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Is Arbitration Worth It? The Pros and Cons of Arbitrating Franchise Disputes

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I. Introduction

When disputes arise concerning the franchise relationship, both parties, franchisor, and franchisee alike, are usually interested in a speedy and cost-effective resolution of their dispute. Since the franchisor and franchisee are in a long-term symbiotic relationship, a high-stakes battle to the death is not an optimum dispute resolution strategy. In addition to time and cost considerations, it may be important to the parties that their dispute is heard in a convenient venue by a finder of fact who is knowledgeable about franchising and commercial contracts. With these objectives in mind, along with other considerations discussed in this paper, the parties in a franchise relationship often look to arbitration to resolve their disputes.

Arbitration is not, however, a panacea. For every advantage, there is an attendant disadvantage. For example, the discovery process can be less rigorous and there are limited avenues for contesting a flawed arbitration award. Additionally, in recent years parties to arbitration have reported that arbitration does not always deliver time and cost savings. These factors, when combined with changes in the legal landscape concerning the enforcement of agreements to arbitrate, have caused some to question whether arbitration is worth it. This paper explores the pros and cons of arbitration as it stands today.

We begin with an important caveat: not all arbitration forums are the same. Just as courts vary by jurisdiction, different arbitration forums apply different rules and procedures and have their own rosters of arbitrators. For purposes of this paper, the authors have focused on the two most popular arbitral forums for domestic commercial disputes—the American Arbitration Association ("AAA") and JAMS f/k/a Judicial Arbitration and Mediation Services. In a dispute between franchisor and franchisee, each of these forums would apply their general commercial arbitration rules, the AAA's Commercial Arbitration and Mediation Procedures ("AAA Rules"), and JAMS's Comprehensive Arbitration Rules & Procedures ("JAMS Rules"). While other organizations could administer a franchise arbitration, and other procedural rules could be applied, these are the two most common and widely trusted arbitral forums for commercial disputes in the United States.[1]

II. Getting to Arbitration

This section discusses the process—which is fraught with many pitfalls—for bringing a dispute to arbitration. While arbitration has many advantages, these pitfalls can make it difficult and costly to get to arbitration.

With a few exceptions, parties are required to arbitrate any dispute that falls within the scope of an arbitration clause in their agreement. The primary law regarding

[1] The focus of this article is domestic arbitration within the United States. This article does not provide guidance with respect to the pros and cons of international arbitration. Similarly, this article focuses only on disputes within the franchise relationship between franchisors and franchisees. It does not provide guidance on the other contexts within which a franchisor or franchisee might get embroiled in legal disputes. For example, consumer-facing franchises can sometimes get involved in litigation with consumers and customers. Arbitration can be useful in this context as well, but that topic is beyond the scope of this article.

arbitration in the United States is the Federal Arbitration Act ("FAA"). The FAA provides that written agreements to arbitrate in interstate and foreign commerce are "valid, irrevocable, and enforceable, save as upon such grounds as exist at law or in equity for the revocation of any contract."[2] The FAA requires courts to place arbitration agreements on equal footing with all other contracts.[3] In addition, all fifty states and the District of Columbia have enacted arbitration laws of their own, which fill gaps not covered by the FAA. These state laws are preempted by the FAA if they undermine the goals and policies of the FAA.[4] The Supreme Court has made clear that state laws that specifically discriminate against arbitration, by putting conditions on arbitration agreements that do not apply to contracts generally, are void.[5] State laws impacting arbitration agreements are not preempted by the FAA to the extent that they govern the validity or revocability of contracts generally or concern procedural rules that do not substantively conflict with the FAA.[6] Notably, state law supplements the FAA on issues of arbitration procedure, and also governs whether state statutes of limitations apply to matters decided by arbitration. Most states have modeled their arbitration statutes on the Uniform Arbitration Act ("UAA").[7]

A. Who Decides Whether a Dispute will be Resolved by Arbitration?

Arbitration starts with the parties' agreement to arbitrate disputes. In some instances, the agreement to arbitrate does not occur until the dispute arises. In these instances, parties to a dispute that would otherwise be resolved in court, agree to submit their dispute to arbitration to have it decided by one or more arbitrators rather than a judge or jury. In other instances, a court may order parties to arbitrate a particular issue pursuant to a local statute or court procedures for certain types of civil disputes. In most instances, however, the parties find themselves bound to arbitrate because they agreed in advance to arbitrate their disputes. In the franchise context, a pre-dispute agreement to arbitrate is most often found in the franchise agreement or the franchise application.

Most franchise agreements have an alternative dispute resolution provision that sets forth mandatory procedures for resolving disputes. For example, many agreements require the parties to engage in an informal settlement process and/or to submit their dispute to mediation before proceeding with adversary litigation. Under such agreements, only after settlement efforts have failed are the parties permitted to file claims in court or arbitration.

Since the franchisor is the drafter of the franchise agreement, it has the added benefit of crafting the arbitration clause to suit its preferences in terms of geography, choice of an arbitration association (*i.e.,* the organization that will administer the

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[2] 9 U.S.C. § 2.

[3] *See Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017).

[4] *See Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

[5] *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996).

[6] *See Volt*, 489 U.S. at 476; *Perry*, 482 U.S. at 492.

[7] *Revised Uniform Arbitration Act: Overview, Practical Law Practice Note Overview w-004-5167.*

arbitration utilizing its specific procedural rules and pool of arbitrators), costs and attorney's fees split, and more. While franchisees often do not have a direct say in the drafting of the dispute resolution clause in their franchise agreement, well-drafted arbitration clauses can also give the franchisee some level of certainty as to where a dispute will be heard, the procedural aspects, and some idea as to its cost.

The parties may choose to have the question of whether a dispute is arbitrable decided by the court or delegate this authority to an arbitrator. However, in cases where the parties intend the issue to be decided by an arbitrator, it must be clearly specified in their agreement.[8] If the agreement is ambiguous as to whether arbitrability has been delegated to the arbitrator, a party who wishes to avoid arbitration will be empowered to either file the claim in court or petition a court to enjoin arbitration on the claim.

In resolving arbitrability questions, courts look at the FAA and the parties' agreement. The court will not take the parties' agreement to arbitrate certain disputes to mean that the parties agreed that an arbitrator must decide questions of arbitrability. To ensure that only an arbitrator decides arbitrability, the agreement must be "clear and unmistakable" that the parties intended for questions of arbitrability to be decided by an arbitrator.[9] This begs the question of what constitutes "clear and unmistakable evidence." In the absence of an explicit statement by the parties that arbitrability issues will be delegated to an arbitrator, the answer to that question could depend on the jurisdiction deciding the arbitrability issue and how it views implied delegation provisions.

The most straightforward evidence is an express delegation provision, stating unambiguously that the parties intend to have an arbitrator decide threshold issues, including whether a dispute is subject to arbitration. Where the language is clear, courts will generally defer to the arbitrator. Additionally, even absent a clear express delegation, some courts (but not most) have recognized an implied agreement by the parties to delegate questions of arbitrability to an arbitrator where the arbitration clause is broad.[10] In addition, some circuits will imply delegation where the parties' arbitration clause adopts arbitration association rules that provide for arbitrability to be decided by an arbitrator, such as the AAA's Commercial Arbitration Rules and Mediation Procedures or the JAMS Comprehensive Arbitration Rules and Procedures, among others. However, some circuits have held that the parties' agreement to arbitrate under the AAA's rules does not, by itself, constitute clear and unmistakable evidence of the parties' intent to delegate arbitrability to an arbitrator.[11]

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[8] *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010).

[9] *First Options of Chi.*, 514 U.S. at 944.

[10] *See Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 898 (2d Cir. 2015) (finding the parties delegated questions of arbitrability to the arbitrator where the arbitration clause provided that "any other dispute [that] arises between the parties" must be arbitrated if either party elects arbitration); *Shaw Grp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 121 (2d Cir. 2003) (finding that a referral of "any and all" controversies was a "broad grant of power" to the arbitrator that included questions of arbitrability).

[11] *See Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972-73 (8th Cir. 2017); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 762-63 (3d Cir. 2016); *Del Webb Comm's v. Carlson*, 817 F.3d 867, 876-77 (4th Cir. 2016).

Notably, in the 2019 Supreme Court Decision *Henry Schein, Inc. v. Archer and Whole Sales, Inc.*, the Court declined to answer whether incorporation of an arbitration association's rules is clear evidence of delegation of arbitrability to an arbitrator.[12] The Court instead decided a different question—whether courts can rule on arbitrability when, even though the agreement expressly delegates questions of arbitrability to the arbitrator, any assertion of arbitrability is "wholly groundless."[13] The Court ruled that there is no "wholly groundless" exception—where the parties have clearly and expressly delegated arbitrability disputes to arbitration, the courts must abstain from ruling on those questions, even when they are certain that the underlying dispute must ultimately be returned to court.[14]

What happens if the parties sign two different contracts, one providing for the dispute to be resolved in arbitration, and the other providing for the dispute to be resolved in court? Pursuant to the Supreme Court's decision in *Coinbase v. Suski*,[15] the Court held that the question of whether the parties' prior agreement is superseded by a subsequent agreement must be decided by the court, not the arbitrator.[16] In that case, Coinbase and the respondent users of the platform had executed two contracts. The first contract, the Coinbase User Agreement, contained an arbitration provision and a delegation clause, while ~~a~~ the second contract, the Official Rules for a promotional sweepstakes, contained a forum selection clause providing that California courts had sole jurisdiction over controversies regarding the sweepstakes.[17] The court found that the issue of whether the parties intended to arbitrate their dispute goes to the question of which contract governs, and the agreement to arbitrate as a whole, which should be decided by the court.[18]

B. Are there Ways Around an Arbitration Clause?

Even when questions of arbitrability are delegated to an arbitrator, courts retain the authority to decide issues pertaining to the formation of the agreement to arbitrate. However, this reservation to the courts does not necessarily extend to issues concerning the formation of the contract as a whole, since the agreement to arbitrate is viewed as a standalone agreement.[19]

When contesting the existence of a valid agreement to arbitrate, the party making the challenge can assert any of the generally applicable challenges to contract

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[12] *Henry Schein, Inc. v. Archer and White Sales, Inc.,*, 139 S. Ct. 524, 531 (2019).

[13] *Id.* at 529.

[14] *See id.* at 529-31.

[15] 144 S. Ct. 1186 (2024).

[16] *See id*. at 1194.

[17] *See id*. at 1191.

[18] *Id.* at 1194 ("[W]here . . . parties have agreed to two contracts—one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitrability disputes to the courts—a court must decide which contract governs").

[19] *See Ahlstrom v. DHI Mort. Co.*, 21 F.4th 631, 635 (9th Cir. 2021); *In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 880-83 (6th Cir. 2021); *MZM Constr. Co., Inc. v. N. J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 401-02 (3d Cir. 2020).

formation.[20] This includes unconscionability, lack of mutuality, and fraud, to name a few. State contract law will determine whether the parties entered into an agreement to arbitrate, and courts will follow a valid choice of law provision in the overall agreement.[21] In general, the party challenging the validity of the clause will bear the burden of proving that it is unenforceable.[22] In addition, parties seeking to challenge an arbitration provision should be sure that the challenge is directed to the arbitration clause itself rather than the contract as a whole.[23]

The unconscionability doctrine is the primary basis for striking down clauses that overreach. As with any agreement, an agreement to arbitrate may be unconscionable if the agreement is materially one sided.[24] A court evaluating an unconscionability challenge will consult state law.[25] An unconscionability challenge can be asserted on two separate tracks—substantive unconscionability and procedural unconscionability.

Substantive unconscionability concerns the fairness of the terms and considers the commercial reasonableness of the terms, the purpose and effect of the terms, the allocation of risk between the parties, and public policy concerns. In *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.,* the Ninth Circuit found a franchise agreement's arbitration provision to be substantively unconscionable due to the mandatory waiver of nonwaivable statutory franchise rights, the franchisor's reservation of a unilateral right to seek injunctive relief, and the Texas choice-of-forum provision.[26] The court declined to sever the overreaching provisions "because they permeated the arbitration clause and severing them would have negated the entire arbitration clause."[27]

Procedural unconscionability asks whether the parties understood what they were agreeing to or whether there was oppression or surprise due to unequal bargaining power.[28] Courts will look at the sophistication of the parties.[29] In the context of franchising, courts may be reluctant to strike down an arbitration clause as procedurally unconscionable, given the disclosures which franchisees receive before signing the franchise agreement, which undermines an argument of surprise.[30] In *Chin v. Advanced Fresh Concepts Franchise Corp.*, an appellate court in California found that because "a franchise agreement is made in a commercial context where arbitration is quite common, and reasonably to be anticipated, absent some special element of unfair advantage an

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[20] *See Casarotto*, 517 U.S. at 686−87 (1996).

[21] *See id*.

[22] *See Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

[23] *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-04 (1967).

[24] *See Longnecker v. American Exp. Co.*, 23 F.Supp.3d 1099, 1110 (D. Ariz. 2014).

[25] *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686−87 (1996).

[26] *See Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004-05 (9th Cir. 2010).

[27] *Id.* at 1005.

[28] *See id.* at 1004.

[29] *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1283 (9th Cir. 2006).

[30] *See We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838, 843 (7th Cir. 1999).

arbitration provision in a franchise agreement may be enforced though the agreement is adhesive, under the doctrine of unconscionability."[31]

The case law is not, however, uniform. In *Nagrampa v. MaiCoups, Inc*., the Ninth Circuit Court of Appeals, analyzing an unconscionability claim under California law, found the franchise agreement to be a contract of adhesion.[32] It further found the forum selection clause, requiring the California franchisee to arbitrate in Massachusetts, was substantively unconscionable, as was a provision in the franchise agreement giving the franchisor access to courts to seek provisional remedies to protect its intellectual property.[33] In *Ticknor v. Choice Hotels Int'l, Inc.,* the Ninth Circuit, this time reviewing under Montana law, found that a one-sided arbitration clause that allowed the franchisor, but not the franchisee, to bring certain claims in court, was procedurally unconscionable.[34]

Fraud is another possible ground for invalidating an arbitration clause. However, to avoid arbitration based on fraud, the fraud must have been specifically targeted ~~to~~ at the arbitration agreement itself, rather than ~~to~~ at the contract generally.[35] It is not sufficient for the party seeking to avoid arbitration to argue that the entire contract is voidable because it was induced by fraud. For example, in *DetailxPerts Franchise Sys., LLC v. TKTM Enterprises, LLC*, the court found that the arbitration clause giving the arbitrator authority to determine the validity of the contract was severable from the rest of the contract, and because the franchisee did not challenge the validity of the arbitration clause, it was up to an arbitrator to decide the franchisee's fraud claims.[36]

In addition, a party's effort to bring claims in arbitration may be challenged based on waiver or estoppel. In arguing that a party has waived its right to arbitrate, the party bringing the challenge must show that based on the other parties' conduct in litigating the claims or failure to seek arbitration sooner, it has waived its right to now arbitrate the claims. Courts reviewing a litigation conduct waiver challenge will typically consider whether the party had knowledge of its right to arbitrate the dispute and, under the totality of the circumstances, acted inconsistently with that right. A federal court may find that a party acted inconsistently with its right to arbitrate if it substantially participated in litigation before seeking to arbitrate.[37] For example, a court may find waiver if the party participated

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[31] *Chin v. Advanced Fresh Concepts Franchise Corp.*, 194 Cal.App.4th 704, 710 (2d Dist. 2011).

[32] *See Nagrampa,* 469 F.3d at 1282-83.

[33] *See id.* at 1285-92.

[34] *See Ticknor v. Choice Hotels Int'l, Inc.,* 265 F.3d 931, 939-41 (9th Cir. 2001).

[35] *See Prima Paint,* 388 U.S. at 403-04 ("[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.").

[36] *See DetailxPerts Franchise Sys., LLC v. TKTM Enterprises, LLC*, 2018 WL 5885503, at *2-3 (E.D. Mich. 2018).

[37] *See In re Pawn Am. Consumer Data Breach Litig.*, 2024 WL 3366702, at *2 (8th Cir. 2024).

in depositions and other substantial discovery, or waited for a significant length of time and engaged in motion practice before seeking to compel arbitration.[38]

In *Morgan v. Sundance, Inc.,* the Supreme Court clarified that federal courts may not adopt an arbitration-specific rule conditioning waiver of the right to arbitrate on a showing of prejudice.[39] While courts are disinclined to find waiver due to the strong federal presumption in favor of arbitration, they may find that a party has waived its right to arbitration, where it is clear that the party's motive in now seeking to arbitrate is that it is unhappy with how the litigation is proceeding. As best practice, parties seeking to compel arbitration of a claim that is currently in court should act quickly to avoid a finding that they have waived their right to arbitration. Issues of waiver may also be delegated to the arbitrator by the parties' agreement.

In some instances, arbitration may be avoided if the nature and claims of the dispute are outside of the scope of the parties' arbitration agreement. The parties' agreement to arbitration may require the parties to arbitrate the entire dispute or only limited issues. As with other considerations concerning arbitrability, a court will decide whether a dispute falls within the scope of an arbitration clause unless the parties have clearly and unequivocally delegated this review to an arbitrator.

A broadly written arbitration clause typically refers to the arbitration of all disputes "arising from," "arising out of," "relating to," or "connected with" the agreement. Furthermore, the parties may evidence their agreement to a broad arbitration clause by either incorporating the standard broad arbitration provision recommended by an arbitration association, such as the AAA's broad template language, or by creating their own broad provision.[40] Alternatively, parties may agree upon a narrow arbitration clause by deviating from the standard broad provision and by limiting arbitration only to a subset of disputes that may arise out of the agreement.[41]

Parties to a dispute resolution clause providing for arbitration do not need to make arbitration mandatory in all cases. They can draft a broadly worded arbitration clause but also choose to carve out certain types of disputes that need not be arbitrated. A potential drawback, however, is that arbitration clauses with carve-outs and exceptions can lead to disputes between the parties as to whether a particular claim falls within the scope of the arbitration clause. In other words, whether the claim is arbitrable. This is particularly true in situations where some of the dispute is carved out while the rest of the dispute is covered by the arbitration clause.

While arbitration clauses in franchise agreements are generally quite broad, in some instances the franchise agreement arbitration clause may be drafted more narrowly with carve-outs for certain matters. For instance, the arbitration clause might carve-out

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[38] *See Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1278 (11th Cir. 2012); *South Broward Hosp. Dist. v. Medquist, Inc.*, 258 F. App'x 466, 468 (3d Cir. 2007).

[39] *See Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022).

[40] *See Papalote Creek II, L.L.C. v. Lower Colorado River Authority*, 918 F.3d 450, 456 (5th Cir. 2019).

[41] *See United Offshore Co. v. So. Deepwater Pipeline Co.*, 899 F.2d 405, 410 (5th Cir. 1990).

disputes concerning money owed under the agreement or certain grounds for termination.[42] A more common carve out from arbitration is one allowing a franchisor to file in court to protect its intellectual property. While often intended by the franchisor to be permissive rather than a requirement that it file intellectual property protection claims in court, at least one court has found that this type of carve out prevented the franchisor from bringing trademark claims against its franchisee in arbitration.[43]

Considering the many ways in which an arbitration clause might be challenged, franchisors and franchisees might question whether arbitration is worth the potential time and money that could be spent on a preliminary dispute about whether their claims belong in arbitration. On the one hand, if the other potential benefits to arbitration, including finality, flexibility, nonprejudicial decisions, and a finder of fact knowledgeable in the subject matter are worthwhile, then it could be money and time well spent. On the other hand, it could make arbitration start to look more comparable to litigation in terms of time and money.

If a party has decided to resolve disputes by arbitration, it is wise to commit to that path, and provide evidence of that intent in the drafting of the agreement to arbitrate. The use of broad and unambiguous language in the arbitration agreement, and limiting carve-outs to arbitration, substantially increases the likelihood that a dispute will be found arbitrable. In addition, clearly and unmistakably delegating procedural and arbitrability questions to the arbitrator should avoid or reduce time spent in court enforcing the agreement to arbitrate. Parties should also keep in mind that the sample arbitration provisions from AAA and JAMS, while not a guarantee of an enforceable agreement to arbitrate, are battle-tested and are a good resource for parties looking to resolve disputes through arbitration with either AAA or JAMS. If parties are considering deviating from a broadly worded arbitration clause, they should carefully think through the cost versus the benefit of that deviation. Finally, parties should avoid selective enforcement of an agreement to arbitrate.

C. Enforcing Your Arbitration Clause

As discussed above, parties to agreements with arbitration clauses can at times find themselves in a two-part dispute that requires them to contend with getting the claims before an arbitrator before they can start resolving the merits of the case. This typically happens in a situation where one party to the dispute files claims in court, while the other party seeks to enforce an agreement to arbitrate.

Section 4 of the FAA provides that if a party fails to arbitrate claims under an agreement, the party "aggrieved by the alleged failure, neglect, or refusal" may petition any United States district court to compel arbitration.[44] This may be filed as a separate petition to compel arbitration of claims or as a motion to compel arbitration in an existing

[42] *See Mainstream Fashions Franchising, Inc. v. All These Things, LLC*, 453 F. Supp. 3d 1167, 1178-1179 (D. Minn. 2020).

[43] *See Core Progression Franchise LLC v. O'Hare*, 2021 WL 1222768, *2 (D. Colo. 2021).

[44] 9 USCA § 4.

case. Any doubts a court may have on whether a dispute is arbitrable should be resolved in favor of arbitration.[45] The FAA does not in and of itself confer federal subject matter jurisdiction, but it applies in both federal and state courts.[46] A party seeking to compel arbitration in federal court must independently meet jurisdiction requirements for diversity or federal question.[47] Where the requirements for federal court jurisdiction are not met, a party may seek an order compelling arbitration in a state court having jurisdiction.

While seeking an order compelling arbitration, the party seeking to enforce arbitration will also want to prevent the underlying dispute from going forward in court, so as not to run the risk of court decisions on the merits before the dispute can get to arbitration. Under Section 3 of the FAA, a court must issue a stay of proceedings if it finds that the parties should be compelled to arbitrate the dispute but will only do so on application of one of the parties.[48] Therefore, it is advisable to request a stay of the proceedings until the arbitration is completed.

Earlier this year, in its decision in *Smith v. Spizzirri*, the Supreme Court resolved a circuit split as to whether a court must stay claims that have been compelled to arbitration or can dismiss the lawsuit.[49] The court held that when a federal court finds that a dispute is subject to arbitration and a party has requested a stay of the court proceeding pending arbitration, the plain text of the FAA compels the court to stay the proceeding.[50] The court stated that because the FAA sets forth the procedures for enforcing arbitration agreements in federal court, it overrides the inherent powers of the court, such that the court does not have the discretion to dismiss the case in lieu of staying it. The Court noted that while Section 16 of the FAA authorizes an immediate interlocutory appeal of the *denial* of a request to compel arbitration, an order *granting* a motion to compel arbitration is not immediately appealable.[51] However, if a district court were allowed to dismiss the underlying lawsuit subject to arbitration, the losing party would have the right to an immediate appeal notwithstanding Congress's intent that such decisions not be appealable. The Court stated that it makes sense to keep the lawsuit on the court's docket given the supervisory role of the courts envisioned by the FAA.[52]

A party seeking to enforce its arbitration agreement may seek to compel arbitration of claims brought by non-signatories to the contract. For example, if a non-signatory to a contract containing an arbitration clause brings claims arising from or relating to the franchise agreement in court. In these cases, a party to the franchise agreement may seek to compel the nonsignatory's claims to arbitration. In other instances, a nonsignatory

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[45] *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

[46] *See Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984).

[47] *See 1mage Software, Inc. v. Reynolds and Reynolds Co.*, 459 F.3d 1044, 1054 (10th Cir. 2006); *Moses H. Cone Mem'l. Hosp.*, 460 U.S. at 25.

[48] 9 USCA § 3.

[49] *See Smith v. Spizzirri*, 601 U.S. 472, 477 (2024).

[50] *See id.*

[51] *See id* at 478.

[52] *See id*.

to the franchise agreement may be the one seeking to utilize Section 3 of the FAA to compel claims to arbitration. To resolve cases like these, the court will look to the applicable state-law principles that allow enforcement of contracts by or against non-signatories.[53] While "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit[,]"[54] a party can be found to have agreed to submit to arbitration even though the party did not personally sign the arbitration agreement.[55] In examining this issue, courts will generally look to whether the arbitration clause is broad or narrow. If the clause is limited to disputes between signatories to the agreement, the court likely will not compel arbitration.

Federal courts have found that non-signatories to an agreement have agreed to arbitrate their claims under the principles of estoppel, incorporation by reference, agency, assumption, alter ego, and third-party beneficiary.[56] For instance, a court may estop a party from avoiding a contract's obligation to arbitrate if the party asserts a claim or defense under the contract and that contract contains an arbitration clause. Courts have been more willing to estop signatories from avoiding arbitration of claims filed in arbitration by non-signatories, and reluctant to require non-signatories to arbitrate their claims. However, in the franchise context, there are some instances where a court found that a non-signatory agreed to arbitrate, such as in the context of a non-signatory claiming to be a franchisee under the franchise agreement.[57]

In reviewing whether to compel arbitration, courts or the arbitrator, whomever is determining arbitrability, may evaluate the extent to which matters that are collateral to the arbitrable matters should be part of the arbitration. This is especially true where there is a broad arbitration clause. For example, in *Ground Connection LLC v. Krinner Schraubfundamente GMBH*, the court held that the phrases "arising out of "or "relating to" are the broadest terms parties can use and include collateral disputes that relate to any agreement containing such language.[58]

The specific drafting of an agreement to arbitrate can impact the availability or unavailability of class-wide arbitration. Many franchise agreement arbitration provisions contain provisions waiving the parties' right to bring a class arbitration. In recent years,

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[53] *See* A*rthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009).

[54] *Workers of Am.*, 475 U.S. 643, 648 (1986); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 681 (2010) (*quoting Volt Info. Scis,* 489 U.S. at 479).

[55] *See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000).

[56] *See, R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n,* 384 F.3d 157, 160-61 (4th Cir. 2004) ("in the context of arbitration, the doctrine [of equitable estoppel] applies when one party attempts to hold another party to the terms of an agreement while simultaneously trying to avoid the agreement's arbitration clause"); *Living Real Est. Grp., LLC v. Douglas Elliman, LLC*, 197 N.Y.S.3d 58, 59 (1st Dep't 2023) (finding that membership in a group whose organizing documents require arbitration of certain disputes constitutes an agreement to arbitrate); *Doctor's Assocs. Inc. v. Burr,* 226 F. Supp. 3d 106, 111 (D. Conn. 2016) (franchise applicants cannot avoid arbitration by bringing claims against the franchisor's non-signatory development agents instead of franchisor*)* Ms. Cooper was one of the attorneys representing Doctor's Associates Inc. in the Burr matter.

[57] *See Mac Tools v. Diaz*, 2012 WL 1409395, *5 (S.D. Ohio 2012) (non-signatory wife of an individual who signed a franchise agreement ordered to arbitrate her claims when she brought suit seeking the benefits of the agreement).

[58] *Ground Connection LLC v. Krinner Schraubfundamente GMBH*, 2019 WL 3504235, at *2 (E.D. Ark. 2019).

the Supreme Court has weighed in on the legality of such provisions and found them to be enforceable. *AT&T Mobility LLC v. Concepcion*, held that the FAA preempts state laws that prohibit or restrict the enforceability of class action waivers in arbitration agreements.[59] As a practical matter, this means that for franchisors and franchisees with agreements waiving class arbitration, their claims will need to be arbitrated on an individual basis. This may be easier and more economical for franchisors but could mean the opposite for franchisees. However, in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court established that courts should enforce arbitration agreements as written, even if it is not economical for the plaintiff to pursue its claims individually.[60] Most recently, in *Lamps Plus v. Varela,* the Supreme Court held that, under the FAA, an ambiguous arbitration agreement cannot provide the necessary contractual basis for a court to conclude that the parties agreed to submit to class arbitration.[61]

D. Forum and Venue Considerations

As a part of their agreement to arbitration, the parties should specify a forum (that is, the administrator of the arbitration) and a venue (that is, the geographic location for the arbitration hearing). While it is more common for an arbitration clause to specify a national (or international) arbitration association, so long as the parties agree, it is also possible for the arbitration forum to be a local arbitration association or even a particular arbitrator. Along with specifying the arbitration forum, the parties will also want to specify in the arbitration agreement the rules and procedures that will govern the arbitration. For example, stating that the arbitration will be filed with the AAA and proceed under its Commercial Arbitration Rules.

There are several factors that parties agreeing to arbitrate may consider in choosing an arbitration association to resolve their dispute. One of those factors may be the rules of the arbitration association, including whether they provide for expedited procedures, the length of time for the arbitration proceeding, and the provisions regarding discovery. The parties may also consider the roster of arbitrators, and the breadth of their experience related to a specific industry. For instance, the JAMS arbitration association has many arbitrators who are former judges. The AAA has a roster of arbitrators with specific experience in franchising as well as former judges. Parties will also want to look at what the arbitration association's rules state regarding single arbitrators or a panel, and will likely want to specify the number of arbitrators in their arbitration agreement. Parties should keep in mind that they may also draft their arbitration agreement to deviate from certain aspects of the arbitration association's rules, such as those related to discovery or the time frame in which the dispute will be decided. In general, the AAA's commercial arbitration rules provide for more limited discovery than the rules of JAMS. The commercial rules of the International Institute of Conflict Prevention & Resolution (CPR) also take a more limited approach to discovery in arbitrations. Parties may also want to

[59] *See, AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 352 (2011).

[60] *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

[61] *See Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1415-17 (2019).

consider the level of administration of the proceeding that is provided by the arbitration association and the cost, including filing fees and arbitrator compensation.

In addition to agreeing on how the arbitration will be administered, the parties in arbitration will also want to consider where the arbitration proceedings will be held. The franchisor, ordinarily the drafter of the franchise agreement, will likely want the arbitration to be held at a location that is close to its headquarters and generally where staff who may be witnesses in the arbitration are located. Doing so will help the franchisor control their costs, especially when taking into account the potential volume of arbitration proceedings. Additionally, the franchisor may be more familiar with the practitioners who are on the roster of arbitrators in the state where the franchisor is located. Also, presuming that the choice of law provision calls for the law of the state in which the franchisor's headquarters are located, a roster of arbitrators located within that state is likely to be more familiar with the law of that state. In general, the parties will want to consider the availability of arbitrators in the venue that they choose. Franchisors may also want to account for a change ~~in~~ the location of their headquarters, such as by including a provision that the hearing will be located wherever the franchisor's headquarters are located at the time of filing. Franchisees will likely be interested in not having to travel far to the hearing due to cost, but they also may not want a venue or choice of law in a state that they believe is more friendly to the franchisor. If the arbitration agreement does not specify a venue, and the parties cannot agree, the arbitration association will decide the venue.

Some state franchise laws restrict out-of-state forums. Michigan, Rhode Island, California, and South Dakota have statutes that void forum-selection clauses in franchise agreements that select an out-of-state forum. In addition, Washington administrative procedures state that franchisees located in the state of Washington are entitled to arbitration in their home state. Courts, however, have generally held that state statutes restricting out-of-state arbitration are preempted by the FAA.[62] But, as discussed above, at least one court has found that the requirement to arbitrate out-of-state was a basis to find the arbitration clause unconscionable. It is noteworthy that in recent years an increasing number of arbitration proceedings are being held virtually, potentially lowering costs and making arbitration hearings more accessible for witnesses on both sides.

The ability to choose a location for the arbitration hearing and the association that will administer the arbitration can be a significant pro for a franchisor in comparison to litigation. This is because a national franchisor may face disputes in state or federal courts all over the country with a lot of uncertainty. The uncertainty as to the judge that will hear the case and whether that judge will have a familiarity with circumstances and the law specific to franchising. The practical effect that the franchisor, as drafter of the franchise agreement, may have the ability to choose the location of the arbitration will in many cases be a con for franchisees, as the franchisor is likely to choose a location that is convenient to the franchisor with many local arbitrators who may be more familiar to the franchisor than the franchisee. A potential con for franchisors is the possibility of

[62] *See KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 51-52 (1st Cir. 1999); *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998); *Management Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 856 (6th Cir. 1997); *Prude v. McBride Research Labs, Inc.*, 2008 WL 360636 at *5 (E.D. Mich., 2008).

contending with a state law that purports to control the location of the arbitration. As a drafting consideration, the parties should specify a site for the arbitration and either the association that will administer the arbitration or the specific procedural rules in their arbitration clause to avoid preliminary disputes. The parties may also want to include language in the arbitration clause specifying that notwithstanding anything in the franchise agreement or the Franchise Disclosure Document that might state to the contrary, the FAA preempts any state law restricting enforcement of the arbitration clause, including restrictions on the site of the arbitration.

III. Your Dispute Made it to Arbitration. Now What?

This section discusses the pivotal early stages of arbitration, including the initial pleadings—the demand for arbitration, answer and affirmative defenses, and counterclaims—and procedures for obtaining interim or temporary injunctive relief during the pendency of the arbitration.

A. Initial Pleadings and Fees

The pleadings in arbitration are not unlike pleadings commonly required in court. The claimant commences an action with a demand for arbitration, which must include a statement of the claims alleged, the remedies sought, and a short summary of the factual basis supporting the claims.[63]

Under both the AAA's and JAMS's commercial rules, the respondent has 14 days after receiving notice of the filing of the arbitration demand to file an answering statement, including any affirmative defenses.[64] Under the AAA rule, if no answer and affirmative defenses are filed, the claims are deemed denied; although as a practical matter most arbitrators will allow an answer to be filed after the preliminary hearing.[65] The AAA and JAMS rules differ on counterclaims. JAMS requires counterclaims to be filed with the answer.[66] AAA does not specify a time for filing counterclaims although the timing of the filing of counterclaims will often be dictated by the Arbitrator in the scheduling order or even by the franchise agreement.[67]

As to jurisdictional challenges, JAMS requires they be made within fourteen days.[68] AAA does not specify a time to challenge jurisdiction but only specifies that the arbitrator has the power to rule "on his or her own jurisdiction."[69] Sometimes the AAA will initially

[63] *See* AAA Rules, R-4(a)(iv); JAMS Rules 5, 9(a), (b).

[64] *See* AAA Rules, R-5; JAMS Rule 9.

[65] *See* AAA R-5(a).

[66] *See* JAMS R-9(c).

[67] *See* AAA R-5(b).

[68] *See* JAMS R-9(c).

[69] AAA R-7.

decide jurisdiction and venue challenges internally prior to the appointment of an arbitrator which is subject to a final determination by the arbitrator.

The arbitration administrator will also collect initial fees and deposits at the time of the initial filings. This is where the parties pay for the added value that arbitration offers over litigation in court. State and federal courts, which are administered through public funds, collect far less fees in comparison to private arbitration. For example, the federal courts of the United States charge a $350 filing fee for the commencement of all new civil actions, payable by the filing party. Most state courts charge a filing fee of a similar amount. With certain limited exceptions—such as attorney admissions or obtaining a copy of certified records—courts do not charge many additional or ongoing fees, and the litigants do not pay for the judge's or jury's time.

Private arbitration, by comparison, is funded solely by the parties themselves. The parties must pay an array of administrative fees to the arbitration administrator, as well as the arbitrator's professional fee, which is usually charged on an hourly basis (and sometimes a daily basis for hearings). The administrative fees are usually charged based on a sliding scale, with relatively low fees for smaller dollar claims, and significantly higher fees for larger claims.

Under its standard fee schedule, AAA charges an initial filing fee ranging from $950 for small matters and up to as high as $65,000 for arbitrations involving claims exceeding $10 million. In most cases, the initial fee in an AAA arbitration is between $3,000 and $8,000. For cases that proceed to a substantive hearing, the AAA charges a "final fee," which ranges from $825 up to $14,150, depending upon the amount in controversy. JAMS charges a flat fee of $2,000 as an initial filing fee, and then assesses a "case management fee" of 13% of all professional fees charged by the arbitrator. The end result is fairly comparable administrative fees at both AAA and JAMS, both far exceeding any administrative fees charged by publicly funded courts. For a moderately complex commercial arbitration dispute with a claim and counterclaim, the parties should not be surprised by total administrative and arbitrator fees exceeding $30,000.

Under the AAA, the filing fees are advanced by the party making the claim or counterclaim, subject to final apportionment by the arbitrator in the award.[70] JAMS assesses each party a pro rata share of the fees and expenses at the time of the commencement of the arbitration.[71] Of course, the parties can alter these default rules by specifying a different allocation in their arbitration agreement.

The parties should also not forget the potential expense of paying for space for the arbitration. Ordinarily the lawyers for one of the parties will provide conference room space in the arbitration's venue. Videoconference arbitrations accomplished via online services such as Zoom, WebEx, or Microsoft Teams are also becoming more common

[70] *See* AAA Rules, R-55.

[71] *See* JAMS Rule 31.

place. If none of the above solutions work, the AAA and JAMS offer arbitration hearing rooms in most major cities, at an additional cost.

Finally, the parties must pay the professional fees charged by the arbitrator. Any arbitrator who is worth using will be a well-credentialed and experienced lawyer who likely charges a competitive hourly rate in the neighborhood of the top practicing lawyers in their locality. Rates will vary, of course, based on the particular arbitrator's background, credentials, and the market in which the arbitrator practices. One of the authors of this paper had recent experience in selecting commercial arbitrators in a non-metro East Coast arbitration. The hourly rates ranged from $300 to $1,000, with the average hourly rate at approximately $550. One can expect rates to run higher for arbitrators based out of major metropolitan centers, like New York or Los Angeles.

B. Arbitrator Selection

Selection of the arbitrator or arbitrators may be the most important phase of the arbitration process as the parties are quite literally selecting both the judge and the jury that will decide their dispute. And because appellate rights are limited, the arbitrator is in many ways more powerful than any judge or jury. In most cases, their decision will be the last word on the parties' dispute.

Arbitrator selection is one of the advantages to arbitration—unlike in court, the parties have a say in selecting their decision-maker. But it is very important to make the right choice. If the arbitration agreement specifies the method for selecting arbitrators, that process will control. If not, the process will be controlled by the administrator's default rules.

1. *Number of Arbitrators*

The first important consideration is how many arbitrators will preside over the case. The default under most arbitration rules is a single arbitrator. One of the important benefits of arbitration is offering a streamlined, efficient, and more cost-effective method for resolving disputes. Appointing multiple arbitrators can potentially add complexity and will most certainly raise the cost of the arbitration. In more complex cases, and particularly in cases with high stakes, it may be worth the added cost to ensure that the final decision is thoughtful and well-considered.

The parties can always agree on the number of arbitrators, either by expressly stating the number of arbitrators in the written agreement, or by reaching agreement in the context of the subject dispute. Absent agreement, the administrator's rules will control. Under the JAMS Rules, a single arbitrator is presumed for all disputes absent the parties' agreement to something different.[72] Under AAA Procedures for Large, Complex Commercial Disputes, a panel of three arbitrators is the default rule for all arbitrations

[72] *See* JAMS Rule 7(a).

where the disclosed claim or counterclaim of any party is at least $3 million exclusive of interest, arbitration fees and costs.[73]

2. *Choosing the Arbitrator*

As with all other aspects of arbitration, the parties control how the arbitrator is selected. The parties are free to agree on a specific arbitrator, or the attributes or qualifications that they will require for their arbitrator, or on the process for selecting an arbitrator. As with all other arbitration procedures, only if the parties cannot reach agreements on these things, will the arbitration administrator employ the default process set forth in the applicable rules.

This is a substantial advantage over litigating in court where the judge who will preside over the case is usually assigned at random. In fact, in many courts, litigants do not get a single dedicated judge for the entire life of the case. They may have one judge who rules on dispositive motions, and a different judge who presides over trial. Additionally, while most judges were practicing lawyers before they became judges, and therefore often bring some specialized expertise to the bench, a franchising litigant would have to be lucky to end up with a judge with significant knowledge and experience in franchise and distribution law. Most courts and most judges are generalists, dealing with all manners of civil, domestic, and criminal matters. There is also a plethora of ex-prosecutors in the judiciary, some of whom have had no experience in a franchise dispute.

In arbitration, however, it is possible to select an arbitrator with a substantial background in franchising, either because they previously practiced as a franchise lawyer and/or because they frequently arbitrate franchise disputes. The AAA, for example, maintains a panel of franchise arbitrators with significant expertise as franchise lawyers. For an arbitrator to be approved to the AAA's franchise panel, the arbitrator's practice during the previous ten years must have been at least 30% devoted to franchise matters, or the arbitrator must have arbitrated a minimum of ten franchise cases in the arbitrator's career, or three franchise cases within the past five years. While JAMS does not have a franchise panel, a recent search of the JAMS database of neutrals yields 23 lawyers who cite franchise and distribution law expertise in their biographies.

Having a decision maker who understands the why and how of franchise relationships is a tremendous aid to the dispute-resolution process. The arbitrator will intuitively understand the context of the dispute and will likely be familiar with the important terms of the franchise agreement. Having this contextual understanding will empower the arbitrator to more quickly discern the crux of the dispute. The result is a more efficient and predictable arbitration, which is a good thing for both parties.

The AAA and JAMS have similar arbitrator selection rules in the absence of agreement by the parties.[74] They both employ a rank-and-strike approach. The administrator sends the parties a list of arbitrator candidates who match any criteria

[73] *See* AAA Rules, L-2(a).

[74] *See* AAA Rules, R-13; JAMS Rule 15.

provided by the parties. For example, the parties could agree to limit the arbitrator selection to only arbitrators with experience in franchise cases or they could limit arbitrators in a certain geographic area. For single arbitrator cases, the AAA ordinarily sends a list with the names of ten candidates, while JAMS sends a list with five candidates. Each party is then permitted to strike a certain number of names from the list and rank the others. The parties can also ask for further names to be added to the list to the extent they agree that the original list is insufficient. After each party has submitted their strikes and rank, the administrator will appoint the highest-ranking arbitrator who was not stricken by either party.

While this process does not guarantee the parties will get the best possible arbitrator for their dispute, it is certainly preferable to going to court where the assignment of judges is purely by random chance.

Following the appointment, the arbitrator, the parties, and their counsel are required to make disclosures regarding "any circumstance likely to give rise to a justifiable doubt as to the arbitrator's impartiality or independence."[75] Any party can challenge the arbitrator's appointment if there is a conflict or even the appearance of a conflict, and the AAA or JAMS administrator will determine whether the arbitrator must be disqualified, and a new arbitrator appointed. As discussed below in section VII.C., the grounds for challenging an arbitrator's award are, by design, extremely limited. But among those limited grounds are "where the award was procured by corruption, fraud, or undue means," or "where there was evidential partiality or corruption in the arbitrators," or "where the arbitrators were guilty of misconduct" in how they conducted the hearing.[76] As a consequence, arbitration administrators tend to be extremely cautious about arbitrator appointments and will usually grant a request to disqualify if there is any appearance of potential bias.[77]

C. Emergency Injunctive Procedures

One previous disadvantage of arbitration was the inability of arbitrators to act quickly on requests for emergency injunctive relief to preserve property or assets or otherwise maintain the status quo. Traditionally, it was common practice that arbitration agreements included an exception or carve-out that allowed a party to file an action in court to obtain temporary injunctive relief before submitting the merits of the dispute to an

[75] AAA Rules, R-18(a); JAMS Rule 15(h).

[76] 9 U.S.C. §§ 10(a), (1), (2), and (3). *See also France v. Bernstein*, 43 F.4th 367, 382 (3d Cir. 2022) (vacating arbitration award procured by fraud).

[77] The standard applied in court at vacatur proceedings is whether "a reasonable person would have to conclude that the arbitrator was partial to the other party to the arbitration." *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 252 (3d Cir. 2013). But arbitration administrators, who are in the business of providing their customers with dependably above-board arbitration proceedings, have an added incentive to avoid even a whiff of partiality in the proceedings they administer.

arbitrator. Such limited carve-outs were not viewed by courts as being a waiver of the agreement to arbitrate.[78]

In 2013, the AAA amended its commercial rules to allow arbitrators to grant temporary injunctive relief as an interim measure.[79] The arbitrator even has the power to require security for the costs of the interim measures.[80] JAMS too added a nearly identical provision in Rule 2(c). The AAA and JAMS, by appointing an interim arbitrator, can grant emergency relief even before the ultimate arbitrator has been appointed.

To obtain interim relief at the commencement of a new arbitration, the party seeking such relief must file an application with the AAA or JAMS stating the nature of the relief sought and the reasons why such relief is required on an emergency basis and must serve a copy of the application on all other parties.[81]

Upon receipt of an application for interim relief, the AAA must, within one business day, appoint a single emergency arbitrator to rule on the application.[82] The emergency arbitrator is obligated to act fast. Within two business days of appointment, the emergency arbitrator must set a schedule for briefing and argument by all parties and may allow for proceedings by telephone or video conference.[83] Thus, the party requesting emergency injunctive relief can expect a preliminary decision in a matter of days.

The standard for granting interim relief will be somewhat familiar to litigants but is also simpler than the standard in court. Under AAA rules, the arbitrator will grant relief if "the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief under applicable law."[84]

The AAA's and JAMS's rapid and streamlined process is faster than the emergency injunction process in most courts. For example, in federal courts, the primary form of temporary injunctive relief is the preliminary injunction.[85] Federal courts, and most state courts, apply some variation of the well-worn four-part test for a preliminary injunction: (1) whether the plaintiff is likely to succeed on the merits of their claim, (2)

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[78] *See*, *e.g.*, *Toyo Tire Holdings of Am. Inc. v. Continental Tire No. Am., Inc.*, 609 F.3d 975, 981 (9th Cir. 2010) ("[A] district court may issue interim injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo and the meaningfulness of the arbitration process[.]"); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1052–54 (2d Cir.1990) (federal district court has power to issue injunction in aid of arbitration even absent express contractual language so providing); AAA Rules, R-38(c) ("A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.").

[79] *See* AAA Rules, R-38.

[80] *See id*., R-38(b).

[81] *See id.,* R-39(b).

[82] *See id*., R-39(c).

[83] *See id*., R-39(d).

[84] *Id.*, R-39(e).

[85] *See* Fed. R. Civ. P. 65.

whether the plaintiff will suffer "irreparable harm" absent an injunction, (3) whether a balancing of the equities and hardships favors granting the injunction, and (4) whether the injunction would benefit the public interest.[86] The second two prongs of this test—balancing the equities and consideration of the public interest—are not expressly required under the AAA and JAMS tests. Although the arbitrator may import those requirements into their analysis if required by applicable law.

Preliminary injunctions are granted only after notice and an evidentiary hearing, which only proceeds after both parties are allowed (often over several weeks) to marshal evidence in favor of their respective positions. While a party may seek a temporary restraining order ("TRO") during the pendency of the preliminary injunction proceedings, even that process is usually slower than the AAA or JAMS process. Courts with busy dockets that prioritize criminal proceedings ahead of civil disputes are less likely to move as quickly as arbitral forums.

Increasingly, courts have also become less inclined to grant *ex parte* TROs, preferring to defer a ruling until a full evidentiary hearing can be conducted, and only granting a TRO in the most extreme cases where the plaintiff presents a compelling case that, without an immediate injunction, they will suffer significant harm that cannot be remedied later. Even in the rare case when a TRO is granted, the plaintiff wins only a short reprieve and must still prepare for a second hearing to secure the preliminary injunction. This is a clunky two-part process when compared to a single quick hearing in the AAA or JAMS.

In some cases, however, a trip to court may be unavoidable. One of the primary disadvantages of arbitration is that an arbitrator, who is nothing more than a private lawyer, has no authority to compel compliance with his or her orders. Only federal and state courts have the power to enforce their rulings through "contempt of court." Thus, if the party being enjoined refuses to honor the emergency arbitrator's interim award, the aggrieved party will need to file a suit in court to confirm the interim award of injunctive relief.[87]

As discussed in more detail below in section VII.B., the process for confirming arbitral awards is streamlined as the courts are instructed by the public policy favoring arbitration to defer to the arbitrators on the merits of their decisions.

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[86] *See, e.g.*, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

[87] *See Arrowhead Glob. Sols., Inc. v. Datapath, Inc.*, 166 F. App'x 39, 44 (4th Cir. 2006) ("[A]s the other circuits to have addressed this issue recognize, arbitration panels must have the power to issue temporary equitable relief in the nature of a preliminary injunction, and district courts must have the power to confirm and enforce that equitable relief as 'final' in order for the equitable relief to have teeth."); *Vital Pharms. v. PepsiCo, Inc.*, 528 F. Supp. 3d 1304, 1308 (S.D. Fla. 2020) ("Despite its interim nature, the Emergency Arbitrator's award is a preliminary injunction, and confirmation of the injunction is necessary to make final relief meaningful." (internal quotation and citation omitted)); *Yahoo! Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310, 319 (S.D.N.Y. 2013) ("[I]f an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made." (internal quotation and citation omitted)).

IV. Preparing Your Case for the Arbitration Hearing

This section discusses the arbitration process after the parties have completed their initial pleadings, an arbitrator or a panel of arbitrators has been appointed, and interim temporary relief, if any, has been obtained, but before the substantive arbitration hearing itself.

A. The Preliminary Hearing

Soon after the arbitrator is appointed, he or she will schedule a preliminary hearing to "discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute."[88] Both counsel and parties or their representatives are usually invited to attend the preliminary hearing, but in most cases, these hearings tend to be lawyers-only affairs. They can be conducted in-person if convenient to all parties, but the standard practice in recent years is for preliminary hearings to be conducted over teleconference or videoconference.

This hearing provides an opportunity for the lawyers to begin a dialogue with the arbitrator as well as to influence how the arbitration will be conducted. Unlike court proceedings, which often employ one-size-fits-all procedures ~~to~~ for every case, arbitration is flexible and can be molded by the parties. While the arbitrator will issue a case management order after hearing from the parties at the preliminary hearing, the parties will have a substantial say in the scope and breadth of discovery as well as how the final arbitration hearing will be conducted.

Among the topics ordinarily discussed at the preliminary hearing, are the following:

- whether mediation or other settlement procedures have been or should be conducted before proceeding;
- whether all the necessary or appropriate parties have been included in the arbitration;
- whether the pleadings are complete or the parties anticipate amendments or motions regarding the pleadings, including dispositive motions;
- whether there are any jurisdictional challenges;
- which arbitration rules, procedural law, and substantive law govern the arbitration;
- the permissible extent and scope of written and document discovery and whether cost-sharing of discovery expenses might be appropriate;
- the extent to which depositions are permissible;
- whether measures are required to protect confidential information;
- cybersecurity and privacy issues;
- a deadline for the close of discovery;
- whether the parties anticipate expert testimony;

[88] AAA Rules, R-23; *see also* JAMS Rule 16.

- the date, time, place, and duration of the arbitration hearing, including whether the hearing will be conducted in-person or via videoconference, or whether certain witnesses can give testimony by other means;
- whether the proceedings will be recorded or transcribed;
- whether subpoenas will be needed for any witness testimony;
- whether the arbitrator will accept any pre-hearing or post-hearing submissions;
- the form of the award; and
- future status conferences.

Many of the same topics are discussed at the preliminary conference mandated by JAMS Rule 16.

Parties that have included arbitration in their franchise agreements should not take the preliminary hearing lightly. They would be wise to think strategically about these topics. While arbitration has its drawbacks, having the power to shape the process is a significant tool that strategic counsel and their clients can leverage to their advantage.

B. Document Exchange and Depositions

By design, discovery is much more restrictive in arbitration than in court, and usually, the AAA is even more restrictive than JAMS. Generally speaking, the arbitrator is afforded substantial discretion to determine a reasonable scope of discovery.[89]

With respect to documents, the AAA's commercial rules provide that the arbitrator may, on the application of a party or in the arbitrator's own discretion, require the production of documents, including electronically stored documents, on which a party intends to rely and/or that are specifically requested by a party and are relevant and material to the outcome of disputed issues.[90] Reasonable search parameters should be agreed upon for searching electronic records for relevant and material information.[91]

The JAMS Rules contemplate broader discovery and they include an automatic disclosure provision not unlike the initial or automatic disclosure rules in most courts.[92] Under the JAMS Rules, each party must complete an "initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, and names of

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[89] *See* AAA Rules, R-23(a) ("The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present is claims and defenses.").

[90] *See id*., R-23(b). *See also* AAA Practice Guide: Controlling E-Discovery Burdens in Arbitration ("AAA Practice Guide") (providing AAA arbitrators with guidance regarding "steps that may help the Arbitrator, and the Parties, 'achieve a fair, efficient and economical resolution' of an arbitration case, R-23, through effective control of the e-discovery process").

[91] See AAA Rules, R-22(b)(iv); AAA Practice Guide, ("Search Procedures").

[92] *See generally* JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases ("JAMS Protocols") (eff. Jan. 6, 2010) (stating that the JAMS Protocols were designed to "provide JAMS arbitrators with an effective tool that will help them exercise their sound judgment in furtherance of achieving an efficient, cost-effective process that affords the parties a fair opportunity to be heard").

individuals whom they may call as witnesses at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received."[93]

Neither the AAA nor JAMS expressly allow interrogatories. Of course, if the parties agree on the need for interrogatories, they could likely convince their arbitrator to allow them.

Depositions are generally discouraged in arbitrations, but they can still be permitted at the arbitrator's discretion. In AAA arbitrations, depositions are generally granted only in cases that are governed by the Procedures for Large, Complex Commercial Disputes, discussed below, and even then, only in "exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration."[94] While the rule sounds highly restrictive, in practice, arbitrators will frequently allow a few depositions if the parties are in agreement, and especially if the amount in controversy is significant. Depositions are more common in JAMS arbitrations as the JAMS rules presumptively allow each party to take at least one deposition and give the arbitrator broad discretion to permit additional depositions upon a showing of "reasonable need."[95] Again, the amount in controversy will often guide the arbitrator's discretion, with higher-value cases justifying more discovery.

For parties that are concerned with the potential for spiraling discovery costs, the AAA rules afford more protection. Both AAA and JAMS allow the parties to set the parameters for discovery by agreement, and absent agreement, both AAA and JAMS give the arbitrator a fair amount of discretion to determine how much discovery is reasonably needed but, as outlined above, the JAMS rules are generally more permissive and contemplate discovery more alike to courtroom litigation than the AAA rules.

C. Expert Discovery

The AAA's commercial rules contemplate that the parties may call expert witnesses to provide testimony, but do not set any hard and fast rules.[96]

The only other provision mentioning experts is AAA Rules, R-36, which discusses whether written witness statements (either percipient or expert) may be considered by the arbitrator. The rule states that the arbitrator "*may* disregard" the written witness statement and/or expert report of any witness who fails to appear in person at the final hearing for examination, or the arbitrator may "make such other order as the arbitrator may consider to be just and reasonable."[97] The use of the permissive term "may" is important here. To streamline the presentation at the hearing, arbitrators will often accept dueling expert reports without any live testimony. A hybrid approach is to accept the expert reports as

[93] JAMS Rule 17(a).

[94] AAA Rules, L-3.

[95] JAMS Rule 17(b).

[96] *See* AAA Rules, P-2 (noting that the preliminary conference should address whether the parties intend to call expert witnesses, and, if so, set a schedule for disclosure of expert reports).

[97] *Id.*, R-36(a).

providing the experts' direct testimony but allow each party a brief opportunity to cross-examine their opponent's expert during the hearing.

The JAMS rules likewise afford the arbitrator ample discretion and hint that expert discovery might be more substantive than in the AAA. For example, JAMS Rule 16.2, regarding "expedited procedures," indicates expert depositions may only be conducted by agreement of the parties or by order of the arbitrator for good cause shown, suggesting that an arbitrator has greater leeway to allow expert depositions in non-expedited cases. As noted above, the AAA rules strongly discourage the deposition of even percipient witnesses, much less expert witnesses.

At least fourteen days before the final hearing in a JAMS arbitration, the parties must exchange any expert reports that may be introduced at the final hearing.[98] As with the AAA, absent agreement of the parties or a showing of good cause, experts will not be permitted to testify at a JAMS hearing if they were not previously disclosed.[99]

D. Dispositive Motions and Discovery Motions

Both the AAA and JAMS specifically authorize dispositive motions, but the procedural rules for both administrators discourage the filing of motions that are not likely to succeed in disposing of at least some claims or counterclaims.

To file a dispositive motion in a AAA proceeding, the moving party must first convince the arbitrator that a dispositive motion is "likely to succeed and to dispose of or narrow the issues in the case."[100] The JAMS rule similarly allows motions for "summary disposition" only where the parties have agreed to allow such motions or where the arbitrator "determines that the requesting Party has shown that the proposed motion is likely to succeed and dispose of or narrow the issues in the case."[101]

Most arbitrators honor these rules by requiring the movant to submit a short (two or three-page) letter brief explaining why the proposed motion is likely to narrow the issues in the case and allowing the non-movant to respond with an equally succinct letter. Some arbitrators may schedule a short telephonic or video conference to discuss the request. If the arbitrator grants the request, the parties are ordinarily permitted an opportunity to expand on their arguments in further briefing. Under the AAA commercial rules, the arbitrator is expressly authorized to assess the fees and costs associated with motion practice to either party as the arbitrator deems appropriate.[102]

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[98] *See* JAMS Rule 20(a).

[99] *See id*., Rule 17(c).

[100] AAA Rules, R-34(a); *see also id*., R-34(b) ("Consistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion.").

[101] JAMS Rule 18.

[102] *See id*., R-34(c).

Regarding discovery motions, both the AAA and JAMS rules are silent. In their silence, both seem to permit limited motion practice to the extent the parties agree, or the arbitrator deems appropriate. Many AAA arbitrators apply the same two-step procedure for discovery motions as applies to dispositive motions—a party may submit a brief request for permission to file a discovery motion that must make a compelling showing of why the requested discovery is reasonably necessary. Alternatively, some arbitrators require a telephonic or video conference discussion before any motions can be filed. In either event, discovery disputes are usually addressed more quickly and efficiently in arbitration as compared to courtroom litigation.

E. Pre-Hearing Exchanges

The AAA rules say very little about pre-hearing submissions leaving those particulars to be hashed out by the parties and the arbitrator during the Preliminary Hearing.[103] Whether the parties are permitted to submit a pre-hearing brief akin to a pretrial statement is a question that the parties may pose to the arbitrator at the preliminary hearing. The AAA Procedures for Large, Complex Commercial Disputes, discussed below, specify that the parties must exchange copies of all exhibits they intend to submit at the hearing at least ten days before the hearing.[104]

The JAMS rules are more explicit about what is expected before the final hearing. Under the JAMS rules, the default procedure, unless altered by agreement of the parties, is that 14 days before the final hearing, the parties must exchange: (1) a list of intended witnesses, including experts, with a short description of their anticipated testimony; (2) any written expert reports that may be introduced; (3) a list of all exhibits intended to be used at the hearing; and (4) pre-marked copies of those exhibits.[105] Seven days before the hearing, the arbitrator may require each party to submit a "concise written statement of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought."[106] The arbitrator may or may not allow rebuttals to these pre-hearing submissions.

F. Special Procedures for Cases Large and Small

The AAA's commercial rules have built-in special procedures for large or complex cases, as well as expedited procedures for smaller cases that must be run more cost-efficiently.

1. *Procedures for Large, Complex Commercial Disputes*

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[103] *See* AAA Rules, P-2(a)(xiv) (stating that topics for the preliminary hearing include determining when the parties must identify witnesses, exchange of witness statements, determine whether witness statements can be submitted in lieu of live testimony, exchange and pre-mark exhibits, and submit any pre-hearing submissions).

[104] *See id.*, L-3(c).

[105] *See* JAMS Rule 20(a).

[106] *Id.*, Rule 20(b).

Unless the parties have otherwise agreed, the AAA's Procedures for Large, Complex Commercial Disputes automatically applies to all AAA cases in which a claim or counterclaim of any party is at least $1 million exclusive of interest, fees, and costs.

These procedures include an early preliminary conference with a AAA case administrator before an arbitrator has even been selected. The primary purpose of this conference is to determine the subject matter of the dispute and the specific subject-matter expertise that will be needed in the arbitrators appointed to decide the dispute.[107]

If any claim or counterclaim is at least $3 million, the AAA will seek to appoint three arbitrators qualified for complex commercial arbitration unless the parties agree otherwise.[108] Assuming the arbitration of a franchising dispute involving a claim or counterclaim in excess of $1 million, the AAA will seek to appoint arbitrators from either or both the Franchise and Distribution Panel and the Large, Complex Commercial Case Panel.[109]

The Large, Complex Commercial Disputes rules also permit the arbitrator, in "exceptional cases" and "for good cause shown," to allow the parties to take a certain number of depositions, a discovery device ordinarily disfavored in arbitration because depositions can quickly become costly to both sides.[110]

2. *Expedited Procedures*

On the other side of the coin, the AAA provides for especially streamlined procedures for smaller disputes. By default, the AAA will apply its expedited procedures in any case in which no claim or counterclaim exceeds $100,000 exclusive of interest, fees, and costs. As always, however, parties can elect, by mutual agreement, to apply or not apply these procedures in any case.

The primary purpose of the Expedited Procedures is speed and efficiency. As a result, every rule is designed to enhance efficiency and discourage delay. For example, extensions of any deadline are strongly discouraged, and the parties are precluded from amending their pleadings after the arbitrator is appointed.[111]

The arbitrator selection itself is streamlined. The parties strike and rank from a list of five arbitrators and must return their lists to the AAA within seven days.[112]

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[107] *See* AAA Rules, L-1.

[108] *See id*., L-2(a).

[109] *See id*., L-2(c). *See also* The AAA National Roster of Arbitrators and Mediators, at: https://www.adr.org/aaa-panel (last visited Mar. 15, 2025) (providing a list and description of each of the AAA's specialty panels).

[110] *See id*., L-3(f).

[111] *See* AAA Rules, E-1; E-2.

[112] *See id*., E-4.

At the preliminary hearing, the arbitrator must schedule the final hearing (if such hearing is to be held) within 60 days.[113] Discovery is limited. Two days or more before the final hearing, the parties are required to exchange copies of any exhibits they intend to use.[114] No other discovery and no motions are permitted except as allowed by the arbitrator for good cause shown.[115] The hearing itself should not exceed a single day, absent the arbitrator granting a second day for good cause.[116] The arbitrator must then submit his or her decision on the matter within 14 days after the closing of the hearing.[117]

By agreement, or by default for cases worth less than $25,000, the parties can submit the dispute entirely on paper and skip a final hearing altogether.[118] Under this process (sometimes referred to as "desktop arbitration"), the parties are given an opportunity to submit exhibits and briefs, and the arbitrator renders a decision entirely from the paper record.

JAMS offers its own version of expedited procedures, but only where all parties to the arbitration agree to expedite.[119]

V. The Arbitration Hearing

The arbitration hearing is perhaps the first time in the arbitration process that the playing field becomes leveled for the franchisee. Up until the hearing, the franchisor has often compelled arbitration or stayed a lawsuit pending arbitration. The franchisor has forced arbitration in its home city and state, likely with a local arbitrator. The franchisor, through the arbitration clause, has dictated the choice of law as well as the amount of discovery.

The arbitration hearing, however, becomes an equalizer. Issues such as the payment of final fees, the relaxed rules of evidence, and flexibility with witnesses, all enhance the franchisee's ability to have its grievances heard. Perhaps most importantly, is that a franchise agreement, written to protect the franchisor's interests, is scrutinized by a neutral person whose objective may be ultimate fairness and not necessarily strictly enforcing the terms of the franchise agreement. Indeed, as discussed below, an arbitrator's award in some of the federal circuits cannot be vacated even if the arbitrator has engaged in a "manifest disregard of the law."

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[113] *See id.*, E-7.

[114] *See id.*, E-5(a).

[115] *See id.*, E-5(b), (c).

[116] *See id.*, E-8(a), (b).

[117] *See id.*, E-9.

[118] *See id.*, E-6.

[119] *See* JAMS Rules 16.1, 16.2.

A. Payment of Fees to Proceed

Franchisors are sometimes put in a dilemma before an arbitration hearing. Franchisees either have run out of funds to pay the arbitrator or decide not to pay any further fees. The arbitration administrator then alerts the arbitrator who issues an order that if the arbitration is to proceed, the franchisor must deposit enough funds to cover the expected fees for the hearing and the rendering of an arbitration award.[120]

If the arbitration involves only the franchisee's claims against the franchisor, the franchisor can allow the arbitration to be dismissed. It is a rare franchise dispute, however, where there are no claims or counterclaims asserted by the franchisor against the franchisee that the franchisor needs to have adjudicated. Additionally, often the franchisor has stayed a lawsuit brought by a franchisee, and the parties are required to report back to the court at regular intervals where the action has been stayed on the progress of the arbitration. Does the franchisor want to test whether the stay it has obtained in a distant trial court is contingent on the completion of the arbitration or have to report back to the court that the arbitration is not going forward because of the nonpayment of fees?[121] For the same reasons the franchisor compelled arbitration, the answer is "no," often leading to the franchisor paying the franchisee's arbitration fees.

B. Relaxed Rules, Procedures, and Rules of Evidence in Arbitration

An overarching principle of arbitration is that the parties have the opportunity to be heard.[122] AAA Rule 35(a) provides that "[c]onformity to legal rules of evidence shall not be necessary."[123] Similarly, JAMS Rule 22(d) provides that:

> Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.[124]

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[120] *See* AAA Rules, R-59; JAMS Rule 31 (providing that the parties are jointly and severally liable for the payment of fees).

[121] *See NRA Enterprises, Inc. v. Midas International Corporation,* 2022 WL 22890858, *4 (C.D. Cal. 2022) ("The parties are **ORDERED** to file periodic Joint Status Reports every 90 days from the date of this Order, and a Final Joint Status Report within 10 days after the arbitration is concluded, along with any appropriate stipulation proposing how to proceed with this case, and a proposed Order. Each successive Joint Status Report must state on the face page the due date of the next report.") (emphasis in original). Mr. Bruno and his firm, Robinson Waters & O'Dorisio, P.C. were lead counsel for Midas in this case.

[122] *See* Arbitration Fundamentals and Best Practices for New AAA Arbitrators at p. 17 (AAA 2007).

[123] AAA Rules, R-35(a)

[124] JAMS Rule 22(d).

The codification of the relaxed rules of evidence by AAA, JAMS, and other arbitration administrators have a profound effect on the arbitration hearing. Hearsay objections are not sustained as in court and are instead typically met with the arbitrator's response that "I understand it's hearsay and I will give it the weight when I review the evidence that I believe it deserves." Relevancy objections are rarely sustained, as overruling a relevancy objection and allowing evidence of questionable value protects an arbitrator's arbitration award against a subsequent challenge.[125] Allowing evidence of questionable relevancy also promotes another overarching principle of arbitration; that all participants have an opportunity to be fully heard.

The relaxed rules of evidence and the principle that all participants get an opportunity to be heard can lead to longer and more expensive hearings. A way to combat arbitration hearings that last longer and cost more because of the presentation of questionably relevant evidence or cross-examinations that devolve into discovery depositions is the imposition of a chess clock. That is, the parties agree that they will have equal time for openings, witness examinations, and closings. Then it is up to the arbitrator, like a timekeeper at a sporting event, to keep track of the time being used and hold the parties to their stipulation. A chess clock also has the effect of limiting long-winded objections and attorneys "speechifying" during the presentation of evidence.

C. Conduct and Duration of Proceedings

1. *How the Hearing Proceeds*

An arbitration hearing can proceed exactly like a court proceeding if the parties so desire. However, an advantage of arbitration over court is that the parties can structure how they want their hearing to proceed.[126] For example, a willing arbitrator can agree to weekend hearings, in part or whole. Unlike in court, where for staff and security reasons proceedings cannot extend much past five o'clock, arbitration hearings can extend into the evening. This can allow the hearing to finish in fewer days or accommodate remote witnesses in different time zones whose testimony has been remotely arranged. Often, closing statements are done in writing or remotely at a later date to accommodate the schedules of the participants, counsel, or the arbitrator(s).

2. *Order of Witnesses and Inherent Flexibility Compared to Court*

Jury and most bench trials follow a strict pattern in terms of the ordering of witnesses. The plaintiff puts on its case through its witnesses then the defendant puts on its case through its witnesses. Cross examination is limited to the scope of direct

[125] *See* 9 U.S.C. § 10 (allowing a court to vacate an arbitration award for "partiality" or for "refusing to hear evidence pertinent and material to the controversy").

[126] *See* AAA Rules, R-33(a) ("The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."). *See also* JAMS Rule 22(b).

examination sometimes resulting in a witness having to be called twice. The plaintiff then has a limited rebuttal.

In arbitration, the parties and the arbitrator have more latitude to order witnesses most efficiently.[127] There may be distinct issues where all witnesses on that issue (whether for claimant or respondent) are called. Cross-examination need not be limited to the scope of the direct, allowing witnesses to be called once. Expert witnesses for both sides can be called consecutively, allowing the respondent's expert to not have to leave and then come back when the respondent puts on its expert. Similarly, the claimant's expert can stay after testifying to assist counsel in cross-examination or to be recalled for rebuttal. This can result in significant savings for the parties and an overall more cogent presentation of evidence for the arbitrator.

3. *Remote vs In-Person*

The Covid 19 pandemic ushered in significant change regarding the acceptance of remote testimony in both arbitration and court proceedings. Technology has evolved and improved, and perhaps just as importantly, the participants' ability to use and be comfortable with the technology has grown.

Franchisees and their counsel in distant states can now participate fully in arbitration remotely. A franchisor concerned about challenges to arbitration based on unfairness will most likely not oppose a franchisee's request to appear remotely. Similarly, an arbitrator wanting to protect the arbitration award against subsequent challenges for bias or the failure to hear evidence is likely to allow a franchisee to appear remotely.[128]

D. Confidentiality

Confidentiality is a benefit to arbitration over court litigation. Nevertheless, franchisors need to understand that "[c]ontrary to a common misperception, arbitration is confidential—not secretive. While the arbitration administrator and its agents are barred from disclosing the confidential arbitration proceedings, the parties are not expressly restricted unless they expressly agreed to confidentiality."[129] Further, arbitration awards must be confirmed to have the force of law, necessitating a public filing.[130] And of course, the Federal Trade Commission's Franchise Rule, as well as various state franchise disclosure laws, require that pending actions involving franchise law violations, allegations of fraud or deceptive trade practices, and material actions involving the

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[127] *See id.*

[128] *See* AAA Rules, R-33(c) ("The arbitrator may also allow for some or all of the presentation of evidence by alternative means including video, audio or other electronic means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination."). *See also* JAMS Rule 22(g).

[129] AAA Website, adr.org/about-us. *See also* AAA Rules, R-45(a) ("Unless otherwise required by applicable law, court order, or the parties' agreement, the AAA and the arbitrator shall keep confidential all matters relating to the arbitration or the award."). *See also* JAMS Rule 26(a).

[130] *See* 9 U.S.C. § 9 (Award of arbitrators; confirmation; jurisdiction; procedure).

franchise relationship, must be disclosed in the franchisor's Franchise Disclosure Document. An adverse arbitration award against a franchisor for the violation of franchise laws or involving allegations of fraud, unfair or deceptive practices, or comparable allegations, must be disclosed in the Franchise Disclosure Document for ten years.[131]

Thus, it is perhaps an overstatement that confidentiality is a benefit of arbitration. Still, unlike a courtroom, the public and other interested parties do not have the right or ability to attend an arbitration.[132] Skillfully drafted protective orders and arbitration clauses can also prevent the public dissemination of some of the aspects of arbitration.[133]

E. Record of Proceedings

Neither the arbitrator nor arbitration administrators like the AAA and JAMS provide a court reporter. AAA Rule 29 provides as follows:

> **Official Record of Proceedings** (a) Any party desiring a transcribed record of a hearing shall make arrangements directly with a transcriber or transcription service and shall notify the arbitrator and the other parties of these arrangements at least seven calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record. (b) No other means of recording any proceeding will be permitted absent the agreement of the parties or per the direction of the arbitrator. (c) If the transcript or any other recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties at the direction of the arbitrator. (d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the transcription or other recording.[134]

Arguably, a court reporter defeats one of the benefits of arbitration, namely, finality. While a transcript may be of use to an arbitrator in rendering an award, a transcript enhances the ability to seek the vacation of the award pursuant to 9 U.S.C. § 10 or comparable state statues.

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[131] *See* 16 C.F.R. 436.5(c).

[132] *See* AAA Rules, R-26 ("The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person."). *See also* JAMS Rule 26.

[133] *See* AAA Rules, R-45(b) ("Upon the agreement of the parties or the request of any party, the arbitrator may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information."). *See also* JAMS Rule 26(b).

[134] AAA Rules, R-29. *See also* JAMS Rule 26(k).

VI. The Arbitration Conclusion

A popular myth is that arbitrations result in awards that resolve nothing, end up being compromises, or orders to "split the baby." The AAA collects data from its arbitrators after each case as to what was sought by the parties and what was ultimately awarded. The AAA found that, regarding 2,547 AAA-ICDR administered business-to-business commercial arbitration cases with monetary claims in 2017, 94.5 percent of the monetary awards were outside the claimed midrange, which is defined as 41 to 60 percent of the filed claim amount. "In fact, the study concluded that the arbitrator ruled clearly in favor of one side or the other in an overwhelming majority of cases."[135] These statistics are particularly salient in that unlike court, participants in at least a AAA arbitration pay additional fees depending on the amount being claimed, discouraging overstated claims.

A. Attorney's Fees and Costs

Most franchise agreements have clauses which provide that the prevailing party is to cover costs and attorney's fees for both sides. Some franchise agreements have one-sided clauses that allow only the franchisor to recover its fees and costs, although by statute some states turn these clauses into a prevailing parties clause.[136] Efficiency dictates that the parties stipulate, or the arbitrator impose, that only the right to attorney's fees and costs be decided in an initial or "interim award." This allows the parties at hearing to focus on liability and damages issues and also allows for arbitration counsel to bill their actual time for the hearing instead of providing estimates at closing. Once the right to attorney's fees and costs is awarded by the arbitrator, a schedule can be issued by the arbitrator for the prevailing party to quantify the amount of attorney's fees and costs and the non-prevailing party to challenge the reasonableness of the amounts sought.

B. Closing the Hearing

"The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed."[137] Upon closing of the hearing, the time limit for rendering the award commences.[138] AAA Rules require an award to be rendered within thirty days after the closing of the hearing by the arbitrator unless modified by the arbitration clause or the parties.[139] The requirement that the award be issued by a date certain is a major advantage of arbitration over litigation; at the conclusion of a bench trial litigants can often wait months or even over a year for a decision.

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[135] *ADR Does not Mean Splitting the Baby*, Corporate Counsel Business Journal, March April 2019, Ryan Boyle and Susan D. Lewin, American Arbitration Association.

[136] *See* Harold R. Bruno III & Nicholas F. Labor, *When Do Unilateral Attorney's Fees Provisions Become Mutual?,* The Franchise Lawyer, Vol. 25, No. 2 (Spring 2022).

[137] AAA Rules, R-40(a). *See also* JAMS Rule 22(h).

[138] *See* AAA Rules, R-40(c). *See also* JAMS Rule 24.

[139] *See* AAA Rules, R-47. *See also* JAMS Rule 24(a).

C. Form of Arbitral Award

"The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."[140] The more reasoned an award, however, the more it is subject to vacatur proceedings, leading to additional time and expense to the parties and delaying finality.[141] The other side of the coin regarding a standard award (which has little in the way of findings of fact and conclusions of law) is that it is extremely dissatisfying to the parties who have expended their time and resources in the arbitration. They may want to know why they won or lost, and want to have a road map for how to conduct themselves in the future.

1. *Monetary and Non-Monetary Outcomes (Declaratory Judgment / Permanent Injunction)*

"The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract."[142] Thus, franchisors can obtain injunctions enforcing trademark rights, covenants not to compete, and system standards. Franchisees can obtain declaratory judgments regarding provisions in the franchise agreement or injunctions preventing encroachment by the franchisor or other franchisees. Nevertheless, to have the force of law, non-monetary relief awarded by the arbitrator must be confirmed by a court. This can lead to delays in the ability to enforce, and give the unsuccessful party a limited chance to revisit non-monetary issues decided in the arbitration. As injunctions and declaratory judgment are time-sensitive, a party seeking a non-monetary form of relief may be better off in Court. This is why, as discussed above, franchise agreements sometimes carve out injunctive relief from the scope of the arbitration clause–particularly regarding Lanham Act[143] and covenant not to compete issues.

2. *Binding or Non-Binding*

Binding arbitration is the universal norm in franchise agreements. Indeed, the authors of this paper have yet to see an arbitration clause in a franchise agreement that calls for non-binding arbitration. Obtaining what is essentially an advisory opinion through a non-binding arbitration is expensive and time-consuming and does not resolve anything. A non-binding arbitration award assumes that the party to whom an adverse decision is rendered will voluntarily comply with a non-binding decision precluding the next required

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[140] AAA Rules, R-48(b).

[141] *See* Arbitration Fundamentals and Best Practices for New AAA Arbitrators (AAA 2007) at p. 163.

[142] AAA Rules, R-49(a). *See also* JAMS Rule 24(c) ("In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' Agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.").

[143] *See* 15 U.S.C. § 1051 *et seq.*

step; a court action or binding arbitration to resolve the underlying problem. A good mediator, who will inform a party of the probability of an adverse outcome in a manner that the party will take to heart, accomplishes the same thing as non-binding arbitration and, hopefully, resolves the dispute through a mediated settlement agreement.

VII. Post-Arbitration Enforcement or Challenge

A. Modification or Correction

AAA rules allow a party to seek modification of an award twenty calendar days after transmittal.[144] Modification, however, is not the reconsideration of any substantive aspects of the award or re-determining the merits of any claim decided. Only clerical, typographical, or computational errors can be corrected. The FAA allows for modification or correction on essentially the same grounds set forth in the AAA and JAMS rules as well as "[w]here the arbitrators have awarded upon a matter not submitted to them . . ."[145]

B. Confirmation

Under § 9 of the FAA, confirmation of an arbitration award is a summary procedure and courts "must grant ... an order [confirming an arbitration award] unless the award is vacated, modified, or corrected."[146] An arbitration award can be confirmed by a federal court so long as the application to confirm the award is made within one year from the date of the award.[147]

A party moving to confirm an award in federal court, however, cannot rely on the FAA to establish subject matter jurisdiction. A federal question or diversity of citizenship must be established, as in any other federal case.[148] Establishing diversity of citizenship to confirm an arbitration award can sometimes be difficult for limited liability companies composed of numerous members, whom themselves might be limited liability companies. A federal court will scrutinize whether all members of all limited liabilities in the ownership structure are diverse to the party against whom the award is being confirmed.[149]

Accordingly, even though the arbitration clause may state that the FAA is to apply, a victor in an arbitration will need to go to state court to confirm if they cannot establish subject matter jurisdiction in the same manner that they would in any other case.

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[144] *See* AAA Rules, R-52(a). *See also* JAMS Rule 24(j) (seven calendar days).

[145] 9 U.S.C. § 11.

[146] *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008) and *Shenzhen Gooloo E- Commerce Co. Ltd. v. Pilot, Inc.*, 2024 WL 1012915, *5 (D. Colo. 2024). *See also* JAMS Rule 34 (providing for appellate review by JAMS if the parties agree) and AAA Optional Appellate Rules.

[147] *See* 9 U.S.C. § 9.

[148] *See Badgerow v. Walters*, 596 U.S. 1, 9 (2022) (rejecting independent FAA jurisdiction and holding that the face of the petition to confirm an arbitration award must contain an independent jurisdictional basis beyond the FAA itself).

[149] The citizenship of a limited liability company is determined, not by its state of organization or principal place of business, but by the citizenship of all of its members. *See Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 781 F.3d 1233, 1237-38 (10th Cir. 2015) ("[I]n determining the citizenship of an unincorporated association for purposes of diversity, federal courts must include all the entities' members.").

Therefore, since the FAA does not give rise to an independent means to obtain federal subject matter jurisdiction, there is neither a benefit nor detriment regarding arbitration contrasted with litigation concerning confirmation.

C. Appealing an Arbitration Award - Vacatur

Unless the arbitration clause itself provides for an appellate arbitration, there is no appealing an arbitration award to a court.[150] If the objective is finality, then the fact that an arbitration award cannot be appealed creates an advantage to going to arbitration.

The FAA does provide limited grounds to vacate an arbitration award.[151] These grounds are: 1) corruption, fraud, or undue means; 2) bias on the part of the arbitrator; 3) misconduct of the arbitrator in refusing to postpone the hearing for cause or for refusing to hear evidence; or 4) the arbitrator exceeded his or her powers.[152] Moreover, there may be state statutory or state common law exceptions that expand vacatur.[153]

Some federal courts of appeals have held that even a manifest disregard of the law on the part of an arbitrator is not a reason to vacate an arbitration award.[154] And, even in federal circuits where the judicially created doctrine of manifest disregard of the law is recognized as a basis for vacating an arbitration award, extreme deference is given to the arbitrator's award[155] and the standard of review is "among the narrowest known to law."[156] Moreover, a manifest disregard of the law does not equate to a disagreement over an

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[150] *See Hall Street*, 552 U.S. at 585 (judicial review of an arbitration award cannot be expanded by contract).

[151] *See* 9 U.S.C. § 10.

[152] *See Waetzig v. Halliburton Energy Services, Inc.*, 145 S. Ct. 690 (2025) (arbitrator exceeded scope of her authority in granting summary judgment when she failed to follow various procedural rules required by the arbitration agreement and employee, who had voluntarily dismissed lawsuit without prejudice to pursue arbitration, could reopen case to vacate the arbitration award based on Fed. R. Civ. P. 60(b)).

[153] *See Hall Street*, 552 U.S. at 590.

[154] *See Jones v. Michaels Stores, Inc.*, 991 F.3d 614, 616 (5th Cir. 2021) (manifest disregard of the law is no longer an independent vacatur ground); *Renard v. Ameriprise Fin. Servs., Inc.*, 778 F.3d 563, 567 (7th Cir. 2015) ("[a]n arbitrator's error of law is not a manifest disregard of the law."); *Beumer Corp. v. ProEnergy Servs., ~~Inc.~~ LLC*, 899 F.3d 564, 566 (8th Cir. 2018) ("'manifest disregard of the law' is not a ground on which a court may reject an arbitrator's award under the Federal Arbitration Act."); and *Campbell's Foliage, Inc. v. Fed Crop Ins. Corp.*, 562 F. App'x 828, 831 (11th Cir. 2014) ("In view of *Hall Street*, we have held the 'judicially-created basis for vacatur' we had formerly recognized, such as where an arbitrator behaved in manifest disregard of the law, 'are no longer valid.'") *citing Frazier v. CitiFinancial Corp. LLC,* 604 F.3d 1313*,* 1324 (11th Cir. 2010).

[155] *See Burlington N. & Santa Fe Ry. Co. v. Pub. Serv. Co. of Okla.,* 636 F.3d 562, 567 (10th Cir. 2010).

[156] *See Kellner v.* Amazon, 2023 WL 2230288, *1 (2d Cir. 2023) ("In addition, our circuit has also recognized that a court may, 'in exceedingly rare circumstances,' vacate an award if it exhibits a 'manifest disregard of the law.'"); *StoneMor, Inc. v. Int'l Bhd. Of Teamsters, Loc., 469,* 107 F.4th 160, 164 (3d Cir. 2024) ("Thus, the arbitration award 'reflect a manifest disregard of the agreement and was rightly vacated.'") (internal citation omitted); *Comedy Club, Inc. v. Improv W. Associates*, 553 F.3d 1277, 1281 (9th Cir. 2009) ("As a result, in this circuit, an arbitrator's manifest disregard of the law remains a valid ground for vacatur of an arbitration award under § 10(a)(4) of the Federal Arbitration Act."); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (recognizing manifest disregard exception but affirming trial court's confirmation of arbitration award); and *Bayer CropScience AG v. Dow Agrosciences LLC*, 680 F. App'x 985, 995 (Fed. Cir. 2017) (affirming trial court's confirmation of award while recognizing manifest disregard of the law as a means to vacate an arbitration award).

arbitrator's interpretation of the law.[157] Consequently, if the objective is to keep all avenues of addressing the merits of a controversy open, then parties in a franchise dispute are better off in court.

D. Res Judicata / Preclusive Effect

In general, "a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."[158] And "the Federal Arbitration Act contains an express statutory command that a federal-court judgment confirming an arbitrator's decision be given 'the same force and effect' as any other judgment from a federal court, 'including the same preclusive effect.'"[159] Similarly, franchisees who do not participate in arbitrations and, subsequently, attempt to litigate their claims against the franchisor are barred by *res judicata* from bringing their claims in the future, or when the franchisor goes to confirm its arbitration award.[160]

VIII. Conclusion

Disputes between franchisor and franchisee are always regrettable. The fundamental goal of every franchise is mutual success—the franchisor sells a profitable brand and business model, and the franchisee realizes that vision by building and operating a successful business, generating profits to the franchisee and royalties to the franchisor. In an ideal world, both franchisor and franchisee are perfectly aligned in growing their businesses together.

In the real world, however, disputes between contracting parties are inevitable. New businesses do not always live up to expectations, and the fault for a franchise's failure—the model versus the operator—is not always easy to pinpoint. Sometimes, unforeseen obstacles arise, and it is not clear whether the seller or the operator should bear the risks and costs of those challenges. While many franchise agreements are carefully drafted and reviewed, it is impossible to account for all contingencies, even when both parties contract in good faith. In short, disputes between franchisors and franchisees are simply a cost of doing business for both sides and, therefore, both parties are wise to carefully consider the best tools for effectively and efficiently resolving those disputes.

The best path is always a negotiated resolution, either through informal talks between parties, or through more formal structured settlement mechanisms, such as

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[157] *See Hall* Street, 552 U.S. at 584.

[158] Restatement (Second) of Judgments § 84 (1982).

[159] *Hansen v. Musk*, 122 F.4th 1162, 1171(9th Cir. 2024) (former employee unable to relitigate Sarbanes-Oxley Act claims in court after unsuccessful arbitration) and 9 U.S.C. § 13.

[160] *See Rudell v. Comprehensive Accounting Corporation.*, 802 F.2d 926, 928 (7th Cir. 1986) (franchisee's fraud claims barred as *res judicata* due to earlier arbitration award confirmed by district court) and *Smith v. Denver Food Systems, Inc.*, 1994 WL 551561, *1 (E.D. Pa. 1994) (franchisee who did not participate in arbitration regarding unpaid royalties precluded by *res judicata* from subsequently bring claims for breach of the implied covenant of good faith and fair dealing, fraudulent and negligent misrepresentation and deceptive trade practices against franchisor and franchisor executives). Mr. Bruno was counsel for the franchisor in this case.

mediation. But sometimes the parties are unable to bridge the gap and submission to a third party “decider” is the only path to resolution.

It makes good sense that many franchisors have embraced arbitration as an alternative to litigating with their franchisees in court. Despite its imperfections, when applied optimally, arbitration lowers the stakes, is faster and less costly, and its finality pushes both parties to accept the result, move on from wasteful distraction, and get back to business. Given that franchisors are most usually the drafters of the arbitration agreement, they can control their experience. Franchisors who wish to get the most from arbitration are advised to give careful attention to their dispute resolution clause, ensuring that the election to arbitrate is broad and unambiguous with only limited, if any, carve-outs. Once a dispute arises, franchisors with arbitration clauses should not hesitate to use their tool. While utilizing the battle-tested rules of a reputable arbitration administrator is advisable, franchisors should remember that they can tailor those rules and processes to their preference—either by agreement before any dispute arises in their franchise agreement, or by a new agreement after a dispute arises. This is one of the primary advantages of arbitration over litigation—the parties can always control the process by agreement.

Franchisees, admittedly, have less control as the arbitration resolution clause was most likely presented as a take-it-or-leave-it term of the franchise agreement. But, unless the arbitration clause is unreasonably one-sided, a franchisor’s inclusion of an arbitration clause is not in and of itself a negative factor for a new franchisee. Most franchisors wisely avoid unreasonably one-sided arbitration clauses to ensure their enforceability. Assuming a reasonable arbitration clause, the franchisee can benefit from arbitration as well, especially given that many franchisees have more limited means to wage war than their franchisor. In the end, arbitration is what the parties make of it. By being actively involved at each step of the process, the franchisee can help to shape the process. A relatively swift and efficient resolution is in the best interest of both the franchisor and the franchisee.

BIOGRAPHIES

Harold R. Bruno III is a shareholder at the Colorado law firm of Robinson Waters & O'Dorisio, P.C. Since 1985, his practice has focused on franchise, distribution and intellectual property litigation and arbitration representing franchisors, franchisees, manufacturers and distributors. Hal is admitted to practice law in Colorado, Wyoming, and the District of Columbia as well as the United States Courts of Appeals for the 1st, 4th, 9th, 10th, and Federal Circuits. Hal is an approved arbitrator with the American Arbitration Association and is on the AAA Franchise Panel. He has served as a neutral in nineteen franchise cases, many of which have gone to hearing. He has also been selected and presided over dozens of commercial disputes as an arbitrator. He is a member of the American Bar Association's Intellectual Property Law Section, the ABA Forum Committee on Franchising, the International Franchise Association, the International Trademark Association, and the South Asian Bar Association. Hal is listed in Best Lawyers in America® for Franchise Law and was selected as the 2016, 2018, and 2022 "Lawyer of the Year" for Franchise Law in Colorado. He has also been recognized as a Super Lawyer® in either franchise law or intellectual property litigation since 2010 and has earned an AV rating from his peers through Martindale-Hubbell. Hal was selected as a "Legal Eagle" by the *Franchise Times*.

Lindsey Cooper is a Lead Counsel in the Subway Legal Department where she provides legal counsel in transactional, litigation, and arbitration matters concerning Subway® Restaurants in the Northeast United States and the United States Territories. She has experience in drafting franchise agreement arbitration clauses, compelling disputes to arbitration, handling arbitration proceedings (primarily before the AAA), and enforcement of arbitration awards. Prior to her current role, she was Associate General Counsel in the Subway Dispute Resolution Group, handling a variety of disputes concerning the Subway® entities, including commercial contract, franchise, and consumer arbitration matters.

Dan Deane is a litigation partner in the Manchester, New Hampshire office of Nixon Peabody LLP. He is active on the firm's Franchising & Distribution, Class Actions and Aggregate Litigation, and TCPA and Consumer Privacy teams. He represents franchisors and franchise systems in all manner of disputes, including breach of contract, franchise terminations, enforcement of trademark rights and non-competition covenants, and defense against government enforcement actions and consumer-based class actions that threaten entire franchise systems. He frequently practices before state and federal courts across the country, as well as arbitral forums, such as the AAA and JAMS. Before joining Nixon Peabody, Dan clerked for Judge Jeffrey R. Howard on the United States Court of Appeals for the First Circuit and Judge Joseph A. DiClerico, Jr. on the United States District Court for the District of New Hampshire.

Stephanie J. Blumstein is Senior Counsel at Wyndham Hotels & Resorts, supporting franchise development and operations. She was previously a Partner and Chair of the Franchise Practice Group at a business law boutique, where she provided counsel to prospective franchisees, veteran franchise operators, and franchisors on a wide range of issues both in and out of court. Ms. Blumstein has extensive experience representing

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