Cooley

Mass Arbitration for Gaming Companies

Presented by:

Teresa Michaud and Marc Suskin

March 18, 2025

Part 1: What is Mass Arbitration? How Did We Get Here?

Cooley

What is Mass Arbitration

- Hundreds (usually thousands) of individual customers all file individual arbitration demands at the same time over the same issue
- Represented by the same counsel
- Arbitration rules (or the arbitration clause) require the company to pay all or most of the arbitration fees – upfront
- Arbitration fee exposure—and not the real amount in dispute—creates significant settlement leverage
- Cases involving **DoorDash, Postmates, Intuit** and **Uber** illustrate the risk

“Scared to Death by Arbitration”

The New York Times

‘Scared to Death’ by Arbitration: Companies Drowning in Their Own System

April 6, 2020

The Economist

Business

Jan 25th 2018

Kept out of the courthouse

When you cannot sue your employer

THE NATIONAL LAW REVIEW

October 5, 2020
Volume X, Number 279

Mass Arbitration, Más Problems

The Washington Post

DoorDash’s multimillion-dollar arbitration mistake

Feb. 16, 2020

How Did We Get Here?

- Rise of manadory arbitration clauses as a way to keep consumer/employee disputes out of court and manage class action risk
- Common practice to include:
  - Arbitration clauses: limited or no resort to courts (privacy/confidentiliaty)
  - Class action waivers: individual, noncollective, nonrepresentative, no consolidation
- Upheld by the Supreme Court
  - *AT&T Mobility v. Concepcion*, 563 U.S. 33 (2011) (consumer)
  - *Epic Systems v. Lewis*, 138 US 1612 (2018) (employment)

Mass Arbitrations Emerge

- Pre-2018, no mass arbitrations:
  - Consumers generally had less interest spending the time and money filing individual arbitrations over small amounts
  - With no representative actions, not financially viable
  - Strategy to challenge arbitration provisions for unconscionability
- The situation changed in 2018:
  - AAA and JAMS modified consumer fee schedule so company pays
  - Companies included fee provisions favorable to consumers
  - First wave focused on worker classification disputes

DoorDash (2019-20)

- **Size/Exposure**: 6k AAA arbitrations; over $12m in AAA filing fees
- **Dispute**: Drivers alleging improper classification as independent contractors
- DoorDash refused to pay, and claimants moved to compel arbitration and require DoorDash to pay the fees
- DoorDash unsuccessful with arguments that claimants filed **frivolous demands**, used mass arbitration **fees as leverage** and raised ethical concerns re: **business model of claimants' counsel**

Judge Alsup's Decision

- Feb. 10, 2020: In a scathing opinion against DoorDash, N.D. Cal. granted motion to compel:
  - "For decades, [employers] have forced arbitration clauses upon workers […] and forced class-action waivers upon them too."
  - "DoorDash, faced with having to actually honor its side of the bargain, **now blanches at the cost of the filing fees** it agreed to pay in the arbitration clause."
  - "In irony upon irony, DoorDash now wishes to resort to a classwide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. **This hypocrisy will not be blessed**."

Growth in Mass Arbitration

- Unclear in 2020-21 if mass arbitration would take off
- JAMS reports over last 2 years increase of 10x number of mass arbitrations
- Proliferation of small-to-medium plaintiffs' firms using mass arbitration
- In last 6 months, significant uptick in number of cases affecting gaming clients

Take-Away 1
Mass Arbitration is Here to Stay, including for Gaming Companies

Cooley

Part 2: Exposure and Mechanics

Cooley

Types of Disputes Susceptible to Mass Arbitration

- Consumer protection – including state UDAP, consumer fraud laws, unfair competition laws
- Privacy and data breaches
- Illinois' Biometric Information Privacy Act (BIPA)
- Video Privacy Protection Act (VPPA)
- California Invasion of Privacy Act (CIPA)
- Online gambling and/or loot box related claims

The Plaintiffs' Firms' Playbook

- Advertise to generate claims – on websites and social media platforms (Facebook, Instagram)
- Approach company with threat to file thousands of arbitration demands
- Little (to no) diligence on validity of claims – online sign-up flow
- Use the threat of huge upfront fees to force a lucrative settlement – usually divorced from the merit of the underlying claims

AAA/JAMS Consumer Fees

- Under AAA Consumer Arbitration Rules:
  - Company responsible for filing fees, case management fees, arbitrator compensation
  - Consumer only responsible for small filing fee (although companies often agree to pay these fees for small-value claims)
  - November 2020, AAA modified filing fees for mass claims
- Under JAMS Consumer Minimum Standards
  - Company responsible for filing fees, case management fees, and professional fees
  - Consumers only responsible for at most $250 in fees

Illustrative Example

- In case involving breach of Terms of Use, where actual damages range from less than $1 to $20
- If 20,000 users file individual arbitration claims, company liable for massive up-front fees and costs associated with each arbitration demand:
  - Flat initiation fees = $8,125
  - Per case fee (between $100-325 depending on # cases) = $2,375,000
  - Arbitrator appointment & final fees (approx. $1200 per case) = $24M
  - Arbitrator Compensation (approx. $2100 per case) = $42M
- Total financial exposure from Fees = Approx. **$68M**
- Actual damages stemming from breach = at most **$20-400K**

California Law Reform: SB 707

- Law passed by the California legislature in 2020
  - Response to companies who include mandatory arbitration, but do not pay arbitration fees when the clause is trigged
  - Courts can sanction companies who refuse to pay arbitration fees
- If company does not pay within 30 days of due date, claimants can:
  - Opt for litigation: allows for severe sanctions against company
  - Compel arbitration: company must pay “reasonable attorney’s fees and costs”

Institutions Adapt to Mass Arbitration

- **AAA, Mass Arbitration Supplementary Rules & Fee Schedule** (Jan. 2024): Applies where group filings > 25 claims; vastly reduced case fees under a tiered model; flat $8,125 initiation fees
- **CPR, Employment Related Mass Claims Protocol** (Sept. 2021): Applies where > 30 claims of "nearly identical nature"; uses randomly assigned test cases
- **FedArb, Framework for Mass Arbitration Proceedings** (Dec. 2024): Applies where group filings > 20 claims; expedited arbitration rules, MDL-like panel comprising three judges; affirmation requirement akin to FRCP Rule 11 "reasonable inquiry" standard
- **ADR Services Inc., Mass Employment Arbitration Fee Schedule** (Dec. 2020): Applies where group filings > 20 claims
- **NAM, Mass Filing Supplemental Rules** (Oct. 2024): Applies where group filings > 25 claims; tiered fees; process arbitrator for preliminary objections; optional global mediation

Take-Away 2
Arbitration Fees Create Enormous Leverage

Cooley

Part 3: Recent Cases

Cooley

MacClelland v. Cellco Partnership d/b/a Verizon, Case No. 3:21-cv-08592 (N.D. Cal. July 1, 2022)

Cooley

Background

- Class action brought against Verizon for false advertising due to alleged failure to disclose an “Administrative Charge” for wireless services
- Verizon moved to compel arbitration
- Bellwether arbitration provision limited number of pending arbitrations to 10 with the same counsel
- Customers could not file their claims in arbitration until the preceding bellwether batches were resolved
- Did not originally include a tolling provision

N.D. Cal. Struck Down Clause

- Ruled arbitration clause was substantively unconscionable
- Sequential bellwether arbitrations could take 100+ years to resolve
- Without a tolling provision, consumers might be forever barred
- Verizon's attempt to cure SOL issue not sufficient as changes not in effect, and per the Agreement, changes will not affect resolution of disputes before change
- Court also refused to sever the offending provisions because Agreement is "permeated by unconscionability"; severance would create a "perverse incentive" and potentially "indirectly reward systemic unconscionability"

Takeaways

- Bellwether and batch arbitration provisions remain largely untested
- Excessive restrictions on consumers' rights risk unconscionability finding
- Careful drafting (and a tolling provision!) may reduce the risk
  - *McGrath v. DoorDash, Inc.*, 2020 WL 6526129 (N.D. Cal. Nov. 5, 2020): found provision similar to the CPR Mass-Claims protocol "appear[ed] fair" and "would [not] result in significant delay in resolution of the [plaintiffs'] claims
- Not all bellwether provisions created equal
  - "It is one thing to set up a bellwether system to adjudicate a group of cases with the purpose of facilitating global or widespread resolution via ADR. It is another to formally bar the timely adjudication of cases that do not settle."

Wallrich et al. v. Samsung Electronics America, Inc. et al., Case No. 1:22-CV-05506 (N.D. Ill.); No. 23-2842 (7th Cir.)

Cooley

Background

- Samsung Terms & Conditions and EULA for Samsung Galaxy devices provide for mandatory AAA individual arbitration
- They also require Samsung to pay a portion of the filing fees and costs necessary for commencing arbitration
- Sept. 2022: Labaton filed 50,000 cases and Samsung's exposure is over **$200 million** in filing fees – Samsung refuses to pay
- Oct. 2022: Labaton requested AAA to close cases and filed motion to compel arbitration and order requiring Samsung to pay AAA arbitration fees and costs

Decisions

- Sept. 2023: N.D. Ill. compelled arbitration for majority of petitioners and ordered Samsung to pay fees
- July 2024: 7th Cir. reversed
- No evidence of petitioners being Samsung's customers and thus bound by arbitration agreement in Samsung's T&Cs
  - Mere spreadsheet listing individuals and addresses insufficient
- Court exceed its authority by ordering payment of AAA fees
  - AAA has discretion over fee disputes under AAA rules

Skot Heckman, et al v. Live Nation Entertainment, Inc. et al, Case No. 2:22-cv-00047 (C.D. Cal.); No. 2:22-cv-00047-GW-GJS (9th Cir.)

Cooley

Background

- Putative antitrust class action against Live Nation over ticketing fees
- July 2021: while case is pending, Live Nation revised arbitration clause to name new ADR provider – New Era ADR
- January 2022 – *Heckman* plaintiffs filed another complaint challenging designation of New Era as unconscionable
- March 2022 – Live Nation moved to compel arbitration
- August 2023 – Court denied motion to compel
- October 2024 – 9th Cir. affirmed

Takeaways

- Court found **procedurally unconscionable** because
  - Arbitration provision presented on a “take-it-or-leave it” basis, with no opportunity to negotiate from an entity with market dominance in the ticket services sector
  - Amended in the midst of ongoing litigation and applied retroactively to accrued claims
  - No notice of significant changes, which court found were buried in New Era ADR’s rules
- Court found **substantively unconscionable** because
  - Rules provide bellwether cases will be applied as precedent without same due process protections as court and no opportunity to opt out
  - No right to discovery and other procedural limitations (page and record limits)
  - Right to appeal grant of injunctive relief, but not denial

Takeaways (cont'd)

- Court also found **unenforceable** under California's *Discover Bank* rule, prohibiting class action waivers in consumer contracts of adhesion
- Not preempted by FAA because Congress "did not have class-wide arbitration in mind"
- At odds with SCOTUS prior holding that FAA's "overarching purpose" is to enforce arbitration agreements "according to their terms" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2010)

Part 4: What Can Companies do to Protect Themselves?

Cooley

Re-drafting Arbitration Clauses

- Companies should consider class actions vs. mass arbitration risks
- Companies should rethink their approach to arbitration
  - Clauses from the 2010s no longer work;
  - Revise dispute resolution to manage future exposure
- If arbitration, choose institutional rules that address mass arbitration with friendlier fee provisions
- Consider incorporating:
  - Informal dispute resolution to eliminate frivolous claims
  - Batched arbitration and/or bellwether arbitration and/or global mediation strategies

1. Informal Dispute Resolution

- Multi-tiered or step clauses can slow process and limit immediate leverage of imminent filings
  - Mediation/Informal dispute resolution
  - Amicable settlement period
- Helps to ensure claims and claimants are valid, while eliminating frivolous filings
- May greatly reduce number of actual claims
- But time/costs to manage

Informal Dispute Resolution – Examples

- "[Parties] agree that, before either [party] demands or attempts to commence arbitration against the other, we will personally meet and confer, via telephone or videoconference, in a **good-faith effort to resolve informally any claim** covered by this mutual Arbitration Agreement." (*Doordash ToS, Cl. 14(b)*)
- "If either [party] intends to seek arbitration under this agreement, the party seeking arbitration must first notify the other party of the dispute in writing at least 60 days in advance of initiating the arbitration… **If you have provided this information and we are unable to resolve our dispute within 60 days,** either party may then proceed to file a claim for arbitration." (*Verizon ToS, Cl. 16.4*)

2. Recourse to Small Claims Court

- Most mass arbitration claims involve small-value disputes
- Include exception to arbitration for small claims court
- Must be mutual to avoid unconscionability risk and to ensure company can invoke
- But often limited utility because plaintiffs' firms will often try to seek damages or relief to block small claims court

Option for Small Claims Court – Examples

- "Scope of Arbitration Agreement: [a]ny dispute or claim arising out of or relating in any way to the subject matter of the Agreement, your access or use of the Services as a User of the Services…. will be resolved by binding arbitration, rather than in court, except …(1) you may **assert claims in small claims court or tribunal** if your claims qualify, so long as the matter remains in such court and advances only on an individual (non-class, non-representative) basis" (*Doordash ToS Cl. 14(a)(i)*)
- "Despite this arbitration provision, either you or AT&T may bring an action seeking only individualized relief in **the small claims court** for the county (or parish) of your billing address, so long as the action is not removed or appealed to a court of general jurisdiction." (*AT&T ToS Cl. 1.3.2.1)*

3. Batch Arbitration

- Batch arbitration allows for grouping 50, 100, or 200 cases if they involve substantially similar facts and law and administering as single case
  - One set of filing fees per batch
  - Unconscionability risk if implemented incorrectly
- AAA, JAMS and NAM have enforced clauses containing batch arbitration provisions
- Still largely untested, but excessive restrictions and strict controls could result in the arbitration clause being held to be unconscionable

Batch Arbitration

- Grouping similar claims in batches and administering as a single case
  - **“**To increase the efficiency of [resolution], you and Coinbase agree that in the event that **there are one hundred (100) or more individual Requests of a substantially similar nature filed** …, within a thirty (30) day period (or as soon as possible thereafter), the AAA shall:
    - (1) administer the arbitration demands in batches of **100 Requests per batch** …;
    - (2) appoint **one arbitrator** for each batch; and
    - (3) provide for the resolution of each batch **as a single consolidated arbitration** with **one** set of **filing and administrative fees** due per side per batch, **one procedural calendar**, **one hearing** (if any) in a place to be determined by the arbitrator, and **one final award**.”

    (Coinbase UA, Appx. 5, Cl. 1.8)
  - See also similar wording in GrubHub ToU, Cl. VII.

4. Bellwether Clauses

- As an alternative to batch arbitration, companies may consider bellwether clauses
  - Test cases sent to arbitration while rest held in abeyance
  - Once test cases are resolved, global mediation follows
  - If mediation fails, cases proceed individually (or with batching)
- May be disfavored following *Heckman* decision
- Contrary to batching, bellwether simply delays the fee leverage
- Can be combined with batching for tailored clauses

Bellwether Clauses

- "… the parties shall select sixteen (16) individual arbitration demands (eight (8) per side) for arbitration to proceed ("**Bellwether Arbitrations**"). Only those sixteen (16) arbitration demands shall be filed with the arbitration provider, and the **parties shall hold in abeyance**, and not file, the non-Bellwether Arbitrations. … Following resolution of the Bellwether Arbitrations, the **parties agree to engage in a global mediation** of all remaining arbitration demands … … If the parties are **unable to resolve** … the remaining demands for arbitration … shall be **filed** and administered by the arbitration provider on **an individual basis**"

(Zoom ToS, § 27.7)

5. Revise Cost-Splitting Provisions

- Remove unconditional promises to pay consumers' filing fees
  - "**Your responsibility to pay** any AAA **fees and costs** will be solely as **set forth in the applicable** AAA **Rules**." (*Coinbase UA, Appx. 5, Cl. 1.4*)
  - "**Payment of all** filing, administration, and arbitration **fees will be governed by ADR** Services, Inc.'s **rules** (for California Consumers) or **NAM's rules** (for Non-California Consumers). If the arbitrator finds that you cannot afford to pay the filing, administrative, hearing, and/or other fees and cannot obtain a waiver of fees from the applicable arbitration provider, DoorDash will pay them for you." (*Doordash ToS, Cl. 12(c)*)
  - "**Payment of all** AAA and arbitrator **fees** will be **governed by the AAA's rules**, unless otherwise stated in this Agreement to Arbitrate. If the value of the relief sought is $10,000 or less, at your request, PayPal will pay all filing, administration, and arbitrator fees associated with the arbitration." (*PayPal UA*)

Cost-Shifting for Frivolous Claims

- "The parties shall bear their own attorneys' fees and costs in arbitration **unless the arbitrator finds that** either the substance of the Dispute or the relief sought in the Request was **frivolous** or **was brought for an improper purpose** (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))." (*Coinbase UA, Appx. 5, Cl. 1.7*)
- "Although under some laws Lyft may have a right to an **award of attorneys' fees and non-filing fee expenses** if it prevails in an arbitration, Lyft agrees that it will not seek such an award unless you are represented by an attorney or the **arbitrator has determined that you or your counsel have violated the standards of Federal Rule of Civil Procedure 11(b),** which the parties agree shall be applicable in arbitration." (*Lyft ToS, Cl. 17(f)(5)*)

6. Rethinking Delegation Clauses

- Delegation clause determines who decides arbitrability (*i.e.*, does a dispute belong in arbitration)
- In general, most arbitration clauses send all arbitrability questions to the arbitrator
- In mass arbitration context, this means the company must still pay the fees for thousands of arbitrations
- For some issues, it may be better to send them to court (*e.g.*, enforceability or breach of class action waiver, exhaustion of informal dispute resolution provisions, which version of the clause controls)

Detailed Delegation Clauses

- "All issues are for the arbitrator to decide, except that a **court of competent jurisdiction shall decide issues relating to arbitrability, the scope or enforceability of this Agreement to Arbitrate** and issues that this Agreement to Arbitrate indicates that a court can resolve." (*PayPal UA*)
- "[O]nly a **court of competent jurisdiction**, and not an arbitrator, shall have the **exclusive authority** to **resolve** any and all **disputes** arising out of or relating to the **Class Action Waiver and Mass Action Waiver**." (*Uber ToS, Cl. 2(a)(4)*)
- Our current best practice is to delegate to courts disputes regarding class action waiver

Take-Away 3
To Manage Mass Arbitration Risk, Companies Need to be Proactive

Cooley

Questions?

Cooley

April 9 - UK Online Safety Act: Key Compliance Challenges for Gaming Companies

The UK’s new Online Safety Act is going to have material impact on a huge number of gaming companies of all sizes across the world.

It has a broad territorial scope - meaning you don’t have to be based in the UK for it to apply. It will reshape the UK's rules around managing illegal content online and protecting children online. It also has attention-grabbing penalties - up to 10% of annual global turnover, and criminal liability provisions for senior managers.

Join Cooley Partners Bryony Hurst and Leo Spicer-Phelps for a session that will explore:

- Who the Online Safety Act applies to
- When you need to comply
- What you need to do to comply