A new ADR development: mass arbitrations

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Many employees and consumers agree to arbitrate any dispute they may have with their employer or vendor. These agreements often result from "mandatory" arbitration clauses which simply means that the employee or consumer had no choice but to agree if she wanted to take the job or buy the product.

Lawsuits were filed by employees and consumers in both state and federal courts throughout the country challenging these mandatory arbitration clauses, which often included waivers of proceeding by a class action, but they were largely unsuccessful. In a few often-cited opinions, the U.S. Supreme Court eventually rejected challenges to these clauses and upheld the agreements to arbitrate despite claims that they were unconscionable or unfair.

Three providers — CPR (the International Institute for Conflict Prevention and Resolution), AAA (the American Arbitration Association) and FedArb — have each developed a plan for handling mass claims in the context of employee and consumer actions.

Once it was settled that compulsory arbitration would be required pursuant to employment contracts or purchase agreements, the unwritten law of unintended consequences caught many companies by surprise. Plaintiffs — now known as Complainants — filed hundreds or even thousands of individual arbitrations most of which required defendants (now respondents) to pay filing fees and costs of arbitrations. These costs often ran into the hundreds of thousands of dollars.

On the defense side there were quiet rumblings about missing out on the benefits of class actions and multidistrict litigation to resolve a large number of similar disputes in one proceeding. Moreover, the large number of filings threatened to overwhelm the providers of neutral services.

Creative minds came up with a potential solution. What if the neutral providers could come up with plans that would benefit both claimants and respondents while providing a fair and efficient forum for resolving a large number of similar claims? After initial skepticism and some skirmishing in court in opposition to such plans, several providers have now developed just such plans.

Many companies and lawyers are not aware of the various plans and how they work. While it will make for a somewhat dry article to summarize these plans, it is important for all who are involved in these fields to be aware of these new procedures in order to be prepared to take advantage of the benefits — or pitfalls — they present.

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The CPR Protocol

The CPR plan, titled Employment-Related Mass Claims Protocol, that can be found here https://bit.ly/3dXDXXf, is the most lengthy and detailed of the three. It is nine pages long replete with 27 footnotes. Of necessity, then, I can only provide a high-level overview of the Protocol.

The Protocol is intentionally detailed so that the parties will understand exactly what is expected. However, the Protocol also makes clear that the parties may agree to vary the terms of the Protocol to meet their needs. CPR appointed a Task Force, made up of both plaintiffs' and defendants' lawyers, as well as experienced arbitrators, to advise it in designing this Protocol.

The CPR plan is limited to employment cases where 30 or more similar claims are made against one employer. Initially, the parties should agree on whether the cases are similar enough to warrant application of the Protocol. If they cannot agree, a special Administrative Arbitrator will decide if the Protocol should apply.

If the Protocol applies, Respondents will pay an Initiation Fee at the outset, which is not the full fee that will eventually be paid. Ten cases will then be randomly selected for arbitration. Each side can submit five additional cases if they deem it necessary, and the Administrative Arbitrator will decide whether one or more of these additional cases should be included. CPR will then randomly generate a list of 15 neutrals per case, all of whom have cleared conflicts. The list will contain at least 30% diverse neutrals. Respondents will pay an appointment fee prior to any party receiving the list.

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After a rank and strike process by the parties, and an opportunity for a party to object based on arbitrator disclosures, one arbitrator will be selected for each test case. Fees for the arbitrator's services will then be due. The arbitrator will hear the case and issue a reasoned award within 120 days of the initial pre-hearing conference. These awards will then be anonymized by CPR.

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The next step is for the parties to select a mediator who will be paid by Respondent. The mediator will have access to the anonymized arbitration awards and, informed by these awards, will then attempt to reach what is termed a "Substantive Methodology" for resolving all of the then outstanding cases — namely all of those filed up to that point other than the cases which have been the subject of a final arbitration award. The term "substantive methodology" means an agreement on all material terms of a settlement and objective criteria to apply those terms to each individual case. The mediation window is 90 days. During this time, all cases are stayed and the statute of limitations is tolled.

If the mediation is unsuccessful, either Respondent(s) or any Claimant can opt out of arbitration and proceed in court. The parties have 60 days to decide whether to opt out. It is noteworthy that if Respondent opts out, then all cases against it will proceed in court. But if Respondent chooses not to opt out, Claimant can still choose to opt out and pursue her claim in court. If neither party opts out, the case proceeds to arbitration. The arbitration must be concluded within 120 days of the arbitrator's selection.

If the mediation is successful, then an offer will be made to each Claimant who may accept or reject the offer. If the offer is rejected the case proceeds to arbitration. The arbitrator has the power to hold the hearing either in person or remotely or a combination of the two. An in-person hearing must take place within 50 miles of Claimant's residence.

This one-page summary cannot fully capture all of the terms set forth in the Protocol. It is important to note, however, that procedural and substantive fairness are guaranteed throughout the process as is speed and efficiency. Indeed, Judge Edward Chen, of the U.S. District Court for the Northern District of California, found that the "terms of [CPR's] Mass-Claims Protocol appear [to be] fair."

The test case arbitrations and the mediation process should be complete within no more than six months to be followed by a period of no more than another six months to complete the arbitration. Finally, the mediation process can be recommenced at the option of the parties, but only those parties who did not have a previous opportunity to do so may now exercise the opt-out option.

The AAA plan

The AAA has developed what it terms "Supplementary Rules for Multiple Case Filings, found here https://bit.ly/3pXb037. Unlike CPR's protocol, these Rules govern both Employment and Consumer cases, although the Rules note that other types of arbitration may opt in to these Rules.

In the introduction to the 10 new Rules, the AAA encourages the parties to agree on a number of topics to streamline the process. The seven specified topics include:

(1) an agreed upon scheduling order eliminating the need for a preliminary management conference;

(2) an agreement to appoint a special master to oversee common procedural issues (e.g. discovery, statute of limitations);

(3) an agreement to hear the case solely on documents;

(4) an agreement to assign multiple cases to a single arbitrator;

(5) an agreed form of award;

(6) limitations of briefs, motions and discovery requests; and

(7) an agreement allowing testimony by affidavit or recorded deposition.

In the introduction to the 10 new Rules, the AAA encourages the parties to agree on a number of topics to streamline the process.

The Rules apply when 25 or more similar cases are filed, where representation of the parties is either consistent or coordinated. The AAA has the authority to apply these Rules for all consumer and employment cases meeting this criterion. Cases are filed via a Demand for Arbitration, but the filing party must also submit a Multiple Case Filing Intake Data Spreadsheet — once the threshold of 25 cases is reached — and this Spreadsheet must be updated as additional cases are filed. Answers, Counterclaims and/or Amended Claims must be filed within 45 days thereafter.

After the filing of the Initial Arbitration Demand, further filings may relate to all filed cases where appropriate. If the parties dispute any administrative decision of the AAA (e.g., designation of cases as substantially similar, filing of one document addressing substantially similar issues, determining the applicable rules, determining the payment of fees and arbitrator compensation) the AAA may decide to appoint a Process Arbitrator to determine the administrative issue for all cases included in the Multiple Case Filing.

The parties can select the Process Arbitrator or select that person from a list supplied by the AAA, or that arbitrator can be selected by the AAA. The Process Arbitrator must make any ruling within

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30 days of receipt of final submission as to that issue. The rulings of the Process Arbitrator are binding on the parties and the Merits Arbitrator.

The parties will then select a Merits Arbitrator by agreement or from a list provided by the AAA. If the parties do not agree on an arbitrator, they will have 15 days from receipt of the list to rank and strike. If this process does not result in the selection of an arbitrator, the AAA may select the arbitrator and may assign multiple cases to a single arbitrator.

The FedArb framework applies when 20 or more claims are made by employees or consumers, by the same law firms or organizations and involve a common set of factual and legal issues.

Within 120 days from the filing of the Answer a global mediation of the Multiple Case Filings will be scheduled. The parties can agree on a mediator, but it they do not then the AAA will appoint the mediator. The mediation will take place concurrent with the arbitrations. There will be no stay of the arbitrations absent agreement of the parties. Any party may opt out of mediation which means that mediation *is not mandatory*. The mediator will not be appointed as an arbitrator.

Administrative fees and compensation and expenses of the arbitrator will be handled in the same manner as all other AAA cases.

The FedArb framework

FedArb has promulgated what it calls a "Framework for Mass Arbitration Proceedings" and has assignment of the trademark ADR-MDL to this framework. This framework can be found here https://bit.ly/3267GdG. In federal court, MDL means Multi-district Litigation and generally assigns one judge to hear similar cases in consolidated pre-trial proceedings. That is the general model of the ADR-MDL developed by FedArb.

The FedArb framework applies when 20 or more claims are made by employees or consumers, by the same law firms or organizations and involve a common set of factual and legal issues. All setup, administrative and *arbitrator fees* will be paid by the Company, with each individual claimant paying only a $50 filing fee subject to any state or local laws holding that such fees may be waived.

Companies may elect to use the FedArb framework to resolve employee and/or consumer disputes. The Company must then pay a $150 filing fee for each claim, although that figure is reduced to $100 for each individual claim after the first 1,000 claims are filed. Claimants must complete a claims spreadsheet and submit it to each company. Claimants must submit their claims through an online claims form.

All individual arbitrations are stayed while an ADR-MDL panel is constituted to resolve common issues. The Company pays FedArb a one-time ADR-MDL setup fee. If multiple law firms represent claimants and the law firms do not agree on lead counsel for claimants, one will be appointed by the ADR-MDL panel, or by FedArb if a panel is not yet appointed. FedArb will appoint a three-judge panel of former federal judges from FedArb's roster with input from the parties. If there are fewer than 50 claims and the aggregate claimed damages are less than $250,000 then the parties may agree to a single FedArb panelist.

The ADR-MDL Panel will decide all common issues including discovery of legal, procedural and common factual issues. The Panel will also decide on a damages formula that will be common to and binding on all current and future claimants.

After those rulings if individual issues need to be resolved, the case will be remanded for resolution by individual arbitrators. The parties will be able to select an arbitrator from a list of five names submitted by Fed Arb. The selected arbitrator must decide the case within 90 days. Presumptively all hearings will be held via videoconference unless there are compelling circumstances to hold an in-person hearing or the claim amount exceeds $250,000.

The ADR-MDL framework does not provide for a mediation process but does state that nothing in the framework prohibits the parties from settling any case or group of cases.

Conclusion

As can be seen, the goal of each of these protocols is to design a mechanism for dealing with mass filings. The common themes appear to be expedited proceedings, costs borne primarily by Respondents, and a process for deciding common issues that can apply to a large group of cases.

These innovative efforts are surely commendable. It remains to be seen how widely they will be utilized! Nonetheless, familiarity with these options (and others that may yet be adopted by other providers) is essential.

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