

# Home Construction Arbitration Rules and Mediation Procedures



AMERICAN ARBITRATION ASSOCIATION®

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Rules Amended and Effective August 1, 2018

# Table of Contents

- Introduction ..... 6
  - Why AAA Home Construction Arbitration Rules and Mediation Procedures? ..... 6
  - What is mediation? ..... 6
  - What are the benefits of mediation? ..... 7
  - Who are the AAA’s mediators? ..... 7
  - What is arbitration? ..... 8
  - What are the benefits of arbitration? ..... 9
  - Who are the AAA’s arbitrators? ..... 9
  - What is the role of the AAA? ..... 10
  
- Highlights of these Rules and Special Considerations ..... 11
- Resources for Both Parties ..... 12
  
- Home Construction Arbitration Rules ..... 13
  - ARB-1. Agreement of Parties ..... 13
  - ARB-2. Applicability ..... 13
  - ARB-3. Dispute Levels ..... 13
  - ARB-4. Declining or Ceasing Arbitration ..... 14
  - ARB-5. Expedited Hearing Procedures ..... 14
  - ARB-6. AAA and Delegation of Duties ..... 14
  - ARB-7. Panel of Home Construction Arbitrators ..... 15
  - ARB-8. Initiation under an Arbitration Provision in a Contract ..... 15
  - ARB-9. Initiation under a Submission Agreement ..... 16
  - ARB-10. Changes of Claim ..... 16
  - ARB-11. Jurisdiction ..... 17
  - ARB-12. Consolidation or Joinder ..... 17
  - ARB-13. Mediation ..... 17
  - ARB-14. Administrative Conference ..... 17
  - ARB-15. Fixing of Locale ..... 18
  - ARB-16. Appointment from Panel of Home Construction Arbitrators ..... 18
  - ARB-17. Number of Arbitrators ..... 19
  - ARB-18. Disclosure ..... 19
  - ARB-19. Disqualification of Arbitrator ..... 19
  - ARB-20. Communication with Arbitrator ..... 19

ARB-21. Vacancies . . . . .	20
ARB-22. Preliminary Hearing. . . . .	20
ARB-23. Exchange of Information . . . . .	20
ARB-24. Date, Time and Place of Hearing. . . . .	22
ARB-25. Attendance at Hearings . . . . .	22
ARB-26. Representation . . . . .	22
ARB-27. Oaths . . . . .	22
ARB-28. Stenographic Record . . . . .	23
ARB-29. Interpreters . . . . .	23
ARB-30. Postponements . . . . .	23
ARB-31. Arbitration in the Absence of a Party or Representative . . . . .	23
ARB-32. Conduct of Proceedings. . . . .	23
ARB-33. Evidence . . . . .	24
ARB-34. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence . . . . .	24
ARB-35. Inspection or Investigation. . . . .	24
ARB-36. Interim Measures. . . . .	25
ARB-37. Closing of Hearing . . . . .	25
ARB-38. Reopening of Hearing . . . . .	25
ARB-39. Waiver of Rules . . . . .	25
ARB-40. Extensions of Time . . . . .	26
ARB-41. Serving of Notice . . . . .	26
ARB-42. Time of Award. . . . .	26
ARB-43. Form and Scope of Award . . . . .	27
ARB-44. Award upon Settlement . . . . .	27
ARB-45. Delivery of Award to Parties. . . . .	28
ARB-46. Modification of Award . . . . .	28
ARB-47. Release of Documents for Judicial Proceedings . . . . .	28
ARB-48. Applications to Court and Exclusions of Liability. . . . .	28
ARB-49. Interpretation and Application of Rules . . . . .	29
ARB-50. Administrative Fees, Arbitrator Fees and Expenses and Suspension for Non-Payment . . . . .	29
<b>Administrative Fees and Arbitrator Compensation. . . . .</b>	<b>30</b>
<b>Arbitration Checklist . . . . .</b>	<b>31</b>
<b>Arbitration Tips for Parties . . . . .</b>	<b>32</b>

**Home Construction Mediation Procedures** ..... 33

M-1. Agreement of Parties ..... 33

M-2. Initiation of Mediation ..... 33

M-3. Fixing of Locale (the city, county, state, territory and, if applicable, county of the Mediation) ..... 33

M-4. Representation ..... 34

M-5. Appointment of the Mediator ..... 34

M-6. Mediator’s Impartiality and Duty to Disclose ..... 34

M-7. Vacancies ..... 35

M-8. Duties and Responsibilities of the Mediator ..... 35

M-9. Responsibilities of the Parties ..... 36

M-10. Privacy ..... 36

M-11. Confidentiality ..... 36

M-12. No Stenographic Record ..... 37

M-13. Termination of Mediation ..... 37

M-14. Exclusion of Liability ..... 37

M-15. Interpretation and Application of Procedures ..... 38

M-16. Deposits ..... 38

M-17. Expenses ..... 38

Cost of the Mediation ..... 38

Mediation Tips for Parties ..... 39

**Glossary of Terms** ..... 40

**Recognition** ..... 43

# Home Construction Arbitration Rules and Mediation Procedures



On June 1, 2007, the American Arbitration Association® introduced the *Home Construction Arbitration Rules and Mediation Procedures*, which replaced the *Supplementary Procedures for Residential Construction Disputes*. Please reference the *Home Construction Arbitration Rules and Mediation Procedures* in any new agreements, contracts, or warranties related to residential construction and remodeling.

Case filings that reference the *Supplementary Procedures for Residential Construction Disputes* will be administered under the *Home Construction Arbitration Rules and Mediation Procedures*.

Please also note that according to the *Home Construction Arbitration Rules and Mediation Procedures* (ARB-1), the parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association under its *Home Construction Arbitration Rules*, or whenever they have provided for arbitration of a home construction dispute in a contract which does not designate a particular AAA® rule set and is dated on or after the effective date of these Rules.

The Glossary defines “home” as used in these Rules. If the parties’ agreement calls for any other AAA Rules, such as the Construction Industry Arbitration Rules, please file your dispute resolution claim in accordance with the Rules named.

## Introduction

### Why AAA Home Construction Arbitration Rules and Mediation Procedures?

Each year, over a million new homes are built and sold in the United States. Occasionally, disagreements develop between the homeowner and homebuilder, and it is important to resolve them quickly and cost effectively. These *Home Construction Arbitration Rules and Mediation Procedures* are suggested for mediation and arbitration provisions in homebuilding contracts because they will provide both parties with fair and cost-effective mediation or arbitration of their dispute. The AAA recommends that parties continue to attempt direct negotiations to resolve their problem and recommends using mediation under these Rules whenever possible. If, however, negotiations should fail, the AAA's *Home Construction Rules* provide the parties with a hearing by an impartial arbitrator who will make a ruling (award) that is binding.

### What is mediation?

Mediation is a process in which parties submit their dispute to a neutral third party (the mediator) who works with the parties to reach a settlement of their dispute. Mediation is an extension of the negotiation process. Mediators do not have the authority to decide issues; they simply assist the parties in reaching an acceptable settlement by probing the motivations and concerns of the parties in an effort to find a basis for resolving the parties' dispute. It is the mediator's neutrality that frequently enables him or her to move beyond the posturing of the parties so that their true concerns can be addressed.

Submitting your dispute to AAA mediation will not cause delay to any pending lawsuit or arbitration you may have unless agreed to by the parties. Mediators who serve on the AAA's Roster are experts in successful negotiation. Mediators receive a fee from the parties for their services. They are also rewarded by knowing that their efforts have resulted in an amicable settlement of a dispute that would have cost substantial time and money had it been litigated through the courts.

## What are the benefits of mediation?

The benefits of successfully mediating a dispute to settlement vary, depending on the needs and interests of the parties. The most common advantages are:

- > Parties are directly involved in negotiating the settlement.
- > The mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives that they might not have considered on their own.
- > Because mediation can be scheduled early in the dispute, a settlement can be reached much more quickly than in litigation.
- > Parties generally save money through reduced legal costs, especially costs associated with discovery and trial preparation.
- > Parties enhance the possibility of continuing their business relationship with each other.
- > Creative solutions or accommodations of special needs of the parties can become a part of the settlement.

The parties might wish to try mediation before submitting their dispute to arbitration. Whether mediation is required in the contract, or whether the parties agree to mediate, mediation should always be considered as an option.

## Who are the AAA's mediators?

Mediators on the AAA's Roster include lawyers, former judges and business persons who have met the qualification criteria and who have been trained in mediation techniques. Qualification criteria include:

- > a minimum of 10 or more years of professional or business experience,
- > successful completion of mediator training programs,
- > relevant academic and business/professional credentials and licenses,
- > scholarship and continuing education achievements,
- > dispute management and neutral skills,
- > reputation in the business/professional community, and
- > commitment and availability to serve as a neutral mediator.

When a case is filed with the AAA, the AAA will appoint a mediator, unless the parties' agreement specifies a different method of appointment. The parties will be notified of the mediator's qualifications, including educational institutions

attended, degrees earned, employment history, professional licenses or certifications, offices held in professional and trade associations, the individual's work experience and participation in training programs.

Mediators must disclose any relationship with the parties, their attorneys, or others involved in the case, such as witnesses; those with disqualifying relationships will not be permitted to serve on the particular case. This assures the parties that the mediator is neutral.

### What is arbitration?

Arbitration is the referral of a dispute to one or more impartial persons for final and binding decision or award. It is designed to be private, informal, quick, practical and economical. Parties frequently negotiate certain aspects of the arbitration process to make for a more efficient process. The parties may also provide for expedited arbitration procedures, including expedited rendering of the award, if they anticipate a need for hearings to be scheduled on short notice.

An important feature of arbitration is its informality. Under the standard AAA rules, the procedure is relatively simple: legal rules of evidence are not applicable; there is no motion practice or court conference; there is no requirement for transcripts of the proceedings or for written opinions of the arbitrators. Although there is no formal discovery process, the AAA's rules allow the arbitrator to require production of relevant documents, the deposition of factual witnesses and an exchange of reports of expert witnesses. The standard AAA rules are flexible and may be varied by mutual agreement of the parties.

The fact that the arbitrators are trained and have professional expertise is also important. Arbitrators are selected for specific cases because of their knowledge of the subject matter. Based on that experience, arbitrators can render an award grounded on thoughtful and thorough analysis.

Most parties provide for arbitration of disputes because they are seeking a final and binding resolution of their business conflicts. Court intervention and review are limited by applicable state or federal arbitration laws; award enforcement is facilitated by those same laws.

Another important advantage of arbitration is that it is designed to be private, having no public record of the dispute or of the facts presented in resolving the dispute.



## What are the benefits of arbitration?

- > *Confidentiality.* Arbitration is a private process. There is no public record of the proceedings.
- > *Limited Discovery.* Extensive discovery is avoided. Arbitrators arrange for limited exchange of documents, witness lists and depositions appropriate to the particular dispute.
- > *Speed.* There is no docket or backlog in arbitration. Hearings are scheduled as soon as the parties and the arbitrator have dates available.
- > *Expert Arbitrators.* The arbitrators have expertise in the subject matter in dispute, as well as ongoing training in the arbitration process.
- > *Cost Savings.* Because of the limited discovery and informal hearing procedures, as well as the expedited nature of the process, the parties save on legal fees and transactional costs.
- > *Preservation of Business Relationships.* In most instances, litigation between business professionals and their clients destroys the working relationship. Arbitration is less adversarial and, because of its informal nature, it is more likely that the parties will be able to continue their business relationship.

## Who are the AAA's arbitrators?

Arbitrators on the AAA's Roster of Home Construction Arbitrators include lawyers and former judges who have met the qualification criteria and who have been trained by the AAA in arbitration techniques. Qualification criteria include:

- > a minimum of 10 or more years of professional or business experience,
- > successful completion of AAA arbitrator training programs,
- > relevant academic and business/professional credentials and licenses,
- > scholarship and continuing education achievements,
- > dispute management and neutral skills,
- > reputation in the business/professional community, and
- > commitment and availability to serve as a neutral arbitrator.

When a case is filed with the AAA, the parties select the arbitrator from a list prepared by the AAA. The list contains the proposed arbitrators' credentials, including educational institutions attended, degrees earned, employment history, professional licenses or certifications, offices held in professional and trade associations, the individuals' work experience and participation in arbitrator training programs.

Arbitrators must disclose any relationship with the parties, their attorneys, or others involved in the case, such as witnesses; those with disqualifying relationships will not be permitted to serve on the particular case. This assures the parties that the arbitrator is neutral.

### What is the role of the AAA?

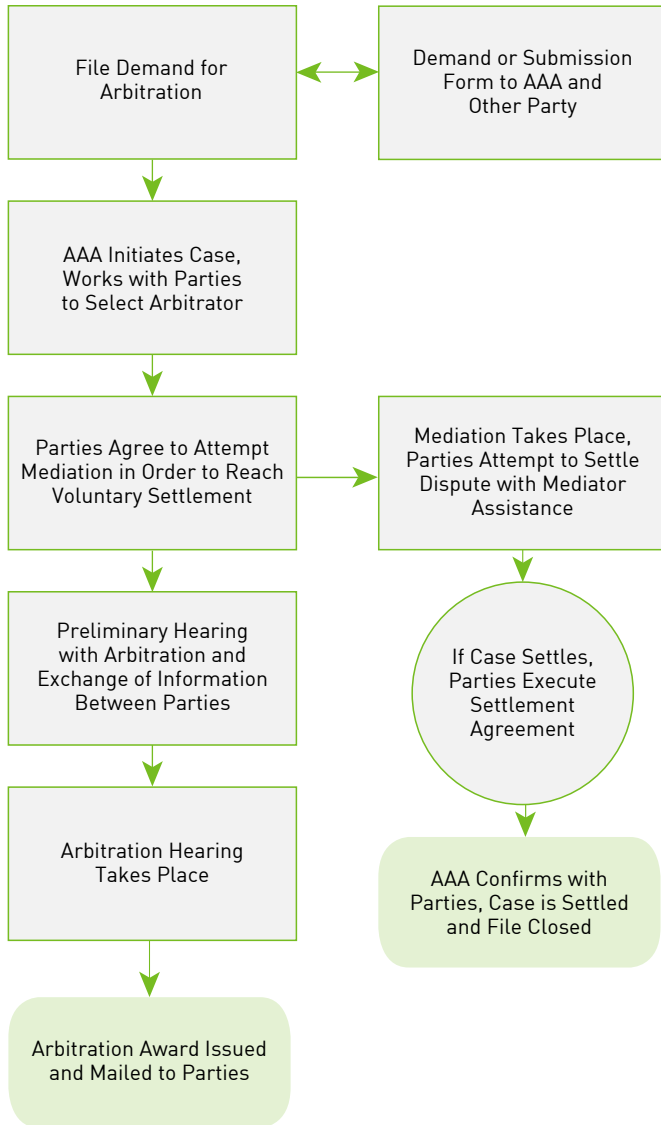
The AAA primarily serves as an arbitration and mediation administrator. To bring the matter to a prompt, fair conclusion, the AAA will provide administrative services that will include, but are not limited to:

- > receipt and acknowledgment of claims and counterclaims,
- > an administrative conference with the parties and their counsel,
- > preparation of lists of neutral arbitrators or mediators suitable to the specific dispute,
- > supervision of the neutral arbitrator or mediator selection process,
- > scheduling of meetings or hearings in AAA facilities or at other locations convenient to the parties,
- > management and facilitation of all communications between the parties and the arbitrator, including any arrangement for compensation of the arbitrator or mediator,
- > determination of whether an arbitrator or mediator has a disqualifying relationship, and
- > ensuring that the mediated settlement or decision of the arbitrator is achieved promptly and fairly.

The AAA also conducts educational programs, prepares materials that explain alternative dispute resolution (ADR) processes, maintains current data on Roster members and provides related services to the parties, both domestically and internationally.

## Highlights of these Rules and Special Considerations

- > Rules are designed specifically for home construction disputes between a home owner and home builder.
- > Rules provide processes that may result in significant cost- and time-savings as compared to traditional litigation.
- > Claims and counterclaims are divided into Levels so that the process can fit the size of the claim, saving time and money for all concerned.
- > Claims filed by homeowner signatories to the contract, for purposes of the arbitration, are considered one Claimant or one Counterclaimant.
- > Arbitrators and mediators serving in these disputes are members of the AAA Roster of Arbitrators and Mediators.
- > Varied arbitration options including documents only hearings, telephone and in-person hearings are available.
- > Parties can mediate and try to resolve the claims themselves without an arbitrator deciding the issues.
- > The AAA offers fast, convenient online claim filing through AAA WebFile®. In addition to filing claims, clients can make payments, perform online case management, access rules and procedures, electronically transfer documents, select Arbitrators or Mediators, use a case-customized message board and check the status of their case.
- > *Please Note:* Rules ARB-8c and ARB-15 specify the time limits to file objections to the arbitration or objection to the locale of the arbitration.



## Resources for Both Parties

At the back of the Rules is a Glossary of Terms, a checklist for mediation or preparing for arbitration, and a checklist for filing your demand for arbitration. Frequently Asked Questions (FAQ) regarding home construction arbitration, along with other valuable information, is available at [www.adr.org](http://www.adr.org).

# Home Construction Arbitration Rules

## ARB-1. Agreement of Parties

- (a) The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association under its *Home Construction Arbitration Rules* or whenever they have provided for arbitration of a home construction dispute in a contract which does not designate a particular AAA rule set and is dated on or after the effective date of these Rules. The Glossary defines “home” as used in these Rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these Rules. After the appointment of the arbitrator, such modifications may be made only with consent of the arbitrator.
- (b) Unless the parties or the AAA determine otherwise, Expedited Hearing Procedures shall apply in any case in which the disclosed monetary claim or counterclaim is less than \$100,000 (referred to as a Level 1 or Level 2 dispute), exclusive of interest and arbitration fees and costs. Expedited Hearing Procedures are indicated throughout these Rules with italicized text. Parties may also agree to use these Expedited Hearing Procedures in larger cases.

## ARB-2. Applicability

These Rules shall only apply to two-party cases involving a home owner and a home builder with claims or counterclaims less than \$1,000,000. Cases with claims or counterclaims of \$1,000,000 or greater, involving more than two parties or with issues of joinder or consolidation, shall be heard under the Construction Industry Arbitration Rules.

## ARB-3. Dispute Levels

- (a) Level 1 disputes shall be those disputes in which the claim or counterclaim is less than \$25,000. The parties can also resolve their Level 1 disputes in a small claims court if the claim or counterclaim is within the jurisdictional limits of such court. This small claims court option does not extend to courts of regular jurisdiction or appellate courts.
- (b) Level 2 disputes shall be those disputes in which a claim or counterclaim is \$25,000 to less than \$100,000.

- (c) Level 3 disputes shall be those disputes in which a claim or counterclaim is \$100,000 to less than \$1,000,000 or the claim or counterclaim is non-monetary or undetermined.

#### ARB-4. Declining or Ceasing Arbitration

The AAA in its sole discretion may decline to accept a Demand for Arbitration or may cease the administration of an ongoing arbitration due to a party's improper conduct, including threatening or harassing behavior towards any AAA staff, an arbitrator, or a party or party's representative. In addition, the AAA may in its discretion decline to administer the case if the arbitration agreement substantially and materially deviates from these rules and the parties do not agree to remedy the material deviation. If either the arbitrator or the AAA suspend or terminate the proceedings, the parties may submit their dispute to an appropriate court.

#### ARB-5. Expedited Hearing Procedures

- (a) Level 1 disputes shall be resolved by submission of documents. Any party, however, may ask for a hearing. The arbitrator shall decide whether a formal hearing, via telephone or in person, is necessary (see item c, below). For disputes resolved by submission of documents, the arbitrator shall establish a fair and equitable procedure for the submission of documents.
- (b) Level 2 and Level 3 disputes shall have a hearing unless the parties agree not to have one.
- (c) The hearing may be by telephone or in person. The hearing may occur even if the other party does not attend. For Level 1 disputes, a request for a hearing should be made in writing within 10 calendar days after the AAA acknowledges receipt of a claimant's demand for arbitration. Requests received after that date will be allowed at the discretion of the arbitrator.

#### ARB-6. AAA and Delegation of Duties

When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these Rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices.

## ARB-7. Panel of Home Construction Arbitrators

The AAA shall establish and maintain a Panel of Home Construction Arbitrators ("Roster") and shall appoint arbitrators as provided in these Rules.

## ARB-8. Initiation under an Arbitration Provision in a Contract

**(a) Filing of a Demand:** Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

- i.** The initiating party ("the claimant") shall, within the time period, if any, specified in the contract(s), file with the AAA a demand for arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration. Filing may be accomplished through use of AAA WebFile, located at **www.adr.org**, or by filing the demand with any AAA office.
- ii.** The claimant shall simultaneously provide a copy of the demand and the applicable arbitration agreement to the opposing party ("the respondent").
- iii.** The demand shall include:
  - a)** the name of each party;
  - b)** the address for each party, including, if known, telephone and fax numbers and email addresses;
  - c)** if applicable, the names, addresses, telephone and fax numbers and, if known, email address of the known representative for each party;
  - d)** a statement setting forth the nature of the claim including the relief sought and the amount involved;
  - e)** the locale requested, if the arbitration agreement does not specify one.

**(b)** The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a demand when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration; however, any disputes in connection with the AAA's determination may be decided by the arbitrator.

If a filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the due date specified by the AAA, the filing may be returned to the filing party.

**(c) Answers and Counterclaims**

- i.** *Answering Statement:* A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the answering statement to the claimant. If no answering statement is filed within the stated time, the respondent will be deemed to have denied the claim. Failure to file an answering statement shall not operate to delay the arbitration.

- ii. *Counterclaim:* A respondent may file a counterclaim within 14 calendar days after notice of the filing of the demand is sent by the AAA. The Respondent shall, at the time of any such filing, send a copy of the counterclaim to the claimant and to all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

If the counterclaim filing is deficient, and not cured by the date specified by the AAA, it may be returned to the filing party.

- (d) Parties are encouraged to provide descriptions of their claims, in any document filed pursuant to this section, in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

### ARB-9. Initiation under a Submission Agreement

Parties to any existing dispute may commence an arbitration under these Rules by filing at any office of the AAA two copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the nature of the dispute, the names and addresses of all parties, any claims and counterclaims, the amount involved, if any, the remedy sought and the hearing locale requested, together with the appropriate filing fee as provided in the schedule included with these Rules. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party.

### ARB-10. Changes of Claim

- (a) A party may at any time prior to the close of the hearing, or by the date established by the arbitrator, increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties.
- (b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed no new or different claim or counterclaim may be submitted without the arbitrator's consent. If an increased claim or counterclaim is \$100,000 to less than \$1,000,000, the case will be administered under Level 3 Procedures, as opposed to Expedited Hearing Procedures indicated in ARB-1, unless all parties and the arbitrator agree that the case may continue to be administered under the expedited procedures.



## ARB-11. Jurisdiction

- (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
- (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
- (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator shall rule on such objections as a preliminary matter or as part of the final award.

## ARB-12. Consolidation or Joinder

Any case in which a party seeks joinder or consolidation will be heard under the current Construction Industry Arbitration Rules. Any party seeking joinder or consolidation will be responsible for any AAA and arbitrator costs and fees greater than those that would be incurred by the parties under the *Home Construction Arbitration Rules*.

## ARB-13. Mediation

At any stage of the proceedings, the parties may agree to conduct a mediation conference under the *Home Construction Mediation Procedures* in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case.

## ARB-14. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, potential mediation of the dispute, potential exchange of information, a timetable for hearings, whether the parties desire a reasoned award, and any other administrative matters.

## ARB-15. Fixing of Locale

Unless the parties mutually agree upon a locale post dispute, the locale shall be the city nearest to the site of the project in dispute, as determined by AAA, subject to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary hearing.

## ARB-16. Appointment from Panel of Home Construction Arbitrators

Unless the parties have agreed to another method of appointment post dispute, the arbitrator shall be appointed in the following manner:

Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement is to be filed, the AAA shall send simultaneously to each party to the dispute an identical list of names of persons chosen from the Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

**(a)** For Level 1 and Level 2 disputes, the AAA will submit to each party to the dispute an identical list of no more than five names of persons chosen from the Roster. If the parties do not agree to an arbitrator, each party may strike up to two proposed arbitrators from the list and number the remaining names in order of preference. The parties must return the list, noting any stricken arbitrators and rankings to the AAA within seven days of receipt of the list.

If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the Roster without the submission of additional lists.

**(b)** For Level 3 disputes, the AAA will submit to each party an identical list of up to 10 names of persons chosen from the Roster. If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the Roster without the submission of additional lists.

## ARB-17. Number of Arbitrators

The dispute shall be heard and determined by one arbitrator. If the agreement specifies more than one arbitrator, or the parties agree that the dispute should be heard and determined by more than one arbitrator, the dispute shall be heard under the *Construction Industry Arbitration Rules*.

## ARB-18. Disclosure

- (a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA as promptly as practicable any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule ARB-39.
- (b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.
- (c) Disclosure of information pursuant to this section, ARB-18, is not to be construed as an indication that the arbitrator considers that the disclosed circumstances are likely to affect impartiality or independence.

## ARB-19. Disqualification of Arbitrator

- (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and may be subject to disqualification for:
  - i. partiality or lack of independence,
  - ii. inability or refusal to perform his or her duties with diligence and in good faith, and
  - iii. any grounds for disqualification provided by applicable law.
- (b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

## ARB-20. Communication with Arbitrator

No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration or the underlying dispute.

## ARB-21. Vacancies

If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules regarding appointment of arbitrators.

## ARB-22. Preliminary Hearing

At the request of any party or at the discretion of the arbitrator or the AAA, the arbitrator may schedule as soon as practicable a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator's discretion.

During the preliminary hearing, the parties and the arbitrator should discuss the issues to be arbitrated, including clarification of the issues and claims, a schedule for the hearings, whether the parties desire a reasoned award, and any other preliminary matters.

## ARB-23. Exchange of Information

### (a) *Expedited Procedures for Level 1 and Level 2 Disputes*

If one or more issues directly or indirectly relate to alleged deficiencies in design, materials, or construction, the arbitrator shall direct that all parties be allowed to inspect, document (by photograph, videotape, or otherwise) and test the alleged deficiencies. At least five business days prior to the hearing or no later than the date established by the arbitrator, the parties shall (a) exchange directly between themselves copies of all exhibits, affidavits and any other information they intend to submit at the hearing, and (b) identify all witnesses they intend to call at the hearing. The arbitrator is authorized to resolve any disputes concerning the exchange of information.

### (b) *Level 3 Disputes*

If one or more issues directly or indirectly relate to alleged deficiencies in design, materials, or construction, the arbitrator shall direct that all parties be allowed to inspect, document (by photograph, videotape, or otherwise) and test the alleged deficiencies. The arbitrator shall have the authority to resolve any disputes relating to the inspection, documentation and testing of the alleged deficiencies.

Consistent with the expedited nature of arbitration, the arbitrator shall direct (i) the production of relevant documents and other information to be used in the arbitration, and (ii) the name and address of any witnesses to be called, and (iii) a brief summary of the testimony expected from each witness. At least five business days prior to the hearing, the parties shall exchange copies of all exhibits, affidavits and any other information they intend to submit at the hearing. The arbitrator is

authorized to resolve any disputes concerning the exchange of information or objections to such information. There shall be no other discovery, except as indicated below or as ordered by the arbitrator in extraordinary cases when the demands of justice require it.

#### **Documents** (applicable only to Level 3 disputes)

- > No later than 14 calendar days after the answering statement is filed or 21 calendar days after the claim is filed if no answering statement is filed, whichever is later, Claimant(s) and Respondent(s) shall produce all documents which are relevant to their claim, counterclaim, or defense. Both Claimant(s) and Respondent(s) shall have a continuing obligation to supplement the production in the event new or additional relevant documents are created or identified during the arbitration.
- > If any party believes additional documents should be produced, the arbitrator shall rule on the party's request, having heard or read the parties' arguments.
- > Absent extraordinary circumstances and a showing that the other party is not prejudiced, no party may admit or otherwise use any document or exhibit which was not produced to all other parties to the arbitration more than five days prior to the arbitration hearing, except if the parties agree or the arbitrator determines that the document or exhibit is necessary.

#### **Interviews** (applicable only to Level 3 disputes)

- > The Claimant(s) may take the recorded and transcribed interview of each Respondent. The Claimant(s) shall, at its cost, produce a copy of the recording or transcription to each Respondent. Subject to the rules governing admissibility of evidence as set forth herein, statements made by the Respondent shall be admissible in the arbitration hearing.
- > The Respondent(s) may take the recorded and transcribed interview of each Claimant. The Respondent(s) shall, at its cost, produce a copy of the recording or transcription to each Claimant. Subject to the rules governing admissibility of evidence as set forth herein, statements made by the Claimant shall be admissible in the arbitration hearing.
- > The Claimant(s) or Respondent(s) may take the recorded or transcribed interview of any witness identified by the other party. The Claimant(s) or Respondent(s) shall, at its cost, produce a copy of the recording or transcription to each party in the arbitration. No later than five business days prior to the deposition or interview of an expert witness, the party sponsoring the expert witness shall produce a written report or, if no written report will be used in the arbitration or by the expert, a written summary of the expert opinions which will be given by the expert witness in the arbitration hearing. Subject to the rules governing admissibility of evidence as set forth herein, statements made by the expert witnesses shall be admissible in the arbitration hearing.
- > Additional interviews may be agreed to by the parties or ordered by the arbitrator.
- > Disputes concerning interviews will be resolved by the arbitrator.

## ARB-24. Date, Time and Place of Hearing

For Level 1 and Level 2 disputes in which a hearing is to be held, the arbitrator will set the date, time and place of the hearing, to be scheduled to take place within 30 days of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

When a hearing is scheduled for Level 3 disputes, the parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

## ARB-25. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any person other than a party and its representatives.

## ARB-26. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least five business days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

## ARB-27. Oaths

Before making any ruling or decisions, proceeding with the first hearing, or, where no hearing is held, before reviewing any evidence, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

### ARB-28. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time and place determined by the arbitrator.

### ARB-29. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

### ARB-30. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

### ARB-31. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

### ARB-32. Conduct of Proceedings

- (a)** The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and each party has the right to be heard and is given a fair opportunity to present its case.
- (b)** The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

*For Level 1 and Level 2 disputes in which a hearing is scheduled, the hearing generally shall not exceed one day. For good cause shown, the arbitrator may*

*schedule additional hearings within seven business days after the initial day of hearings.*

- (c) The parties may agree to waive oral hearings in any case.

### ARB-33. Evidence

- (a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.
- (b) The arbitrator shall determine the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.
- (c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.
- (d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

### ARB-34. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

- (a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.
- (b) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

### ARB-35. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties simultaneously and afford them an opportunity to comment.



### ARB-36. Interim Measures

- (a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods. If it deems necessary, the AAA may appoint a different arbitrator for the sole purpose of ruling on any requests for interim measures.
- (b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.
- (c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

### ARB-37. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in section ARB-34 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing.

### ARB-38. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time.

### ARB-39. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

## ARB-40. Extensions of Time

*For Level 1 and Level 2 disputes, except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the demand for arbitration or counterclaim.*

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any extension.

## ARB-41. Serving of Notice

- (a)** Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these Rules, for any court action in connection therewith, or for the entry of judgment on any award made under these Rules, may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.
- (b)** The AAA, the arbitrator and the parties may also use overnight delivery, electronic fax transmission (fax), or electronic mail (email) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by other methods of communication.
- (c)** Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

## ARB-42. Time of Award

For Level 1 and Level 2 disputes, unless otherwise agreed by the parties, the award shall be rendered no later than 14 calendar days from the date of the closing of the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

For Level 3 disputes, the award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the original or reopened hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

## ARB-43. Form and Scope of Award

- (a)** The arbitrator may grant any legally available remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract.
- (b)** In addition to the final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses and compensation related to such award as the arbitrator determines is appropriate, subject to the provisions of and limitations contained in Rule 43(c).
- (c)** In the final award, the arbitrator shall assess administrative and arbitrator fees as provided for in these Rules. Arbitrator compensation, expenses, and administrative fees (which include filing and hearing fees) are not subject to reallocation except as may be required by applicable law or upon the arbitrator's determination that a claim or counterclaim was filed for the purposes of harassment or is patently frivolous.
- (d)** The award of the arbitrator may include:
  - > interest as the arbitrator may deem appropriate, and to the extent authorized by law or the arbitration agreement; and
  - > an award of attorneys' fees to the extent authorized by law or the arbitration agreement.
- (e)** In the award, the arbitrator shall apply any pertinent contract terms, statutes and legal precedents. The arbitrator may grant any remedy, relief, or outcome the parties could have received in court. The award shall be final and binding. The award is subject to review in accordance with applicable statutes governing arbitration awards.
- (f)** Any award shall be in writing and shall be executed in the manner required by law. The arbitrator shall provide a concise, written breakdown of the award. For Level 2 and Level 3 cases, if requested in writing by any party, or if the arbitrator believes it is appropriate to do so, the arbitrator shall provide a written explanation of the award, including the legal and factual basis thereof. The award of the arbitrator shall not exceed five pages, except in extraordinary cases when the demands of justice require it.

## ARB-44. Award upon Settlement

If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

### ARB-45. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

### ARB-46. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request that the arbitrator, through the AAA, correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

### ARB-47. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

### ARB-48. Applications to Court and Exclusions of Liability

- (a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party in judicial proceedings relating to the arbitration.
- (c) Parties to an arbitration under these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- (d) Parties to an arbitration under these Rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these Rules.
- (e) Parties to an arbitration under these Rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

## ARB-49. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

## ARB-50. Administrative Fees, Arbitrator Fees and Expenses and Suspension for Non-Payment

The administrative fee charged by the AAA is for its administration, handling and processing of the arbitration claim and shall be in accordance with the fee schedule available at **www.adr.org**. The amount of the administrative fee is based upon the size of the claim and counterclaim and is based only on the actual damages. Any additional damages such as punitive damages and attorneys' fees which may be claimed are not included in the calculation of the administrative fee. The parties' share of the administrative fee is indicated in the fee schedule. These amounts must be paid at the time of filing.

The final fee indicated in the chart is part of the administrative fee, but is only due if a hearing is scheduled. If the claim is settled, the final fee is not owed.

A final fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred.

The AAA may, in the event of extreme financial hardship on the part of any party, defer or reduce the administrative fees.

### **Arbitrator Fees**

The fee schedule indicates the amount due for arbitrator compensation based upon the size of the claim. These fees are paid in advance of the arbitration hearing. Any unused deposits are returned at the end of the case.

### **Expenses**

The expenses of witnesses and experts for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives and any witness and the cost of any proof produced at the direct request of the arbitrator,

shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

### **Suspension for Nonpayment**

If arbitrator compensation or administrative fees have not been paid-in-full five business days prior to commencement of the hearing, the AAA may so inform the parties in order that one of them may advance the required payment. The arbitrator may assess these costs in the final award. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings. If either the arbitrator or the AAA suspend or terminate the proceedings, the parties may submit their dispute to an appropriate court.

If the builder does not pay its share of the administrative fees, arbitrator fees, or expenses, the AAA may elect to not administer the case and future cases in contracts involving that builder.

### **Administrative Fees and Arbitrator Compensation**

*FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT [www.adr.org/homeconstructionfeeschedule](http://www.adr.org/homeconstructionfeeschedule).*

## Arbitration Checklist

Before you file for arbitration:

- ▶ Identify and evaluate your applicable statute of limitations.
- ▶ Complete the Demand for Arbitration.
  - ▶ Identify all parties and their contact information. Delays may occur if information is inaccurate.
  - ▶ Be specific in what you are claiming. If you are claiming monetary damages or specific performance (e.g., repairs needed), specify each claim.
  - ▶ Indicate the name of these Rules on your Demand form.
  - ▶ Sign the form.
- ▶ Review the AAA WebFile program available through **www.adr.org** to file online.
- ▶ Send the original completed Demand for Arbitration to the other party (i.e., the builder or the homeowner).
- ▶ Send two copies of the Demand for Arbitration to your American Arbitration Association (AAA) local office or Case Management Center along with the completed Demand. Also send the following items to the AAA:
  - ▶ copy of the arbitration clause or provision contained in your contract;
  - ▶ the appropriate filing fee indicated in the filing fee chart.

## Arbitration Tips for Parties

1. Assemble all documents and papers that you will need for your case. A checklist of documents and exhibits will be helpful toward your orderly presentation.
2. If documents that are needed are in the possession of the other party, ask the other party to make them available to you. Under some state arbitration laws, arbitrators or attorneys have authority to subpoena documents and witnesses.
3. If you provide witness testimony by affidavit, consider using sworn statements. These sworn statements are more persuasive when they are from witnesses with direct knowledge of the facts. Hearsay testimony may be received by an arbitrator but may not be given much weight.
4. Support your allegations with proofs and make sure you identify which proofs are supporting which claims or arguments.
5. Be concise and to the point. Try not to give information to an arbitrator that is not relevant to the case. You must present them with a clear case.
6. Study the case from the other side's point of view and be prepared to respond to the opposition's evidence.
7. Types of documents or records you might use to convince an arbitrator of your position:
  - a. Invoices
  - b. Cancelled checks
  - c. Engineering or architect or expert reports
  - d. Letters or memos
  - e. Plans or blueprints that might be important
  - f. Copies of change orders
8. Be sure to ask the arbitrator to deal with preliminary issues, for example, whether the arbitration is premature pending the parties' compliance with legal or contractual notice, opportunity to repair requirements, etc.

For further information on construction arbitration and mediation, visit our website at [www.adr.org](http://www.adr.org).



# Home Construction Mediation Procedures

## M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedures, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

## M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via email, regular mail, or fax. Requests for mediation may also be filed online via AAA WebFile at **www.adr.org**.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

- i. a copy of the mediation provision of the parties' contract or the parties' stipulation to mediate;
- ii. the names, regular mail addresses, email addresses and telephone numbers of all parties to the dispute and representatives, if any, in the mediation;
- iii. a brief statement of the nature of the dispute and the relief requested;
- iv. any specific qualifications the mediator should possess.

## M-3. Fixing of Locale (the city, county, state, territory and, if applicable, county of the Mediation)

Unless the parties mutually agree upon a locale post dispute, the locale shall be the city nearest to the site of the project in dispute, as determined by AAA.

## M-4. Representation

Any party may participate without representation (*pro se*), or by any representative of that party's choosing, or by counsel, unless such choice is prohibited by applicable law. A party intending to have representation shall notify the other party and the AAA of the name, telephone number and address, and email address if available of the representative.

## M-5. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

- i. Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.
- ii. If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.
- iii. If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

## M-6. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the Model Standards of Conduct for Mediators in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the timeframe desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

### M-7. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-5.

### M-8. Duties and Responsibilities of the Mediator

- i. The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
- ii. The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person, or otherwise.
- iii. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.
- iv. The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

- v. In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.
- vi. The mediator is not a legal representative of any party and has no fiduciary duty to any party.
- vii. The mediator shall set the date, time, and place for each session of the mediation conference. The parties shall respond to requests for conference dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established conference schedule. The AAA shall provide notice of the conference to the parties in advance of the conference date.

### M-9. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s), the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

### M-10. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

### M-11. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

- i.** views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
- ii.** admissions made by a party or other participant in the course of the mediation proceedings;
- iii.** proposals made or views expressed by the mediator; or
- iv.** the fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

### M-12. No Stenographic Record

There shall be no stenographic record of the mediation process.

### M-13. Termination of Mediation

The mediation shall be terminated:

- i.** by the execution of a settlement agreement by the parties; or
- ii.** by a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- iii.** by a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or
- iv.** when there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

### M-14. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act, or omission in connection with any mediation conducted under these procedures. Parties to a mediation under these procedures may not call the mediator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the mediation. The mediator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

### M-15. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

### M-16. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

### M-17. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

### Cost of the Mediation

*FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT [www.adr.org/homeconstructionfeeschedule](http://www.adr.org/homeconstructionfeeschedule).*

## Mediation Tips for Parties

1. Define and analyze the issues involved in the dispute.
2. Recognize the parameters of the given situation (what can realistically be expected, time constraints, available resources, legal ramifications, business or trade practices, costs, etc.).
3. Identify needs and interests in settling the dispute.
4. Prioritize the issues in light of needs.
5. Determine courses of action, positions and tradeoffs and explore a variety of possible solutions.
6. Seek to make proposals reasonable and legitimate and be willing to accommodate the needs of the other party.
7. Ascertain the strengths and weaknesses of the claim.
8. Ready facts, documents and sound reasoning to support claims.
9. Anticipate the other party's needs, demands, strengths and weaknesses, positions and version of facts.
10. Must have party with full authority to settle the claim attend the hearing.
11. Develop strategies and tactics through discussion of issues, presentation of proposals and testing of the other party's positions.
12. Recognize that mediation and arbitration are different processes.

## Glossary of Terms

### AAA WebFile

The AAA offers fast, convenient online claim filing through our AAA WebFile service. In addition to filing claims, clients can make payments, perform online case management, access rules and procedures, electronically transfer documents, select Arbitrators or Mediators, use a case-customized message board and check the status of their case.

### Answering Statement

This is a written response, by the respondent, to the initial claim. Typically, the answering statement will be a denial of the claim.

### Arbitration

In arbitration, the parties submit disputes to an impartial person (the arbitrator) for a decision. Each party can present evidence to the arbitrator. Arbitrators decide cases with written decisions or “awards.” An award is binding on the parties. A court may enforce an arbitration award, but the court’s review of arbitration awards is limited.

### Arbitrator

The arbitrator, not a party to the dispute, hears and reviews evidence and testimony from the parties either in person or by document submission and also telephonic hearings. The arbitrator then renders an award, deciding the disputed issues.

### Award

This is the final decision or ruling by the arbitrator on a claim and/or counterclaim submitted to arbitration, sometimes called a “Decision.”

### Case Manager

The Case Manager is the AAA’s employee assigned to handle the administrative aspects of the case. He or she does not decide the case. He or she only manages the case’s administrative steps, such as exchanging documents, matching schedules and setting up hearings. The Case Manager is the parties’ contact point for almost all aspects of the case outside of any hearings.



## Claim

This is the underlying basis for arbitration or mediation. The claim can be either for monetary or non-monetary damages.

## Claimant

A Claimant is the party who files the claim or starts the arbitration. Either the homeowner or homebuilder may be the Claimant.

## Counterclaim

More than just an answering statement, a counterclaim is an assertion that damages are owed to the Respondent by the Claimant.

## Desk Arbitration

In a desk arbitration, the parties submit their arguments and evidence to the arbitrator in writing. The arbitrator then makes an award based only on the documents. No hearing is held.

## Home

A home is a single family, duplex, triplex, quadplex, townhome, modular, or a unit in a multi-unit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system.

## In-Person Hearing

During an in-person hearing, the parties and the arbitrator meet in a conference room or office and the parties present their evidence in a process that is similar to going to court. An in-person hearing, however, is not as formal as going to court.

## Level 1 Disputes

No claim or counterclaim exceeds \$25,000. For Level 1 disputes, either party can opt to file their claim in Small Claims Court if the claim or counterclaim is within the jurisdictional limits of such court.

## Level 2 Disputes

Claims or counterclaims are greater than \$25,000 but not more than \$100,000.

## Level 3 Disputes

Claims or counterclaims are greater than \$100,000 or are non-monetary.

## Mediation

In mediation, an impartial person (the mediator) helps the parties try to settle their dispute by facilitating an equitable solution to the problem between them. Mediation should not be confused with arbitration or litigation, in which the parties or their lawyers present their case to a third party (the arbitrator or judge) who makes a decision for them. In mediation, the mediator facilitates the dialogue between the parties, but it is the parties who decide whether there will be an agreement and what the agreement will be.

## Owner

An owner means a homeowner, including a subsequent purchaser, tenant, or association, or a subrogee or assignee of the homeowner.

## Respondent

A Respondent is the party against whom the claim is filed. A Respondent may, in response to the Claimant's demand, state a claim in arbitration against the Claimant. Such a claim is called a counterclaim. Either the homeowner or the homebuilder may be the Respondent.

## Telephone Hearing

In a telephone hearing, the parties have the opportunity to tell the arbitrator about their case during a conference call. Often this is done after the parties have sent in documents for the arbitrator to review. A telephone hearing can be less expensive and easier than an in-person hearing.

## Recognition

The American Arbitration Association wishes to recognize the contributions of the advisory committee members who assisted in the development of the *Home Construction Arbitration Rules and Mediation Procedures*.

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