# Arbitrating Mass Claims

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The paradigmatic arbitration case, like the paradigmatic lawsuit, involves one or a few parties on each of two sides. As a consequence, the emergence of mass claims poses a challenge to arbitration, just as it has to litigation. Representative collective proceedings in arbitration are extremely rare, but arbitration providers in the United States have experimented with "class arbitration" for domestic disputes and there have been two high profile class action-like proceedings in investor-state arbitration. Moreover, contractual barriers to collective arbitration proceedings in the United States have led to the adoption of new arbitration procedures for mass claims, akin to aggregation procedures discussed elsewhere in this chapter. Although the future is always difficult to predict, it seems likely that pressure to provide specialized arbitral procedures for mass claims will grow over time.

## Class Arbitration in Domestic Disputes in the United States

Representative collective arbitration – i.e. "class arbitration" – for domestic disputes was approved by a few U.S. state courts in the 1980s and 1990s,[2] and a U.S. Supreme Court decision in 2003 that seemingly paved the way for class arbitration[3] sparked the development of rules for class arbitration by the two leading arbitration providers in the United States.[4] However, after an early take-up of the option of class arbitration,[5] corporations were able to shut down the phenomenon by including class action waivers in consumer and employment contracts that explicitly precluded plaintiffs from proceeding in *any* collective proceeding, either in court or arbitration. Although many national jurisdictions deny enforcement of clauses that waive rights to litigate disputes when included in form (i.e. adhesive) contracts, the U.S. Supreme Court has long held that such clauses are enforceable.[6] Starting in the early 2000s, large corporations used this doctrine to include language in arbitration clauses waiving any right to proceed collectively, in court or in arbitration.[7] In 2011, in *AT&T Mobility LLC v. Concepcion*,[8] a case

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[2] Jean R. Sternlight, "As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?" 42 Wm. & Mary L. Rev. 1 (2000), at fns. 149-151 (reporting interviews with attorneys who represented parties in classwide arbitrations in California and Pennsylvania). The earliest reference to class arbitration is *Keating v. Superior Court,* 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), reversed on other grounds by *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). *Southland* was notable for holding that under the *Federal Arbitration Act of 1925,* federal arbitration law trumped state arbitration law, which previously determined the application of arbitration to most civil lawsuits.

[3] *Greentree Financial Corp. v. Bazzle,* 539 US 444 (2003).

[4] David Clancy & Matthew Stein, "An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History," 63 Business Lawyer 55 (November, 2007) (reporting that the American Arbitration Association (AAA) issued Supplementary Rules for Class Arbitration in 2003 and that JAMS (the Judicial Arbitration and Mediation Service) followed suit soon after.

[5] *Id.,* at 56 reporting that by September 2007 the American Arbitration Association was administering "more than 190 class arbitrations."

[6] Deborah Hensler & Damira Khatam, "Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication," 18 Nev. L. J. 381 (2018).

[7] *Id.*

[8] 563 U.S. 333

that arose out of a consumer contract dispute, the U.S. Supreme Court held that such waivers are enforceable, and subsequently extended this doctrine to other contractual domains.[9]

In *ATT Mobility v. Concepcion*, the majority opined that arbitration is unsuitable for class actions, which in the United States require substantial judicial decision-making, including certification (i.e. permitting an action to proceed in class form and approving the definition of the class), overseeing notice to class members, and – in the event of settlement – holding a public hearing on the fairness, adequacy and reasonableness of the settlement and approving (or not) the settlement.[10] Consistent with the majority's concerns, Sternlight found that the small number of class arbitrations held in state courts in the 1990s used hybrid approaches, relying on a judge to certify a class and to oversee notice before it was shifted to arbitration.[11] A judge would sometimes also review a proposed settlement and oversee settlement administration. Across the small number of class arbitration cases that Sternlight was able to identify, it appears that arbitrators were most likely to be assigned the responsibility of reaching a judgment on the merits that would bind (non-opt-out) class members.[12] In contrast, the American Arbitration Association's and JAMS special class arbitration rules[13] currently emulate the federal class action rules, with the arbitrators making all the decisions a judge would otherwise make.[14] Because of defendants' success in enforcing class action waivers, these rules do not appear to have been tested frequently enough to produce court decisions on their appropriateness.

Collective Proceedings in International Arbitration

Class arbitration in the international domain has been equally infrequent and the results equally inconclusive from a policy standpoint. Globalization has produced more complex disputes, leading to more complex (and expensive and time-consuming) arbitration proceedings.[15] Although comprehensive statistics on international commercial arbitration are lacking, 2019 statistics from the International Chamber of Commerce (ICC), the leading international commercial arbitration forum, show that of approximately 2500 new filings, one-third involved multiple parties on one or both sides.[16] Multi-party

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[9] *Epic Systems Corp. v. Lewis*, 544 U.S. __ (2018); *Lamps Plus, Inc. v. Varela*, 587 U.S. ___ (2019). But see *New Prime Inc. v. Oliveira*, 586 U.S. ___ (2019) holding that because the Federal Arbitration Act of 1925 excluded transportation workers from its remit, independent truck drivers could not be bound to an arbitration clause prohibiting class actions.

[10] The federal class action rules also require the court to appoint class counsel and, if the class prevails, award class counsel fees.

[11] *Supra,* note 2

[12] *Id.*

[13] American Arbitration Association, Supplementary Rules for Class Arbitrations, adopted 2003; amended 2010 available at https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf; JAMS Class Action Procedures, adopted 2009, available at https://www.jamsadr.com/rules-class-action-procedures/

[14] The AAA rules, but not the JAMS rules, provide a pause in the process for a party to challenge the appropriateness of a class proceeding before a judge.

[15] Remy Gerbay, "Is the End Night Again? An Empirical Assessment of the 'Judicialization' of International Arbitration," 25 American Journal of International Arbitration 223 (2014) (arguing that increasing complexity of international arbitration proceedings reflects increasing complexity of the arbitration caseload)

[16] Smitha Menon and Charles Tian, "Joinder and Consolidation Provision Under ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Complex Disputes," Kluwer Arbitration Blog, January 3, 2021, available at

arbitrations may result when there were multiple parties to a single contract governing the transaction that gave rise to a dispute or when there were multiple contracts between and among parties to a transaction that led to a dispute. Anecdotal data suggest that these situations are increasingly common in international commerce and investment.[17]

The ICC has long provided for joinder of parties and consolidation of multi-party disputes,[18] in limited circumstances and with consent of parties, and ICSID rules for arbitrating investor-state disputes similarly provide for consolidation with the consent of parties. In recent years, some other arbitration providers have adopted joinder and consolidation rules for multi-party disputes, as discussed further below. However, in two instances, international arbitration tribunals presiding over investor-state arbitration have gone further, announcing their intention to decide thousands of mass claims arising ut of a single set of facts and law in a proceeding akin to a class action.[19] In 2011, in *Abaclat v. Argentina,* a massive dispute over debt restructuring between 60,000 Italian bondholders and Argentina, a 3-person arbitration tribunal held, 2-1, that it had jurisdiction to decide the dispute in a single proceeding.[20] The tribunal was sitting under the aegis of the International Centre on the Settlement of Investment Disputes (ICSID), which had been named as the arbitration forum for future disputes in a bi-lateral investment treaty between Italy and Argentina.[21] The ICSID rules (like other similar rules for investor-

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https://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/ The majority of multi-party cases involved multiple respondents but a significant fraction involved multiple claimants and respondents. *Id.*

[17] Julian Lew, Loukas Mistelis, and Stefan Kroll, "Multiparty and Multicontract Arbitration," In *Id.,* COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer, 2003. Sometimes an arbitration proceeding may also include a non-contracting party, although the validity of arbitration in such instances may be contested.

[18] *See* Menon & Tian, *supra,* note 16; ICSID ARBITRATION RULES, Chapter VI, Rule 46, available at https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf

[19] The different varieties of international arbitration are supported by different international conventions. The enforcement of international commercial arbitration of disputes among private parties is granted by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as "the New York Convention." Arbitration of investment disputes between private investors and states, usually contracted for in bi-lateral investment treaties, is governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The Convention established the International Centre for the Settlement of Investment Disputes (ICSID), which issues arbitration rules for investor-state disputes and administers arbitration tribunals. Parties to investor-state disputes may choose to arbitrate their disputes in an ad hoc (i.e. non-ICSID) process under the United Nations Commission on International Trade Law (UNCITRAL) rules, or may choose to have ICSID administer their arbitration under UNCITRAL rules. Although there are differences between ICSID and UNCITRAL rules, they are quite similar in most respects.

[20] The factual background of this dispute is extremely complex. It is but one of multiple disputes relating to Argentina's efforts to re-position itself in the bond market after its 2001 fiscal crisis. Briefly, the 60,000 bondholders were mainly individual investors who had declined Argentina's offer to restructure its bond debt at a substantially discounted price; when the arbitration was initiated there were 180,000 such bondholders but by the time the tribunal issued its jurisdictional decision, the vast majority had accepted Argentina's offer of payment and withdrawn from the case. *See* Jennifer Permisly & Meredith Craven, "Where Are We Now? Investment Treaty Arbitration, Sovereign Debt and Mass Claims in the Post-Abaclat Era," 15 Transnational Dispute Management 1 (2018), available at https://www.skadden.com/-/media/files/publications/2018/01/where_are_we_now_investment_treaty_arbitration.pdf

[21] The bi-lateral investment treaty between Italy and Argentina that governed resolution of this dispute specified that the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("the

state arbitration) make no provision for mass claims, but the *Abaclat* tribunal found a basis for its jurisdiction in rules that authorized it to adopt special procedures to resolve claims when a "gap" exists in the rules. In this instance, the tribunal viewed the lack of a provision for mass claims as such a gap. (Interestingly, in asserting its jurisdiction, the tribunal noted that the Italian bondholders had no practical recourse to Argentina's courts because Argentina lacked a collective litigation procedure and it would be practically infeasible for the courts to resolve 60,000 claims.) It also seems to have viewed the association that many (although not all) of the bondholders had signed up with to represent them as akin to a class representative.[22]

The *Abaclat* decision was hugely controversial.[23] In addition to the fundamental questions of whether the tribunal had the authority to declare a collective proceeding and if so, whether the individual investors were properly represented, it raised practical questions such as how evidence would be collected and assessed. Subsequent to its jurisdictional (admissibility) ruling,[24] the tribunal appointed a special master to devise a process for collecting and assessing evidence from the individual claimants. Argentina objected to the special master's appointment, arguing that a case-by-case assessment of evidence for each of the 60,000 claimant-bondholders was necessary, thereby defeating the notion of a collective proceeding. The expert-led process proceeded over Argentina's objection, with individualized evidence collection, but within the context of the collective proceeding.[25]

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ICSID Convention") and its rules would apply. *See ICSID Rules and Regulations,* available at https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf

[22] The association, labeled "Task Force Argentina" in English, represented bondholders in negotiations with Argentina for many years after the republic defaulted. Prior to filing its arbitration claims with ICSID, the association asked the bondholders to agree to its representing them in a prospective arbitration. In the information packet the association sent to bondholders it informed them that it would be pursuing the arbitration in their interests, represented by a single law firm, and asked the bondholders to sign a power of attorney. Argentina objected to the association's filing, arguing that ICSID rules did not provide for a claims by "groups of people" or a "class action." The association claimed in response that each investor was initiating a claim on its own behalf; it declined the term "class action" and instead referred to the claims as a "joint action." The tribunal itself used the term "mass arbitration." The background of the *Abaclat* arbitration and the tribunal's decision on jurisdiction can be found at Trans-Lex, "ICSID Decision on Jurisdiction and Admissibility, Abaclat and others v. The Argentine Republic, ICSID Case Number ARB/07/05, available at https://www.trans-lex.org/291300/_/icsid-decision-on-jurisdiction-and-admissibility-abaclat-and-others-vs-the-argentine-republic-icsid-case-no-arb-07-5/
[23] After dissenting from the majority's decision to take jurisdiction over a "mass claim" proceeding, the dissenting arbitrator stepped down from the tribunal and was replaced, and the proceeding moved into preparation for the merits phase. See JusMundi, Abaclat and Others v. Argentina, available at https://jusmundi.com/fr/document/decision/en-abaclat-and-others-formerly-giovanna-a-beccara-and-others-v-argentine-republic-consent-award-under-icsid-arbitration-rule-43-2-thursday-29th-december-2016#decision_404
[24] The *Abaclat* tribunal used both "jurisdiction" and "admissibility" to refer to its authority to decide claims en masse. As the dispute settled, whether either or both were appropriate bases for its decision was never tested.
[25] *Abaclat and others v. The Argentine Republic*, ICSID Case Number ARB/07/05, Procedural Order 15, available at http://icsidfiles.worldbank.org/icsid/icsidblobs/OnlineAwards/C95/DC8316_en.pdf
The procedure initially proposed by Special Master Norbert Wuhler relied on statistical sampling. In the face of objections, and at the request of the tribunal, Dr. Wuhler proposed an alternate approach in which each claim would be verified, requiring triple the amount of money (for a total of $270,000) and additional time. The tribunal approved this alternate approach. See Investor State Law Guide, Abaclat and others v. The Argentine Republic, ICSID Case Number ARB/07/05, Procedural Order 17, available at

Because the *Abaclat* dispute was settled in 2016 after a change in national government, the fundamental question of whether the ICSID (or any other) investment arbitration rules authorize what the tribunal at first termed a class proceeding and later termed a "mass claim proceeding," was never answered. However, in 2020, a different ICSID tribunal declared that it had jurisdiction over another mass claim proceeding, this one comprising about 1000 Greek bondholders, mostly individual investors, suing the Republic of Cyprus.[26] As was true of the *Abaclat* dispute, the *Adamakopoulos* dispute arose from a national financial crisis, in this instance the effects of a Greek economic crisis on Cypriot banks that had issued financial instruments to the Greek investors. And, as in the *Abaclat* dispute, the defendant (Cyprus) objected to treating the claims in a single mass proceeding, on the grounds that such a proceeding was not contemplated under the Cyprus-Greece bi-lateral investment treaty that provided the basis for ICSID arbitration or under the ICSID rules, and that the parties had not given consent for such a proceeding.

In 2020, the *Adamakopoulos* tribunal rejected Cyprus' objections to the mass proceeding. Noting that the claimants had referred to the procedure they sought as a "multi-party proceedings," the tribunal wrote:

> "The claim here is a "mass claim" in the sense that it is a claim brought by a large number of claimants within the scope of a single case against the Respondent. But this does not imply that it is a representative claim, a class action, or a consolidation of claims, or that it is anything other than what it is – a substantial number of individuals bringing their claims against the Republic of Cyprus within a single case against the Republic… the Tribunal does not see that any consequence flows from the use of the term "mass claims" to describe this case and that the questions of jurisdiction and admissibility are to be decided on the basis of the substantive nature of the claims that are brought and their relevant elements and not on the basis of terminology. Hence, it simply uses the term "mass claims" as a convenient shorthand expression."[27]

Noting the *Abaclat* tribunal's decision as a precedent, the *Adamakopoulos* tribunal held that it did have jurisdiction over mass claims under the ICSID rules. At the time of this writing, the arbitrators are holding hearings on the merits of the dispute.

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https://www.investorstatelawguide.com/documents/documents/IC-0103-22-%20Abaclat%20v.%20Argentina%20-%20PO17.pdf.

[26] *Theodoros Adamacopolous v. Republic of Cyprus*, ICSID Case No. ARB/15/49 available at https://www.italaw.com/sites/default/files/case-documents/italaw11238.pdf The application for arbitration was submitted while the *Abaclat* proceeding was still ongoing. The *Adamacopolous* arbitration was complicated by dispute over the effect of *Slovak Republic v. Achmea,* a 2018 CJEU ruling holding that EU law preempts intra-EU bilateral investment treaties. *Id., para.* 50-63. *See also* Clement Fouchard and Marc Krestin, "The Judgment of the CJEU in Slovak Republic v. Achmea: A Loud Clap of Thunder on the Intra-EU BIT Sky," Kluwer Arbitration Blog, March 7, 2018, available at https://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/ Ultimately, the ICSID arbitration tribunal held that *Achmea* did not preclude the tribunal's jurisdiction over the dispute.

[27] *Theodoros Adamacopolous v. Republic of Cyprus*, ICSID Case No. ARB/15/49, *para*. 190-191, available at https://www.italaw.com/sites/default/files/case-documents/italaw11238.pdf

Aggregate Arbitration

The *Abaclat* arbitration tribunal seemed ambivalent as to whether its decision to take jurisdiction over the 60,000 bondholders' claims was equivalent to authorizing a representative collective proceeding – a class arbitration – or some other sort of mass claim proceeding. The more recent *Adamakopoulos* tribunal asserted that it did not matter what the procedure was formally labeled: as a practical matter the tribunal had decided to address a large number of claims in a single proceeding. By inference, neither tribunal thought the proceeding could properly be termed a joinder, consolidation or coordinated procedure, the latter two of which are provided for in Chapter VI, Rule 46 of the ICSID arbitration rules.[28] And not surprisingly: Rule 46 applies to merging (consolidating) claims that were initially filed separately or treating such claims together for certain but not all purposes (coordination). Under ICSID rules, both consolidation and coordination should be proposed and consented to by the parties. In *Abaclat* and *Adamakopoulos,* the respondents (defendants) objected to the tribunal addressing the claims collectively.

To date, there has been no move in the international arbitration community to emulate the assertions of the Abaclat and Adamakopoulos ICSID tribunals that they have authorization to decide large numbers of claims arising out of the same facts and law, without party consent, in a single proceeding. And the U.S. Supreme Court's endorsement of waivers of any form of collective proceeding in contractual arbitration clauses has stymied the development of representative collective arbitration there. However, just as U.S. Supreme Court decisions limiting the use of class actions in the United States have given rise to mass claims aggregation, recent large-scale disputes involving gig workers and others whose contracts include waivers of class proceedings have led several U.S. domestic arbitration providers to experiment with aggregate arbitration.

The gig worker disputes that began in the United States but have now spread globally turn on a substantive legal question: are such workers properly categorized as employees, and hence due whatever benefits and protection are accorded by the relevant national or state law, or are they instead properly categorized as independent contractors and hence outside the protection of such laws? In the United States, when gig workers sought to contest employers' treatment of them as independent contractors, most were bound by pre-dispute mandatory arbitration clauses including class action waivers that seemingly made disputing this treatment impractical. The workers could not litigate and arbitrating individual claims required paying a significant fee. With compensation uncertain at best, individuals in similar situations historically found it difficult to find lawyers to represent them (and arbitration procedures are not generally designed to facilitate claiming by unrepresented individuals or entities). Because of concerns about perceived unfairness of mandating arbitration in adhesive employment and consumer contracts, the leading arbitration providers in the United States several decades ago adopted fee rules that imposed the bulk of administrative filing fees and expenses on corporate defendants, rather than claimants. As a result, claimants filing for arbitration might pay a few hundred dollars (still not an inconsequential amount for low-income workers), while corporations

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[28] ICSID ARBITRATION RULES, Chapter VI, Rule 46, available at https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf

defending claims would pay a few thousand.[29] Starting in the mid-2010s, some plaintiff attorneys began agreeing to represent massive numbers of individual worker and consumer claimants in arbitration, reasoning that the cost to defendants of paying aggregate filing fees in the millions would give the plaintiff lawyers substantial leverage to achieve mass settlements, *prior to filing for arbitration*.[30] Notably, these plaintiff lawyers were *not* seeking to proceed in class form; rather, their settlement leverage relied on defendants' need – under the contracts *they* had drafted – to contest the claims individually in an arbitration process designed explicitly for such individual dispute resolution.[31]

The story of what some have termed "mass arbitration" is still playing out in the United States. But an early response by some arbitration providers has been to establish special procedures for consolidating claims that arise out of the same factual and legal circumstances. The leading examples share two features: (1) they emulate the multidistrict litigation procedure ("MDL") described elsewhere in this volume in one or more respects; and (2) they reduce the upfront costs of arbitration in an obvious attempt to solve corporate defendants' financial dilemma derived from contracting for individual arbitration and reducing the plaintiff attorneys' settlement leverage that in turn derives from the defendants' dilemma. For example, FedArb offers an agreement with a company defendant to establish a framework for deciding common issues in arbitration claims when 20 or more claims arising out of the same factual circumstances are filed by the same law firm or several firms coordinating with each other. Under FedArb's special "Mass Arbitration: ADR-MDL" rules, individual claimants pay a $50 filing fee (less than the fees normally charged by competitor American Arbitration Association for individual arbitration) and defendants pay $150 (far less than routine AAA fees) to answer those claims up to a total of 1000 claims, at which point per claim fees to defendants are reduced. A panel of 3 arbitrators titled the "ADR-MDL" panel decides common issues, after an expedited process that limits discovery and briefing.[32] The new FedArb protocol is designed explicitly to address the new mass arbitration filings.[33]

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[29] The maximum fee charged by the American Arbitration to an individual employee filing for arbitration is $350. In contrast, employers must pay a combined fee of $2850 for responding to the employee's claim and for "case management." *See* https://go.adr.org/employmentfeeschedule

[30] The complex socio-legal dynamics driving this development have been well described in J. Maria Glover, "Mass Arbitration," 74 Stan L Rev 1283 (2022). Here, I focus on the response of arbitration fora.

[31] The American Arbitration Association (AAA), the provider specified in a large number of the gig workers' contracts, has a long history of expeditiously arbitrating and mediating mass claims on an individual basis. See https://www.adr.org/sites/default/files/document_repository/Mass-Claims-and-Federal-Programs-ADR.pdf In the gig workers' dispute, defendants did not reject the likelihood that the AAA could handle a large number of workers' claims; rather, they balked at paying fees for thousands of claims under the lopsided fee schedule that the AAA had adopted years earlier to make the prospect of enforcing mandatory pre-dispute arbitration in employment disputes more palatable. Turning the usual tables on defendants, plaintiff attorneys responded by filing motions to compel arbitration., which many (albeit not all) all judges granted. *See* Glover, *supra,* note 30

[32] FedArb, "Framework for Mass Arbitration ADR-MDL Proceedings," available at https://www.fedarb.com/framework-for-mass-arbitration-proceedings-adr-mdl/. Additional fees are charged for hearings that (by inference) would consider common issues, meaning that such fees could be minimized. If the Panel fails to resolve all issues and claims do not settle, then claimants and defendants could proceed to individual arbitration.

[33] Ken Hagan, "Another Arbitration Service – FedArb – Establishes a New Mass Arbitration Protocol," February 7, 2020, available at https://www.fedarb.com/another-arbitration-service-fedarb-establishes-new-mass-arbitration-protocol/

The International Institute for Conflict Prevention and Resolution (CPR) offers a more distinctive protocol for the new mass arbitration filings arising from employment disputes that incorporates elements of multidistrict litigation and class action practice. The new protocol applies to situations where 30 or more arbitration claims are filed by a single firm or collaborating firms.[34] Taking a leaf out of the federal MDL playbook, which frequently uses "bellwether" trials to help parties set a value on aggregate litigation, the CPR procedure begins with a series of randomly selected "test" arbitration cases. After these individual claims are decided and reasoned decisions are issued by the arbitrators, their outcomes (anonymized) are shared with a mediator who then has 90 days to work with the parties' lawyers to negotiate a "global solution." If the parties reach such a global agreement, any individual claimant who is unhappy with it can opt out and proceed to individual arbitration. If a global agreement cannot be reached, the defendant can decide (unilaterally) to file all of the claims either in court or in arbitration; if the latter, an individual claimant may nonetheless take their dispute to court. Unlike a traditional arbitration process (and the special FedArb mass claims protocol), CPR charges a single fee to initiate the process that does not cover the full costs that would ultimately be due, which would apparently depend on how far the process proceeds.[35] Holding back full fees would presumably attract defendants who under traditional arbitration would pay fees to contest each claim that is filed, when it is filed; it would also much diminish plaintiff attorneys' settlement leverage.

The American Arbitration Association (AAA) special rules for mass filings contains elements of both the FedArb and CPR protocols.[36] Like the FedArb protocol, the AAA rules mimic an aspect of the federal MDL process: the appointment of a single adjudicator (termed a "process arbitrator") akin to an MDL transferee judge to decide how the claims shall be administered prior to an attempt to resolve them. Such decisions would apparently relate to discovery and statute of limitations issues. Like the CPR protocol, the AAA rules call for appointment of a single mediator to attempt a "global" resolution of the claims. Although it does not establish separate rules for arbitrating the claims or returning them to court thereafter, it encourages parties to assign group claims and assign them to single arbitrators. Finally, like both FedArb and CPR it adjusts fee schedules, but in a way that seems intended to appeal to both claimants and defendants: for the first 500 cases, claimants' per case filing fee is $100 (rather than the $300 usually charged) and defendants' per case filing fee is $300 (rather than $1900). For the next 1000

[34] CPR, EMPLOYMENT-RELATED MASS CLAIMS PROTOCOL, Version 2.1, September 19, 2022, available at https://static.cpradr.org/docs/ERMCP%20V2.1%20September%202022.pdf. See also Alison Frankel, "The Problem with Outsourcing Justice to Mass Arbitration Services," Reuters, February 27, 2020 (reporting on whether CPR's protocol was deliberately designed to appeal to DoorDash, which, having specified AAA in its gig workers' contracts attempted summarily to switch its ADR provider to CPR)

[35] I have not been able to find information on what these fees might ultimately amount to. On my reading of the protocol, parties would pay the arbitration fees associated with the ten test cases, and then a single mediation fee for that stage of the process. By inference, arbitration fees would be imposed if and when the mediation fails and individual arbitration proceedings commence. CPR's "due process" protocol require that parties not be required to pay fees larger than fees that would apply if the claim were to proceed in court in the relevant jurisdiction.

[36] American Arbitration Association, SUPPLEMENTARY RULES FOR MULTIPLE CASE FILINGS, August 1, 2021, available at https://www.adr.org/sites/default/files/Supplementary_Rules_MultipleCase_Filings.pdf

cases, the claimants' filing fee is reduced to $50 and the defendants' to $250. For successive tranches of claims, defendants' (but not claimants') filing fees are further reduced.[37]

To date, it appears that few if any corporations have taken advantage of these new arbitration protocols in response to mass arbitration filings. For now, they are useful more for illustrating how elements of representative collective litigation (class action) and aggregate procedures (such as the English GLO and the U.S. MDL) may be incorporated into contract-based domestic arbitration in the future.[38]

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[37] American Arbitration Association, EMPLOYMENT/WORKPLACE FEE SCHEDULE, November 1, 2020, available at https://adr.org/sites/default/files/Employment_Fee_Schedule.pdf. The reduced rates appear to apply solely to the first filing stage. Before an arbitrator can be selected, additional fees of $100 per claimant and $1750 per defendant is due. Whether this is meant to apply to the appointment of a "process arbitrator" is unclear to me.
[38] For a more extensive discussion of how mass arbitration filings may shape arbitration protocols and forums in the future, *see* Glover, note 30.