

To Litigate or To Arbitrate--That is the Question: Recent Arbitration Developments That Question the Pros and Cons of Arbitration

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To Litigate or To Arbitrate— That is the Question:

Recent Arbitration Developments That Question the Pros and Cons of Arbitration

Vanessa Szalapski, Dorsey & Whitney LLP

Aaron Schaer, Ballard Spahr LLP

Traditional Pros of Arbitration

- Quick results
- Less costly
- Parties select decision-maker
- Confidential
- Decision is usually final and binding
- Especially useful in international disputes



Traditional Cons of Arbitration

- Less thorough and detailed case presentation
- Less thorough analyses and explanations from arbitrator
- More likely to reach compromised result
- Less predictable
- Can be significant delays to initiating
- Limited appeal rights

Unique Developments & Considerations

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Handling preliminary
injunctive relief

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Dispositive motions
in arbitration

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Mass
arbitrations

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Stay of litigation
pending arbitration

Handling Preliminary Injunctive Relief

- Litigants traditionally went to court for this relief, but many arbitration forums now have specific rules that allow for this.
 - AAA Commercial Arb. Rule 39
 - JAMS Comprehensive Arbitration Rules and Procedures, Rule 2

Handling Preliminary Injunctive Relief

Potential for simultaneous motion practice in both venues because attorneys lack familiarity with arbitration rules or prefer courts.



Handling Preliminary Injunctive Relief

- Some state statutes provide for court ordered injunctive relief if an arbitrator has not yet been appointed.
- N.J.S.A 2A:23B-8(a): “Before an arbitrator is appointed and is authorized and able to act, the court, in such summary action upon application of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and pursuant to the same conditions as if the controversy were the subject of a civil action.”

Handling Preliminary Injunctive Relief

- Courts provide some possible benefits:
 - Arbitrators may be more likely to grant preliminary injunctions
 - Only courts can hold parties in contempt
 - Less ability to control selection of the emergency arbitrator

Dispositive Motions in Arbitration



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- Fewer incentives to close a case.

Dispositive Motions in Arbitration

- Even when dispositive and other motions decided, there are other potential drawbacks to arbitration:
 - Decisions not binding in other disputes
 - Creates less developed caselaw in frequently arbitrated areas

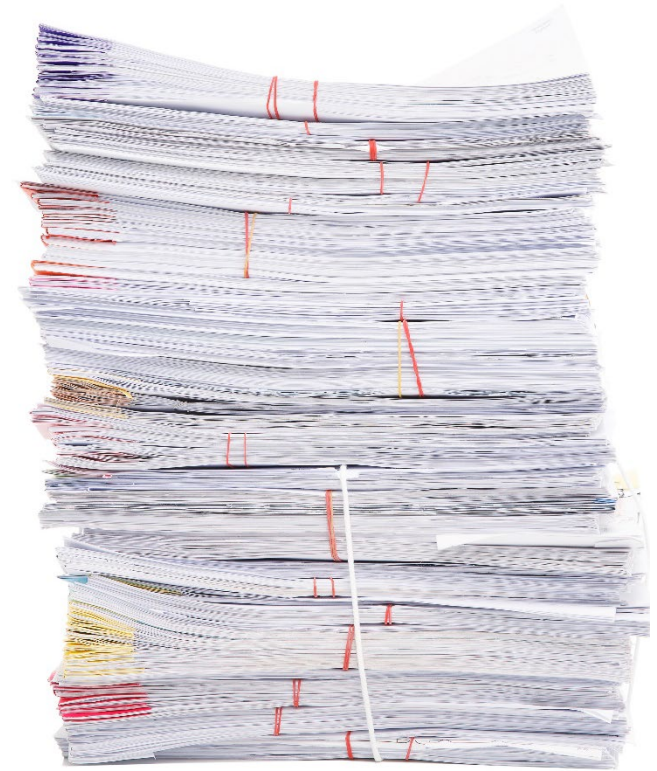
Mass Arbitrations

What are they and why are they happening?

- The usually coordinated filing of tens, hundreds, and possibly thousands of individual arbitration claims against the same defendant.
- Sparked by U.S. Supreme Court Decisions
 - *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (upholding arbitration class action waiver).
 - *Epic Sys. Corp. v. Lewis*, 584 U.S. 497 (2018) (holding employers can include arbitration agreements that include class and collective action waivers).

Mass Arbitrations Repercussions

- Defendants required to spend tens of millions on initial filing and arbitrator fees
- Overwhelming case loads



Mass Arbitrations

What to do about them?

- Some arbitration bodies have created specific rules
 - AAA has implemented sliding scale for filing fees for consumer cases
 - International Institute for Conflict Prevention and Resolution Employment-Related Mass Claims Protocol

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- Companies getting rid of class action waivers
- Reconsidering cost-shifting provisions in arbitration agreements

Stay of Litigation Pending Arbitration

Smith v. Spizzirri, 601 U.S. 472 (2024)

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- If court grants motion to compel arbitration, the court must stay the litigation if a party requests it and cannot dismiss litigation.

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- **Class action waivers:** may not always be what they're cracked up to be; it may be better to handle one case (or arbitration) than thousands
- **Conditions precedent:** ensure enforceability
- **Requesting a stay:** be careful what you request when moving to compel arbitration

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