AAA Arbitration for Employment Lawyers

A Lexis Practice Advisor® Practice Note by
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This practice note provides guidance on arbitrating employment-related disputes before the American Arbitration Association (AAA) and summarizes what practitioners might expect during the commencement of the arbitration, the arbitrator selection, the prehearing procedures, the hearing, and the post-award process.

Specifically, this practice note covers the following topics:

- Why Parties Arbitrate Employment Disputes
- Preparing for and Commencing an AAA Employment Arbitration
- Selecting the Arbitrator
- Navigating Prehearing Procedures
- Conducting the Hearing
- Understanding the Award and Post-award Process

While this note focuses on employment arbitration before AAA, it also may be useful to litigants in other arbitral forums, such as JAMS and the Financial Industry Regulatory Authority (FINRA).

For additional guidance on employment arbitrations before AAA and in other forums, see AAA Arbitration for Employment Lawyers Flowchart; Labor And Employment Arbitration CHAPTER 1.syn; Alternative Dispute Resolution in the Work Place, Chapter 10: The ADR Process; FINRA Arbitration for Employment Lawyers; FINRA Arbitration for Employment Lawyers Flowchart; and Arbitration in International Jurisdictions.

For guidance on labor arbitrations, see Labor Arbitrations: Key Steps and Strategies.

Why Parties Arbitrate Employment Disputes

There are various reasons why arbitration may be preferred to traditional litigation for employment disputes. For one, most arbitration proceedings do not allow public access to hearings and filings (unless either party seeks an injunction in aid of arbitration or there is a court proceeding to confirm or vacate an award). Additionally, arbitrations generally have looser pleading standards; less burdensome discovery, particularly with respect to depositions; streamlined motion practice and hearings; and limited appeals, resulting in a less expensive process that resolves more quickly than litigation through the courts.

Less Stringent Pleading Standards

The arbitration process is intended to be less formal and less expensive than the traditional court process. Consequently, pleadings in arbitration are often less detailed than pleadings in courts, which maintain and enforce definite pleading

standards. The Supreme Court's decisions in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009) underscore this point. A court likely will dismiss an action if the complaint does not include all elements of the cause of action. Additionally, detailed pleading standards govern certain employment claims, such as defamation and fraud. See, e.g., Fed. R. Civ. P. 9(b); N.Y. C.P.L.R. 3016.

In contrast, it is less common for an arbitration claim to be dismissed on the pleadings. Indeed, FINRA rules now discourage prehearing motions to dismiss, and prohibit the panel from acting upon a motion to dismiss except in a few very limited circumstances. See FINRA Rule 13504(a)(1), (a)(6). Under the AAA rules, an arbitrator "may" allow parties to file dispositive motions if the arbitrator determines that the moving party has shown "substantial cause" that the motion is likely to succeed. See Empl. Arb. Rules & Mediation Procs. R – 27. Similarly, JAMS rules provide that an arbitrator "may" permit a party to file such a motion. See JAMS Employment Arbitration Rules & Procedures Rule 18.

Less Burdensome Discovery

Although discovery procedures vary among the arbitration fora, party document discovery in arbitration can be as broad as in court, and sometimes even broader. See, e.g., Empl. Arb. Rules & Mediation Procs. R – 9 (an arbitrator "shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary"). See also "Discovery" in Navigating Prehearing Procedures below. However, depositions typically are more limited in arbitration than in court. Depositions can be one of the largest expense items at the pre-trial stage in employment disputes, which often depend on the testimony of numerous witnesses to the allegations, and arbitration is designed to minimize costs. Nonparty discovery is also generally more limited in arbitration, but it is not uncommon. The party seeking nonparty discovery usually needs approval from the arbitrator and her or his signature on the corresponding subpoena for documents or testimony.

Streamlined Motion Practice and Trial

Pre-trial motions tend to be more limited in arbitration as well. Courts readily dismiss employment cases on motions for summary judgment based on a review of the discovery record. In contrast, arbitrators will often hear claims notwithstanding that the factual or legal basis for the claim appears questionable.

Finally, an arbitration hearing is generally informal. Without strict rules of evidence, the parties have substantial leeway to bring in all manner of evidence. By contrast, the rules of evidence a trial court applies restrict parties from introducing broad categories of prejudicial and marginally relevant evidence.

Limited Appeals

Additionally, although appeal is possible in arbitration, it is quite limited compared to court proceedings. The Federal Arbitration Act provides that a court only may vacate an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators . . . ; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced [or]; (4) where the arbitrators exceeded their powers . . . .

9 U.S.C. § 10.

Preparing for and Commencing an AAA Employment Arbitration

Review the steps below to ensure that you understand the key steps involved in preparing for and commencing an employment arbitration.

Claimant's Key Steps

When preparing for and commencing an AAA employment arbitration, the claimant should take the following steps:

- **Review the arbitration agreement.** Arbitration is a matter of contract, and many employers have incorporated arbitration agreements into their employment documentation. Thus, before initiating arbitration, the claimant should review the relevant arbitration clause, which is likely included in the employment agreement.
- **Determine whether the claim is arbitrable.** When reviewing the arbitration clause, the claimant should ensure that the dispute falls within the scope of the arbitration clause; if it does not, the respondent may challenge the arbitrator's jurisdiction. Assuming the dispute falls within the scope of the arbitration clause, the claimant should determine what law governs the dispute and confirm that its claim is timely under any applicable statutes of limitations or repose. Additionally, the claimant should confirm that any conditions precedent to bringing a claim in arbitration have been met.

- **Discrimination claims.** Note that arbitration agreements can require arbitration of discrimination claims. Generally, employment discrimination statutes do not prevent courts from enforcing agreements between the parties to arbitrate such claims. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (claims under the Age Discrimination in Employment Act (ADEA) can be subjected to compulsory arbitration).
- **Wage and hour class actions.** Because wage and hour claims often involve low individual damages amounts, employees might choose to bring class or collective action lawsuits. To avoid these suits, employers may include a class and collective action waiver in their employment agreements, requiring the employee to individually arbitrate any employment claims. The Supreme Court has held that such agreements are enforceable under the Federal Arbitration Act (FAA) and do not violate the National Labor Relations Act (NLRA). See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018). See also Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412 (2019) (an ambiguous agreement does not provide the necessary contractual basis for concluding that parties agreed to class arbitration). Thus, it is unlikely that a claimant employee would be able to challenge such a waiver and agreement to arbitrate claims on individual basis under current law. As detailed below, however, federal courts are currently split as to whether the threshold issue of availability of class arbitration is one for a court or an arbitrator to decide in the first instance. For more information, see Arbitration Agreement and Class Action Waiver Enforcement in Employment Litigation.

- **Consider discovery.** A claimant should think ahead to the evidentiary record and identify any documents that may be relevant to its claims and determine whether nonparty discovery will be necessary. The claimant also should consider if it will need any experts and begin the retention process. For more information on discovery, see "Discovery" in Navigating Prehearing Procedures below.
- **File a demand for arbitration.** If the parties do not submit a joint request for arbitration, a claimant may initiate arbitration on its own. The claimant must file, within the time limit established by the applicable statute of limitations, a written notice, known as a "demand," of its intent to arbitrate, as well as pay the filing fee. The claimant must submit its demand to the AAA office in the appropriate venue and simultaneously provide a copy to the respondent. Empl. Arb. Rules & Mediation Procs. R – 4(b).
- **Include the necessary information in the demand.** Because the arbitration process is intended to be informal and inexpensive, pleadings may be short and conclusory. The AAA rules provide that the "form of any filing in these rules shall not be subject to technical pleading requirements." Empl. Arb. Rules & Mediation Procs. R – 4(c). The demand for arbitration under the AAA rules must include a brief statement about the nature of the dispute; the amount in controversy; the remedy the claimant seeks; the requested hearing location; and the names, addresses, and phone numbers of the parties. The claimant must also include the contract that contains the arbitration clause at issue. Empl. Arb. Rules & Mediation Procs. R – 4(b)(i)(1). Thus, under the AAA rules, a claimant is not required to submit any document to initiate its arbitration apart from the demand for arbitration; a claimant need not submit an enumerated complaint, memorandum of law, or any other written statement setting forth the factual or legal bases for the claims. The claimant should ensure that the demand provides a clear and concise recitation of the controversy that highlights the claimant's best facts and documents in a compelling narrative. For a sample demand, see Employment Litigation § 12.03.
- **Calculate and pay the filing fee.** A claimant is responsible for paying an initial filing fee when it initiates the arbitration. The amount is tied, in part, to the amount of damages claimed. The AAA rules have a very detailed schedule of fees and costs for arbitration proceedings, which first hinges on a determination of whether the claim was brought pursuant to an employer-promulgated plan or an individually negotiated contract. See Empl. Arb. Rules & Mediation Procs. EP – 1; Empl. Arb. Rules & Mediation Procs. IN – 1 & 2. A claimant must identify in its initial papers under which type it is bringing its claim. Further, with respect to fees and costs more generally, the claimant should review the arbitration provision to determine whether it allows for fee-shifting from the prevailing party to the non-prevailing party; if so, that provision should be highlighted in opening demand papers and/or the complaint. For more information, see "Arbitration Fees and Costs" below.
- **Address any counterclaims.** If the respondent files a counterclaim against the claimant, the claimant has the option of filing an answer in response within 15 days after the date of the AAA letter acknowledging receipt of the counterclaim. In the answer, the claimant should include a brief response to the counterclaims and issues the respondent raised. If the claimant chooses not to file an answer, the claimant "will be deemed to deny the counterclaim. Failure to file an answering statement shall

not . . . delay the arbitration." Empl. Arb. Rules & Mediation Procs. R – 4(b)(iv). If the respondent files new or amended counterclaims, the claimant has 15 days from receiving the new or amended counterclaims to file an answer to them. Empl. Arb. Rules & Mediation Procs. R – 5.

- **Amend the demand as necessary.** Additionally, a claimant may raise new or different claims in writing (by filing a statement with the AAA and simultaneously providing a copy to the other party) at any point until the arbitrator has been appointed. Once the arbitrator has been appointed, a claimant may only offer new or different claims and counterclaims at the arbitrator's discretion. Empl. Arb. Rules & Mediation Procs. R – 5.

Respondent's Key Steps

When faced with an AAA employment arbitration, the respondent should take the following steps:

- **Determine whether the claim is arbitrable.** Before answering the claimant's demand, the respondent should examine the arbitration agreement to determine whether the dispute falls within the agreement's scope.
- **Challenge the arbitrability of the claim in the appropriate venue.** If the respondent concludes that the dispute should not be in arbitration, it may challenge arbitrability (i.e., whether the merits of the dispute are subject to arbitration) in court.
    - **"Clear and unmistakable" intent to arbitrate.** As a preliminary matter, a court must decide whether a valid arbitration agreement exists, and it must do so by applying ordinary state-law principles governing contract formation. "[I]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530–31 (2019) ("express[ing] no view about whether the contract at issue in this case [incorporating AAA rules, subject to carve-outs] in fact delegated the arbitrability question to an arbitrator"). In deciding whether the parties agreed to arbitrate the gateway issue of arbitrability, however, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995) (citing AT&T Techs. v. Communs. Workers of Am., 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.")). Where it is "clear and unmistakable" that the parties agreed to arbitrate arbitrability, a court must respect the parties' decision and may not decide the issue of arbitrability, even if the court is convinced that the assertion of arbitration is "wholly groundless." Schein, 139 S. Ct. at 530-31 (resolving a circuit court split and rejecting the so-called "wholly groundless" exception).
    - **Incorporation of AAA rules in arbitration agreement.** A majority of appellate courts that have considered the issue have now held that the incorporation of the AAA rules (JAMS rules or other similar rules) in arbitration clauses constitutes "clear and unmistakable" evidence that the parties had agreed to submit to an arbitrator the threshold issue of arbitrability, at least where bilateral arbitration between two sophisticated parties is at issue, and there are no carve-out provisions in the arbitration clause. Courts reason that because under AAA Rule 7(a) the arbitrator has authority to determine his or her own jurisdiction, by incorporating the AAA rules in their agreement, the parties intended to submit the issue of arbitrability to an arbitrator. Am. Arbitration Ass'n, Commercial Arb. Rules and Procs. R-7 (2013) ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."). Courts are split on whether incorporation of AAA rules, without more, constitutes "clear and unmistakable" intent regarding class arbitrability.
        - **"All claims and disputes."** Where an arbitration agreement provides that all claims and disputes shall be resolved in binding arbitration in accordance with the AAA rules (or similar arbitration rules that empower arbitrators to decide their own jurisdiction), a majority of federal appellate courts have found "clear and unmistakable" evidence that the parties agreed to arbitrate the issue of arbitrability on a bilateral basis. See, e.g., Apollo Comput., Inc. v. Berg, 886 F.2d 469, 473-74 (1st Cir. 1989) (holding that the parties' agreement to have all disputes resolved according to the International Chamber of Commerce's Rules of Arbitration, in which the arbitrator has the power to determine her own jurisdiction, was clear and unmistakable evidence of the parties' intent to arbitrate arbitrability). Contec Corp. v. Remote Solution, Co., 398 F.3d 205, 208 (2d Cir. 2005) ("[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to

decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012) (agreeing "with most of our sister circuits" that the "express adoption" of the AAA rules "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability"); VIP, Inc. v. KYB Corp., 2020 U.S. App. LEXIS 5494, at *6 (6th Cir. Feb. 24, 2020) ("[W]e recently held nearly identical language in AAA's Employment Arbitration Rules and Mediation Procedures 'shows that the parties clearly and unmistakably agreed that the arbitrator would decide questions of arbitrability.'" (citing McGee v. Armstrong, 941 F.3d 859, 866 (6th Cir. 2019)); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009) ("[W]e conclude that the arbitration provision's incorporation of the AAA Rules ... constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator."); Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1246 (10th Cir. 2018) (similar); Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (similar); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1372-73 (Fed. Cir. 2006) (similar), abrogated in part on other grounds, Schein, 139 S. Ct. 524; see also Rep. of Argentina v. BG Group PLC, 665 F.3d 1363, 1371 (D.C. Cir. 2012) (stating in dicta that incorporation in treaty of UNCITRAL Rules (which "grant the arbitrator the power to determine issues of arbitrability") provided the requisite clear and unmistakable evidence that issues of arbitrability were intended for an arbitrator).

Although the Seventh Circuit Court of Appeals has not considered the arbitrability issue with regard to incorporation of the AAA rules, district courts in that circuit have followed the majority rule. See, e.g., Wal-Mart Stores, Inc. v. Helferich Patent Licensing, LLC, 51 F. Supp. 3d 713, 719-20 (N.D. Ill. 2014) ("by incorporating the AAA Rules, including Rule 7(a), into the arbitration provision, [the parties] clearly and unmistakably agreed to have an arbitrator decide whether they agreed to arbitrate Plaintiff's disputes").

— **"Sophisticated parties."** The Fourth and the Ninth Circuit courts of appeal have expressed at least an inclination to limit their holding that explicit incorporation in an arbitration agreement of the JAMS or AAA rules (both allowing arbitrators to determine own jurisdiction) is evidence of "clear and unmistakable" intent to arbitrate the issue of arbitrability to disputes between sophisticated parties. See Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522, 527–28 (4th Cir. 2017) (finding that "in the context of a commercial contract between sophisticated parties, the explicit incorporation of JAMS Rules serves as "clear and unmistakable" evidence of the parties' intent to arbitrate arbitrability"), abrogated in part on other grounds, Schein, 139 S. Ct. 524; Brennan v. Opus Bank, 796F.3d 1125, 1130–31 (9th Cir. 2015) (holding that, at least as between sophisticated parties to commercial contracts (without foreclosing possibility that rule could also apply to unsophisticated parties or consumer contracts), "incorporation of AAA rules shows a clear and unmistakable intent to delegate arbitrability to an arbitrator"); see also Galilea, LLC v. AGCS Marine Ins. Co., 879 F.3d 1052, 1061–62 (9th Cir. 2018) (reaching same conclusion as Brennan, and noting that whether rule articulated in Brennan applies where one or more parties is unsophisticated remains an open question); Mohamed v. Uber Technologies, Inc., 848 F.3d 1201, 1207–09 (9th Cir. 2016) (finding, under terms of contract, arbitrability was issue for arbitrator to decide without considering the parties' sophistication).

No federal district court cases from the Fourth Circuit have refused to apply *Simply Wireless* on the basis that at least one party to the dispute was not sophisticated, but at least some courts in the Ninth Circuit, as well as in the Third Circuit, have done so. See, e.g., Vargas v. Delivery Outsourcing, LLC, 2016 U.S. Dist. LEXIS 32634, at *21 (N.D. Cal. March 14, 2016) ("The Court concludes that incorporation of AAA's rules does not evince a 'clear and unmistakable' intent to delegate disputes involving unsophisticated employees."); Money Mailer, LLC v. Brewer, 2016 U.S. Dist. LEXIS 47928, at *7 (W.D. Wash. Apr. 8, 2016) (incorporation of AAA rules does not constitute "clear and unmistakable" intent to delegate arbitrability in case involving franchisee small business owner and a sales and general manager, with no legal or franchise experience); Allstate Ins. Co. v. Toll Bros., Inc., 171 F. Supp. 3d 417, 428 (E.D. Pa. 2016) ("[T]his Court concludes that a cross-reference to a set of arbitration rules containing a provision that vests an arbitrator with the authority to determine his or her own jurisdiction does not automatically constitute clear

and unmistakable evidence that the parties intended to arbitrate threshold questions of arbitrability—at least where those parties are unsophisticated."); Richardson v. Coverall N. Am., Inc., No. 18-532, 2018 U.S. Dist. LEXIS 167240, *10-*11 (D.N.J. Sept. 27, 2018). See also Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 11-12, 13 (1st Cir. 2009) (noting that AAA Rule 7(a) says an arbitrator can rule on their jurisdiction, and therefore explicit incorporation of AAA rules constitutes clear and unmistakable evidence of parties' intent, but affirming district court's refusal to order arbitration and remanding because appellees are entitled to ruling by the district court as to whether arbitration remedy in franchise agreements ("often contracts of adhesion") is illusory).

— **Carve-out provisions.** Where an arbitration agreement is subject to a qualifying provision or specific carve-outs, and the dispute appears to fall within that carve-out, at least the Second and Fifth Circuit courts of appeal have found ambiguity as to whether the parties intended to have arbitrability decided by an arbitrator. In such cases, given the lack of "clear and unmistakable" intent to arbitrate, the court examines the arbitrability question itself (without referring to an arbitrator). See, e.g., NASDAQ OMX Grp., Inc. v. UBS Securities, LLC, 770 F.3d 1010, 1031-32, 1035-36 (2d Cir. 2014) (Where a broad arbitration clause is subject to qualification, "Except as may be provided in the NASDAQ OMX Requirements, all claims . . . shall be settled by final and binding arbitration, . . . [t]he district court properly decided the question of arbitrability because the parties never clearly and unmistakably expressed an intent to submit that question to arbitration, and such an intent cannot be inferred where, as here, a broad arbitration clause contains a carve-out provision that, at least arguably, covers the instant dispute." (emphasis in original)); Archer and White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 280-82 (5th Cir. 2019) (on remand from the Supreme Court, the Fifth Circuit affirmed denial of motion to compel arbitration claim seeking injunctive relief, finding no clear and unmistakable intent to arbitrate the issue of arbitrability where the arbitration agreement provided that "[a]ny dispute . . . (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [the predecessor]), shall be resolved by binding arbitration in accordance with the [AAA] arbitration rules . . ." (emphasis added)), petition for cert. filed (U.S. March 2, 2020) (No. 19-1080); see also VIP, Inc. v. KYB Corp., 2020 U.S. App. LEXIS 5494, at *8–*11 (6th Cir. Feb. 24, 2020) (court found no agreement to arbitrate arbitrability; incorporation of AAA's rules does not alone establish agreement to arbitrate arbitrability where provision in arbitration agreement limited application of the agreement to original retail purchasers, which plaintiffs were not).

— **Class arbitrability.** Presumption that courts decide issue NOT overcome by incorporation of AAA rules. Although the Supreme Court "has not yet decided whether the availability of class arbitration is a question of arbitrability" presumptively for the courts to decide, Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 n.2 (2013), a majority of federal appellate courts have reached that conclusion.

Federal courts are split, however, on whether the incorporation of the AAA rules demonstrates "clear and unmistakable" intent by the parties to overcome the presumption and submit the issue of class action arbitrability to an arbitrator. At least the Third, Fourth, Sixth, Seventh and Eighth Circuit courts of appeal have held that a mere reference to AAA rules is not sufficient to leave the question of class arbitration to an arbitrator, and unless the parties specifically and expressly delegated that to an arbitrator, the court should decide the issue. See, e.g., Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 758–66 (3rd Cir. 2016) (finding contractual reference to arbitration "in accordance with the [AAA] rules" not enough to "satisfy the onerous burden of undoing the presumption in favor of judicial resolution of the question of class arbitrability"), cert. denied, 137 S. Ct. 40 (2016); Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867, 869, 873–77 (4th Cir. 2016) (holding that "whether an arbitration clause permits class arbitration is a gateway question of arbitrability for the court," even when the arbitration agreement applies to "[a]ny controversy or claim" and incorporates the AAA rules); Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2017) (Incorporation of AAA rules, without more, is insufficient evidence that the parties agreed that an arbitrator should decide the availability of classwide arbitration because "given the total absence of any reference to classwide arbitration in this clause, the agreement here can just as easily be read to speak only to issues related to bilateral arbitration. Thus, at best, the agreement is silent or ambiguous . . . and that is not enough to wrest

that decision from the courts."); Herrington v. Waterstone Mortg. Corp., 907 F.3d 502, 506–10 (7th Cir. 2018) (agreeing with the Fourth, Sixth and Eighth Circuits' holdings that "availability of class or collective arbitration is a question of arbitrability, which the court decides," even where the agreement provides for binding arbitration in accordance with AAA rules); Catamaran Corp. v. Towncrest Pharm., 864 F.3d 966, 972–73 (8th Cir. 2017) ("Each agreement states that any dispute or controversy that arises out of the agreement shall be resolved by arbitration under the AAA's applicable rules. But regarding class arbitration, there is complete silence. And silence is insufficient grounds for delegating the issue to an arbitrator.").

— **Class arbitrability: Incorporation of AAA rules constitutes "clear and unmistakable" evidence of intent to delegate issue to arbitrator.** On the other hand, the Second, Fifth, Tenth and Eleventh Circuit courts of appeal have held that by incorporating the AAA rules into the agreement the parties have agreed to delegate to an arbitrator all arbitrability questions, including the question of class arbitrability. See, e.g., Supplementary Jock v. Sterling Jewelers Inc., 942 F.3d 617, 623–24 (2nd Cir. 2019) (holding that incorporation of the AAA Rules "evinces agreement to have the arbitrator decide the question of class arbitrability" because Rule 3 of the AAA Supplemental Rules empowers an arbitrator to determine if classwide arbitration is permitted) (citing Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392 (2d Cir. 2018))); Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630, 633–36 (5th Cir. 2012) (same), abrogated in part on other grounds by Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013); Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1233–34 (11th Cir. 2018) (same); Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1247-48 (10th Cir. 2018) (rejecting the analyses of the Third, Sixth and Eighth Circuits, adopting the Second Circuit's approach in Sappington, and holding that "incorporation of the AAA Rules provides clear and unmistakable evidence that the parties intended to delegate . . . all issues of arbitrability to the arbitrator," including the issue of classwide arbitrability. (emphasis in original)). Although the Ninth Circuit Court of Appeals has not considered the issue, at least one district court recently followed the Second and Fifth Circuits' holdings. Harmon v. RDO Equip. Co., 2019 U.S. Dist. LEXIS 166029, at *13 (C.D. Cal. July 3, 2019) (The Court "must . . . leave to the arbitrator the decision regarding the arbitrability of class claims.").

— **Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).** Note that the recent Supreme Court decision in *Lamps Plus, Inc. v. Varela* calls into question the reasoning of the Second, Fifth, Tenth and Eleven Circuits. The plaintiff Lamps Plus employee filed in district court a putative class action on behalf of other employees. Relying on the arbitration agreement in plaintiff's employment contract, defendant sought to compel arbitration—on an individual rather than a classwide basis—and to dismiss the suit. The district court rejected the individual arbitration request, but authorized class arbitration and dismissed plaintiff's claims. Defendant appealed, arguing that the district court erred by compelling class arbitration, but the Ninth Circuit affirmed, finding that the arbitration agreement was ambiguous on the availability of classwide arbitration and, applying state contract law principle, resolved the ambiguity in favor of the non-drafter plaintiff. In reversing, the Supreme Court held that under the Federal Arbitration Act, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration. The "ambiguous agreement" at issue in Lamps Plus provided for binding arbitration in accordance with either the AAA's rules or JAMS' rules for resolution of employment disputes (depending on which arbitral forum the parties selected).

Given the procedural posture of the case, the Supreme Court did not consider whether the availability of class arbitration is a question for a court or an arbitrator to decide, but the Court's reasoning suggests that it would not view the mere incorporation of the AAA rules in an arbitration agreement as "clear and unmistakable" evidence of the parties' intent regarding class arbitration. In finding no intent to submit to class arbitration, the Supreme Court noted the same "fundamental" differences between class arbitration and bilateral arbitration that the Third, Fourth, Sixth, Seventh and Eighth Circuits relied on in refusing to infer agreement to arbitrate class arbitrability from the incorporation of the AAA rules. The Supreme Court also stated, albeit in dicta, that "[a]lthough parties are free to authorize arbitrators to resolve [gateway arbitrability] questions, we will not conclude that

they have done so based on 'silence or ambiguity' in their agreement, because doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."

- **Agreement silent on who decides threshold arbitration questions.** Where the contract is silent on the matter of who primarily is to decide threshold questions about arbitration, courts determine the parties' intent with the assistance of certain presumptions.
  - **Courts decide "substantive" arbitrability.** On the one hand, courts presume that parties intend courts, not arbitrators, to decide substantive disputes about arbitrability (e.g., whether the parties are bound by a particular arbitration clause, whether an arbitration clause in concededly binding contract applies to a particular type of controversy or to particular parties). BG Group PLC v. Republic of Argentina, 572 U.S. 25, 34–35 (2014). See also Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (a court should decide questions such as "whether the parties are bound by a given arbitration clause," or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy"); Granite Rock Co. v. Teamsters, 561 U.S. 287, 299-300 (2010) (disputes over "formation of the parties' arbitration agreement" and "its enforceability or applicability to the dispute" at issue are "matters . . . the court must resolve" (internal quotation marks omitted)); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 941, 943–47 (1995) (a court should decide whether an arbitration clause applied to a party who "had not personally signed" the document containing it); AT&T Techs. v. Communs. Workers of Am., 475 U.S. 643, 651–52 (1986) (a court should decide whether a labor-management layoff controversy falls within the arbitration clause of a collective-bargaining agreement); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546–47 (1964) (a court should decide whether an arbitration agreement survived a corporate merger and bound the resulting corporation)
  - **Arbitrator decides "procedural" issues.** On the other hand, courts presume that parties intend arbitrators, not courts, to decide disputes about **procedural** preconditions or prerequisites for the use of arbitration (e.g., claims of waiver, delay, or a like defense to arbitration, or procedural matters such as time limits, statute of limitations, notice requirements, laches, estoppel, and other conditions precedent to an obligation to arbitrate). BG Group PLC v. Republic of Argentina, 572 U.S. 25, 34–35 (2014); see also Revised Uniform Arbitration Act of 2000 § 6, Comment 2, 7 U.L.A. 13 (Supp. 2002) (stating that an "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled," and explaining that this rule seeks to "incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal Arbitration Act]"); Howsam, 537 U.S. at 84-85 (stating that "procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide," and finding that "the applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not the judge") (citations and quotations omitted); BG Group PLC, 572 U.S. at 35 (provisions that a dispute "shall be submitted to international arbitration" if "one of the Parties so requests," as long as "a period of eighteen months has elapsed" since the dispute was "submitted" to a local tribunal and the tribunal "has not given its final decision," are "procedural condition[s] precedent to arbitration" and are therefore for an arbitrator to decide, not a court).
- **Objections.** Under AAA rules, if a party objects to the arbitrability of a claim or counterclaim or to the arbitrator's jurisdiction over a claim or counterclaim, it must object no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. Empl. Arb. Rules & Mediation Procs. R – 6(c).

- **File an answer.** A respondent may choose to, but does not have to, file an answer. A respondent must file its answer within 15 days of receiving the letter from the AAA acknowledging receipt of the demand. Empl. Arb. Rules & Mediation Procs. R – 4(b)(ii). In practice, the 15-day answering period does not begin until the AAA has received the claimant's filing fee and the case is assigned to a case manager. The case manager will thereafter advise respondent as to the date when the answer should be submitted. A respondent also has 15 days to file an answer to any new or amended claims and counterclaims that the claimant files. Empl. Arb. Rules & Mediation Procs. R – 5.
- **Include the necessary defenses in the answer.** If a respondent files an answering statement (or a claimant files an answer to a counterclaim), the answer should include a concise and compelling response to the claims

(or counterclaims) and issues the claimant (or respondent) presented. Empl. Arb. Rules & Mediation Procs. R – 4(b)(ii), (iv). The answering party should recite each of its defenses, including a timeliness defense if the claims (or counterclaims) are not timely under any relevant statutes of limitations or repose. The respondent (or claimant) choosing not to file an answer will not delay the arbitration; if the respondent (or claimant) fails to file an answer, the respondent (or claimant) "will be deemed to deny the claim [or counterclaim]." Empl. Arb. Rules & Mediation Procs. R – 4(b)(ii), (iv).

- **Determine fees and costs.** A respondent should consult the forum's applicable rules to determine the amounts for which it may be responsible if the arbitration moves forward. As noted, AAA rules have a very detailed schedule of fees and costs for the arbitration proceeding, which first hinges on a determination of whether the claim was brought pursuant to an employer-promulgated plan or an individually negotiated contract. A claimant must identify in its initial papers under which type it is bringing its claim. If the respondent disagrees, it should so notify the AAA in its answering papers. For more information, see "Arbitration Fees and Costs" below.
- **Consider filing a counterclaim.** In addition to filing the answer, the respondent may choose to file a counterclaim against the claimant at this time. Empl. Arb. Rules & Mediation Procs. R – 5. Before filing, the respondent should evaluate any potential counterclaims and ensure that they fall within the arbitration agreement's scope. A respondent should also ensure that the counterclaims are timely. When filing a counterclaim, the counterclaim should include (1) the nature of the claim; (2) the amount in controversy, if any; and (3) any remedy the respondent seeks. Empl. Arb. Rules & Mediation Procs. R – 4(b)(iii).
- **Amend counterclaims as necessary.** Additionally, a respondent may raise new or different counterclaims in writing at any point until the arbitrator has been appointed. Once the arbitrator has been appointed, a respondent may only offer new or different counterclaims at the arbitrator's discretion. Empl. Arb. Rules & Mediation Procs. R – 5.
- **Begin preparing the defense.** Finally, the respondent should begin the early stages of preparing the case. The respondent should identify any documents that may be relevant and which documents it will need to support its responses and any counterclaims. Additionally, the respondent should assess if it will need discovery from nonparties and whether to retain experts. The respondent should also consider whether to notify any third parties (such as insurers) of the dispute.

Arbitration Fees and Costs

The fees and costs of AAA employment arbitrations vary based on several factors, including whether the party filing the claim is the employer or the employee, the number of arbitrators, the amount in controversy, the number of hearing days, and whether the dispute arose out of employer plans or individually negotiated employment agreements and contracts. See AAA Employment/Workplace Fee Schedule 1-5 (Nov. 1, 2019) (Employment Fee Schedule); AAA Commercial Arbitration/Mediation Administrative Fee Schedule 1-3 (May 1, 2018) (Commercial Fee Schedule).

The arbitrator's compensation is not included in the fee schedules. In employer plan disputes utilizing the Employment Fee Schedule, the arbitrator's compensation is based on the arbitrator's most recent biography sent to the parties prior to the appointment. The employer pays the arbitrator's compensation, unless the employee elects to pay a portion. Employment Fee Schedule at 2. In contractual disputes utilizing the Commercial Fee Schedule, arbitrator compensation and administrative fees are subject to allocation by an arbitrator in an award, unless the parties' agreement provides otherwise. Commercial Fee Schedule at 1.

Employer Plan Disputes

In disputes arising out of employer plans, if the arbitration takes place in front of a single arbitrator and the employee filed against the employer, the nonrefundable filing fee for the employee is a maximum of $300 and the nonrefundable filing fee for the employer is $1,900, unless the arbitration agreement provides that the employee will pay less and that the employer will pay more. If there are three arbitrators, the filing employee's maximum fee is still $300, but the employer's fee rises to $2,500. If the employer files a claim against the employee in a case before a single arbitrator, the employer must pay a nonrefundable fee of $2,200 (no fee for the employee). In cases before three arbitrators, the employer must pay $2,800 (again, no fee for the employee). The employer is responsible for a case management fee of $750, as well as for all hearing room rental fees. Employment Fee Schedule at 1–2.

If a party demands treatment of a claim or counterclaim as a "collective action" arbitration, that party will be subject to an administrative fee of $3,250. Employment Fee Schedule at 1. Disputes proceeding under AAA Supplementary Rules for Class Action Arbitration are subject to an initial filing fee of $3,350 and then, if the matter proceeds as a class action, a supplemental fee determined in accordance with the Commercial Fee Schedule. Employment Fee Schedule at 1;

AAA Supplementary Rules for Class Arbitrations § 11 (Oct. 8, 2003 (Rules); Jan.1, 2010 (Fees)).

Individually Negotiated Employment Agreements and Contract Disputes

In disputes arising out of individually negotiated employment agreements and contracts, parties may choose to pay under either the "standard fee schedule" or the "flexible fee schedule." Commercial Fee Schedule at 1. The standard fee schedule is a "two-payment schedule that provides for somewhat higher initial filing fees, but lower overall administrative fees for cases that proceed to a hearing." Meanwhile, the flexible fee schedule is a "three-payment schedule that provides for lower initial filing fee[s], and then spreads subsequent payments out over the course of arbitration. Total administrative fees will be somewhat higher for cases that proceed to a hearing." The flexible fee schedule is only available for claims of $150,000 or more. Commercial Fee Schedule at 1.

Selecting the Arbitrator

Selecting an arbitrator or arbitrators (if the agreement or arbitration forum rules call for multiple arbitrators) is a crucial step in the arbitration process. There are two distinct paths under AAA rules: either the parties' arbitration agreement names a specific arbitrator or a method for appointing the arbitrator or, if the agreement does not, the AAA rules provide a selection mechanism.

Selecting an Arbitrator by Party Agreement

The parties' arbitration agreement may name a specific arbitrator or specify a method for appointing an arbitrator. In that case, the designation or method shall be followed. If the agreement provides that each party shall name one arbitrator, the named arbitrators must "meet the standards of [the AAA Rules] with respect to impartiality and independence," unless the parties specifically agreed that the party-appointed arbitrators are to be non-neutral and need not meet the AAA standards. Empl. Arb. Rules & Mediation Procs. R – 13(b). "Upon the request of any appointing party," the AAA will provide "a list of members of the National Roster from which the party may, if it so desires, make the appointment" of the arbitrator. Id. After selecting the arbitrator, the appointing party must file a notice of appointment with the AAA containing the arbitrator's name, address, and contact information. Id.

Time Limits

If the parties fail to meet an arbitration agreement's deadline to choose an arbitrator, the AAA will appoint one. Empl. Arb. Rules & Mediation Procs. R – 13(c). If the agreement does not include a time limit, the AAA will instruct the parties to appoint an arbitrator within 15 days of receiving the AAA's instruction; if the parties fail to appoint an arbitrator within 15 days, the AAA will appoint an arbitrator unless the parties seek an extension of time. Empl. Arb. Rules & Mediation Procs. R – 13(d).

Three-Arbitrator Panels

Unless the parties' arbitration agreement specifies otherwise, employment disputes are heard by a single arbitrator. Empl. Arb. Rules & Mediation Procs. R – 12(a). For more complex arbitrations, it is not uncommon for the parties to select three-arbitrator panels, with one arbitrator serving as the chairperson. The chairperson may be appointed by the party-appointed arbitrators or by the parties. If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson, the AAA will furnish a list of arbitrators, and the chairperson is appointed in the same manner as the party selection of a single arbitrator. If the parties have agreed to appoint a chairperson but fail to do so either within the time set by the arbitration agreement or, if the agreement is silent, within 15 days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson. Empl. Arb. Rules & Mediation Procs. R – 14.

Selecting an Arbitrator under the AAA Rules

If the arbitration agreement does not select an arbitrator or a method of appointing an arbitrator, then shortly after the AAA receives the demand for arbitration, it will send to each party a list of arbitrators chosen from the Employment Dispute Resolution Roster. Empl. Arb. Rules & Mediation Procs. R – 12(c)(i). The list will identify the candidates and provide basic biographical information about each, as well as each arbitrator's hourly rate.

The parties may mutually agree upon an arbitrator from the list and so inform the AAA. If the parties cannot come to agreement, each has 15 days to strike arbitrators from the list, rank the remaining arbitrators in order of preference, and send the list back to the AAA; if a party does not send the list back to the AAA within 15 days, the AAA will assume that the party accepts all of the arbitrators on the list. Empl. Arb. Rules & Mediation Procs. R – 12(c)(ii). After receiving the lists from the parties, the AAA will choose an arbitrator that both parties deemed acceptable. If the parties' lists do not agree on an acceptable arbitrator or if all acceptable arbitrators are unavailable, the AAA may appoint an arbitrator on its own without having the parties submit additional lists. Empl. Arb. Rules & Mediation Procs. R – 12(c)(iii).

Arbitrator Conflicts-of-Interest

In conjunction with the parties' submission of arbitrator rankings, the AAA requires the parties to submit a checklist for conflicts identifying anticipated witnesses, consultants, attorneys, subsidiaries, and any other related entities or persons. That information is cross-checked against the arbitrator selected. The arbitrator is required to divulge any relevant information in order to make appropriate and necessary disclosures in accordance with AAA Rule 15—namely, that any arbitrator "shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any past or present relationship with the parties or their representatives." Empl. Arb. Rules & Mediation Procs. R – 15(a).

Practical Tips and Strategies for Selecting an Arbitrator

When selecting an arbitrator, parties should consider:

- The arbitrator's record of arbitral awards (i.e., whether the awards tend to be favorable to the employer or employee)
- The arbitrator's adjudicative experience (i.e., whether the arbitrator has familiarity with legal issues relevant to the party's case)
- The arbitrator's professional legal experience (i.e., whether the arbitrator represented employers or employees when practicing as a lawyer, whether the arbitrator is a former judge, and other similar considerations)
- The arbitrator's relevant professional background
- The arbitrator's professional writing and any positions espoused therein –and–
- Whether the arbitrator is an active member of the bar or community

To view AAA employment arbitration decisions by particular arbitrators, consult the Lexis Advance database of AAA employment arbitration decisions in Lexis Advance Research AAA Employment Arbitration Awards.

Navigating Prehearing Procedures

Common prehearing procedures in AAA employment arbitrations include the arbitration management conference, the issuance of a scheduling order, discovery, and, in limited cases, motion practice.

Arbitration Management Conference

Shortly after the appointment of an arbitrator, the AAA administrator will reach out to the parties to schedule an arbitration management conference with the arbitrators by telephone. The conference must take place within 60 days of selecting an arbitrator. The AAA does not charge any administrative fees for the arbitration management conference. Empl. Arb. Rules & Mediation Procs. R – 8.

At the conference, the parties should be prepared to do the following:

- Address the issues being arbitrated.
- Set the date, time, location, and estimated length of the hearing.
- Resolve any discovery issues and establish a discovery schedule and parameters, including when witness and document lists must be exchanged.
- Discuss the relevant law, standards, evidence rules, and burdens of proof.
- Discuss whether the parties should bifurcate the arbitration into a liability phase and a separate damages phase.
- Disclose the names of likely witnesses (including any expert witnesses), the scope of witness testimony, and witness exclusion.
- Discuss and determine matters related to the hearing, including whether the parties will need a stenographic record; whether the parties will make their arguments orally or in writing; the extent to which parties may submit documentary evidence at the hearing; and the extent to which parties can admit testimony at the hearing by phone, over the internet, by deposition, by affidavit, or by other means.
- Discuss and determine matters related to the award, including the form of the award, how to allocate attorney's fees and costs, and whether to specify undisclosed claims.
- Address any disputes the parties have with the AAA's determination about whether the dispute for arbitration arose from an employer plan or an individually negotiated employment agreement.

Empl. Arb. Rules & Mediation Procs. R – 8.

Consider preparing a proposed schedule for discovery, prehearing submissions, and the hearing that you can present to the opposing party and arbitrator at the conference. Keep track of any scheduling conflicts any attorneys on your team

may have in case the arbitrator diverges from the proposed schedule.

Additionally, in communications with the arbitrator (at the conference and otherwise), be mindful that the arbitrator does not have your in-depth understanding of the issues, and it may be necessary to educate him or her. There can be more opportunity to substantively and informally engage with an arbitrator prior to a hearing than with a judge, so it is important to make use of those opportunities to have the arbitrator view you as a credible advocate.

The Scheduling Order

After the conference, the arbitrator will issue an oral or written order outlining the arbitrator's decisions about matters the parties discussed. The arbitrator may request additional conferences if necessary as the arbitration progresses. Empl. Arb. Rules & Mediation Procs. R – 8.

Generally, the "parties may modify any period of time by mutual agreement." Likewise, "[t]he AAA or the arbitrator may, for good cause, extend any period of time . . . except the time for making the award." Empl. Arb. Rules & Mediation Procs. R – 37. Where possible, work with your adversary to reach stipulations that streamline discovery and the hearing to reduce client expenses.

Discovery

Although discovery procedures vary among the arbitration fora, document discovery in arbitration is generally liberal with respect to party discovery. See, e.g., Empl. Arb. Rules & Mediation Procs. R – 9. The AAA gives the arbitrator discretion to order any discovery through depositions, interrogatories, document production, or other means that "the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." Id. Thus, when discussing the parameters of discovery with the arbitrator, keep in mind what evidence you will need to establish your claims or defenses, and seek discovery methods that will allow you to obtain the necessary documentation or information.

Because discovery is largely conducted by the parties independently of the arbitrator, it is important to agree upon a confidentiality stipulation with the opposing party. The parties also may choose to have the stipulation entered by the arbitrator. Execute the confidentiality stipulation early in the arbitration process so that discovery is not delayed. For a sample confidentiality agreement, see Stipulated Protective Order With Clawback Provision (Federal).

Unless a dispute arises, parties generally do not need to provide notice of communications and matters related to discovery. Nonparty discovery is an exception. While the parties may issue subpoenas for nonparty discovery, they may only do so only by leave of "an arbitrator or other person authorized by law." Empl. Arb. Rules & Mediation Procs. R – 30.

If there is a discovery dispute, the parties should inform the AAA so that an arbitrator may decide the issue. See Empl. Arb. Rules & Mediation Procs. R – 9.

Substantive Motion Practice

An arbitrator may allow a party to file a dispositive motion if the arbitrator believes that "the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case." Empl. Arb. Rules & Mediation Procs. R – 27. Consequently, to make a dispositive motion, the party must convince the arbitrator that the motion has merit.

Conducting the Hearing

Review this section to understand the various aspects of the AAA employment arbitration hearing.

Setting a Time and Place

If the employment documentation does not designate or the parties cannot agree on the location of the hearing, the AAA may initially decide in which city, state, or country the hearing will take place. After the arbitrator has been appointed, he or she may change the location. Empl. Arb. Rules & Mediation Procs. R – 10. Additionally, the arbitrator has the authority to set the date, time, and specific place for the hearing. The AAA will send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless the parties have agreed otherwise. Empl. Arb. Rules & Mediation Procs. R – 11.

Establishing the Rules of the Proceeding

The arbitrator sets the rules that govern the conduct of the proceedings. When setting the rules, the arbitrator must ensure that each party has a full and equal opportunity to present relevant and material evidence. Empl. Arb. Rules & Mediation Procs. R – 28. Unless the parties agree otherwise or a party has defaulted or waived the right to be present, parties must present all evidence in the presence of all arbitrators and all parties. Empl. Arb. Rules & Mediation Procs. R – 30. Additionally, the arbitrator cannot alter the allocation of the burden of proof, which is the same burden as if the parties had brought their claims and counterclaims in court. Empl. Arb. Rules & Mediation Procs. R – 28.

Presenting Evidence

The parties may offer evidence that is relevant and material to the dispute. The parties may also examine documents and evidence and lodge appropriate objections. Ultimately, the arbitrator determines whether evidence is relevant and material and does not need to follow legal rules of evidence. Empl. Arb. Rules & Mediation Procs. R – 30. Indeed, arbitrators often do not adhere strictly to the rules of evidence, preferring to let most evidence come into the proceeding and determining for themselves the probative value of the admitted evidence.

The arbitrator's discretion with respect to evidence includes directing the order of proof, bifurcating proceedings, excluding cumulative or irrelevant testimony or other evidence, and directing the parties to focus their presentations on issues that could dispose of all or part of the case. Empl. Arb. Rules & Mediation Procs. R – 30.

If the parties agree or the arbitrator directs, the parties may submit documents or other evidence to the AAA after the hearing for transmission to the arbitrator, unless the parties agree to a different method of distribution. Parties will have the opportunity to examine documents or other evidence and lodge objections. Empl. Arb. Rules & Mediation Procs. R – 30.

In short, there is a much broader scope for the admission of testimony and documentary evidence in arbitration than in traditional litigation. Nevertheless, it is important to be aware of the sensibilities of the particular arbitrator. Some arbitrators are willing to entertain objections to admissibility of testimony or to badgering or repetitive questioning, for example.

Concluding the Hearing

At the end of the hearing, the arbitrator will ask all parties if they have more evidence to offer or more witnesses to examine. If the parties say they have no more evidence to offer, the arbitrator will close the hearing. Unless the parties have agreed otherwise, the time limit for the arbitrator to issue an award will begin to run upon the closing of the hearing. Empl. Arb. Rules & Mediation Procs. R – 33.

As long as the arbitrator has not issued the award, the arbitrator may choose to reopen the hearing on the arbitrator's own initiative or if a party has shown good cause. If reopening the hearing would mean that the arbitrator would not meet the deadline for issuing an award, both parties must agree to extend the deadline. Unless the parties agree otherwise, the arbitrator has 30 days from closing the reopened hearing to issue an award. Empl. Arb. Rules & Mediation Procs. R – 34.

Practical Tips and Strategies for the Arbitration Hearing

To conduct the most effective hearing for your client, bear in mind the following tips:

- Do not waste the arbitrator's time. Organize your exhibits (e.g., in a binder with tabs) in advance of the hearing. Also consider exchanging documents prior to the hearing and/or jointly submitting exhibits.
- Use the opening statement to set the stage by providing necessary background information (such as acronyms, key players, or events); an overview of what the documentary and testimonial evidence will establish; and your response to the opposing party's claims. Do not overstate the evidence or otherwise make statements that you cannot support with evidence.
- Ensure that your witnesses are adequately prepared. Meet with each of your witnesses beforehand to discuss your questioning and anticipate difficult questions on cross-examination.
- During direct examination, avoid asking leading questions and questions that call for a "yes" or "no" question. It is better for the witness under oath to tell a party's story to the arbitrator than the attorney.
- Do not excessively object to opposing counsel. Doing so may irritate the arbitrator and lessens the impact of important objections.
- In the closing statement, address all the issues in a clear and concise manner. Do not ignore the evidence or arguments that may be damaging to your case and explain why the testimony of your witnesses should be credited. Explain why the relief you are seeking is justified based on the evidence presented.
- Act in a courteous and professional manner—not only with the arbitrator, but with all witnesses and the opposition—throughout the course of the arbitration.

Understanding the Award and Post-award Process

AAA arbitration awards are final and binding and, in practice, they are rarely vacated. Nevertheless, you should understand the contours of the award and when to seek remedies in court.

Content of the Award

The award should include, in writing, the arbitrator's disposition of all claims and counterclaims and the arbitrator's reasoning behind the award, unless the parties have agreed otherwise. Empl. Arb. Rules & Mediation Procs.

R – 39(c). The arbitrator has the authority to "grant any remedy or relief that would have been available to the parties had the matter been heard in court," including attorney's fees and costs. The arbitrator will include in the award the arbitrator's assessment of arbitration fees, expenses, and compensation. Empl. Arb. Rules & Mediation Procs. R – 39(d).

Once the arbitrator issues an award, that award is final and binding on the parties. Empl. Arb. Rules & Mediation Procs. R – 39(g). If a panel of arbitrators issues an award, a majority must sign the award. Empl. Arb. Rules & Mediation Procs. R – 39(c). If the parties reached a settlement agreement during the arbitration proceedings and if both parties ask the arbitrator to do so, the arbitrator will include the settlement terms in a consent award. Empl. Arb. Rules & Mediation Procs. R – 39(e).

The contents of AAA awards are publicly available in certain electronic databases, although the names of the parties and witnesses are redacted from the award. Empl. Arb. Rules & Mediation Procs. R – 39(b). See the Lexis Advance database of AAA employment arbitration decisions in Lexis Advance Research AAA Employment Arbitration Awards.

Timing

Unless the parties have agreed otherwise, the arbitrator will issue the award within 30 days from the closing of the hearing. If the parties filed briefs or other documents, the arbitrator has 33 days to issue an award. Empl. Arb. Rules & Mediation Procs. R – 39(a).

Modification

The arbitrator cannot "redetermine the merits of any claim already decided." The only modifications the parties can ask the arbitrator to make are modifications "to correct any clerical, typographical, technical, or computational errors in the award." After a party submits a modification request, the arbitrator has 20 days to either make the modification or deny the request. Empl. Arb. Rules & Mediation Procs. R – 40.

Confirming the Award in the Courts

After the arbitrator issues the award, a party may ask a court to confirm it. Confirmation proceedings are generally "intended to be summary[;] confirmation can only be denied if an award has been corrected, vacated, or modified in accordance with the Federal Arbitration Act." Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986); accord Popular Sec., Inc. v. Colón, 59 F. Supp. 3d 316, 318--19 (1st Cir. 2014).

In employment arbitrations, the employer that has won an award rejecting an employee's claims must decide whether to petition in court to confirm the award. In addition to cost considerations, the petition would be public; consequently, a dispute that otherwise would have been private would then be on the public record.

For sample motions to confirm arbitration awards, see Employment Litigation § 12.06.

Vacating the Award in the Courts

If a party believes the arbitrator erred in issuing the award, the party may ask a court to vacate it. The grounds for vacating an award are set forth in the Federal Arbitration Act. See 9 U.S.C. § 10. Some courts apply a standard, based on their interpretation of the act, that allows for vacating arbitration awards for manifest disregard of the law. See, e.g., Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 (2010) (manifest disregard of law where arbitration panel "impose[d obtain its own view of sound policy regarding class arbitration"); Schwartz v. Merrill Lynch & Co., 665 F.3d 444, 451 (2nd Cir. 2011) ("[T]the court may set aside an arbitration award if it was rendered in 'manifest disregard of the law'" (citing cases)); In re Stewart Tabori & Chang, Inc., 723 N.Y.S.2d 492, 494 (App. Div. 2001) ("award of attorney's fees and disbursements" was in "manifest disregard of well-defined, explicit and clearly applicable New York law"). For an arbitrator to manifestly disregard the law, the petitioner must show both (1) that the arbitrator knew "of a governing legal principle yet refused to apply it or ignored it altogether," and (2) that the law the arbitrator ignored "was well-defined, explicit, and clearly applicable to the case." Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d 133, 139 (2d Cir. 2007). Additionally, some courts will vacate arbitration awards if they "violate[] a strong public policy, [are] irrational or clearly exceed[] a specifically enumerated limitation on the arbitrator's power." Matter of City of Oswego v. Oswego City Firefighters Assn., Local 2707, 988 N.E.2d 499, 501 (N.Y. Ct. App. 2013).

For a sample motion to vacate an arbitration award, see Motion to Vacate or Modify an Arbitration Award: Making the Motion (Federal).

Remands to a New Arbitrator

Even if a court chooses to vacate an arbitration award, remands to new arbitrators are infrequent. When deciding whether to remand to a new arbitrator, courts generally focus on whether the original arbitrator was biased or acted improperly. See, e.g., LLT Int'l Inc. v. MCI Telecomms. Corp., 18 F. Supp. 2d 349, 354 (S.D.N.Y. 1998) (no bias or impropriety unless "evident partiality," such that a "reasonable person would have to conclude that an arbitrator was partial to one party to an arbitration" (citations omitted)); Caruso v Viridian Network, LLC, 112 A.D.3d 515, 515 (N.Y. App. Div. 2013) (remand to the same arbitrator unless "evidence of bias, fraud or corruption by the arbitrator"); Sawtelle v.

Waddell & Reed, Inc., 304 A.D.2d 103, 117 (N.Y. App. Div. 2003) (remand to same arbitration panel where no evidence of "bias or serious misconduct"). When the arbitrator's award is arbitrary and capricious, courts may choose to vacate the award and remand to a different arbitrator. See, e.g., Lawrence Terrace Co. v. Benova, 133 A.D.2d 689, 691–92 (N.Y. App. Div. 1987) (remand to a new arbitrator where award was "completely irrational"), appeal dismissed, 70 N.Y.2d 1003 (1988); Matter of Wright v. New York City Tr. Auth., 86 N.Y.S.3d 820, 828–30 (N.Y. Sup. Ct. 2018) (Because an arbitral award regarding a terminated employee's sexual harassment claim against a coworker was irrational, in that the parties were treated differently for reasons that were arbitrary and capricious, it had to be remanded to a different arbitrator or arbitral panel.). Courts may also remand to a new arbitrator if the original arbitrator had an undisclosed conflict of interest. See, e.g., Excelsior 57th Corp. v. Kern, 218 A.D.2d 528, 529–31 (N.Y. App. Div. 1995) (disqualifying arbitrator in part because he failed to disclose potential conflict of interest).

For more information on grounds to appeal arbitration decisions, see Alternative Dispute Resolution in the Work Place § 10.06.

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Antonia Stamenova-Dancheva, an associate in the Firm's Litigation Group, has focused her practice on complex business litigation matters, including products liability and false advertising matters, antitrust and unfair competition actions, trade secrets and misappropriation disputes, as well as litigation related to residential mortgage-backed securities.

Ms. Stamenova has successfully represented a leading electronics and consumer products manufacturer in several nationwide and multistate consumer class actions. Recently, she defeated class certification and obtained dismissal and favorable summary judgment in a putative nationwide products-liability class action seeking $460 million in damages. Ms. Stamenova has also represented a diverse range of corporate clients, such as commodity manufacturers, providers of power management technologies and financial institutions.

Ms. Stamenova is actively involved in S&C's pro bono practice. Since 2010, she has been a part of the S&C team working alongside the ACLU of Southern California, Public Counsel, Mental Health Advocacy Services and the Northwest Immigrant Rights Project in *Franco-Gonzalez v. Holder*. As a result of the litigation, the U.S. District Court for the Central District of California ordered the government to create a system to screen immigration detainees for mental disability and assess their competency, to provide legal representation for those class members who are unable to represent themselves and bond hearings for class members facing prolonged detention. For her work on this matter, Ms. Stamenova was honored with the ACLU's "Equal Justice Advocacy Award" in 2011 and again in 2014. Ms. Stamenova has also done pro bono work for the Alliance for Children's Rights Foundation, including successfully finalizing the adoption of two foster children.