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The AAA Enacts Mass Arbitration Supplementary Rules

by Michele Floyd

The American Arbitration Association ("AAA") has enacted new Mass Arbitration Supplementary Rules, as well as a new fee schedule, that went into effect on January 15, 2024. The AAA defines "mass arbitration" as: (1) twenty-five or more similar demands filed on behalf of or against the same or related parties; (2) representation of the parties is consistent or coordinated across the cases; and (3) the Employment/Workplace Fee Schedule or the Consumer Fee Schedule applies. Mass Arbitration Supplementary Rule ("MA") 1(b).

The new rules take aim at practices such as filing demands on behalf of claimants who are not customers of the respondent, who were not exposed to the challenged conduct, and/or who did not enter into an arbitration agreement with the respondent. Under the old rules, respondents had limited recourse, and the associated fees were high. The amended rules endeavor to strengthen the remedies against abusive practices while lowering the fees.

First, the AAA has adopted a Rule 11-type affirmation for claimants and respondents. Counsel must now "include an affirmation that the information provided for each individual case is true and correct to the best of the [lawyer's] knowledge" with each filing. MA-2; MA-4(a).

Second, the AAA has capped some of the fees. The new fee schedule replaces the per case filing fees and institutes a flat fee of $11,250 ($3,125 for claimant and $8,125 for respondent) for the appointment of a Process Arbitrator (the Process Arbitrator's regularly hourly rate applies thereafter). The parties can agree to a Process Arbitrator, or the AAA can appoint one in its discretion. The Process Arbitrator is authorized to determine a number of non-merits issues, including whether a claimant has complied with contractual conditions precedent to filing such as a mandatory pre-filing meet and confer or other pre-dispute resolution processes. MA-6(c)(ii). Thus, the new rules give teeth to contractual provisions that often go unenforced.

Third, the new rules require the Process Arbitrator to issue reasoned rulings. This change is significant because the merits arbitrators are generally bound by the rulings, subject to review of the Process Arbitrator's rulings under an abuse of discretion standard. MA-6(j).

Last, the new rules modify the parties' ability to opt-out of mandatory mediation. The previous rules permitted a party to unilaterally opt-out. Now, the AAA can appoint a mediator *sua sponte,* even if one party elects to opt-out. MA-9.

The new rules and fee schedules are found here: https://www.adr.org/consumer/mass-arbitration.

Recommendations

If your arbitration agreement incorporates the AAA Rules and allocates fees, you should review the existing allocation provisions to make sure that they remain in line with the new AAA fee schedule. If you do not have a pre-dispute resolution process in your arbitration agreement, you should consider adding

one now. The new rules recommend that the parties agree to processes that will streamline the proceeding and increase efficiencies, such as agreeing to the appointment of a Process Arbitrator, agreeing to the appointment process for the Merits Arbitrator, and agreeing to "documents only" proceedings before the same neutral. *See* MA-1(d); MA-7; MA-8. If your business faces a risk of mass arbitrations, you should review the AAA's suggested list of efficiencies and consider adding some or all of them to your arbitration agreement.