



NEWS & KNOWLEDGE

Editorial: Florida's Arbitration Code Comes Of Age

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After nearly 50 years, the Florida Legislature in 2013 revised Florida's antiquated Arbitration Code by adopting most of the provisions of the 2000 revision of the Uniform Arbitration Act. The new law, now renamed the "Revised Florida Arbitration Code," significantly amends or repeals each section of the prior arbitration code by recognizing the increasing use of arbitration, the greater complexity of the disputes resolved by arbitration, and the significant developments in arbitration law and technology since the Florida Arbitration Code was last revised in 1967. The RFAC applies to any agreement to arbitrate made after July 1, 2013, or before that date, if all the parties agree.

What Are the Most Material Changes?

1. The Ability to Recognize Nontraditional Forms of Arbitration Agreements

One of the most notable differences is the inclusion of the definition of "record," which is "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Unlike the former version of the code, which required arbitration agreements to be in writing (presumably in paper format), the RFAC takes into account the realities of a modern world by clarifying that the writing may be contained in an electronic medium.

For example, the RFAC would recognize an arbitration agreement contained in a series of emails exchanged by the parties, as long as those emails clearly reflected the parties' agreement to submit to arbitration an existing or subsequent controversy arising between them.

2. The Power to Grant Early Injunctive Relief

Another important difference is the addition of an entirely new section allowing for provisional remedies. Before an arbitrator has been appointed and is able to act, the court may now enter an order for provisional remedies "to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action."

After the arbitrator is appointed, the role of granting provisional remedies falls to the arbitrator, but the court may still grant interim relief if the matter is urgent and the arbitrator is unable to act timely or provide adequate relief.

One of the most common types of requests for provisional remedies is a request for injunctive relief. Often, parties who have agreed and intend to arbitrate a dispute nevertheless have the need for immediate court intervention (e.g., to prevent dissipation of assets, the removal of goods from the state, the destruction of a building, the sale of real property, etc.). The RFAC now expressly provides a mechanism to obtain that type of interim relief even before an arbitrator is appointed.

Recognizing that arbitration is largely a creature of contract, the RFAC allows parties to vary the provisional remedy provisions. For example, one of the most commonly used domestic arbitration rules, the Commercial Arbitration Rules of the American Arbitration Association, were recently amended to include a provision allowing an emergency arbitrator to grant interim relief.

Specifically, new Rule R-38, titled "Emergency Measures of Protection," mandates a "party in need of emergency relief prior to the constitution of the arbitral panel to notify the American Arbitration Association and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis."

Upon receiving such notice, the AAA within 24 hours will appoint "a single emergency arbitrator" to rule on the emergency application. Therefore, by incorporating the new AAA Commercial Rules in an arbitration agreement, the parties will have agreed that interim relief will always be granted by an arbitrator, and not a judge.

3. The Power to Summarily Dispose of Cases

Hidden in a section of the RFAC that generally discusses how arbitrations should be conducted is perhaps the most important change to the code. The RFAC now authorizes an arbitrator to decide a request for summary disposition of a claim or a particular issue.

Prior to the enactment of the RFAC, dispositive motions (namely, motions to dismiss and motions for summary judgment) were largely unheard of. Any attempt to bring those types of motions usually was successfully met by the argument that dispositive motions were inconsistent and violative of the provision in the prior version of the code, which gave the parties the right "to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the [final] hearing."

This argument has now been debunked. Under the RFAC, arbitrators now clearly have the authority to dismiss an arbitration proceeding at a very early stage, or grant summary judgment prior to a full hearing on the merits.

At first glance, the availability of summary disposition may appear to reflect a troublesome trend in domestic arbitration toward gradually incorporating more of the mechanisms traditionally associated with less efficient and more costly litigation in state courts. Actually, the opposite is true. By authorizing arbitrators to dispose of matters summarily, the RFAC allows for the quick and efficient resolution of meritless claims that previously could not have been disposed of prior to a final hearing.

Contrastingly, new AAA Commercial Rule R-33 also authorizes an arbitrator to make rulings upon a dispositive motion provided the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

4. The Ability to Consolidate Similar Claims in Arbitration

The RFAC now allows for consolidation of separate arbitration matters if several conditions are met, namely, commonality of the parties, the underlying transaction, and the issues of law and fact. This section is not intended to address classwide disputes. Further, a court may not consolidate matters if the parties' agreement expressly precludes consolidation.

5. The Increase in Arbitral Power

Various sections of the RFAC have been enacted or amended to give arbitrators the same powers as, or even greater powers than, elected judges:

First, even though arbitrators have always had the power to order discovery, including issuing subpoenas and ordering the taking of depositions, the RFAC now expressly authorizes arbitrators to also "take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state."

This means that an arbitrator can now sanction parties for discovery misconduct or violations that went largely unpunished before the RFAC's enactment. This particular provision is also consistent with the new AAA Commercial Rules, particularly R-58, which now grants to the arbitrator the authority to order sanctions where a party fails to comply with its obligations under the rules or with an order of the arbitrator.

Second, the RFAC now allows an arbitrator to award attorneys' fees and "other reasonable expenses of arbitration" if such an award "is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." This is a significant change from the prior version of the code, and a complete deviation from existing case law, which precluded an arbitrator from awarding attorneys' fees to the prevailing party absent the parties' express agreement.

Third, the RFAC authorizes arbitrators to award punitive damages and other exemplary relief to the same extent they would be available in a civil action, but the arbitrator must specify in the award the basis in fact justifying and the basis in law authorizing the award. The RFAC also gives arbitrators the broad power to order any other remedies the arbitrator considers just and appropriate under the circumstances, regardless of whether a court could grant those types of remedies in a civil action.

Fourth, the RFAC grants to arbitrators acting in that capacity the same immunity from civil liability afforded to state court judges acting in a judicial capacity. This provision is nonwaivable, meaning that parties cannot by agreement determine to make an arbitrator liable for conduct arising from his or her services.

The goal of this provision appears clear: ensure that there is a sizable pool of individuals willing to act as arbitrators. Therefore, this provision is key to fostering arbitration as a viable alternative to litigation in Florida state courts.

What Will be the RFAC's Effect?

Ultimately, the effect of the RFAC may prove to be relatively minor. This is because the

RFAC is a gap-filler, meaning that it provides governing rules in procedural areas that the parties have not specifically addressed in their agreements.

Although the revisions to the code are significant, the reality is that parties customarily incorporate into their agreement the procedural rules of arbitration organizations that already have many of the RFAC's new provisions in place.

For example, the American Arbitration Association's Commercial Rules (also recently amended) contain many of the provisions the RFAC has enacted. Nevertheless, by incorporating the RFAC into an arbitration agreement, parties now can utilize a comprehensive and up-to-date set of procedural rules to resolve their disputes through arbitration.

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