

USA

STRUCTURING AND LAYING THE FOUNDATION FOR AN EFFECTIVE COMPLEX CONSTRUCTION ARBITRATION

In the United States, construction project participants often specify the [American Arbitration Association \(“AAA”\)](#) as the forum for claim resolution and will utilize the [AAA Construction Industry Arbitration Rules](#) to resolve disputes. Even a seemingly small project could have a dozen different types of contractors participating in the completion of the work. If one subcontractor fails to perform it will likely impact other trades, causing a ripple effect of delays, inefficiency, construction defects, and cost increases. Arbitration, however, is a matter of contract.

To effectively utilize arbitration as a dispute resolution process for complex projects, it is necessary to first establish the contractual foundation to ensure that all necessary parties may be [joined](#) when a dispute arises. The failure to properly join necessary parties in a complex arbitration will lessen the benefits derived from engaging in arbitration. This article addresses how to properly



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establish the right to join necessary parties in a complex construction related arbitration, sequence and stage hearings, and provide best practices for the successful joinder of necessary parties.

Joinder Requirements and Related Considerations Under the AAA Construction Industry Arbitration Rules

Under [AAA Construction Rule R-7](#), parties are required to raise any consolidation or joinder requests during the early stages of the arbitration – the latter of (1) before the [appointment](#) of a merits arbitrator or (2) within ninety days of satisfaction of all administrative filing requirements. Thereafter, a single arbitrator from a pool of arbitrators is appointed by the AAA to resolve a consolidation or joinder request. This single arbitrator is initially selected to determine the joinder issue but cannot

serve as the arbitrator for the merits component of the arbitration hearing – unless all parties consent to the selection of this arbitrator as the merits arbitrator.

A party seeking joinder of another party or parties must provide an affirmative written request to the AAA which identifies the parties to be joined and the reasons for the joinder. This joinder request is filed after an initial demand for arbitration has been filed with the AAA. For the purposes of proper service, the requesting party is obligated to send a copy of the written joinder request to all parties named in the pending arbitration – plus those individual parties the requester is attempting to join in the arbitration. The AAA Construction Industry Arbitration Rules require that if one of the proposed parties for joinder is not already a party to a pending AAA arbitration, the requesting party must submit a demand for arbitration as to that party (See, [AAA Construction Industry Arbitration Rule R-7\(c\)](#)). In contrast, the [ICDR International Arbitration Rules](#) of the AAA allow a new party to join if the tribunal deems it appropriate and the additional party consents (See, [ICDR Article 8\(1\)](#)).

Once the joinder request is received, the AAA will send a notice to all parties subject to the arbitration – which may be a significant undertaking in the event there are multiple, or extensive claims in the arbitration involving numerous design professionals, owners, contractors or subcontractors. The non-requesting parties have ten days to provide a written response (See, [AAA Construction Industry Arbitration Rule R-7\(b\)](#)).

The AAA Construction Industry Arbitration Rules provide flexibility on what happens next, including allowing the tribunal to stay the proceedings in order to make a full decision on joinder. The arbitrator or panel, for more complex cases, can address joinder at the initial administrative conference or convene one separately to contemplate the joinder issue (See, [AAA Construction Industry Arbitration Rule R-11](#)). For complex construction matters, panels will often choose the latter to provide time for facts to develop and for the parties to at least begin settlement discussions for certain claims.

Practical Components for Construction Contract Provisions to Lessen Joinder Disputes

A first step in eliminating [joinder](#) concerns for future arbitration proceedings is to mandate and ensure the inclusion of joinder arbitration provisions in all contracts and related subcontracts. This applies to all contracts for a project, including the prime owner-contractor agreement and the owner-architect agreement. The parties to a construction contract should carefully consider the various tiers of subcontractors and/or suppliers and which should be included in a potential dispute so that these parties are included in the dispute provisions of the proposed contracts or subcontracts. A general contractor should include and require joinder provisions in agreements for downstream subcontractors and in related purchase orders to ensure the right to join lower-tier subcontractors and suppliers in regards to a future arbitration.

For example, to ensure the right to join a subcontractor in a future arbitration proceeding, a general contractor may include a clause in its subcontract form stating:

“If requested by Contractor, Subcontractor agrees to and shall submit any dispute under this Subcontract to arbitration under the AAA Construction Industry Arbitration Rules, or pursuant to any arbitration proceeding and rules governing the prime contract between the Contractor and Owner. Subcontractor hereby agrees to participate and cooperate with Contractor in connection with any arbitration proceeding between Contractor and Owner, including joining such arbitration proceeding if requested to do so by Contractor.”

Any lower tier subcontractor agreements should also include a provision whereby the sub-subcontractor agrees to abide by and be bound by the arbitration provisions specified in the subcontract agreement between

the subcontractor and contractor and the prime contract between the owner and the contractor.

In addition to the foregoing, and given the recognized right to complete discovery in traditional litigation in the [United States](#), parties employing arbitration to resolve construction disputes should also specify in their agreements what rights they have to conduct and complete discovery as part of the arbitration, if any, and to require the [exchange of documents](#) or the appearance of [witnesses](#) at a final arbitration hearing. These are just a few considerations parties should keep in mind when agreeing to utilize arbitration to resolve their disputes associated with a complex construction project.



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