AAA’S NEW COMMERCIAL ARBITRATION RULES: NOW MORE LIKE COURT

You’re negotiating a contract and need to address dispute resolution procedures. Do you want to recommend (or agree to) arbitration? If arbitration is the right choice, which arbitration service should you select?

One of the largest private arbitration companies, the American Arbitration Association (“AAA”), may be trying to win your business through significant recent changes to its Commercial Arbitration Rules. In the past, the AAA (and other companies offering dispute resolution services) has marketed its services as a faster, cheaper and more streamlined alternative to court. But the AAA’s rules changes in October and November, 2013 make its new procedures more court-like in many respects, thereby eliminating the summary aspects of arbitration that may have made it an undesirable choice for certain parties.

The three “headliner” changes are:

- The availability of immediate injunctive relief – the equivalent of a temporary restraining order or preliminary injunction from a court;
- The availability of dispositive motions – like a federal court motion to dismiss or motion for summary judgment; and
- A new appellate procedure, using AAA appellate panel.

If you previously disfavored AAA arbitration because it lacked some of these critical aspects of court proceedings, you may now rethink your position.

Now You Can Get “Emergency Relief” From AAA

The most eye-catching new rule is that the AAA is now in the business of awarding immediate injunctive relief – meaning, awarding relief within a few days or weeks of the filing of an arbitration demand.

The Problem. You find out that a business partner or employee has done something that is going to imminently harm you – such as stealing your confidential customer lists or selling your product under their name. You need immediate relief – but your contract calls for arbitration.
Traditionally, you couldn’t get that relief in arbitration, so you’d be forced to file a TRO in court. In fact, previous AAA rules expressly recognized that you must get a TRO from a court, but can resolve the remainder of the dispute with the AAA. But as a practical matter, the resolution of a TRO often disposes of the entire case. So your choice of arbitration was effectively mooted by the urgency of the matter.

**What The AAA Changed.** The AAA is fixing that problem by implementing a process – called “Emergency Measures of Protection” – to award immediate injunctive relief. Within one business day, the AAA will appoint an emergency arbitrator to set a schedule to resolve requests for emergency relief. This arbitrator now has authority to issue an interim order granting temporary relief.

**Microsoft v. Yahoo.** This new process has already been used in a heavyweight battle between Microsoft and Yahoo. Microsoft filed a demand for arbitration and sought emergency relief. The AAA appointed an emergency arbitrator who issued a ruling for Microsoft within two weeks of the initial arbitration demand. Yahoo appealed this decision to federal court, also on an emergency basis, where the arbitrator’s interim order was upheld only 25 days after the demand for arbitration was filed.

**Will New AAA Rules Be More Likely To Eliminate Meritless Claims?**

One of the most vexing problems of arbitration is that arbitrators often permit every claim to go forward to hearing – no matter how infirm or meritless. This drives up the cost of arbitration. The AAA is trying to fix this, but it’s not clear whether the rule change will have the intended effect.

**Dispositive Motions.** It has long been assumed, and even argued, that arbitrators possessed the *inherent or implicit* right to dispose of a claim by motion. The AAA now formally recognizes that the arbitrator can rule on a claim by a “dispositive motion” before a hearing if one party “is likely to succeed” on an issue, and the ruling will either narrow or dispose of issues in the case.

**Remaining Problems.** While incrementally helpful, the new rule presents problems. First, the standard is amorphous – what does “likely to succeed” mean? The wording is more permissive than the more specific standard required for a motion to dismiss (“not plausible”) or summary judgment (“no reasonable juror”). And, what does “narrow the issues” mean – does it mean that disposing of an issue will reduce the number of witnesses or facts at the hearing, or the amount of damages, or merely the number of claims?

Also, the new rule has no procedures attached to it. It does not impose any briefing schedule or time for decision, so there is no assurance that an arbitrator will resolve the motion before a hearing. It does not say whether the arbitrator can consider

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evidence (like on summary judgment) or is limited to the content of pleadings (like on a motion to dismiss). Finally, the idea of a dispositive motion runs against the general grain of arbitration, where parties are traditionally given their “day in court” by way of a live hearing with witnesses.

We see the new rule as a good first step towards having a robust process for eliminating meritless claims, but it’s clearly a work in progress.

What If The Arbitrator Issues A Flawed Decision?

One of the major reasons you might not favor arbitration is that an arbitrator rules with virtual impunity, with little meaningful review of errors. Courts are reluctant to revisit an arbitrator’s decision short of an obvious problem that infects the heart of the proceeding.6

AAA Appellate Procedures. The AAA has implemented an entirely new process, allowing for appeals of arbitration decisions to AAA panel of appellate arbitrators.7 The appeal supposedly will permit a much closer review of an arbitrator’s ruling than is available from a court.8 A party can appeal “an error of law that is material and prejudicial,” or factual findings that are “clearly erroneous.”9 While this scope of an appeal is slightly broader than a court’s review authority, it remains a very high bar to overturning an arbitrator’s decision.

If confidentiality is important, an AAA appeal will remain confidential whereas a court’s review of an arbitrator’s ruling is public.10 Furthermore, using the AAA appeal process does not foreclose any judicial challenge to the arbitration award (although that remains very limited).

Key for Contract Writers. The AAA appellate process is strictly voluntary – and both parties must expressly agree to it. If you want to guarantee that you can use this process, your contract’s arbitration clause must expressly include the appellate arbitration process.11

Recommendation

The general lore is that arbitration is faster and less expensive than court proceedings. The AAA rules changes attempt to bring arbitration closer to court proceedings and may make AAA arbitration a more appealing option. However, in addressing each contract, you should consult with litigation counsel experienced with both arbitration and litigation to determine the various dispute resolution terms to which you should agree.

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6 See Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008) (holding that federal courts can only overturn an arbitration award under the narrow grounds of §§ 10 and 11 of the Federal Arbitration Act which allows a reversal for fraud, corruption, arbitrator misconduct, an error in the calculation of the award or when the arbitrator exceeds his authority).
8 Id. Introduction (“[A]n appellate arbitral panel … would apply a standard of review greater than that allowed by existing federal and state statutes.”).
9 Id. A-21.
10 Id. A-10.
11 Id. Introduction & A-1.