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AAA Revises Construction Industry Arbitration Rules and Mediation Procedures

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The American Arbitration Association (AAA) has revised its Construction Industry Arbitration Rules and Mediation Procedures (Rules), effective July 1, 2015. Although some changes are relatively modest, others expand the powers of the arbitrator and may alter traditional assumptions underlying the selection of arbitration as a dispute resolution process for construction projects.

Introduction to the Revised Rules

The AAA's recently revised Rules involve some changes that are relatively modest, while others may alter traditional assumptions underlying the selection of arbitration as a dispute resolution process for construction projects. For example, the Rules now provide a procedure for emergency relief that may result in more mid-project disputes being taken to arbitration or court, as the new *Rule R-39* provides a party can seek emergency relief from either the AAA or a court, without violating the agreement to arbitrate. Also, the arbitrator is now expressly provided with the authority to sanction parties for violating his/her orders, and with specific authority to manage the discovery process and enforce compliance. Specific changes are discussed in detail below, and all parties to construction contracts with arbitration clauses are encouraged to review these changes carefully in conjunction with new and existing contracts, particularly because some contracts may require the use of the Rules in effect at the time of the dispute and not necessarily at the time of contracting.

Eight Specific Changes of Note

Rule R-7, Consolidation or Joinder, previously provided no guidance on timing concerning requests for joinder or consolidation, or any responses. The new *Rule R-7* now provides that any requests for joinder or consolidation must be submitted prior to the selection of a Merits Arbitrator or within 90 days of AAA's determination that all filing requirements have been satisfied, whichever is later. Although later requests may be considered on a showing of good cause, properly effectuated, this rule change should generally work to ensure that requests for joinder and consolidation are made early on in the arbitration, in turn minimizing the headaches associated with late joinder and consolidation.

The new *Rule R-7* also provides for response times—written responses to requests for consolidation or joinder must be provided within 10 days or 14 days, respectively, of AAA's notice of the request. If a party to an ongoing AAA arbitration fails to object to a request for joinder, that party waives any objection. Although the phrasing is less than clear,[1] the intent appears to be that failure by a non-party to object to a request for it to join an arbitration is deemed a denial of the request.

Notably, the new *Rule R-7* also gives AAA the power to stay arbitrations affected by a joinder or consolidation request while the *Rule R-7* arbitrator (appointed to resolve joinder and/or consolidation issues in the absence of agreement by the parties) determines whether joinder and/or consolidation is proper.

Rule R-10, Mediation, has been completely rewritten. Whereas the prior *Rule R-10* merely served as an acknowledgment that the parties to an arbitration could mediate their dispute if desired, and set some boundaries for participation by an arbitrator in a mediation, the new *Rule R-10* purports to require mediation if a claim or counterclaim is greater than $100,000. However, there are no teeth to this purported requirement. Unless the underlying arbitration agreement mandates mediation, any party can unilaterally opt out on notice to AAA and the other parties.

Rule R-23, Preliminary Management Hearing, has been rewritten in its entirety. The old *Rule R-23* mandated a preliminary hearing and provided a list of potential topics to be discussed. The new *Rule R-23* provides that the timing of the preliminary hearing (and arguably even its occurrence[2]) is "[a]t the discretion of the arbitrator . . . depending on the size and complexity of the arbitration." The new *Rule R-23* provides a generic statement that at the hearing "the parties and arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute," and points to new *Rules P-1* and *P-2* for the topics to be discussed. *Rule P-1* focuses on the purpose of the hearing, noting that "[c]are must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious." *Rule P-2* contains a more detailed laundry list of topics to be discussed than the old *Rule R-23*, including allocation of costs related to burdensome discovery and whether site visits will be required.

Rule R-24, Pre-Hearing Exchange and Production of Information, has been expanded. The old *Rule R-24* provided that the arbitrator could "direct . . . production of documents and other information" and "resolve any disputes concerning the exchange of information." The new *Rule R-24* begins with a statement about "efficient and economical resolution of the dispute," but then provides that the arbitrator can "on application of a party or on the arbitrator's own initiative:"

i. require the parties to exchange documents in their possession or custody on which they intend to rely;

ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;

iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to

[1] "If the party sought to be joined is not a party to an ongoing arbitration administered by the AAA, the party seeking joinder shall comply with the provisions of Rule 4(a) as to that party. If no response to the joinder request is received ***by*** a party that is not a party to an ongoing arbitration, that party will be deemed to have denied the arbitration request." Rule R-7(c) (emphasis added.). Presumably the underlined "by" was intended to be "from." Also, the choice of "denied" instead of rejected as to the effect of a failure to object is curious.

2 "At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed."

the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of the disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

This has the potential of equaling the document discovery burden in ordinary litigation, so parties anticipating a reduced burden in arbitration would do well to consider the ramifications of this rule.

A brand new rule**, Rule R-25, Enforcement Powers of the Arbitrator**, has been introduced to explicitly provide the arbitrator with the "authority to issue any orders necessary to enforce the provisions of *Rules R-23* and *R-24* and to otherwise achieve a fair, efficient and economical resolution of the case." Examples provided include issuance of confidentiality orders to protect confidential information, imposition of electronic search parameters, and allocation of costs of document production. Most importantly, however, *Rule R-25* provides that the arbitrator may draw adverse inferences, exclude evidence, and award costs in the event of a party's "willful non-compliance" with an order of the arbitrator.

Rule R-34, Dispositive Motions, is also new—it allows the arbitrator to entertain motions disposing of "all or part of a claim, or narrow[ing] the issues in a case."

Rule R-39, Emergency Measures of Protection, is one of the most intriguing of the new rules, affecting only arbitration agreements entered after July 1, 2015, unless otherwise agreed by the parties. Under *Rule R-39*, a party can petition the AAA for appointment of an emergency arbitrator to grant emergency relief. The AAA will appoint an arbitrator within one business day, and that arbitrator can "enter an interim order or award granting the relief and stating the reason therefore." Parties relying on arbitration clauses to ensure that mid-project disputes are kept between the parties would do well to consider the ramifications of this rule, as it further provides that "[a] request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate."[3]

Rule R-60, Sanctions, is new and provides the arbitrator with the authority to "order appropriate sanctions" when a party does not comply with the arbitrator's orders or the party's obligations under the rules. Although the rule expressly prohibits entering a default award as a sanction, it allows for sanctions "limit[ing a] party's participation in the arbitration" and adversely determining issues, provided the order is explained in writing and evidence and argument were submitted.

Other changes include failure to timely object to a potential conflict with the arbitrator as possible waiver of that conflict (*Rule R-19*, subdivision (a)); clarification of evidence required in the absence of participation by a party (*Rule R-32*, formerly *Rule R-31*); express authorization for the arbitrator to disregard a written witness statement or expert report if the witness or expert fails to appear for examination (*Rule R-36*, subdivision (b)); express authorization for the arbitrator to order a witness who is unable or refuses to testify at the hearing, to testify at some location where the witness is willing or can be legally compelled to testify; (*Rule R-36*, subdivision (c)); authorization for the chair of a three-arbitrator panel to delegate resolution of discovery disputes to a single member of the panel (*Rule R-45*); elevation of the ceiling for applicability of fast track procedures to $100,000 (*Rule F-1*); elevation of the ceiling for a presumed

[3] Note this last is consistent with California law. See California Code of Civil Procedure § 1281.8.

documents-only hearings to $25,000 (*Rule F-1*); provision for unilateral extension of timelines by the arbitrator (*Rule F-12*); and reorganization of *Rule L-4*, "Preliminary Management Hearing and Management of Proceedings," and former *Rule L-5* into a single rule referencing new *Rules P-1* and *P-2*, discussed *supra*.

Conclusion

Although the recent changes to the Rules may well end up in more efficient resolution of disputes in arbitration under those Rules, these changes may not necessarily comport with traditional assumptions concerning arbitration as a construction dispute resolution method. All construction project participants whose contracts contain arbitration clauses are encouraged to review the Rules to ensure that they know exactly what they have bargained for.

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