

# A Leaky Boat in Rough Waters — Arbitrating Class Actions

BY LOUISE LAMOTHE

Since 2003, arbitrators have been navigating uncharted waters. In *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, the United States Supreme Court decided the arbitrator should determine whether an arbitration clause allows classwide arbitration when the arbitration clause is silent on the subject. Since then, if the arbitrator decides that arbitration on behalf of a class is permitted, then the arbitrator conducts the arbitration procedures that follow in the case.

While class arbitrations had existed before the *Bazzle* case, they have significantly increased since. The two most significant arbitration providers — the American Arbitration Association (AAA) and JAMS — rushed to create class procedural rules and dozens of arbitrations are underway. A dearth of reported cases gives little guidance to arbitrators. Overall, there are many perplexing issues to resolve.

Class arbitrations cover the same types of cases the courts have handled arising from standardized contracts in consumer, health care, franchise, customer, and employment relationships. These are usually adhesion contracts in which the stronger party has dictated the terms of the deal and “agreement” is a fiction. Frequently, choice of law is a thorny threshold issue because the adhesion contract that produced the dispute may have many provisions, including choice of law provisions, which claimants argue are unconscionable.

Arbitrators deciding the governing substantive law follow the applicable court decisions while procedural guidance comes from both F.R.C.P. Rule 23 and corresponding state law. But the precise structure for managing class arbitrations is established by the provider organization’s own rules.

## **Provider Rules for Navigating Class Arbitrations**

Each of the large provider organizations has a phased process for handling class actions. The AAA’s Rules, available on its Web site at [www.adr.org](http://www.adr.org), are known as the Supplementary Rules for Class Arbitrations. JAMS’ Class Action Procedures similarly set forth the rules in that forum on its Web site, [www.JAMSadr.com](http://www.JAMSadr.com).

The first step is the “clause construction” decision (see, e.g., AAA Rule 3), in which (post-*Bazzle*) the arbitrator decides if the arbitration clause allows classwide arbitration when the clause is silent about class treatment.

The second phase is class certification (see, e.g., AAA Rules 4, 5). At this stage, the arbitrator determines whether the issues presented are appropriate for classwide treatment, and if so, the class definition. If

the arbitrator certifies a class, the arbitrator also establishes the wording of the class notice, the specifics of its mailing and the procedures for opting out (see, e.g., AAA Rule 6).

Third is the hearing on the merits of the case. It is handled as any evidentiary hearing, keeping in mind that the rights of absent parties, as well as those at the table, are at issue. AAA Rule 7 provides that the final award shall be “reasoned.”

All of these steps frequently involve discovery, which needs to be carefully tailored to the issues at hand in each phase and balanced to achieve justice. Arbitrators are aware that parties choose arbitration, in part, because it can be a more streamlined process, so it is important that discovery does not get out of control. On the other hand, in class actions statutory rights are frequently at issue and the rights of hundreds or even thousands of absent class members are affected by the arbitrator’s decisions. Frequently, issues of e-discovery arise, as well.

Calendar management is a challenge, as it is for courts faced with class actions. We arbitrators take our cues from the courts handling any complex dispute with a couple of important differences. One difference is that we have the time to oversee the process closely, whereas the court may have hundreds of matters on its calendar. The parties will have the arbitrator’s attention whenever they seek it. Moreover, if the contract calls for a panel of three arbitrators, the panel may include someone with technical experience — an engineer or an accountant, for example. This expertise may enhance the quality of the decisions reached.

A couple of traditional arbitration processes are reversed in the class context. First, the providers’ class rules allow



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judicial review during the process, rather than simple confirmation of the final award at the end. The AAA Rules, for example, include a stay of proceedings after the arbitrator's partial final award in each of the first two phases described above; however, there are very few reported decisions for guidance. In *Dealer Computer Services v. Dub Herring Ford*, (4<sup>th</sup> Cir. 2009) 547 F.3d 558, the Fourth Circuit refused to review the arbitrator's clause construction partial final award. The court reasoned that neither the parties nor the AAA rules could impose on the court the obligation to review a non-final award.

Moreover, arbitrators' decisions are public, a 180-degree shift from traditional arbitration. Any arbitrator's class action orders may be found simply by Googling the arbitrator's name. The AAA website also lists its entire class action docket.

### **Why the Boat Leaks**

So why do I call class arbitration a "leaky boat?" Well, for as long as arbitration agreements imposed by adhesion contracts have existed, the weaker parties have been trying to avoid them when disputes arise. When the trend of court decisions enforcing arbitration of disputes accelerated, adhesion contracts everywhere soon required arbitration. But the stronger, drafting parties did not want class actions in arbitration any more than they wanted them in court. So, arbitration clause drafters began to insert provisions precluding class arbitration. These restrictive provisions inevitably ended up being challenged in court, on the ground that it is unconscionable to require a party to arbitrate, while precluding that party from representing a class in that forum. In California, courts frown on those restrictive clauses. (See, e.g., *Discover Bank v. Superior Court* (2005) 36 Cal.4<sup>th</sup> 148.)

But claimants really don't want to be in arbitration, so the legislative fight against it has intensified. In Congress, efforts to eliminate pre-dispute arbitration provisions in adhesion contracts could get traction this year due to the new Administration. A bill now pending in Congress — H.R. 991 (the Consumer Fairness Act of 2009) — would make arbitration agreements in consumer contracts illegal under the Consumer Credit Protection Act. If this bill passes and becomes law, arbitration of disputes arising from adhesion contracts will be a thing of the past. And if that happens, class arbitrations will disappear as well since they are creatures of those adhesion contracts, too.

Perhaps neither side will miss them. ☐

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