To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION
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In the Matter of the Application of:

33 CALVERT PROPERTIES LLC,

Petitioner,

Index No. 59183/2020
Motion Seq. No. 1
Motion Date: 10/16/2020

For a Permanent Stay of Arbitration Pursuant to Article 75 of the Civil Practice Law and Rules,

-against-

AMEC LLC,

Respondent.
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WALSH, J.

The following e-filed documents, listed in NYSCEF by document numbers 1-33 were read on this Petition by Petitioner 33 Calvert Properties LLC ("Petitioner" or "33 Calvert") against Respondent AMEC LLC ("Respondent" or "AMEC") for an order pursuant to CPLR 75 granting a permanent stay of mediation and arbitration proceedings (the "Proceedings") commenced by AMEC against 33 Calvert.

Respondent opposes the Petition and contends this Court is not the proper forum to render a determination as to whether the dispute between the parties should be mediated and arbitrated with the American Arbitration Association ("AAA") and that, pursuant to the rules of the AAA, the arbitrator should determine the proper forum for this action.

Upon the foregoing papers, and for the reasons stated herein, Petitioner's Petition shall be denied, and the proceeding shall be dismissed.

PETITIONER'S ALLEGATIONS

Petitioner contends that it contracted with Respondent for Respondent to serve as its construction manager in connection with the development of a residential apartment complex at

33 Calvert Street, Harrison, New York (the "Property" or the "Project"). Petitioner alleges that, on or about November 7, 2018, Petitioner and Respondent entered into a certain Standard Form of Agreement Between Owner and Construction Manager (the "CMA" or "A133"), which incorporates by reference certain General Conditions of the Contract for Construction (AIA Document A201-2007) (as modified, supplemented or amended by the parties, the "A201" and together with the CMA, the "Agreements") (Petitioner at ¶¶ 1-7, Exs. 1-2).

Petitioner alleges that shortly after 33 Calvert contracted with AMEC to serve as its construction manager for the Project, problems stemming from AMEC's work (or lack thereof) arose, and for the remainder of their relationship, were not abated. Petitioner argues that, as construction manager, AMEC's responsibilities included, but were not limited to, oversight of the Project, retention of subcontractors across various trades, making payments to subcontractors, and facilitation of a precise schedule for the Project (*id.* at ¶¶ 8-9). Petitioner states that, on or about January 25, 2019, Respondent contracted with AMEC Construction LLC (the "Affiliated Subcontractor") to serve as a subcontractor for the Project pursuant to a certain subcontractor contract, entered into between AMEC and the Affiliated Subcontractor (the "Subcontractor Contract"). Petitioner states that Guy Mazzola, the President of AMEC and the Affiliated Subcontractor, executed the Subcontractor Contract on behalf of AMEC and the Affiliated Subcontractor (*id.* at ¶ 10).

According to Petitioner, by September 2019, AMEC and the Affiliated Subcontractor brought the Project to a halt and that, purportedly on behalf of the Affiliated Subcontractor, AMEC demanded -- based on change orders issued by the Affiliated Subcontractor -- an increase of more than $1,000,000 to the already-contracted for Project cost (*id.* at ¶ 11). Petitioner contends that, when it began to question the merit of these change orders, the Affiliated Subcontractor, while in the midst of excavation at the Property, abandoned the Project and that, shortly thereafter, AMEC also abandoned the Project (*id.* at ¶ 12).

Petitioner argues that by letter dated October 2, 2019, Petitioner demanded AMEC terminate, in accordance with the terms of the Subcontractor Contract, the Affiliated Subcontractor (*id.* at ¶ 13, Ex. 3). According to Petitioner, on October 9, 2019, Bob Stevens of AMEC sent a copy of Petitioner's October 2, 2019 letter to Petitioner incorporating annotations wherein it, *inter alia*, declined to terminate the Affiliated Subcontractor (*id.* at ¶ 14, Ex. 4). Petitioner contends that the declination of Petitioner's request was tantamount to a refusal to re-bid the scope of work for which the Affiliated Subcontractor contracted but surreptitiously sought, through change orders, to increase the cost of the Project by over $1,000,000 (*id.*).

Petitioner argues that by letter dated October 16, 2019, Petitioner requested that Philip A. Fruchter, AIA, a principal of PAPP Architects P.C., and the architect of record for the Project ("Fruchter" or the "Project Architect") provide his consent pursuant to A201 § 2.4, to allow Petitioner to demand Respondent to commence and correct its default (*i.e.*, return to the Property and perform the work for which Petitioner contracted) and upon its failure to do so, permit Petitioner to replace Respondent and continue the Project work itself (*id.* at ¶ 15).

Petitioner then argues that, on October 18, 2019, Fruchter granted Petitioner's request in accordance with its letter dated October 16, 2019 (*id.* at ¶ 16, Ex. 5). According to Petitioner, upon receipt of Fruchter's approval to demand Respondent to commence and correct its default pursuant to A201 § 2.4, Petitioner, on October 18, 2019, demanded that AMEC, *inter alia*, return to work and warned that upon its failure to do so within 10 days after receipt, Petitioner would, in accordance with A201 § 2.4, exercise its right to carry out the work (*id.* at ¶ 17, Ex. 6).

By October 29, 2019 (ten days after Petitioner's notice to commence work if AMEC failed to return to work), neither AMEC nor the Affiliated Subcontractor returned to the Property nor exhibited an intent to do so. Accordingly, on October 29, 2019, Petitioner sent Respondent a Notice of Termination for Cause, dated October 29, 2019 (the "Notice of Termination"), pursuant to Section 15.1.2 of the A201 (*id.* at ¶ 18, Ex. 7). Petitioner's termination of AMEC for cause became effective seven days after the date of the Notice of Termination (*i.e.*, effective as of November 5, 2019) (*id.* at ¶ 19). On November 27, 2019, Petitioner sent a letter to Respondent wherein it asserted Claims (as defined *infra*) against Respondent (*id.* at ¶ 20, Ex. 8). Petitioner contends that, on or about February 10, 2020, Respondent filed a Mechanic's Lien with the Clerk of Court for the County of Westchester in the amount of $1,340,200.81 upon the Property (*id.* at ¶ 21, Ex. 9).

Petitioner argues that, on February 15, 2020, nearly three months after its termination, Respondent sent a letter (dated February 10, 2020) (the "February 10 Letter") to Petitioner wherein Respondent asserted its "(1) written response to [Petitioner's] claims included in [Petitioner's] letter dated November 27, 2019 and (2) written notice of the Constructions [sic] Manager's Claims (as defined in the A201) against 33 Calvert Properties LLC (the Owner)" (*id.* at ¶ 22, Ex. 10). On March 3, 2020, Petitioner responded, by letter (the "March 3 Letter") to Respondent's February 10 Letter (*id.* at ¶ 23, Ex. 11). Petitioner contends that, on March 27, 2020, Respondent, through counsel, sent by email, a letter in response to the March 3 Letter (the "March 27 Letter") (*id.* at ¶ 24, Ex. 12).

Petitioner states that, on or about July 21, 2020, Petitioner's counsel received, by certified mail, return receipt requested, a letter, dated July 14, 2020, from Respondent's counsel enclosing a Demand for Arbitration (the "Demand") wherein Respondent commenced a proceeding with the AAA, captioned as *AMEC, LLC v 33 Calvert Properties, LLC* (Case No.: 01-20-0009-9946) for mediation and arbitration (*id.* at ¶ 25, Ex. 13). Petitioner states that by letter dated July 24, 2020, Petitioner's counsel advised Respondent's counsel that, *inter alia*, its request for mediation and arbitration was improper since AMEC failed to satisfy certain conditions precedent to mediation and arbitration (*id.* at ¶ 26, Ex. 14).

According to Petitioner, by email dated July 29, 2019, Respondent's counsel responded to Petitioner's counsel's letter dated July 24, 2020 wherein Respondent maintained that it was entitled to pursue mediation and arbitration pursuant to the CMA and A201 (*id.* at ¶ 27, Ex. 15). Petitioner argues that the "instant dispute – and Respondent's procedurally improper and untimely 'demand' to commence mediation and arbitration – stems from, *inter alia*, the foregoing events" (*id.*).

Petitioner asserts three causes of action. In its First Cause of Action, Petitioner seeks an order and judgment staying arbitration of the claims asserted against it in Respondent's Demand.

Petitioner states that it has not participated in any such arbitration, and that pursuant to CPLR 7503(b), "a party who has not participated in the arbitration may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation" (*id.* at ¶¶ 29-32). In its Second Cause of Action, Petitioner seeks a stay pursuant to CPLR 7503(b) for failure to assert claims within 21 days (*id.* at ¶¶ 42-53). Finally, in its Third Cause of Action, Petitioner seeks a stay pursuant to CPLR 7503(b) based upon Respondents' alleged failure to demand that Respondent "demand in writing that the other party within 60 days of the 'initial decision' seek mediation" (*id.* at ¶¶ 54-57).

RESPONDENT'S ANSWER AND AFFIRMATIVE DEFENSES

On September 16, 2020, AMEC filed its Answer to the Petition, denying its material allegations and asserting various affirmative defenses, including that this Court is not a proper forum to render a determination as to whether the dispute between the parties should be mediated and arbitrated with the AAA, and that, pursuant to the relevant rules of the AAA, the arbitrator should determine the proper forum for this matter (Answer at ¶¶ 61-62).

THE PARTIES' CONTENTIONS

A. Petitioner's Contentions in Support of Petition

In support of its Petition (together with its supporting exhibits), Petitioner submits: (1) an affirmation of counsel, Jason Jacobs, Esq., dated August 10, 2020, together with its exhibit; (2) a memorandum of law ("Pet's Mem.").

The essence of Petitioner's contentions is that a permanent stay of mediation and arbitration is appropriate because: (1) AMEC failed to have an Initial Decision Maker render a decision on its claims; (2) AMEC failed to timely assert its claims; and (3) AMEC failed to demand that Petitioner commence mediation. Petitioner contends that, as set forth in its Petition, the "need for this stay stems entirely from AMEC's failure to comply with the mandatory and explicit conditions precedent to mediation and arbitration contained within the governing contract between the parties" (Pet's Mem. at 1).

Petitioner states that on or about November 7, 2018, 33 Calvert, as Owner, and AMEC, as Contractor, entered into the CMA, which incorporates by reference the A201. According to Petitioner, the A201's express provisions concerning the resolution of disputes arising under the Agreements are subject to several conditions precedent that must be satisfied prior to a party seeking mediation and arbitration. For instance, Petitioner argues that an aggrieved party must first pursue a decision of its Claims from an "Initial Decision Maker," who must be an "unbiased third party architect chosen by the [Project's Architect]" and is "subject to Owner's approval" which approval is "not to be unreasonably withheld" (*id.*). Petitioner states that the aggrieved party must provide written notice of its "Claims" to the Initial Decision Maker, the Project Architect and the other party and that "strict time limitations are imbued in the A201: 'Claims' must be 'initiated'

by the later of '21 days after the occurrence of the event giving rise to such Claim' or 'within 21 days after the claimant first recognizes the condition giving rise to the Claim'" (*id.* at 1-2). Petitioner contends that, after review and adjudication by the Initial Decision Maker, either party may pursue mediation and then, if demanded, binding arbitration, but to do so, the party seeking mediation must demand that the other party commence mediation to review the Initial Decision Maker's decision (*id.* at 2)

Petitioner first argues that AMEC failed to timely provide written notice of its Claims and "AMEC's letter, dated February 10, 2020 (but sent on February 15, 2020) is the earliest and only 'written notice' of Claim" and "[t]his letter was sent *over three months* after the expiration of the time within which Claims could permissibly be asserted" (*id.*).

Petitioner next argues that, even had AMEC timely asserted its Claims to an Initial Decision Maker, it still is precluded from commencing mediation and arbitration since it failed to abide by the explicit procedural requirements necessary to commence mediation and arbitration against 33 Calvert and, because it "failed to comply with any of these mandatory conditions precedent," mediation and arbitration are not appropriate under the terms of the Agreements (*id.* at 2). Petitioner states that the requirement that Claims be referred to an Initial Decision Maker as a condition precedent to any subsequent means of dispute resolution is set forth in the A201:

> Claims, excluding those arising under Sections 10.3, 10.4, 11.3.9, and 11.3.10, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, *an initial decision shall be required as a condition precedent to mediation of any Claim arising prior to the date final payment is due*, unless 30 days have passed after the Claim has been referred to the Initial Decision Maker with no decision having been rendered (A201 § 15.2.1 [emphasis by Petitioner]).

Petitioner contends that the A201 also provides that "[e]ither party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution with respect to the initial decision" (A201 § 15.2.6.1) (Petitioner's Mem. at 2-3).

B. Respondent's Contentions in Opposition to Petition

In opposition to Petitioner's Petition, Respondent submits: (1) an affidavit of Guy Mazzola, sworn to September 16, 2020 ("Mazzola Aff."), together with exhibits; and (2) an affirmation of counsel, Daniel E. Katz, Esq., dated September 16, 2020 ("Respondent's Aff.").

Respondent, through its attorney, contends that the Petition "is without merit and should be denied, as a matter of law, because the contract at issue specifically incorporates the Construction Industry Arbitration and Rules and Mediation Procedures of the [AAA] [the

"Rules"], which expressly and unequivocally reserve all issues regarding the arbitrability of this dispute to the arbitrator and the AAA" (Respondent's Aff. at ¶ 2). Respondent argues that, because the issue of arbitrability is reserved solely to the arbitrator and the AAA by express agreement, the Petition must be denied as a matter of law (*id.* at ¶ 2). Respondent further contends that, even if the Court does not dismiss the Petition as a matter of law, it should still be denied because: (i) no Initial Decision Maker (as defined in the AIA Document A133-2009) was ever appointed, nor did one render a decision within 30 days after AMEC's written notice of its claims, (ii) AMEC did not waive its claims by raising them in writing more than 21 days after AMEC was wrongfully terminated for cause, and (iii) an "initial decision" was never rendered by an Initial Decision Maker, and, therefore, the purported condition precedent that AMEC demand 33 Calvert to commence mediation is inapplicable. Finally, Respondent argues that, to the extent mediation is a condition precedent to arbitration under the Agreements, AMEC requested mediation in accordance with Section 15.3.2 of the AIA Document A201-2007 (*id.* at ¶ 3).

After quoting various provisions of the Agreements, Respondent contends that, in or about October 2019, 33 Calvert and AMEC exchanged written correspondence detailing certain claims and issues experienced by each party in connection with the Project (*id.* at ¶ 15). It argues that, although AMEC's October 9, 2019 letter was not the first time AMEC raised certain of its claims in writing, by at least October 9, 2019, 33 Calvert was well aware of the factual basis of AMEC's claims (*id.* at ¶ 16). Respondent states that, upon information and belief, at some time prior to November 18, 2019, 33 Calvert requested that an Initial Decision Maker, as defined in Section 9.3 of the A133, be appointed, and the Project Architect referred the request to Michael Gismondi, RA ("Gismondi"). It contends that, thereafter, on or about November 18, 2019, 33 Calvert sent an email to Gismondi, inquiring as to whether he would serve as the Initial Decision Maker but that, as of November 27, 2019, the Owner had not received a response from Gismondi, and thus, as of that date, no Initial Decision Maker has been established (*id.* at ¶ 17).

According to Respondent, as no Initial Decision Maker had yet been established, on November 27, 2019, 33 Calvert wrote to AMEC, with a copy to the Project Architect, asserting certain claims against AMEC in connection with the Project ("33 Calvert Notice of Claim") (*id.* at ¶ 18). Respondent further asserts that, thereafter, on or about February 10, 2020, after no further clarification as to whether or not an Initial Decision Maker had been established, it submitted its response to the 33 Calvert's Notice of Claim and issued its own written notice of claims ("AMEC's Notice of Claim") to 33 Calvert and the Project Architect (*id.* at ¶ 19). It contends that neither the Project Architect nor any Initial Decision Maker responded to either 33 Calvert's Notice of Claim or AMEC's Notice of Claim and that, to date, AMEC is unaware of the appointment of any Initial Decision Maker (*id.* at ¶¶ 20-21).

Respondent argues that, after more than 30 days passed after the submission of the AMEC's Notice of Claim, and with no receipt of an "initial decision" from an Initial Decision Maker, AMEC filed a request for mediation and demand for arbitration ("Mediation and Arbitration Demand") in accordance with Section 15.3.2 of the A201 on or about July 14, 2020 (*id.* at ¶ 22). It states that, on the first page of the AAA form titled "Construction Arbitration Rules Demand for Arbitration," AMEC selected the box indicating that it wanted to arrange for

mediation before the AAA, in accordance with Section 15.3.2 of the A201 (*id.* at ¶ 23). Respondent argues that it has complied with all applicable conditions precedent necessary to commence the dispute resolution process with 33 Calvert (*id.* at ¶ 24).

DISCUSSION

Petitioner and Respondent do not dispute that, on or about November 7, 2018, they entered into the CMA, which incorporates by reference the A201 (CMA at Article 12). Under the CMA, "[a]ny Claim between the Owner and Construction Manager shall be resolved in accordance with the provisions set forth in this Article 9 and Article 15 of A201-2007" (NYSCEF Doc. No. 2 at § 9.1). It further provides that "[f]or any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of the AIA Document A201-2007, the method of binding dispute resolution shall be as follows: Arbitration pursuant to Section 15.4 of AIA Document A201-2007" (*id.* at § 9.2). Section 9.3 of the CMA provides that "[a]n unbiased third party architect chosen by Architect subject to Owner's approval, not to be unreasonably withheld," will "serve as the Initial Decision Maker pursuant to Section 15.2 of AIA Document A201-2007 for Claims arising from or relating to the Construction Manager's Construction Phase services" (*id.* at § 9.3).

Article 15 of the A201 governs claims and disputes between the parties. Section 15.1.2 concerning notice of claims provides that:

> Claims by either Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later (NYSCEF Doc. No. 2 at § 15.11.2).

Section 15.2.1 provides that:

> Claims, excluding those arising under [sections not relevant to the instant dispute], shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Initial Decision Maker with no decision having been rendered (*id.* at § 15.2.1).

Section 15.3.1 of the A201 then establishes mediation as a condition precedent to binding dispute resolution, which, in this matter, is arbitration. It provides that "[t]he parties shall endeavor to resolve their Claims by mediation, which, unless the parties mutually agree otherwise,[1] shall be

[1] It is undisputed that the parties have not agreed otherwise.

administered by the [AAA] in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement" (*id.* at § 15.3.1).

Similarly, Section 15.4.1 of the A201 provides, in pertinent part:

> If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the [AAA] in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement (*id.* at § 15.4.1).

Finally, Section 13.1 provides that where "the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4" (*id.* at § 13.1).

"'Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit'" (*Matter of Monarch Consulting, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 26 NY3d 659 [2016] [citations omitted]; *see also Matter of County of Rockland v Primiano Constr. Co.*, 51 NY2d 1, 9 [1980] ["[T]he entire arbitration process is a creature of contract, the parties by explicit provision of their agreement have the ability to place any particular requirement in one category or the other, to make it a condition precedent to arbitration or to make it a condition in arbitration"]). As the Court of Appeals stated in *Matter of Monarch*:

> The Supreme Court has also held that arbitration agreements must be enforced according to their terms, and that "parties can agree to arbitrate 'gateway' questions of 'arbitrability'" (*Rent-A-Center, West, Inc.*, 561 US at 68-69; *see Nitro-Lift Technologies, L.L.C.*, 568 US at —, 133 S Ct at 503; *Buckeye Check Cashing, Inc.*, 546 US at 445). Such "delegation clauses" are enforceable where "there is 'clea[r] and unmistakabl[e]' evidence" that the parties intended to arbitrate arbitrability issues (*First Options of Chicago, Inc.*, 514 US at 944, *quoting AT&T Technologies, Inc.*, 475 US at 649). "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts" (*First Options of Chicago, Inc.*, 514 US at 944) (*Matter of Monarch Consulting, Inc.*, 26 NY3d at 675).

In short, whether a dispute is arbitrable is generally an issue for the court to decide unless the parties clearly and unmistakably provide otherwise (*id.*; *Matter of Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 45-46 [1997]). Where the terms of the parties' agreements incorporate rules of an alternative dispute resolution tribunal, "the issue of whether the dispute is arbitrable

should be resolved by the arbitrator" (*Garthon Bus. Inc. v Stein*, 30 NY3d 943, 944 [2017] [agreements incorporating rules of the London Court of International Arbitration])

In the context of contracts incorporating the AAA rules, New York courts have held that where there is a broad arbitration clause and the parties' agreement specifically incorporates by reference the AAA rules providing that the arbitration panel shall have the power to rule on its own jurisdiction, courts will "leave the question of arbitrability to the arbitrators" (*Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [1st Dept 2009], *affd* 14 NY3d 850 [2010] ["Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, which provide that '[t]he tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement,' and employs language referring 'all disputes' to arbitration, courts will 'leave the question of arbitrability to the arbitrators'"]); *see also Lake Harbor Advisors, LLC v Settlement Serv. Arbitration and Mediation, Inc.*, 175 AD3d 479, 480 [2d Dept 2019] [same]; *Matter of WN Partner, LLC v Baltimore Orioles Ltd. Partnership*, 179 AD3d 14, 17 [1st Dept 2019] [same]; *Matter of Flintlock Const. Serv., LLC. v Weiss*, 122 AD3d 51, 54 [1st Dept 2014], *lv dismissed* 24 NY3d 1209 [2015] [same]).

Here, Respondent argues that the parties specifically incorporated the Rules that reserve issues of arbitrability to the arbitrator and, therefore, the threshold question of whether AMEC's claims against 33 Calvert are subject to arbitration must be decided by the arbitrator. Petitioner argues that the satisfaction of conditions precedent is a question that must be decided by the Court. Although Petitioner is correct that under New York law, courts have held that the satisfaction of conditions precedent, such as the ones involved in this case (*i.e.*, the submission of the claim to Initial Decision Maker and then mediation prior to arbitration) must be decided by a court and not an arbitrator, those cases were decided based on the application of New York law[2] rather than the Federal Arbitration Act ("FAA"), which the parties stipulated applies to their agreed-upon dispute resolution process (*i.e.*, arbitration) (*see* NYSCEF Doc. No. 3 at §13.1).

Courts enforce arbitration agreements which provide that they are to be governed by the FAA (*Reynolds & Reynolds Co., Automotive Sys. Div. v Goldsmith Motor Corp.*, 251 AD2d 312 [2d Dept 1998]). "When an agreement to arbitrate falls within the scope of the FAA, '[f]ederal law in terms of the Arbitration Act governs [the] issue [of arbitrability] in either *state* or federal court'"

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[2] *Lopez v 14th St. Dev., LLC*, 40 AD3d 313 (1st Dept 2007); *Matter of 3202 Owners Corp. (Billy's Contr., Inc.)*, 25 AD3d 715 (2d Dept 2006); *Matter of Lakeland Fire Dist. v East Area Gen. Contr., Inc.*, 16 AD3d 417 (2d Dept 2005); *Matter of Asphalt Green, Inc.(Herbert Constr. Co.)*, 210 AD2d 21 (1st Dept 1994); *Matter of Bd. of Educ., Longwood Cent. School Dist. v Hatzel & Bueler, Inc.*, 156 AD2d 684 (2d Dept 1989); *New York Tel. Co. v Schumacher & Forelle, Inc.*, 60 AD2d 151 (1st Dept 1977); *Emerald Green Group, LLC v Norco Constr., Inc.*, 2014 WL 3107904 (Sup Ct, NY County 2014); *see also Matter of County of Rockland,* 51 NY2d at 8 ("If the court concludes that the parties made a valid agreement to arbitrate, that the dispute sought to be arbitrated falls within its scope, and that there has been compliance with any agreed on conditions precedent to arbitration, judicial inquiry is at an end …").

(*Blimpie Intl., Inc. v D'Elia*, 277 AD2d 69, 70 [1st Dept 2000], *quoting Moses H. Cone Mem. Hosp. v Mercury Constr. Corp.*, 460 US 1, 24 [1983] [issues of arbitrability with respect to FAA arbitration agreements are governed by substantive federal law, which supplants inconsistent state law]; *see also N.J.R. Assoc., L.P. v Tausend,* 19 NY3d 597 [2012]). Furthermore, under the FAA, the court is required to enforce contract terms that specify the rules under which an arbitration will be conducted (*Patterson v Raymours Furniture Co.*, 96 F Supp 3d 71, 79 [SD NY 2015], *affd* 659 Fed Appx 40 [2d Cir 2016], *cert dismissed* 138 S Ct 1975 [2018]). For purposes of the FAA, "'[q]uestions concerning whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met are [generally] for the arbitrators to decide'" (*Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]).

Section 15.4.1 of the A201, set forth above, contains a broad arbitration clause that specifically incorporates by reference the Rules. Rule 9 provides that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." According to the United States Supreme Court:

> courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about "arbitrability." These include questions such as "whether the parties are bound by a given arbitration clause," or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy" ... On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration ... These procedural matters include claims of "waiver, delay, or a like defense to arbitrability" ... And they include the satisfaction of "'prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate'" (*BG Group PLC v Republic of Argentina*, 572 US 25, 34-35 [2014]).

Here, resolution over whether a given presumption applies is irrelevant since the question of arbitrability has been delegated by the parties to the arbitrator based on the Rules, and this Court has no power to decide this procedural issue of arbitrability (*see Lake Harbor Advisors, supra*; *Morelli v Alters,* 2020 WL 1285513 at * 10 [SD NY 2020] ["(t)he issue of whether the parties' failure to mediate frustrated a condition precedent and excuses [the plaintiff] from his duty to arbitrate is a question of procedural arbitrability and thus must be determined by an arbitrator]).

In *Pacelli v Augustus Intelligence Inc.* (459 F Supp 3d 597 [SD NY 2020]), the parties, like the parties in this case, incorporated by reference AAA Rule 6(a). In holding that the arbitrator had to decide whether the condition precedent to arbitration (*i.e.,* mediation) was satisfied, the district court held that by incorporating that rule:

> the parties clearly and unmistakably delegated questions of arbitrability of any dispute "arising out of or relating to [the] contract, or breach thereof," to an arbitrator … The mediation requirement is merely a condition precedent to arbitration of that same category of disputes (*id.* at 612).

Likewise, Petitioner's arguments that AMEC failed to timely submit[3] the dispute to the Initial Decision Maker and/or mediation pursuant to the terms of the Agreements, are questions reserved to the arbitrator under the FAA (*Shearson Lehman Hutton v Wagoner*, 944 F2d 114, 121 [2d Cir 1991] ["*any* limitations defense – whether stemming from the arbitration agreement, arbitration association rule, or state statute – is an issue to be addressed by the arbitrators"]; *see also Howsam v Dean Witter Reynolds, Inc.*, 537 US 79, 84-85 [2002] ["applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not for the judge"]; *Morelli*, 2020 WL 1285513 at *10 ["[t]he issue is simply whether the parties are obligated to mediate before they proceed to arbitration. This is a procedural question because it is not a question of whether Morelli and Alters are bound by a duty to arbitrate. Hence, it should be decided by an arbitrator"]).

Moreover, even if New York law (and not the FAA) controlled these issues, their resolution would have to be decided by the arbitrator. In *Matter of Spencer-Van Etten Cent. School Dist. (A. Roy Auchinachie & Sons, Inc.)* (179 AD2d 855 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), the trial court granted the owner's motion to stay arbitration based on the owner's contention that respondent had failed to comply with the time limit to submit its claim to the architect. The architect's decision was a condition precedent to arbitration and, like the clause in this case, any such claim had to be presented to the architect "within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later" (*id.* at 857). In reversing the trial court's grant of the stay, the Third Department explained that

> [w]hether a particular requirement in a valid contract providing arbitration is a condition precedent to arbitration or a condition in arbitration "depends on its substance and the function it is properly perceived as playing – whether it is in essence a prerequisite to entry into the arbitration process or a procedural prescription for the management of that process" (*id.*)

The Third Department held that the 21 day requirement was a condition in arbitration for the arbitrator to resolve, and not a condition precedent for the court to decide (*id.; see also Matter of Barbalious v Exterior Wall Sys., Inc.*, 14 AD3d 508, 508 [2d Dept 2005] ["the provision requiring submission of claims to the architect within 21 days, although termed a condition precedent, is a matter of contract interpretation for the arbitrator to resolve"]; *Matter of Village of*

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[3] Petitioner's contention that Respondent waived its right to arbitrate is a "gateway matter" that is a procedural question that is presumptively reserved for the arbitrator (*Republic of Ecuador v Chevron Corp.*, 638 F3d 384, 394 [2d Cir 2011]; *Morelli*, 2020 WL 1285513 at *10; *Howsam*, 537 US at 84-85 *Moses H. Cone Mem. Hosp.*, 460 US at 24-25; *Contec Corp. v Remote Solution Co.*, 398 F3d 205, 208 [2d Cir 2005]).

Saranac Lake, Inc. (H. Schickel Gen. Contr., Inc.), 154 AD2d 855, 855 [3d Dept 1989], *lv denied* 75 NY2d 707 [1980] ["the question of whether the demand for arbitration was made within the contractual period of limitations is to be resolved by the arbitrator"]; *Matter of Calvin Klein, Inc. (G.P. Winter Assoc., Inc)*, 204 AD2d 149, 150 [1st Dept 1994] ["[t]he failure to file a formal notice within 21 days, and the reason for such alleged lapse, were failures of conditions inextricably bound up with questions of contract performance, and thus were issues for arbitration"]). Based on the foregoing authority, the arbitrator must decide whether Respondent complied with the 21-day time limitation.

Accordingly, because the issues raised in the Petition are questions reserved for the arbitrator, Petitioner's Petition shall be denied, and the Petition shall be dismissed.

Based on the foregoing, it is hereby

ORDERED that the temporary restraining order issued by this Court (NYSCEF Doc. No. 22) is hereby vacated; and it is further

ORDERED that the Petition by 33 Calvert Properties LLC to stay arbitration is denied, and the Petition is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
October 27, 2020

ENTER:

HON. GRETCHEN WALSH, J.S.C.

TO:

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