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Take Time To Study New Rules, Arbitration Pros Say

By **Caroline Simson**

Law360, New York (May 24, 2016, 4:30 PM ET) -- Recent rule changes adopted by the major arbitral institutions may alter the course of an arbitration and should be given consideration when drafting arbitration clauses, according to a Tuesday discussion conducted by Mayer Brown LLP and the International Centre for Dispute Resolution.

Many of the world's leading arbitral institutions have over the last few years updated their rules, incorporating provisions that provide for things like expedited proceedings, discovery limits and the consolidation of proceedings. Mayer Brown partner James R. Ferguson told listeners during Tuesday's webinar that it's important to consider these rule changes — and how they may inure to one's benefit — before the arbitration clause is even invoked.

"I am a litigator and an advocate, as well as a neutral, so I encounter provisions of arbitration agreements when it's too late to do anything about it," he said. "As a result, my mantra to clients is that this is something you need to pay attention to when drafting agreements. ... It's critically important that you recognize those amendments and understand that these are tools that are available to you when you're drafting your arbitration clause."

Some of the recent updated rules discussed during the event include a provision on consolidation, which was adopted by the ICDR in its 2014 rule changes, ICDR Vice President for North America Steven K. Andersen said during the Tuesday event.

Under those rules, parties to an ICDR arbitration may ask the administrator to appoint a consolidation arbitrator, who has the authority to consolidate two or more arbitrations as long as the parties have agreed to do so or the claims are made under the same arbitration agreement.

Parties may also ask arbitrations to be consolidated even if they aren't under the same arbitration agreement if they involve the same parties, the disputes arise in connection with the same legal relationship and the consolidation arbitrator finds that the arbitration agreements are compatible — meaning that they incorporate the same governing law and institution.

Such provisions are particularly useful in the energy and construction sectors, where it's not uncommon for parties involved in a single project or transaction to enter into subcontracts with other parties, according to Andersen.

Other rule changes adopted by the ICDR that can be useful to parties are provisions discouraging some

of the discovery procedures that are typically incorporated in U.S. proceedings, including depositions and wide-ranging discovery, Ferguson said

Those changes are part of a larger series of rule updates aimed at expediting arbitrations, including a provision allowing parties with claims totaling less than $250,000 to take advantage of expedited procedures, under which parties are required to present detailed submissions on the facts, claims and defenses, together with all the relevant evidence, in the notice of arbitration.

"This provides as close to a guarantee as one can get that in smaller cases, the parties are going to get a quicker and therefore a far more cost-effective resolution," said Ferguson. "This has always been touted as an advantage of arbitration ... but in recent history those advantages had tended to be eroded by real-world practice. So this is a great option for parties with smaller disputes who want to contain the costs and guarantee a very timely resolution."

--Editing by Catherine Sum.