DISPUTE RESOLUTION JOURNAL®

A Publication of the American Arbitration Association®-
International Centre for Dispute Resolution®

March-April 2025 Volume 78, Number 6

Dispute Resolution Journal®

A Publication of the American Arbitration Association®-
International Centre for Dispute Resolution®

Volume 78, Number 6 March-April 2025

DISPUTE RESOLUTION JOURNAL®

The Journal of the American Arbitration Association®-International Centre for Dispute Resolution® (AAA®-ICDR®)

ISSN 1074-8105 (print) and 25733-606X (digital).

Article Submissions

Direct editorial inquiries and send materials for publication to: Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to arbitrators and mediators, attorneys and law firms, in-house counsel, corporate officers, government agencies and their counsel, senior business executives, and anyone interested in dispute resolution.

Subscriptions

Digital and print subscriptions to the Dispute Resolution Journal are available for purchase through the AAA-ICDR's online store, https://aaaeducation.org/bookstore.

Reprint Permissions

Please send requests to reproduce Dispute Resolution Journal articles to the AAA-ICDR's Publications Department Elizabeth Bain, Director of Publications, at baine@adr.org.

ISSN 1074-8105 (print) and 25733-606X (digital).

The cover of this journal features the painting *Close Hauled*, a drawing by Rockwell Kent, 1930, electrotype on paper.

Publishing Staff
Director of Publications: Elizabeth Bain
Production Editor: Sharon D. Ray
Cover Design: Sharon D. Ray

Cite this publication as:

Dispute Resolution Journal® (The Journal of the American Arbitration Association®-International Centre for Dispute Resolution® (AAA®-ICDR®))

Editorial Office
American Arbitration Association
120 Broadway, Floor 21
New York, NY 10271

POSTMASTER: Send address changes to American Arbitration Association-International Centre for Dispute Resolution, 120 Broadway, 21st Floor, New York, NY 10271

To reach Customer Service:

Elizabeth Bain
Available 8:00 AM-5:00 PM Eastern Time
(401) 431-4837
baine@adr.org

Mass Arbitration Clauses Done Right: Prevention as the Best Remedy for Disputes

Freda L. Wolfson, Wayne Fang, and Julie A. Minicozzi[1]

In this article, the authors review recent case law regarding unconscionability related to arbitration provisions involving mass arbitration. They also survey rules and procedures adopted by the American Arbitration Association and JAMS addressing mass arbitration. Based on the current legal landscape, the authors suggest best practices and drafting strategies to avoid a finding of unconscionability in mass arbitration provisions.

Any parent who has taken a young child to a restaurant knows the outing seems like a great idea—right up to the moment one stands at the hostess podium and reaches for the arm of the screaming child now pounding on the lobster tank. At that moment, one flashes back to memories of the last restaurant excursion with the child and remembers saying, never again. Counsel considering eschewing alternative dispute resolution (ADR) altogether in the face of unexpectedly expensive mass arbitration proceedings may come to experience a similar moment of reckoning. Although returning to traditional litigation might seem tempting,[2] many surely have forgotten the expensive and

[1] Judge Wolfson (ret.) previously served as chief judge of the U.S. District Court for the District of New Jersey and now leads Lowenstein Sandler LLP's ADR practice. Wayne Fang is senior counsel at the firm and focuses on complex commercial litigation. Julie A. Minicozzi is an associate attorney at the firm and works on commercial and civil litigation matters. The authors may be contacted at fwolfson@lowenstein.com, wfang@lowenstein.com, and jminicozzi@lowenstein.com, respectively.

[2] In 2021, after receiving approximately 75,000 similar arbitration demands and facing tens of millions of dollars in fees, Amazon eliminated

Dispute Resolution Journal® | March-April 2025, Vol. 78, No. 6, pp. 519-540.

ISSN 1074-8105 (print) | ISSN 25733-606X (digital).

drawn-out experience of litigating in an already overburdened court system.

For a while, arbitration offered businesses a comfortable perch from which to resolve claims that might otherwise strain corporate finances in a traditional court setting. With the advent of mass arbitration as a tool to force settlements, however, counsel has been left muttering Shakesperean rhetoric: To arbitrate or not to arbitrate. That is the question.

In response to mass arbitration filings, corporate counsel are drafting and revising arbitration agreements to include provisions designed to curb the excesses of mass arbitration, such as, *inter alia*, fee-shifting provisions, discovery limitations, and batching and bellwether provisions. The amendments have prompted plaintiffs' counsel to allege unconscionability of the provisions. Courts are now sketching out the contours of unconscionability in mass arbitration provisions, which has created uncertainty for litigants.

Given the rising uncertainty about the conscionability of mass arbitration provisions, as well as process administration concerns, no one blames counsel for mulling over whether to continue utilizing what previously served as a curtailment of litigation costs and time expenditure. But while the bloom may have worn off the arbitration rose, arbitration—even mass arbitration—remains a viable and sensible method for resolving claims. The key is to carefully draft provisions that lessen the negative impact of mass arbitration, while simultaneously avoiding unconscionability.

This article discusses recent court decisions analyzing unconscionability in mass arbitration provisions, gives a brief overview of mass arbitration rules and procedures adopted by the American Arbitration Association® (AAA®) and the Judicial Arbitration and Mediation Services (JAMS), and examines best

---

its arbitration provision in its consumer terms and conditions and, instead, directed customers to pursue potential claims in federal court. Michael Corkery, Amazon Ends Use of Arbitration for Customer Disputes, New York Times (updated Sept. 28, 2021), https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html.

practices and drafting strategies to avoid unconscionability in mass arbitration provisions.

Courts Weigh Unconscionability in Mass Arbitration Provisions

The Federal Arbitration Act (FAA),[3] which "was designed to promote arbitration," requires that "private arbitration agreements are enforced according to their terms," and further "afford[s] parties discretion in designing arbitration processes."[4] The terms of such agreements and design of arbitration processes, however, are not without limits, and courts may invalidate an arbitration agreement on grounds of substantive and procedural unconscionability.[5] "The substantive element of the unconscionability analysis looks to the actual terms of the parties' agreement to ensure[] that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided."[6] "Procedural unconscionability addresses the circumstances of contract negotiation

[3] 9 U.S.C. §§ 1-16 (1947).

[4] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344-47, n.6 (2011).

[5] See Sanchez v. Valencia Holding Co., LLC, 353 P.3d 741, 746 (Cal. 2015) (noting unconscionability "refers to an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party"); see also, e.g., Delta Funding Corp. v. Harris, 912 A.2d 104, 110-11 (N.J. 2006) (confirming arbitration agreements may be challenged on grounds of procedural and substantive unconscionability). The federal analogue to the unconscionability doctrine is the effective vindication doctrine, under which "provisions within an arbitration agreement that prevent a party from effectively vindicating statutory rights are not enforceable." Cedno v. Sasson, 100 F.4th 386, 395 (2d Cir. 2024).

[6] Hasty v. Am. Auto. Ass'n. of N. Cal, Nev., & Utah, 98 Cal. App. 5th 1041, 1058 (Cal. Ct. App. 2023) (alteration in original) (quotations and citations omitted).

and formation, focusing on oppression or surprise due to unequal bargaining power."[7]

While courts have long reviewed unconscionability in arbitration provisions, the advent of mass arbitration has thrown unconscionability analysis into a state of flux. Courts are only beginning to flesh out the contours of unconscionability in the context of mass arbitration, with California courts blazing a legal trail in this realm.

Two recent cases in which courts considered unconscionability in mass arbitration provisions illuminate the pitfalls counsel should seek to avoid, and thereby inform drafting strategies for mass arbitration provisions—strategies that will preserve key benefits of arbitration, curb disadvantages to parties, and avoid invalidation of the arbitration agreement on the basis of unconscionability.

Heckman v. Live Nation Entertainment, Inc.

In *Heckman v. Live Nation Entertainment, Inc.*,[8] a putative class of plaintiffs brought claims against Live Nation Entertainment, Inc. and Ticketmaster LLC (collectively, defendants), alleging defendants engaged in anticompetitive practices.[9] Defendants filed a motion to compel arbitration pursuant to their recently adopted terms of service.[10] The new terms of service changed the arbitration provider from JAMS to New Era ADR (New Era), an ADR provider offering an annual subscription agreement and a mass arbitration procedure plaintiffs alleged is "a novel and one-sided process that is tailored to disadvantage consumers" and "skews the odds so egregiously in [d]efendants' favor through its defense-biased provisions that the arbitration agreement is rendered unconscionable."[11] In particular, plaintiffs objected to

[7] Bakersfield Coll. v. Cal. Cmty. Coll. Athletic Ass'n, 41 Cal. App. 5th 753, 757 (Cal. Ct. App. 2019) (quotations and citations omitted).

[8] 686 F. Supp. 3d 939 (C.D. Cal. Aug. 10, 2023).

[9] Id. at 945-46.

[10] Id. at 946.

[11] Id. at 946-48 (quotations and citation omitted).

conflicts in defendants' selection of New Era as the arbitral forum, New Era's mass arbitration batching and bellwether arbitration procedures, and multiple discovery and appeal rules.[12]

After examining the arbitration agreement, the court found several provisions procedurally and substantively unconscionable, including:

- Defendants selected New Era after attorneys representing both New Era and defendants connected the companies and helped develop New Era's arbitration rules protocols. And, New Era's revenue during its first year of operation was nearly entirely attributable to defendants, which created an inference of favoritism and bias in favor of defendants.[13]
- Defendants significantly and retroactively changed the terms of service by unilateral action during ongoing litigation without notice to existing customers and, moreover, hid the changes in confusing rules.[14]
- The mass arbitration protocol required batching cases involving common issues and selecting three bellwether cases to set precedent. Then a neutral arbitrator with unchecked discretion would adjudicate—and potentially summarily dispose of—claims based on precedent set forth, sometimes before a claimant was even a party.[15]
- New Era did not provide for discovery as a right; imposed stringent discovery, page, and record limitations, including complaints limited to ten pages, evidence presentations limited to ten references, argument limited to 15,000 characters; required claimants who want a more formal discovery process to pay a fee and obtain defendants' consent; and granted the

[12] Id. at 948, 967.

[13] Id. at 957-58.

[14] Id. at 952-53.

[15] Id. at 959-63.

neutral arbitrator constrained discretion to expand discovery.[16]

- New Era retained power to override a claimant's disqualification of an arbitrator and provided a right for each *side* to disqualify an arbitrator (not individual parties).[17]
- Parties were permitted to appeal a grant of injunctive relief, which would, in effect, give only defendants the right to appeal since plaintiffs were the only party seeking an injunction, and could have far-reaching implications if denying injunctive relief to a bellwether plaintiff. And, the appeal would be adjudicated by JAMS, which would further benefit defendants.[18]

In sum, the court determined that "any one of these elements, standing alone, might not suffice to invalidate the agreement. However, when viewed together and alongside the extremely high degree of procedural unconscionability present here . . . the Court finds the agreement unconscionable."[19]

Live Nation appealed and a Ninth Circuit panel heard oral argument in June 2024. During oral argument, one judge reportedly called the arbitration agreement provisions "drafting malpractice," "cockamamie," and "just nuts"; another said the language was "circular and problematic"; and another suggested the "crazy" rules created a conflict of interest for the arbitrator.[20] On October 28, 2024, the Ninth Circuit affirmed the District Court's decision and held, *inter alia*, that "the delegation clause of the arbitration agreement, and the arbitration agreement as a

[16] Id. at 963-64.

[17] Id. at 964-65.

[18] Id. at 965-66.

[19] Id. at 967.

[20] Craig Clough, "Cockamamie" Live Nation Arbitration Rules Perplex 9th Circ., Law 360 (June 14, 2024, 10:26 p.m.), https://www.law360.com/articles/1848371/-cockamamie-live-nation-arbitration-rules-perplex-9th-circ-.

whole, are unconscionable and unenforceable under California law."[21] Additional review may or may not be forthcoming.

MacClelland v. Cellco Partnership

In *MacClelland v. Cellco Partnership*,[22] a putative class of plaintiffs brought claims against Cellco Partnership d/b/a Verizon Wireless and Verizon Communications, Inc. (collectively, defendants) alleging defendants falsely advertised an administrative charge on customers' bills and misrepresented the fee as a tax or regulation fee.[23] Defendants filed a motion to compel arbitration as required by an arbitration agreement, which incorporated AAA rules for claims over $10,000, and claimant's choice of AAA or BBB [Better Business Bureau] rules for claims of $10,000 or less.[24] Plaintiffs agreed they assented to the operative arbitration agreement, which "contained an arbitration clause that required arbitration and expressly prohibited class arbitrations,"[25] but argued "that the dispute resolution provisions are permeated with unconscionability and are thus unenforceable."[26]

After examining the arbitration agreement provisions, the court found several provisions procedurally and substantively unconscionable, including:

- The agreement had minimal procedural unconscionability by virtue of being a contract of adhesion.[27]

---

[21] Heckman v. Live Nation Ent., Inc. et al., 120 F.4th 670, 676 (9th Cir. 2024).

[22] 609 F. Supp. 3d 1024 (N.D. Cal. 2022).

[23] Id. at 1028.

[24] Id. at 1028-29, 1032.

[25] Id. at 1029.

[26] Id.

[27] Id. at 1033.

- A 180-day dispute notice provision in the agreement acted functionally as a short statute of limitations and "erect[ed] a potential trap to the unwary."[28]
- The words "if for any reason a claim proceeds in court rather than through arbitration" preceded a pre-dispute jury waiver.[29] The court did not attribute weight to the substantive unconscionability assessment, however, because the provision would only trigger if a claim proceeded outside of arbitration.[30]
- A provision waiving punitive damages would limit statutorily imposed remedies.[31]
- A provision limiting public injunctive relief to only individual claimants would effectively waive injunctive relief for the benefit of the general public.[32]
- A broad-sweeping exculpatory clause excluded discovery of all extrinsic evidence without exceptions, and only allowed claimants to rely on the agreement itself as evidence.[33]
- A mass arbitration provision applied when 25 or more customers represented by the same counsel[34] raise similar claims, capped the number of arbitration proceedings to ten claims at a time, and required bellwether adjudication of the ten claims before the next tranche of ten could be filed and proceed. The process

[28] Id. at 1035. But see Ruiz v. CarMax Auto Superstores, Inc., No. 23-1986, 2024 WL 1136332, at *6 (C.D. Cal. Jan. 18, 2024) (finding mass arbitration batching provision in employment contract not substantively unconscionable because arbitration agreement contained tolling of statute of limitations).

[29] MacClelland, 609 F. Supp. 3d at 1036 (citation omitted).

[30] Id.

[31] Id. at 1036-37.

[32] Id. at 1037-39.

[33] Id. at 1039.

[34] The court found this provision lacks mutuality because it "imposes restrictions on a law firm representing twenty-five or more of Verizon's customers with 'similar claims,'" but "Verizon is apparently free to select the same law firm to represent it in all of its arbitrations." Id. at 1042.

> would purportedly take 156 years to resolve the present claims. The court found the length of delay, risk that claims would be barred by the statute of limitations, lack of tolling provision, and forfeiture of legal rights contrary to public policy.[35]

The court deemed the entire agreement "permeated by unconscionability"—which rendered severance inappropriate—and determined defendants sought to impose an inferior and ineffective forum on the claimants.[36]

Defendants appealed[37] but settled the case one day before oral arguments were set to commence.[38]

Both cases provide insight into how courts may evaluate[39] unconscionability and the interplay of various arbitration provisions in the context of mass arbitrations. These courts found batching and bellwether provisions,[40] discovery limitations, and injunctive relief limitations unconscionable. In *Live Nation*, the court found arbitrator neutrality, hidden or confusing terms, and a disqualification of arbitrator provision favoring defendants

---

[35] Id. at 140-42. During adjudication, defendants sought to amend the terms of the agreement to include a tolling provision. Plaintiffs pointed out the agreement specifically "precludes Verizon from changing the terms of dispute resolution once a dispute is pending."

[36] Id. at 1044-46.

[37] MacClelland v. Cellco P'ship, No. 22-16020 (9th Cir. 2024).

[38] Stephanie A. Sheridan, et al., Hoisted by Your Own (Pet)Arb Clause? New Developments in Mass Arbitration, (Mar. 27, 2024), https://www.beneschlaw.com/resources/hoisted-by-your-own-petarb-clause-new-developments-in-mass-arbitration.html#:~:text=In%20response%20to%20complaints%20that,of%20mass%20arbitration%20claims%20are.

[39] While analyses will vary depending on jurisdiction, because mass arbitration unconscionability case law is nascent, reviewing these cases may give insight into how courts in other jurisdictions could analyze unconscionability.

[40] Contra Brooks v. WarnerMedia Direct, LLC, No. 23-11030, 2024 WL 3330305, at *17-18 (S.D.N.Y. July 8, 2024) (finding—among other determinations related to conscionability—tiered batching procedures not substantively unconscionable when the number of cases decided significantly increases with each batch and the statute of limitations is tolled during the adjudication of claims).

unconscionable; and in *MacClelland*, the court found a shortened notice provision, statutory damages limitation, and a jury waiver provision unconscionable, in addition to the inherent procedural unconscionability of a contract of adhesion. The unconscionability pitfalls in these mass arbitration cases in conjunction with the new AAA and JAMS rules,[41] provide key insight on how to approach drafting valid agreements that permit parties to proceed with mass arbitration in an ADR forum.

Overview of AAA Mass Arbitration Rules and JAMS Mass Arbitration Procedures

AAA Rules

Effective January 15, 2024, AAA revised its Mass Arbitration Supplementary Rules (Rules) and specifically designed them to provide "an efficient and economical path" to "streamline the administration" of mass filings.[42] The Rules are triggered "whenever 25 or 100 or more similar [d]emands for [a]rbitration are filed, whether or not such cases are filed simultaneously."[43] Parties are encouraged to mutually adopt additional processes for efficiency, such as a scheduling order; an appointed neutral to oversee procedure, discovery, choice of law, and statute of limitations issues; an agreement to proceed on the documents; an

[41] For a recent comparison of additional arbitration administrators' rules, see David Horniak, Oliver Kiefer, and Michael Essiaw, Comparing 5 Administrators' Mass Arbitration Procedures (Aug. 27, 2024), https://www.law360.com/articles/1859008/comparing-5-administrators-mass-arbitration-procedures.

[42] Mass Arbitration Supplementary Rules, AAA, 3 [hereinafter AAA Rules] (amended effective Apr. 1, 2024), https://www.adr.org/sites/default/files/Mass-Arbitration-Supplementary-Rules.pdf.

[43] Id. at MA-1(c). The minimum of 25 demands pertains to "Consumer or Employment/Workplace similar Demands for Arbitration (Demand(s)) filed against or on behalf of the same party or related parties"; the minimum of 100 demands pertains to "non-Consumer/non-Employment/Workplace similar Demands filed against or on behalf of the same party or related parties." Id. at MA-1(b)(i) to (ii).

agreement to proceed with a single arbitrator for multiple cases; an agreement to the form of award; an agreement to limits on briefs, motions, and discovery; and an agreement to testimony by affidavit or recorded deposition.[44]

The Rules "include new attestation requirements, a preference for virtual hearings, an expanded [P]rocess [A]rbitrator role[,] and the limited ability of [M]erits [A]rbitrators to review [Pr]ocess [A]rbitrator's decisions."[45] AAA also appoints a Global Mediator to facilitate meditation during the arbitration process.[46] And, the Rules offer latitude in the processes employed to appoint Merits Arbitrators. Particularly impactful are the "amendments to the fee schedules[, which] focus on early resolution opportunities and cost predictability, with flat initiation fees and staged fees for both consumer and employment/workplace mass arbitrations."[47]

Below is a summary of several important procedural aspects of the Rules:

- Each filing must include a fully completed data intake spreadsheet with client information and an "affirmation that the information provided for each individual case is true and correct to the best of the representative's knowledge."[48]
- "Virtual hearings are the preferred method of evidentiary hearings," but if in-person hearings are required, absent party agreement AAA will identify locations for the hearings.[49]
- Appointed Process Arbitrators have authority to "rule on their own jurisdiction"; determine whether parties

[44] Id. at 3.

[45] Rules Update: AAA 2024 Mass Arbitration Supplementary Rules and Consumer Mass Arbitration and Mediation and Employment/Workplace Mass Arbitration Fee Schedules, AAA (effective Jan. 15, 2024), https://go.adr.org/2024-mass-arbitration-rules.html.

[46] AAA Rules at MA-9.

[47] Id.

[48] Id. at MA-2.

[49] Id. at MA-5.

have met filing requirements; handle disputes about conditions precedent; address disputes about administrative fee, arbitrator compensation, and expense payment; determine "[w]hich [demands] should be included as part of the mass arbitration filing," whether subsequently filed cases are included in the mass arbitration, and whether previously issued process rulings bind subsequent cases; oversee the selection of Merits Arbitrators, determine rules "that will govern the individual disputes"; decide which consumer cases should proceed in small claims court instead; determine if the merits arbitrators will hold hearings or proceed by documents only; decide on the location of hearings; and address other issues submitted to the process arbitrator.[50] The Process Arbitrator can make fact-specific decisions on an individual basis, or non-fact-specific decisions for claimants in the mass filing.[51] The Process Arbitrator's determinations are subject to abuse of discretion review by a Merits Arbitrator.[52]

- Within 120 days of answer, the parties must "initiate a global mediation," which is to occur "concurrently with the arbitrations" so as to not delay the proceedings. While any party may opt out of mediation, AAA has discretion to appoint a Mediator "to facilitate discussions between the parties on processes," for the sake of efficiency.[53]
- The appointment of Merits Arbitrators is a flexible process AAA facilitates with input from parties, and may include use of the AAA search platform, and the potential for "assigning multiple proceedings to a single, mutually agreeable Merits Arbitrator."[54]

---

[50] Id. at MA-6(c)(i) to (xii), (d).

[51] Id. at MA-6(d)(i) to (ii).

[52] Id. at MA-6(j).

[53] Id. at MA-9.

[54] Id. at MA-7.

These rules and proposed processes improve the ability of AAA and its Process Arbitrators, as well as appointed Mediators, to fairly, efficiently, and effectively manage mass arbitration claims. In particular, the filing affirmation and data intake spreadsheet requirements encourage claimants' counsel's due diligence in vetting claims prior to filing demands.[55] The virtual hearings are designed to promote efficiency and reduce expenses. The Process Administrator serves an important and similar function as a U.S. magistrate judge (in some districts), such as adjudicating process- and procedure-related issues, and, generally, dispositive matters are adjudicated by the Merits Arbitrator, akin to a U.S. district judge. And the required mediation facilitates discussions and provides an opportunity for early settlement of claims.

AAA also introduced new staged-fee provisions—one for consumer mass arbitrations[56] and one for employment-workplace mass arbitrations.[57] The fees are assessed at different points in the arbitration process, including case initiation, case administration, arbitrator appointment, and finalization, and include the following:

- An initial filing fee of $3,125 for individuals and $8,125 for businesses, with the individual fee paid upon filing and the business fee paid once filing requirements

[55] See Sheridan, supra note 38 (discussing Valve Corp. v. Zaiger LLC, No. 2:23-cv-01818 (W.D. Wash. 2023), in which a "law firm defendant is accused of improperly signing up thousands of platform users to increase the amount of arbitration demands it could file and ultimately force a settlement—despite having no real intention of arbitrating the claims").

[56] Consumer Mass Arbitration and Mediation Fee Schedule: Costs of Arbitration and Mediation, AAA [hereinafter Consumer Fee Schedule] (Jan. 15, 2024), https://www.adr.org/sites/default/files/document_repository/Consumer_Mass_Arbitration_and_Mediation_Fee_Schedule.pdf.

[57] Consumer Mass Arbitration and Mediation Fee Schedule: Costs of Arbitration and Mediation, AAA [hereinafter Employment Fee Schedule] (Jan. 15, 2024), https://www.adr.org/sites/default/files/document_repository/Employment-Workplace_Mass_Arbitration_and_Mediation_Fee_Schedule.pdf.

have been met by the individuals.[58] The initial fees cover a filing review, conference call for the parties, and appointment of the Process Administrator and Mediator.[59]

- Case administration fees, which are assessed on a sliding scale depending on the number of filings, range per case from $125 to $75 for individuals, and $325 to $100 for businesses.[60] The Process Administrator, Mediator, and Merits Arbitrator(s) receive hourly compensation, typically paid for by the business.[61]
- Per-case Merits Arbitrator appointment fees for consumer arbitration of $450 for businesses and $50 for individuals for direct appointment merits arbitration, or $600 for businesses and $75 for individuals for a list and rank process;[62] and per-case Merits Arbitrator appointment fees for employment matters of $150 for individuals and $1,100 for businesses.[63]
- Final case fees of $600 for consumer arbitrations and $750 for employment arbitrations, which are billed when there is an evidentiary hearing or at final submission of documents for documents-only proceedings.[64]

Each fee schedule also addresses various fees and charges for items such as expenses, abeyance, and additional services, and

[58] See Consumer Fee Schedule, supra note 56, at 1-2; Employment Fee Schedule, supra note 57, at 1-2.

[59] See Consumer Fee Schedule, supra note 56, at 1-2; Employment Fee Schedule, supra note 57, at 1-2.

[60] See Consumer Fee Schedule, supra note 56, at 2; Employment Fee Schedule, supra note 57, at 2.

[61] See Consumer Fee Schedule, supra note 56, at 3; Employment Fee Schedule, supra note 57, at 3.

[62] See Consumer Fee Schedule, supra note 56, at 2.

[63] See Employment Fee Schedule, supra note 57, at 2.

[64] See Consumer Fee Schedule, supra note 56, at 2; Employment Fee Schedule, supra note 57, at 2.

fees specific to the type of arbitration, such as a consumer class review and registry fee.[65]

The graduated fee schedules complement the process improvements to ensure better initial screening of claims, reduced fees at the outset of litigation, and fairness throughout the adjudication of claims.

JAMS Procedures

Effective May 1, 2024, JAMS provided Mass Arbitration Procedures and Guidelines (Procedures) with a focus "on leveraging administrative and procedural decision-making" when adjudicating mass arbitration cases.[66] The Procedures, which are only applicable to claims filed after the effective date of the Procedures, are triggered when 75 or more similar demands are filed, unless the parties' agreement stipulates otherwise.[67] Importantly, and different from AAA's Rules, the Procedures must be incorporated into a pre- or post-written agreement reflecting agreement to mass arbitration procedures.[68] The Procedures outline filing requirements, appointment of a Process Administrator, interpretation of procedures and jurisdiction, arbitrator selection, the merits hearing, and fees.

Below is a summary of several important provisions in the Procedures:

- Each filing must include a demand form, copy of the applicable arbitration agreement, contact and representative information, and "a sworn declaration from counsel averring that the information in the [d]emand

[65] See Consumer Fee Schedule, supra note 56, at 3-4; Employment Fee Schedule, supra note 57, at 3.

[66] JAMS Mass Arbitration Procedures and Guidelines, JAMS (effective May 1, 2024), https://www.jamsadr.com/mass-arbitration-procedures.

[67] Id. at 1(c).

[68] Id. at 1(a).

is true and correct to the best of the representative's knowledge."[69]

- A Process Administrator will initially conference with the parties; create a schedule for procedural issues with input from the parties; hold virtual administrative conferences and hearings; resolve preliminary and administrative matters; determine whether parties have met filing requirements and conditions precedent; determine which demands will be included in the mass arbitration; decide which JAMS rules apply to the proceeding; resolve disputes over the consumer or employment standards; determine "[w]hether to batch, consolidate, or otherwise group the [d]emands" for discovery, merits arbitrator appointment, merits hearings, or other purposes; and make any other non-merits decisions needed for fair and efficient adjudication of the matter.[70]
- The Process Administrator also resolves issues concerning the interpretation of the Procedures, jurisdiction, and arbitrability.[71]
- The parties may agree on appointment of Arbitrator(s) or the Process Administrator will devise a selection process for appointment. The Arbitrator(s) may handle multiple cases. The Process Administrator has authority to handle disputes and appoint an Arbitrator should the parties not agree on Arbitrator(s), but disqualification challenges are handled by the National Arbitration Committee. And, the Process Arbitrator cannot also serve as the Arbitrator without the parties' consent.[72]

[69] Id. at 2(a) to (c).

[70] Id. at 3(a) to (vii).

[71] Id. at 4(a) to (d).

[72] Id. at 5(a) to (g).

- The merits hearing proceeds pursuant to applicable rules and determinations made by the Process Administrator.[73]

JAMS also introduced a Mass Arbitration Fee Schedule, which provides as follows:

- An initial filing fee of $7,500 is assessed for cases or counterclaims.[74] The most employee or consumer claimants will pay is $2500, and the businesses are responsible for the remainder of the fees.[75]
- Process Administrators and Arbitrators bill according to a separate fee schedule.[76]
- The Case Management Fee is 13 percent of professional fees and includes administration, document handling, and use of conference facilities.[77]
- An Arbitrator Appointment fee of $2,000 for two-party matters and $3,500 for matters with three or more parties is "assessed for each arbitrator appointed regardless of the number of cases or groups of cases the arbitrator is appointed to or the number of times the arbitrator is appointed to cases" in the arbitration.[78]

The fee schedule also addresses general policies and additional fees and charges for items such as hearings and abeyance.[79]

Generally, the Procedures are designed to ensure a fair and efficient mass arbitration process. While the claim-screening processes and appointment of an administrator to oversee

---

[73] Id. at 6.

[74] Mass Arbitration Procedures Fee Schedule, JAMS (updated Apr. 30, 2024), https://www.jamsadr.com/files/uploads/documents/massarbitrationprocedures-fs_4.29.24.pdf (filing fee is designated as non-refundable, but 50 percent will be refunded if matter withdrawn within five days of filing.).

[75] Id.

[76] Id.

[77] Id.

[78] Id.

[79] Id.

initial filing and process concerns are similar to those in AAA's Rules, unlike AAA's Rules, the Procedures do not require global mediation, which may save some cost—at the potential expense of a mediator helping the parties achieve earlier resolution. The JAMS mass arbitration Procedures provides claimants clear processes designed to effectively facilitate claims, as well as a capped fee schedule. The processes and fee schedule offer businesses screening procedures and staged fee submission, which promote adjudication on the merits.

While the developing mass arbitration case law may eventually prompt AAA and JAMS to further hone their respective rules and fee schedules, these iterations are a positive step toward fair adjudication of mass arbitration claims.

Best Practices

Businesses must maneuver gingerly through the challenging new ADR landscape and carefully assess mass arbitration provisions in terms of service, consumer contracts, employment contracts, and other contracts, and draft provisions that protect business interests but are not so one-sided or onerous as to be unconscionable.

The following is a list of best practices for businesses to consider as the mass arbitration landscape evolves.

Select Reputable ADR Provider

When selecting an ADR provider, consider the reputation of the company, the size and scope of the client base, the availability of arbitrators and mediators, and whether the arbitration company provides a fair and equitable forum. Because mass arbitration is a fairly new legal phenomenon, it is important to review the details of AAA, JAMS, and other leading arbitration companies' updated mass arbitration rules and procedures and monitor any changes that may occur as the companies adapt and refine the rules and procedures. Rather than selecting an ADR provider that functions as a "yes company"—one that will tailor

its rules to obtain business without due consideration of fairness or impartiality[80]—work with an established and procedurally conscious ADR provider that seeks to ensure an equitable forum for claimants and businesses alike.

Draft Reasonable Provisions

When drafting any arbitration provisions, particularly mass arbitration provisions, businesses must thread the needle to adopt provisions that curtail false or abusive claims[81] but also curb the natural tendency toward protective or obstructive clauses that may veer into the realm of unconscionability. Keep in mind the following considerations:

- Stay abreast of case law developments in the mass arbitration realm—and legislative action, if any—to draft and update arbitration terms most likely to pass muster in the courts.
- Before modifying any terms, review the current agreement's requirements for contract modification and follow the prescribed process for making modifications.[82]
- Use plain, understandable language when drafting terms, and avoid unduly complicated rules and provisions.
- If adding a mass arbitration waiver, contemplate the effect of the provision in conjunction with other

[80] As the Live Nation case demonstrates, courts consider not only whether the arbitration procedures and rules are fair but also whether the arbitration company has a conflict or is biased in favor of those companies forming the basis of its compensation. 686 F. Supp. 3d 939 (C.D. Cal. Aug. 10, 2023).

[81] See, e.g., Valve Corp. v. Zaiger LLC, No. 2:23-cv-01818 (W.D. Wash. 2023).

[82] See, e.g., David Horniak, et al., 4 Ways Businesses Can Address Threat of Mass Arbitration, Law 360 (June 10, 2024, 5:16 p.m.), https://www.law360.com/articles/1845742/4-ways-businesses-can-address-threat-of-mass-arbitration.

procedures within the agreement (such as opt-out clauses).[83]

- Consider provisions designed to vet viability of claims and encourage early settlement, such as mediation or conference requirements.
- Revisit delegation clauses in conjunction with other provisions and decide whether allowing a court to decide arbitrability may promote conscionability.[84]
- Draft provisions conditioning fee shifting or reimbursement on a finding of good faith and ensure the provisions do not impose terms too onerous.[85]

---

[83] The term "mass arbitration waiver" refers to an agreement's definition of "mass arbitration" and any limitations placed thereupon. The waiver provision may include limitations on the number of claims brought by the same attorneys within a specified timeframe and may require transition to court when a certain number of plaintiffs using the same attorney(s) initiate similar claims. Courts are only beginning to draw the contours of mass arbitration waivers. Whether courts find a mass arbitration waiver unconscionable may vary depending on the court's interpretation of the agreement's mass arbitration definition and the waiver's interaction with other procedural safeguards. See Jenkins v. PetSmart, LLC, 2023, No. 23-2260, 2023 WL 8548677, at *11, *13 (E.D. Pa. Dec. 11, 2023) (finding mass arbitration waiver in employee contract—defined "as 'when [fifty] or more arbitration demands asserting the same or similar Covered Disputes are made and/or sought to be compelled by Covered Individuals during any rolling 180-day period, and such Individuals are represented by the same lawyer(s) or law firm(s)'"—not procedurally unconscionable because employee had multiple opportunities to opt out of agreement to arbitrate (alteration in original) (citation omitted)); see also Scally v. PetSmart, LLC, No. 22-06210, 2023 WL 9103618, at *4 (N.D. Cal. May 25, 2023) (finding mass arbitration waiver provision in employee contract—"provid[ing] that when 100 or more arbitration demands asserting the same or similar Covered disputes are made by claimants represented by the same lawyer(s) or law firm(s), the parties will not arbitrate the Covered disputes at issue therein, which instead will be litigated in a court of competent jurisdiction"—not unconscionable because the 101st employee and thereafter to use the same counsel can proceed in court (citation omitted)).

[84] See, e.g., Michael D. DeFrank, Staying on the Front Foot in the Face of Mass Arbitrations (Sept. 19, 2022), https://www.wyrick.com/news-insights/staying-on-the-front-foot-in-the-face-of-mass-arbitrations.

[85] See, e.g., id.

- Weigh cautiously whether bellwether or batching procedures are a viable option and keep in mind that claims must be adjudicated in a timely and fair manner so that each litigant receives the bilateral benefit of the bargain.[86]
- Evaluate the potential employment of small claims adjudication and opt-out procedures for both parties.[87]
- Generally, consider on balance whether adopting or retaining a term, in conjunction with other terms, will allay or aggravate a court's concern about unconscionability.

In essence, until courts flesh out the limits of unconscionability in mass arbitration provisions, the best drafting practice is to evaluate court decisions, especially nationwide appellate-level courts, and work within those confines while the body of jurisprudence catches up.

Provide Notice

Provide timely notice of changes to arbitration provisions in existing contracts to parties with whom the business contracts—notice with an affirmative consent requirement (email, mail, hyperlink—make the notice conspicuous).[88] Issue a plain-language summary of the changes and effective date.[89] Retain consent documentation as long as the parties are bound by the arbitration provision, and document any and all changes in every place applicable (i.e., not only in consumer contracts but also in terms of service, etc.).[90]

---

[86] See, e.g., id.

[87] See, e.g., id.

[88] See, e.g., Horniak, supra note 82.

[89] See, e.g., id.

[90] See, e.g., id.

Consult with Insurance Carrier

Remember to consult with your insurance carrier. Carefully negotiate terms and conditions of coverage for mass arbitration claims (monitor changes in definitions and sublimits that may impact coverage), and, if feasible, consult with the insurer when drafting ADR provisions to ensure the provisions comport with the insurer's terms of coverage.

Conclusion

The era of mass arbitration has shifted power dynamics and brought the issue of unconscionability to the forefront, which demands attention. Some may resort to traditional litigation, but one must bear in mind why ADR became so widely employed in the first place. Others may wistfully yearn for a return to the halcyon pre-mass-arbitration days and begrudge the new state of flux.

Perhaps an optimistic view is warranted. The AAA and JAMS mass arbitration rules and procedures demonstrate commitment to fair and efficient resolution of bona fide disputes. Case law developments will bring a new balancing of benefit to both consumer and business—not to mention continued benefit to courts in general as dockets are relieved from the massive deluge of filings that would occur absent ADR—and this area of practice will reach an equilibrium in time. While the advent of mass arbitration may be seen as swinging the arbitration pendulum from the benefit-to-business end to the benefit-to-claimant end, the mass arbitration rules and procedures set forth by AAA and JAMS and other reputable ADR providers may tap the pendulum toward the middle and will hopefully provide an opportunity for litigants to achieve fair, economical outcomes—a goal centered at the heart of ADR.