

CURRENT AAA PROCEDURES

The construction industry arbitration rules and mediation procedures of the American Arbitration Association were last amended effective September 15, 2005. Because these rules and procedures are often used as a result of an arbitration provision in a commercial agreement, including agreements between owners and design professionals, between design professionals and their subconsultants, between owners and contractors, and between other parties who have entered into a commercial transaction, a brief review of the current AAA procedures may be helpful.

The construction industry rules provide for mediation, as well as arbitration. However, contract provisions providing for mediation or arbitration must be in writing in order to be enforced by a court. Parties may mutually agree to mediation or arbitration even if they have no written agreement.

Because of the advantages associated with mediation, which is a nonbinding process, prior to the commencement of arbitration, which is a binding process, mediation procedures have become quite popular. The mediator is an impartial facilitator of negotiations between the parties who are having a dispute. The mediator will honor requests for confidentiality while mediating a dispute and will permit the parties to mediate pursuant to an agreement that provides for confidentiality of facts and circumstances revealed during mediation. Accordingly, there is no reason for parties to be reluctant to mediate out of a concern that information that may harm them might be disclosed. Courts will honor the confidentiality associated with the mediation process.

The AAA itself does not act as a mediator or as an arbitrator, but rather provides the means of choosing mediators and arbitrators. Many other organizations exist that provide such

mediation and arbitration services, and it is not uncommon to find retired judges actively engaged in the rendering of mediation and arbitration services. Many of them advertise their availability.

However, the American Arbitration Association has endeavored to provide mediation and arbitration services pursuant to established and published rules in return for the payment of a filing fee and a case service fee. Copies of the rules can be obtained on-line from AAA at its website, www.adr.org. AAA rules are divided into mediation procedures, arbitration rules for regular track procedures, arbitration rules for fast track procedures, and arbitration rules for large complex construction disputes procedures. The National Society of Professional Engineers and approximately 19 other organizations participate in the National Construction Dispute Resolutions Committee, which sponsors arbitration and mediation procedures specially designed for members.

Mediation procedures cover the subjects of the initiation of the mediation, the appointment of a mediator, the qualifications of the mediator, the identification of matters in dispute, the date, time and place of mediation and the authority of the mediator. The mediator does not have the authority to impose a settlement on the parties. Mediators often meet jointly with the parties and separately with the parties in an effort to bring about a resolution of the disputes through negotiation. The mediation may continue until it is successful or until it is apparent that no success is likely.

AAA arbitration rules cover regular track procedures, fast track procedures and complex construction procedures. Disputes involving \$75,000 or less are administered under the fast track procedures, which are designed to provide an economical and fairly quick conclusion to the dispute. No discovery of evidence is permitted. Claims or counterclaims exceeding \$75,000 are

administered under regular track procedures where discovery is permitted. However, a recent Wisconsin Supreme Court decision has held that only the discovery provided for in Wisconsin Statutes dealing with arbitration may be used by an arbitrator. Since AAA appointed arbitrators have often authorized more extensive discovery procedures by the parties, there currently is some uncertainty as to how much discovery authority an arbitrator has, including an arbitrator appointed from a panel under the auspices of the American Arbitration Association. That decision may prompt an expansion of the discovery rules contained in the AAA procedures for regular and complex construction cases.

While it is common in court initiated proceedings for multiple parties to participate in one case, the power to order such joinder of disputes may be limited by the parties' agreement. Where there is no agreement, AAA may appoint an arbitrator for the limited purpose of deciding whether separate arbitration should be consolidated or joined to permit a fair and complete outcome.

The parties may mutually agree to the place of the arbitration, but where no agreement is possible, the AAA will determine the locale. The AAA appoints arbitrators from its national roster of arbitrators and the parties have an opportunity to agree to the identity of the arbitrator or arbitrators. Normally, one arbitrator is selected by the parties, or a panel of three arbitrators may be appointed. If the parties cannot agree on the selection of an arbitrator, AAA will appoint the arbitrator. Sometimes the agreement itself provides for the appointment of an identified arbitrator in which case the agreement will be honored.

An arbitrator must be impartial and independent, and willing to perform his or her duties with diligence and in good faith. Arbitrators found acceptable by the parties or appointed by AAA must sign sworn statements that they have no conflict with the parties or their witnesses or

their attorneys, the names of whom are disclosed during the arbitration selection process.

Once appointed, the arbitrator or arbitrators hold a preliminary hearing to schedule the pre-hearing procedures, including where permitted, discovery and exchange of documents. A date, time and place of hearing is determined. On the date of the hearing, witnesses give sworn testimony under oath, and the proceeding may be stenographically reported if the parties choose to pay the cost.

The proceedings are conducted similarly to a court proceeding, but the arbitrator has the discretion to vary from the strict legal procedures applicable to a court proceeding. The arbitrator determines the admissibility, relevance and materiality of any evidence offered. The arbitrator is authorized to subpoena witnesses or documents for the hearing. When the hearing is concluded, the arbitrator declares it closed and the time limit in which the arbitrator is required to make the award commences to run. The award must be made by the arbitrator no later than 30 days from the date of closing the hearing. The form of the award may be agreed to by the parties, but if no agreement is reached, the arbitrator is expected to provide a concise, written breakdown of the award. Where requested by the parties, the arbitrator will provide a written explanation of the award.

In the award, the arbitrator may not only award or deny damages to a party, but may also assess fees, expenses and compensation associated with the arbitration.

The arbitrator is compensated at the rate filed with AAA. The parties have an opportunity to consider the appropriateness of the rate at the time the arbitration selection process is undertaken.

Large, complex construction disputes are defined as claims or counterclaims involving at least \$1,000,000. Such disputes are heard by three arbitrators. Once again, the arbitrators must

be agreeable to the parties, but if they are unable to agree, AAA appoints the arbitrators from a large, complex construction case panel. Proceedings thereafter are similar to the regular track proceedings.

Under Wisconsin law, an arbitration subject to Wisconsin law is subject to only limited review by a court. Certain defects in the process will result in an award being vacated by the court. Those circumstances include where the award is procured by corruption, fraud or undue means, where there is evidence of partiality or corruption on the part of the arbitrators, where the arbitrators are guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or refusing to hear evidence pertinent or material to the controversy, or for any other behavior which prejudices the right of the parties, or where the arbitrators exceed their powers or execute them in a substantially imperfect way so that a final and definite award has not been made.

Where an award is vacated by the court, the court may in its discretion direct a rehearing in arbitration.

Considering the high cost associated with court proceedings, arbitration is a reasonable alternative disputes resolution process. Sometimes, particularly in a large, complex case, arbitration procedures may be as costly as court procedures. However, everyone associated with arbitration hopes that arbitration can accomplish the resolution of disputes more economically and more timely than court proceedings.