



Aaron Schmidt

AMERICAN ARBITRATION ASSOCIATION



Adam Shoneck

AMERICAN ARBITRATION ASSOCIATION

Multiple case filings in arbitration

THE AAA HAS A HISTORY OF HANDLING LARGE-VOLUME CASELOADS. HERE IS A REVIEW OF THE AAA'S RULES AND PROCESSES TO RESOLVE SUCH MATTERS

A string of U.S. Supreme Court decisions upholding class-action waivers in arbitration agreements resulted in a substantial rise in multiple-arbitration case filings. In response to this increase in activity, the American Arbitration Association (AAA) launched its Supplementary Rules for Multiple Case Filings. This article examines the background of multiple-case filings, the AAA's history of handling large-volume caseloads, the AAA's rules and processes, and how they can be resolved efficiently and economically.

The AAA Rules define a multiple-case filing as "twenty-five or more similar Demands for Arbitration... filed against or on behalf of the same party or related parties, where representation of the parties is consistent or coordinated across the cases."

Multiple arbitration filing rules

Whether they are called mass filings, group filings, multiple-case filings, or something else, there has been much discussion over the trend of hundreds or even thousands of claimants simultaneously filing arbitration demands against a company, pursuant to the company's consumer, employment or independent contractor arbitration agreements.

Several U.S. Supreme Court decisions upholding class action waivers in arbitration agreements resulted in a rise in multiple-case filings. (See *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662; *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333; *Epic Systems Corp. v. Lewis* (2018) 138 S.

Ct. 1612.) As more in the legal community have learned about multiple-case filings, the AAA has seen more filings and large volume filings.

In response to this activity increase, the AAA launched its Supplementary Rules for Multiple Case Filings ("MCF Rules") in August 2021. The Rules define a multiple-case filing as "twenty-five or more similar Demands for Arbitration... filed against or on behalf of the same party or related parties, where representation of the parties is consistent or coordinated across the cases." (MCF Rule MC-1(b).) The MCF Rules supplement the AAA's other rules – usually the Consumer Arbitration Rules, Employment Arbitration Rules, or Commercial Arbitration Rules (for some workplace disputes) – when this definition is met.

The MCF Rules streamline the administration of multiple-case filings and provide an efficient mechanism for resolving such disputes. The parties can also agree to additional processes to help reduce time and costs in resolving their claims. For example, the parties can utilize an agreed-upon Scheduling Order that provides deadlines across multiple cases, including deadlines for submission of documents and witness lists, completion of discovery, and filing motions. If the parties can agree on the Scheduling Order, a Preliminary Management Conference for each case may not be necessary, saving significant time and costs.

The Special Master

The parties can also agree to

appoint a Special Master who can oversee procedural issues common to the cases. A Special Master can resolve these issues efficiently by deciding common issues in one proceeding. By agreeing to appoint a Special Master, the parties will not incur fees to re-litigate these common issues in each individual case.

Typical issues that a Special Master could decide include arbitrability disputes, parameters of information exchange, and legal questions that may apply across the caseload, like choice of law and statute of limitations. The appointment of a Special Master and the scope of their authority must be agreed upon by the parties. Once the Special Master makes common case findings, the case would then be assigned to a Merits Arbitrator.

Arbitrators are compensated for the work they do. The more issues the parties can resolve on their own or that can be resolved by a Special Master, the less time and fees incurred.

The parties can also agree to limitations regarding briefs, motions, and discovery requests. They can agree to allow testimony via affidavit or recorded deposition rather than requiring live witness testimony at a hearing. They can also agree on the form of the award.

Process Arbitrator

If either party disagrees with an administrative determination made by the AAA prior to the appointment of an arbitrator, the AAA may appoint a Process Arbitrator to hear and determine the administrative issues for all cases included in the multiple case filing affected by such

issues. (MCF Rule MC-6.) The parties can appoint the Process Arbitrator themselves, agree to a process for appointing the arbitrator, or the AAA can appoint the arbitrator.

The Process Arbitrator can make administrative determinations such as filing requirements, the allocation of payment advances on administrative fees, arbitrator compensation, and expenses. The Process Arbitrator also can establish the applicable AAA rules that will govern the individual disputes, other administrative issues arising out of the nature of the multiple case filings, and any other issue the parties wish to submit by agreement.

Once a Process Arbitrator has been appointed and the issues have been argued by the parties, the Process Arbitrator will issue a ruling within 30 days. The decision will contain the reasons for their determinations.

Their authority will cease upon the rendering of their ruling. However, if new and different administrative issues arise upon which the parties disagree, the AAA may re-appoint the same Process Arbitrator to rule on the new administrative issues. The rulings are final and binding with respect to subsequently filed cases that the AAA determines to be part of the same multiple case filing.

Mediation

When parties cannot resolve a dispute independently, good-faith mediation should be the first step. Mediation can be highly effective for resolving both merits and procedural issues. The AAA believes in mediation so strongly that the MCF Rules include a mediation step that applies to all multiple case filings. (MCF Rule MC-9.)

The parties are to initiate a mediation within 120 days from the due date for the Answer, according to the AAA mediation procedures or as otherwise agreed to by the parties. However, any party may unilaterally opt out of mediation upon written notification to the AAA and the other parties to the arbitration.

The parties can agree on a mediator, or one can be administratively appointed by the AAA. It should be noted that the mediator will not be appointed as an arbitrator for any of the cases in the same multiple case filing, unless agreed to by the parties and the mediator.

Entering into mediation before arbitration claims are filed can save administrative fees and the time associated with filing and responding to the arbitration cases. The AAA's panel of expert mediators can help parties resolve the underlying dispute before an arbitration filing fee is ever billed. Part of the role of the mediator is also to help parties understand their likelihood of success in arbitration. This assistance can be an important reality-check for each side in evaluating the strengths and weaknesses of their cases and the process that lies ahead.

Even when arbitrations have already been filed, mediation can occur at any time during the process. The mediation takes place concurrently with the arbitrations and does not act as a stay of the arbitration proceedings.

Where parties cannot resolve merits issues in mediation, they can mediate how the multiple-case filing will proceed in arbitration. Failing resolution on merits or procedure, the AAA's MCF Rules direct how the AAA will administer multiple-case filings.

Merits Arbitrators

Merits Arbitrators render awards in individual cases and hear all arguments relevant to that case that have not already been decided by a Process Arbitrator or Special Master. For Merits Arbitrators, the AAA will facilitate any selection process the parties agree upon. (MCF Rule MC-7.) The selection process may include the use of the AAA arbitrator search platform. The parties are encouraged to consider assigning multiple proceedings to a single, mutually agreeable Merits Arbitrator.

The AAA's roster includes arbitrators qualified to hear cases in multiple case filings. If the parties do not have a contractual selection process, the AAA can

submit a list of proposed arbitrators to the parties.

The AAA encourages parties to agree to arbitrators from this list. However, if they cannot agree, each party will have 14 days to strike and rank their list. If appointments cannot be made from the submitted lists or if the AAA determines the number of cases is too numerous for the use of lists, the AAA has the authority to appoint Merits Arbitrators administratively. (MCF Rule MC-7.)

All arbitrators appointed by the AAA on multiple-case filings, whether Process or Merits Arbitrators, are subject to the disclosure and disqualification procedures set forth in the applicable AAA rules.

The arbitration hearing

Unless the parties' agreement provides otherwise, the arbitration hearings can be held in person, via telephone, or virtually, using a videoconference platform. The AAA encourages video conferences for any hearings to avoid the time and expense of in-person proceedings. Another option is to have cases heard on the documents rather than holding a hearing.

If the parties have in-person hearings and have not agreed on the location, the AAA will identify one or more locales where the hearings may take place. (MCF Rule MC-5.) In determining the locales of the arbitrations, the AAA will consider the positions of the parties, the relative ability of the parties to travel, the location of performance of the agreement, the location of witnesses and documents, relative costs, and the location of any prior court proceedings, among other factors presented by the parties.

Where live hearings are conducted, the parties will sometimes request the opportunity to submit post-hearing briefs. Arbitrators may also request post-hearing briefs from the parties. The availability and length of these briefs may be agreed upon by the parties at any point in the process.

The award

Unless the parties agree otherwise, each case in a multiple-case filing will be

decided in an individual award. Award requirements and procedures are governed by the parties' agreement and the underlying AAA rules applicable to the dispute. Typically, AAA rules allow an arbitrator 14 days to render an award when the arguments have been submitted on the documents and 30 days when a hearing was conducted. Parties can agree to change these timelines.

AAA rules call for a default format of the award. Parties can also agree to change the format to one that suits the cases involved. Awards are final and binding.

Fee schedules

The AAA has established fee schedules for consumer and employment multiple case filings reflecting the efficiencies in the initial filing and initiation of these cases. For example, a multi-case consumer's filing fee is \$100 or \$50 per case, depending on how many cases are filed against the respondent. This consumer filing fee is half or a quarter of the standard single consumer case filing fee of \$200.

The fee schedule is tiered based on the number of cases included in the multiple case filing. For the first 500 cases, the *individual* filing fee is \$100 per case, and the *business* filing fee is \$300 per case.

For over 500 cases, the *individual* filing fee is \$50 per case. For the *business*, on cases 501 to 1,500, the filing fee is \$225 per case. For 1,501 to 3,000 cases, the *business* filing fee is \$150 per case. For cases over 3,000, the *business* filing fee is reduced to \$75 per case.

Because cases proceed individually through the administration process, an individual case management fee (for consumer cases) or arbitrator selection fee (for employment matters) is assessed to the business in each case. If the business files the multiple case filing, the business pays both the individual's and the business's filing fee.

Conclusion

The AAA has a history of handling large-volume caseloads. It has developed the MCF Rules to streamline the administration of multiple-case filings

and provide a more efficient mechanism for resolving such disputes. The AAA has spent more than 95 years seeking to provide fair, effective, efficient, and economical dispute resolution. It remains as dedicated to this mission as ever in the developing area of multiple-case filings.

Aaron Schmidt is Vice President of Labor, Employment & Elections at the American Arbitration Association. He is a graduate of The Ohio State University and The Cleveland-Marshall College of Law. Mr. Schmidt writes and speaks on ADR, labor, and employment law topics. He can be reached at SchmidtA@adr.org.

Adam Shoneck is an assistant vice president with the American Arbitration Association, overseeing the AAA's consumer case administration teams in the eastern U.S. He earned his law degree from the Pennsylvania State University School of Law. He can be reached at ShoneckA@adr.org.

