a party requests joinder of a third party not involved in any other AAA arbitration, then the moving papers must be filed and served on the third party, together with a demand for arbitration. Finally, revised Rule R-7 gives the AAA authority to stay arbitrations impacted by the consolidation or joinder motions pending their resolution.

### **Sanctions**

Many cases confirm the authority of arbitrators to assess monetary and evidentiary sanctions. *See, e.g., Nat'l Cas. Co. v. First State Ins. Grp.*, 430 F.3d 492, 498 (1st Cir. 2005) (recognizing that drawing of negative inferences by arbitration panel are routine remedies); *Todd Shipyards Corp. v. Cunard Line Ltd.*, 943 F.2d 1056, 1064-65 (9th Cir. 1991); *Polin v. Kellwood Co.*, 132 F. Supp. 2d 126, 130-31 (S.D.N.Y. 2000). New Rule R-60 expressly provides the arbitrator with authority to order "appropriate sanctions" upon the request of a party. Sanctions may be ordered if a party fails to comply with the Rules or with an order of the arbitrator. If the sanction limits a party's participation in the arbitration or results in an adverse determination of an issue, the arbitrator must explain in writing the reason for the sanction and, in any event, require the submission of evidence and legal argument prior to making an award. However, the arbitrator may not enter a default award as a sanction. If a sanction request is made, the arbitrator must give the opposing party an opportunity to respond prior to making any decision. This rule is similar to AAA's Commercial Rule R-58 and appears to require a formal motion for sanctions with the opportunity for opposition. Under this rule, an arbitrator could, for example, preclude admission of evidence at the hearing if a party has failed to produce documents contrary to the arbitrator's prior order, or determine an adverse inference if a party has withheld evidence.

### **Mediation**

Under the prior version of the Rules, mediation of a dispute in arbitration was purely permissive. But now under revised Rule R-10, mediation is required during the course of the arbitration and prior to the evidentiary hearings. In particular, it requires mediation in all cases where a claim or counterclaim exceeds \$100,000, such to be held pursuant to the AAA Construction Industry Mediation Procedures or other mediation provision in the contract. Unless the contract mediation clause provides otherwise, a party may unilaterally opt out of the mediation on giving notice to the AAA and other parties. Further, the new rule states that the mediation shall not serve to delay the arbitration proceedings unless the underlying contract provides otherwise.

### **Emergency Measures of Protection**

In some cases, a party to an arbitration agreement may need immediate interim relief to avoid irreparable injury, such as misuse

of trade secrets, or to preserve the status quo. New Rule R-39 allows parties to apply for emergency interim relief prior to the appointment of the merits arbitrator(s). Upon written application to the AAA stating the grounds for emergency relief, the AAA is to appoint a "single emergency arbitrator" within one business day. The emergency arbitrator is required to establish a schedule for considering the motion for emergency relief within tight deadlines. A moving party must show that immediate and irreparable loss or damage will occur without emergency relief and that the moving party is entitled to relief. Relief can be in the form of an interim order or award. Under this new rule, a party could apply for the equivalent of a temporary restraining order, for example, to prevent theft of trade secrets. Similar provisions appear in the AAA's Commercial Rules and International Rules. However, the provisions of this rule apply only to arbitrations conducted under arbitration agreements executed on or after July 1, 2015.

### **Preliminary Management Hearing**

A distinguishing feature of arbitration is the authority of arbitrators to shape prehearing and discovery procedures so as to reduce the time and expense of resolving disputes. To further this goal, Rule R-23 is rewritten to require that a preliminary management hearing be held as soon as practical after the arbitrator is appointed. Parties as well as their representatives should be invited to attend, and the hearing can be conducted either in person or by telephone. The express purpose of the preliminary hearing is to establish procedures appropriate to achieve a "fair, efficient and economical resolution of the dispute," goals which are traditionally inherent in construction arbitration. The new rule incorporates Supplemental Rules P-1 and P-2. The former expressly states that "[c]are must be taken to avoid importing procedures from court systems" because arbitration is designed to be simpler, less expensive, and more expeditious. New Rule P-2 includes a checklist of some 20 topics which, depending on the size, nature, and complexity of the case, are to be addressed during the preliminary management hearing. This checklist includes, for example, whether there are potential dispositive motions contemplated by the parties, whether and to what extent ESI is to be produced in the document exchange, and whether there are consolidation or joinder issues.

### **Exchange and Production of Information**

Construction cases typically involve mutual production of large volumes of documents and ESI, particularly on major, long-term projects. To streamline the process, Rule R-24 was substantially revised to provide the arbitrator with greater control over the parties' production of documents and other information. The arbitrator may on application of a party or sua sponte require the parties to exchange documents on which they intend to rely; require the parties to update their exchange of documents as soon as they become known to them; require the parties to make other

documents, not otherwise available to the party seeking them, available to that party; require an exchange of ESI in a form most convenient and economical for the party in possession; and, if the parties cannot agree in advance, impose reasonable search parameters that balance the need for production of ESI which is relevant and material to the outcome of the issues against the cost of locating and producing it. The latter criteria appear more restrictive than those typically allowed for discovery in court litigation.

### **Enforcement Powers**

New Rule R-25 is patterned after AAA Commercial Rule R-23. It expressly provides the arbitrator with the power to issue any orders necessary to enforce discovery Rules R-23 and R-24, including without limitation: in the case of willful noncompliance with any order of the arbitrator, imposing sanctions such as drawing adverse inferences, excluding evidence, and/or making special allocations or interim awards of costs resulting from noncompliance; conditioning production of confidential information on a confidentiality order; and allocating the cost of producing documents (including ESI) between the parties.

Other miscellaneous changes made in the new Construction Industry Rules can be found on the AAA website.

**Keywords:** litigation, ADR, arbitration, American Arbitration Association, AAA, construction, dispositive motions, consolidation, joinder, sanctions, mediation, emergency relief, discovery

Edward Lozowicki is of counsel at Sheppard, Mullin, Richter & Hampton LLP in Palo Alto, California.

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