Changes To Note In New AAA Mass Arbitration Rules

By **Jonathan Gardner, Jonathan Waisnor and Alexander Schlow** (January 26, 2024)

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On Jan. 15, the American Arbitration Association — the nation's largest consumer arbitration administrator — released updated mass arbitration rules.

These rules clarify issues that were previously being litigated in front of the AAA, and significantly streamline the process of getting to a merits arbitration for claimants who have suffered similar wrongs and are bound by mandatory arbitration clauses.

Background

In a number of decisions, including AT&T Mobility LLC v. Concepcion, the U.S. Supreme Court in 2011 permitted, with some limitations, companies to channel consumer and employee claims that were typically suitable for class treatment into individual arbitration.

This led to cases in which law firms representing thousands or tens of thousands of employees or consumers filed individual arbitration proceedings before arbitration administrators like the AAA or JAMS Foundation.

In response, many defendants refused to pay arbitration fees so that merits arbitrators could be appointed. While the specific justifications for default shift, the basic argument from the companies is the same: Commencement of a mass arbitration is a violation of the parties' arbitration clause or class action waiver, or otherwise improper.

Frequently, companies also complained that the arbitration administrator refused to amend or modify its existing arbitration rules to reduce the defendant's fees or streamline the proceedings, even though the administrator's rules and fee schedule are public, and the defendant introduced the arbitration clause. Courts were largely unsympathetic and compelled the companies to arbitrate, often noting the irony in the switch in positions.[1]

Uber Technologies Inc., which was a respondent in 31,000 consumer arbitration claims in Uber v. American Arbitration Association Inc. in 2022, went even further. It sought a preliminary injunction blocking the AAA from administering the arbitrations.

Uber claimed that by failing to reduce its posted fees, the AAA had violated the implied duty of good faith and fair dealing. The injunction was denied and New York's intermediate appellate court affirmed, rejecting Uber's attempt to "avoid paying the arbitration fees associated with 31,000 nearly identical cases," because the "fees are directly attributable to [a] [business] decision" to preclude class or collective action.[2]

AAA Amends the Mass Filing Rules

In 2021, the AAA adopted Supplementary Rules for Multiple Case Filings "to streamline the administration of large volume filings involving the same party, parties, and party representative(s), or related party, parties and party representative(s)."

The mass filing rules apply to "twenty-five or more similar Demands for Arbitration ... filed against or on behalf of the same party or related parties" and "representation of the parties is consistent or coordinated across the cases."

The AAA amended the mass filing rules to address several issues of continued importance to the claimants and defense bars. The modified rules are effective as to all mass arbitration case filings on or after Jan. 15. A summary of some key changes is discussed below.

Formalizing Process Arbitrator Authority to Resolve Administrative Disputes

Even after introduction of the mass filing rules, companies would continue to raise objections to the AAA's jurisdiction before the AAA administrative staff at the outset of a filing.

This places an unnecessary burden on AAA staffers to resolve disputes and permits the company to delay commencement of merits arbitration while still retaining the option to strategically default on fees and force the claimants to move to compel.

The modified rules update the categories of disputes that are potentially within the authority of the process arbitrator, who can be appointed to adjudicate administrative issues.

This development will give companies a limited opportunity to raise administrative or process issues, provide for streamlined decision making, and create predictability in the administration of the mass filing such that subsequent batches of claims can be efficiently processed.

Process arbitrator decisions may now also be reviewed by merits arbitrators on a case-by-case basis, subject to an abuse of discretion standard.

Staggered Fee Schedules

The modified rules provide that the costs for process arbitrator appointments are $3,125 for claimants and $8,125 for the business. Additional time is paid by the business on an hourly basis. However, once the claims proceed to merits arbitration, administrative fees are assessed for each individual arbitration depending on the stage of the case.

These rule changes may make it less likely that companies will strategically default before the process arbitrator is appointed. However, choosing to walk away after the game has started looks even less credible than never taking the field in the first place. Companies should assess early on whether they are comfortable with large numbers of merits arbitrations moving forward after a relatively short initial period.

Mandatory Mediation

In our experience, mediation is an effective technique for resolving mass arbitrations before filing, with parties usually agreeing to stay the filing of demands while they attempt to reach a resolution. However, it is not a good use of time and party resources if one party is simply trying to delay filing.

The modified rules provide for the automatic appointment of an AAA mediator in a mass arbitration, with no stay of proceedings and a mediation to be held within 120 days.

On the other hand, because either party can opt out of mediation, claimant firms may adopt a more aggressive approach to filing arbitrations. This would permit progress toward a merits resolution while permitting initial issues to be adjudicated by the process arbitrator while discussions are ongoing.

Requirement for Representative Attestation

The modified rules adopt language from the Federal Rules of Civil Procedure that the claimant's representative affirm that the individual allegations of the demand are true and correct to the best of the representative's knowledge. Arbitrators will need to determine the meaning of this requirement and how it will be applied in the context of specific individual cases.

Adoption of Hourly Compensation for Neutrals

Previously, AAA neutrals were compensated starting at $1,500 per hour for a documents-only proceeding and $2,500 per hour for a hearing, with the business responsible for additional compensation if certain parameters were exceeded.[3]

The modified rules set compensation at $300 per hour. This will align neutral compensation with the realities of mass arbitration, in which companies will often heavily litigate at least the initial batch of cases.

This new structure should ensure that companies are raising only meritorious defenses and are cooperating in discovery consistent with the expedited, informal and party-driven nature of arbitration.

Individual Merits Arbitrations

Importantly, the modified rules continue to provide that each consumer is entitled to an individual merits arbitration and may obtain a separate adjudication of their claim by a neutral that they can participate in selecting.

Further, it now provides that the process arbitrator must resolve issues regarding whether subsequently filed cases are part of the same mass arbitration and whether previous rulings are binding on subsequently filed arbitrations.

While companies may prefer a process that allows them to obtain binding rulings across all existing and potential claimants — even those who have yet to file claims[4] — the AAA seems to have rejected an approach that would administer mass filings involving unrelated claimants as a single mass filing.

Moving Forward

While the modified rules have just become effective, we can offer some initial predictions.

First, companies that are chiefly concerned with the enforceability of their arbitration clauses and class action waivers will continue to use the AAA as administrator.

The AAA has a reputation for impartiality and experience with mass claim administration.

Unlike in other mass arbitration cases, there is no evidence or suggestion that the modified rules were drafted by or with the input of corporate defense counsel, that the AAA's revenue is dependent on a particular corporate defendant or law firm, or that the rules changed during pending litigation over their enforceability.[5]

Companies may make other risk assessments. Those hoping to eliminate mass claiming may seek out administrators that are more responsive to their preferred rule changes, even if it risks invalidating their arbitration clause.[6]

Companies more concerned with predictability of litigation may remove their arbitration clauses altogether or explicitly permit consolidated arbitration.

Second, the modified rules will continue to encourage the acceptance of mass arbitrations by the court system by demonstrating that major independent administrators, like the AAA, are responding to the growth in the space.

Courts have not been, and are unlikely to start being, sympathetic to companies that aren't playing by the rules of an administrator they selected where that administrator is making policy changes.

Third, adoption of the modified rules will accelerate the development of an informal body of guidance regarding how particular process arbitrators address common mass-filing issues.

However, since arbitration is a confidential process, decisions applying the modified rules won't become public unless they are disclosed in a court filing. They are also not precedential.

Further, because arbitration is a party-driven exercise, parties may also agree on procedures that deviate from the existing arbitration agreement or the mass filing rules. Both the claimants and defense bars are likely to see the continued need for counsel experienced in the nuances of mass arbitration.

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[1] Abernathy v. Doordash, Inc., 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020) (company's refusal to arbitrate with 5,879 employees was "hypocrisy" and "irony upon irony"); Adams v. Postmates, Inc., 414 F. Supp. 3d 1246, 1254 (N.D. Cal. 2019), aff'd, 823 F. App'x 535 (9th Cir. 2020) (finding in case involving 5,257 individual arbitration filings by rideshare couriers, that "the Fleet Agreement delegates to the arbitrator the exclusive authority to resolve any dispute concerning arbitrability" and rejecting arguments that court should

decide condition precedent).

[2] Uber Tech., Inc. v. American Arb. Assn., Inc., 204 A.D.3d 506, 510 (N.Y. App. Div. 2022).

[3] https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_2.pdf.

[4] In Concepcion, the Supreme Court distinguished bilateral, individual arbitration from class arbitration. While the former was "envisioned by Congress when it passed the FAA in 1925," class arbitration strayed far from "the individualized and informal procedures characteristic of traditional arbitration." This distinction could be applied to certain mass arbitration protocols, raising the possibility that FAA preemption simply would not apply should procedures become too convoluted. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022).

[5] In Heckman et al. v. Live Nation Entertainment, Inc., No. 2:2022-cv-00047, 2023 U.S. Dist. LEXIS 145793 (C.D. Cal. Aug. 10, 2023), for example, a California court held that a mass arbitration protocol was unconscionable in part because of its "difficult-to-parse" mass arbitration rules adopted in the midst of litigation. The Court noted that the administrator's interpretation of its own rules apparently changed during the pendency of the defendant's motion to compel arbitration and that the defendant was the administrator's "anchor client."

[6] Id.