THOMSON REUTERS
PRACTICAL LAW™

Discovery (Disclosure) in US Construction Arbitration

by Albert Bates Jr., R. Zachary Torres-Fowler, and Jamey B. Collidge, Troutman Pepper, with Practical Law Arbitration

Status: **Maintained** | Jurisdiction: **United States**

This document is published by Practical Law and can be found at: **content.next.westlaw.com/w-041-8456**
Request a free trial and demonstration at: **tr.com/practicallaw-home**

A Practice Note explaining key issues in the discovery (disclosure) process of a domestic US construction arbitration, such as conducting disclosure in an ad hoc proceeding or under institutional rules, identifying the disclosure's scope, and managing electronically stored information (ESI) and other disclosures (for example, site visits, depositions, expert disclosure, and third party disclosure). This Note identifies the various tools available to parties and factors for parties to consider when preparing for and seeking prehearing disclosure in a construction arbitration in the US.

Arbitration is an important method of alternative dispute resolution (ADR) in domestic US construction industry. It gives parties flexibility in choosing how to manage their dispute, especially the discovery process, which in arbitration is often referred to as disclosure. For more on construction arbitration in the US, see Practice Note, Overview: Construction Arbitration in the US and Practice Note, Arbitrating Construction Disputes in the US.

Although arbitration is generally faster and cheaper than traditional court litigation, disclosure still plays an important role in US construction arbitration. This Note provides a basic introduction to the various approaches to disclosure available to parties in US domestic construction arbitrations. It provides considerations for how to approach the disclosure process in light of the goals of keeping arbitration a less expensive and more expeditious form of dispute resolution.

The Range of Approaches to Disclosure

There is no one-size-fits-all approach to disclosure in construction arbitration. Disclosure in a construction arbitration, especially in the US, can become cumbersome because construction disputes often involve many documents and witnesses. Approaches to disclosure can vary widely depending on the preferences of the parties, attorneys, and arbitrators.

On one end of the spectrum, some parties to arbitration may take the same approach to construction disputes as the US state and federal courts, which usually includes:

- Requests for production (RFP) of documents.
- Depositions.
- Interrogatories.
- Requests for admission.

By contrast, international construction arbitrations are usually more limited in the form of permissible disclosure. These cases typically have limited and specific document exchange procedures. Often the international arbitration rules do now allow for other disclosure tools, like depositions.

Domestic US construction arbitrations generally fall somewhere in the middle between these two extremes. Although approaches vary greatly depending on the specific case's facts, circumstances, and amount in controversy, disclosure in US construction arbitrations may include, with reasonable limits, document exchanges (including email and other electronically stored information (ESI) and depositions.

Prehearing disclosure is also available under the institutional arbitration rules that parties often use for construction cases, such as:

- The Construction Arbitration Rules and Mediation Procedures of the American Arbitration Association (AAA), which include:
  - regular track procedures (AAA Construction Rules) for cases that are not exceptionally large or small;
  - fast-track procedures for smaller cases where no claim or counterclaim exceeds $100,000 (AAA Fast-Track Construction Rules); and

  - rules for large, complex construction cases where there is more than $1,000,000 in controversy (AAA Large Construction Rules).
- The Engineering and Construction Arbitration Rules & Procedures (JAMS Construction Rules) of JAMS.
- The JAMS Engineering and Construction Rules & Procedures for Expedited Arbitration (JAMS Expedited Construction Rules) for cases where the parties want to expedite the proceedings.

The various AAA and JAMS rules provide similar flexibility for the parties to manage their disputes and empower the arbitrator to ensure a speedy and cost-effective resolution. For more information about arbitrating construction disputes under the AAA Construction Rules, see Practice Note, AAA Construction Arbitration: A Step-by-Step Guide. For more information about arbitrating construction disputes under the JAMS Construction Rules, see Practice Note, JAMS Construction Arbitration: A Step-by-Step Guide.

Whether the arbitration is ad-hoc or governed by institutional rules, practitioners must understand the disclosure's nature under the applicable rules and governing law. Some ADR institutions also publish best practices guidelines on disclosure for construction arbitration advocates and arbitrators, such as the AAA Discovery Best Practices for Construction Arbitration (AAA Best Practices). Even where a case proceeds under institutional rules with guidelines on best practices, the disclosure's scope and type often depends on the case needs and the parties' and arbitrator's preferences.

Scope of Disclosure

Most arbitrators hold a preliminary conference early in the case, for the arbitrators and counsel to discuss and schedule the various stages of the proceedings, including disclosure. Both the AAA and JAMS rules provide for a preliminary conference (AAA Construction Rule R-23; JAMS Construction Rule 16). The preliminary conference is the place for, among other things:

- The parties or their counsel to discuss their views on the speed, nature, and scope of disclosure.
- The arbitrators to understand the parties' disclosure needs and, if necessary, resolve any differences over what disclosure will be permitted.

For more information on the preliminary hearing in an AAA construction arbitration, see Practice Note, AAA Construction Arbitration: A Step-by-Step Guide: Pre-hearing Procedures. For more information on the preliminary hearing in a JAMS construction arbitration, see Practice Note, JAMS Construction Arbitration: A Step-by-Step Guide: Preliminary Conference.

The scope of disclosure for the case is an issue the parties must discuss with the arbitrators as early as possible to minimize disagreements and delays as the case proceeds. Parties sometimes think that the scope of permissible disclosure in arbitration is similar to the discovery a federal court permits under Federal Rule of Civil Procedure (FRCP) 26, which generally allows for the discovery of any nonprivileged matter that is relevant to a party's claim or defense (FRCP 26).

Unlike expansive federal court discovery, disclosure in a construction arbitration is usually more limited. For example, the AAA Best Practices caution that:

- By choosing an arbitral forum, the parties forego the unlimited discovery that may be available in a judicial forum, unless their agreement provides for expansive discovery.
- Costly and time-consuming prehearing disclosure is generally available only where it is consistent with the goals of arbitration as a speedy, cost-effective, and final means of dispute resolution.
- Because construction disputes tend to involve more documents than a typical commercial case, construction arbitrators should:
  - manage the case to achieve the above-referenced arbitral goals; and
  - decide disclosure disputes based on the case's size and complexity.

(AAA Discovery Best Practices for Construction Arbitration, at 1.)

Institutional Disclosure Rules

The institutional rules for construction arbitration generally limit the parties' disclosure obligations and empower the arbitrator to maintain efficiency in the process. For example:

- Under the AAA Construction Rules and AAA Large Construction Rules, the arbitrator:
  - has the power to manage the parties' exchange of information (AAA Construction Rule R-24(a); AAA Large Construction Rule L-4(d)); and
  - may require the parties to produce, in response to a document request, documents that are relevant and material to the disputed issues (Construction Rule R-24(b); AAA Large Construction Rule L-4(d)).

- There is no disclosure permitted in a fast-track AAA construction arbitration. The parties must only exchange all witness lists and exhibits they intend to present five days before the hearing. (AAA Fast-Track Construction Rules F-8 and F-9.)
- In a JAMS construction arbitration, unless the arbitrator or the parties' agreement provides otherwise:
  - the parties must cooperate in a voluntary and informal exchange of information relevant to the dispute (JAMS Construction Rule 17(a); JAMS Expedited Construction Rule 17);
  - if the case is not expedited, a party may take two depositions of the other party (JAMS Construction Rule 17(b)); and
  - if the case is expedited, no party may take a deposition unless the arbitrator permits it based on a showing of exceptional need (JAMS Expedited Construction Rule 17).

Party Agreement on Disclosure

Parties may also narrow disclosure by agreeing to follow the norms common to international construction arbitrations, which typically include much more limited document exchanges and less emphasis on other disclosure tools like depositions. For example, under the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (IBA Rules), a party seeking documents must:

- Identify a narrow and specific category of documents that the party reasonably believes exist.
- Show that the requested documents are:
  - relevant to the case; and
  - material to its outcome.

(IBA Rules Art. 3(1)(3).)

Even if the parties' agreement does not limit the exchange of information and other fact disclosure tools, the parties may agree on a framework for expert witnesses where necessary. For example, the Chartered Institute of Arbitrators (CIArb) provides a guideline for the use of party-appointed and tribunal-appointed expert witnesses in international arbitration proceedings. Parties in a domestic US construction dispute may want to adopt the CIArb guidelines concerning party-appointed experts to manage their expert submissions (see Expert Disclosure).

In practice, some arbitrators defer to the wishes of the parties' counsel concerning the scope of disclosure. Others take a more active role and promote efficiency by urging counsel to limit the scope of disclosure, particularly about depositions and the exchange of email and other ESI.

Managing the Production of Email and Other ESI

The exchange of ESI is an important part of disclosure in any case. However, without limitations, electronic discovery (e-discovery) can become unmanageable and defeat the benefits of arbitration. Disclosure of ESI, and particularly email and other electronic information and files, can be a significant driver of costs for parties in US domestic construction arbitrations.

Consistent with the promotion of arbitration as a more efficient and cost-effective dispute resolution system, arbitral institutions typically discourage blanket requests to produce ESI. The AAA Discovery Best Practices for Construction Arbitration provide useful best practices to keep ESI production manageable, including:

- Developing an ESI protocol at the outset of the proceedings, where the parties confer on, for example, the number of custodians and permissible search terms.
- Shifting the production costs to the requesting party where a request is overbroad.

For resources on e-discovery in US federal court litigation, see E-Discovery Toolkit.

Email

Parties involved in a construction project often have large teams where all members regularly use email or other electronic messaging systems to communicate, resulting in a large volume of email and electronic messages. The fact that construction projects can also last for years compounds the number of emails and electronic messages.

Collecting email for production in a construction arbitration is often complicated because:

- There are many email custodians who may have relevant information.
- Many project participants may be involved with several projects simultaneously.
- Emails from certain custodians, such as principals, may potentially contain material that is subject to attorney-client privilege.

When discussing ways to limit or manage email disclosure, parties and the arbitrator may consider, for example:

- The project's size and complexity.
- The exchange of limited custodians, project-limiting search terms, and narrowly tailored search strings for emails.
- Limiting or dispensing with the need to produce external emails the other party already possesses.

Project Files

Large construction projects often maintain a project file, which is an electronic repository of project documents. Project files can be particularly large, containing hundreds of thousands of documents and hundreds of gigabytes or even terabytes of information. There is no limit to the type and number of documents that may be maintained in a project file, but it usually includes, at a minimum:

- Formal letter correspondence.
- Submittals and transmittals.
- Requests for information (RFIs).
- Responses to RFIs.
- Project control documents.
- Meeting minutes.
- Daily logs or reports.

Documents in a construction project file may also often involve unique file types that require special programs to access, such as drawings, CAD files, and schedules.

When discussing ways to limit or manage disclosure concerning project files, parties and the arbitrator may consider, for example, having the parties:

- Produce their project files without the need for detailed document requests.
- Exchange copies of project file directories to allow the opposing party to identify the folders or sub-folders it believes contain relevant information.
- Target their document requests for specific files that would normally be contained in a project file without the need to request or produce the entire file.

Timing of Document Exchanges

The timing for document exchanges depends on the parties' agreement or the applicable rules. Where the parties have not agreed to use institutional rules to govern the arbitration, their arbitration agreement may set out the timetable for document exchanges. Where institutional rules govern the arbitration, they may set out the timing of initial and later exchanges. For example:

- Where the JAMS regular construction rules govern the arbitration, the parties must:
  - voluntarily and informally exchange all relevant, non-privileged documents and other information, including ESI, immediately after the arbitration begins;
  - exchange all relevant, non-privileged documents and information on which they intend to rely within 21 days after the preliminary conference; and
  - supplement their productions as they become aware of new documents.

  (JAMS Construction Rule 17.)
- The parties in an expedited JAMS construction arbitration must voluntarily and informally exchange all relevant, non-privileged documents and other information, including ESI, within the timeframe set at the preliminary telephone conference, which occurs within five days after the arbitrator's appointment (JAMS Expedited Construction Rules 16, 17).
- Where the AAA rules govern the arbitration, the arbitrator may require the parties to:
  - produce documents and ESI responsive to reasonable document requests by the deadline the arbitrator sets at the preliminary conference;
  - produce all documents and ESI on which they intend to rely; and
  - supplement their productions as they become aware of new documents and ESI.

  (AAA Construction Rule R-24; AAA Large Construction Rule L-4.)

Other Disclosure

Although construction disputes are generally document-intensive proceedings, document exchanges are not the only form of disclosure that parties may wish to use in a construction arbitration. The unique features of construction disputes, often involving a physical project and numerous professionals, may make other disclosure tools equally appropriate, such as site visits, depositions, expert disclosure, and third party disclosure.

Site Visits

Construction disputes often involve physical projects that the parties and arbitrator may wish to see and

inspect. A site inspection may be particularly helpful in a construction arbitration if the dispute centers on defective, unremedied, or unresolved work at the project site. For example, the parties may want their respective experts, the arbitrators, or both, to visit the site to allow:

- The experts to gather information to formulate their opinions.
- The arbitrators to see the disputed issues up close and in the context of the whole project.

An AAA construction arbitrator may set a date and time for a site inspection if the arbitrator finds an inspection necessary (AAA Construction Rule R-37). Although industry practitioners generally consider site inspections helpful in some circumstances, it is not necessary in every case. The parties should carefully consider the time and expense involved in a site inspection. The AAA provides guidance on effectively managing a site visit, such as providing photos to the arbitrator before the visit so the arbitrator knows the layout and issues (AAA Discovery Best Practices for Construction Arbitration, at 2-3).

Where the parties and arbitrator agree a site inspection may be helpful, the parties should work together to establish a protocol for the visit to avoid unfair or unanticipated surprises. The International Chamber of Commerce (ICC) provides guidance on effectively managing a site visit in an international construction arbitration. That guidance is equally helpful for a domestic US construction arbitration site visit. For example, the ICC suggests conducting a site visit after the parties brief the site issues to focus the tribunal on the issues. (ICC Construction Industry Arbitrations, Recommended Tools and Techniques for Effective Management.)

When developing a site visit protocol, the parties and arbitrator should consider, among other issues:

- Who will attend the site visit.
- Whether each party may appoint a lead representative to attend and direct the attendees to the observation area, and if lead party representatives may attend:
  - their names and positions; and
  - whether they may answer questions about the project from other attendees, including the arbitrator.
- The extent of permissible communication between the arbitrator and:
  - other attendees; and
  - any experts who attend, including whether the arbitrator may communicate with both parties' experts to resolve the arbitrator's questions in real time.
- The site visit's timing and route.

Depositions

Depositions are routinely used in US civil litigation. Many practitioners consider depositions a useful disclosure tool, particularly where there are a limited number of key witnesses from each party.

However, institutional construction arbitration rules discourage depositions. For example, for construction arbitrations the AAA administers:

- The rules for regular track cases do not mention depositions and the AAA Best Practices provides that depositions:
  - should not be permitted unless there are clear and compelling grounds that the depositions will promote efficiency and may save costs; and
  - where permitted, their scope should be proportional to the case size and complexity.

  (AAA Discovery Best Practices for Construction Arbitration, at 4.)
- The rules for large cases permit depositions only in exceptional cases at the arbitrator's discretion and the arbitrator may allocate deposition costs (AAA Large Construction Rule L-4(f)).
- The AAA Fast-Track Construction Rules do not permit any disclosure other than exchanges of documents and witness lists (AAA Fast-Track Construction Rules F-8 and F-9).

For a JAMS construction arbitration:

- Under the regular rules, each party may take two depositions. The arbitrator may grant additional depositions after considering:
  - the need for the requested information;
  - the availability of other disclosure options; and
  - the burden imposed on the opposing party and witness.

  (JAMS Construction Rule 17.)
- Where the case is expedited, no party may take a deposition unless the arbitrator permits it based on the party's showing of exceptional need (JAMS Expedited Construction Rule 17).

These rules generally limit depositions because they are costly and time-consuming. Depositions may waste resources if the parties do not use them properly and strategically. Practitioners weighing the need for depositions in construction arbitration should consider various factors, such as:

- The complexity of the issues in dispute.
- The amount in dispute.
- Whether depositions will save time and expense or narrow the issues in dispute.
- Limiting the number of depositions or the total hours of deposition time, including for any party representative depositions.

Expert Disclosure

Construction disputes often involve matters that may require expert testimony, such as:

- Claims involving cost accounting analysis.
- Highly technical issues.
- Delay and disruption claims.

Parties should be prepared to discuss during the preliminary hearing any logistical issues concerning the use of expert witnesses. The institutional rules often provide a roadmap for expert report exchanges, subject to dates the arbitrator sets during the preliminary conference.

Parties typically exchange expert reports outlining each expert's opinions in a format that mimics the requirements for expert reports under the FRCP. After exchanging expert reports, the parties often submit rebuttal expert reports. In large cases, the parties sometimes agree to expert depositions if the arbitrator permits them.

When planning for expert disclosure in a US construction arbitration, parties usually consider the timing and exchange of affirmative expert reports. They also consider whether the parties will:

- Take expert depositions, particularly if an expert witness will also submit a report and testify live during the hearing.
- Exchange rebuttal expert reports or present rebuttal points during live questioning at a hearing.

Third-Party Disclosure

Third-party disclosure (for example, using a subpoena) is not necessarily an available disclosure tool in US construction arbitration. Parties intending to take third-party disclosure must consider whether third-party disclosure is permitted under:

- The applicable institutional rules.
- The law governing the dispute.

Institutional rules generally do not allow the parties to engage in third-party disclosure except in limited circumstances. For example:

- In a JAMS arbitration, the rules expressly provide for third-party disclosure in some kinds of cases but not in construction cases (compare JAMS Comprehensive Rules and Mediation Procedures Rule 17(e) (permitting third-party disclosure in consumer and employment cases) with JAMS Construction Rule 17 (permitting exchanges of information only between the parties).
- The AAA Construction Rules do not expressly provide for third-party disclosure, although they permit the arbitrator to issue a subpoena for testimony at a hearing (AAA Construction Rule R-35(d)). The AAA Best Practices suggests:
  - there should be no third-party disclosure in small cases; and
  - in larger cases, any party seeking third-party disclosure should demonstrate the information sought is relevant, material, and cannot be obtained from other sources (like a party to the arbitration).

(AAA Discovery Best Practices for Construction Arbitration, at 6.)

Whether the applicable law permits an arbitrator to issue a prehearing discovery subpoena depends on the arbitration's location. The federal courts are split on whether an arbitrator may compel a third-party to engage in pre-hearing disclosure, including the production of documents or attendance at a deposition. Specifically:

- The Second, Third, Ninth, and Eleventh Circuit Courts of Appeal have held that Section 7 of the Federal Arbitration Act (FAA) requires non-party document disclosure to take place only when the non-party appears at a hearing before the arbitrators (see *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008); *Hay Grp, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406-07 (3d Cir. 2004); *CVS Health Corp. v. Vividus*, LLC, 878 F.3d 703, 706 (9th Cir. 2017); see also *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145 (11th Cir. 2019) (arbitration subpoena commanding attendance by video not enforced)).
- The Sixth and Eighth Circuits have held that Section 7 of the FAA authorizes arbitrators to subpoena

pre-hearing document disclosure from non-parties (see *Am. Fed. of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Comm. of Detroit, Inc.)*, 164 F.3d 1004, 1009 (6th Cir. 1999); *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000)).

- The Fourth Circuit generally prohibits discovery subpoenas but recognizes an exception for a special need (*COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 271, 275-76 (4th Cir. 1999)).

For more information on third-party disclosure in arbitration, see Practice Note, Compelling Evidence from Non-Parties in Arbitration in the US.

Resolution of Disclosure Disputes

Disputes over disclosure often arise in domestic US construction arbitration. Parties should consider and be prepared to discuss at the preliminary conference a framework for the efficient resolution. When devising the framework, the parties should consider, for example:

- Whether and how the parties should meet and confer before they submit a disclosure dispute to the arbitrator.
- In arbitrations before a three-member panel, whether to have:
  - a single arbitrator, such as the panel chair, hear and decide disclosure disputes; or
  - all arbitrators hear the dispute and decide it by majority rule, which may take more time and be more costly.
- How to present disclosure disputes to the arbitrator for decision, including timing and length of briefs.

(AAA Discovery Best Practices for Construction Arbitration, at 5.)

The various institutional construction arbitration rules generally permit the parties and arbitrator to decide the best resolution method. For example:

- In a JAMS construction arbitration:
  - a single member of the panel may decide a disclosure dispute; and
  - with the written agreement of all parties, the arbitrator may appoint a special master to decide a disclosure dispute.

  (JAMS Construction Rule 17(d); JAMS Expedited Construction Rule 17(c).)
- In an AAA construction arbitration:
  - the arbitrator has authority to issue and enforce orders concerning disclosure in a regular case and resolve disclosure disputes (AAA Construction Rule R-25; AAA Fast-Track Construction Rule F-8); and
  - any single member of a panel has authority to decide a disclosure dispute in a large case (AAA Construction Rule L-4(h)).

For disputes over document requests or exchanges, parties sometimes use a Redfern schedule rather than briefing the issues for the arbitrator. A Redfern schedule, common in international construction arbitration, is an organizational tool for streamlining the exchange of documents. It provides a grid for the parties and arbitrator, as applicable, to insert:

- The specific document requests.
- The counterparty's objection to the request.
- The arbitrator's decision.

For a sample Redfern schedule, see Standard Document: Specimen Redfern schedule and drafting note.