

AAA Updates Its Construction Industry Arbitration Rules and Mediation Procedures

Effective March 1, 2024, the American Arbitration Association (the AAA) adopted an updated version of its *Construction Industry Arbitration Rules and Mediation Procedures* (the Rules), for the first time since 2015. The Rules were revised with input from nationwide stakeholders. Linked are the AAA's updated Rules, announcement, and complete summary of changes.

The Rules were revised to, among other things, reflect technological advances (e.g., add video conferencing and remove fax numbers), promote efficiency (e.g., update cost considerations), and clarify rules (e.g., confidentiality is now the default). The Regular and Fast Track Procedures also underwent several important rule revisions.

Regular Track Procedures

Confidentiality is codified for the first time — as the default standard. See R-45. Specifically, Rule 45 makes explicit the requirement for the AAA and arbitrators to keep all matters confidential (unless otherwise required by applicable law, court order, or the parties' agreement). The Rule also grants arbitrators the specific authority to issue confidentiality orders.

Consolidation and Joinder under Regular Track Procedures were streamlined in several regards. See R-7. Notably, consolidation and joinder requests under Rule 7 must now be filed before the Merits Arbitrator's appointment is confirmed, thereby removing a previous option that allowed for such actions to occur up until 90 days after filing. *Id.* If a party requests leave to file for joinder after the Merits Arbitrator has been confirmed, that party will now need to establish both good cause and, pursuant to the recent revisions, prejudice if the request is not permitted. *Id.* Failure to timely respond to a joinder request is deemed a waiver of any objections under the Rules. *Id.*

An Arbitrator's decision to grant leave for a party to file a dispositive motion was also modified under the revised Rules in an effort to reduce the cost and improve the efficiency of the arbitration process. See R-34. Pursuant to the revised Rules, an arbitrator must now consider the cost of a dispositive motion in determining whether to grant leave for a party to file such a motion. *Id.* This particular revision will be interesting to watch going forward, in part because of the mandatory inclusion of cost onto an arbitrators scale when weighing the likelihood of success and procedural economy.

Arbitrator appointments also received significant attention in the recent revisions. Among the more impactful revisions, the AAA now has explicit authority under Rule 14 to limit party strikes. See R-14. Another example of these efforts is the new rule that a Panel Chair must be appointed from the AAA National Construction Panel, unless the parties agree otherwise. See R-16. Similarly, under Rule 15, party appointed arbitrators must now be on the AAA's National Roster of Arbitrators, unless the parties agree otherwise or the AAA determines that members of the AAA Roster do not meet the parties' requested level of expertise.

Rule 52 was revised to permit arbitrators to "clarify" their awards, although the merits of an award still may not be reconsidered. The previous rule allowed arbitrators to address only clerical, typographical, technical, or computational errors in their awards.

Fast-Track Procedures

To expand industry access to expedited procedures, the revised Rules have raised the ceiling for Fast-Track claims from \$100,000 to \$150,000. See F-1. Former Fast Track Procedures F-8 and F-9 were also combined under the new Rules in an effort to further streamline the proceedings by (i) retaining the requirement that discovery is to be provided only in extraordinary circumstances; (ii)



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adding a requirement that a case may be removed from the Fast Track if discovery is permitted; and (iii) specifying that motions will not be permitted except in instances where there is a showing of good cause. *See* F-8.

Procedures for Large, Complex Construction Disputes

The only noteworthy change to the Procedures for Large, Complex Construction Disputes is that the default threshold for appointing a three-arbitrator panel has been increased from cases exceeding \$1 million to cases exceeding \$3 million. *See* L-3.

Conclusion

Given the complexities of construction disputes and selecting the proper method of dispute resolution for a project, we recommend that parties consult with counsel when negotiating their construction contracts.
