I. Drafting an Effective Arbitration Clause

Pre-dispute arbitration agreements carry the same requirements as any other contract. In other words, the same prerequisites for an enforceable contract apply to agreements to arbitrate. When a dispute arises and a party refuses to honor their agreement to arbitrate, the party seeking to enforce the arbitration clause will file a motion to compel arbitration. “In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry. The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement.” *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002).

A. Contractual Requirements for a Valid Agreement to Arbitrate

1. Arbitration agreements are expressly recognized by Mississippi law. “[W]e expressly state that this Court will respect the right of an individual or an entity to agree in advance of a dispute to arbitration or other alternative dispute resolution.” *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 104 (Miss. 1998).

2. The Federal Arbitration Act, 9 U.S.C. § 1, et seq. creates a framework for enforcing agreements to arbitrate. “In enacting § 2 of the Arbitration Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. Congress has thus mandated the enforcement of arbitration agreements.” *IP Timberlands*, 726 So. 2d at 107 (Miss. 1998) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L.Ed.2d 1 (1984)).

3. Arbitration agreements are not treated any more or less favorably than any other contract. “Arbitration agreements and other contract terms should be on equal footing, in that state courts may not invalidate arbitration agreements under laws that affect only arbitration agreements. *Doctor's Assoc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902, 909 (1996). That is, arbitration clauses shall not receive especial treatment not otherwise available under basic
state contract principles.” Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock, 14 So. 3d 695, 699 (Miss. 2009).

4. “[W]e can place no more burden or constraint on the enforcement of an arbitration provision than on an agreement to sell a fig or pay a wage.” Terminix Int’l, Inc. v. Rice, 904 So. 2d 1051, 1055 (Miss. 2004).

B. The Scope of an Arbitration Provision

In drafting an arbitration clause, a broad clause is favorable as it will bring nearly all claims between a client and the other party within the scope of the arbitration provision.

1. The Fifth Circuit has stated: “Both the Supreme Court and this court have characterized [certain] arbitration clauses as broad arbitration clauses capable of expansive reach. See Prima Paint Corp., v. Flood & Conklin Mfg. Co., 388 U.S. 395, 397–98, 87 S.Ct. 1801, 1802–03, 18 L.Ed.2d 1270 (1967) (labeling as “broad” a clause requiring arbitration of “[a]ny controversy or claim arising out of or relating to this Agreement”); Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc., 138 F.3d 160, 164–65 (5th Cir.1998) (holding that when parties agree to an arbitration clause governing “[a]ny dispute ... arising out of or in connection with or relating to this Agreement,” they “intend the clause to reach all aspects of the relationship.”). Furthermore, courts distinguish “narrow” arbitration clauses that only require arbitration of disputes “arising out of” the contract from broad arbitration clauses governing disputes that “relate to” or “are connected with” the contract.” Pennzoil Exp. & Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1067 (5th Cir. 1998).

2. Arbitration clauses can be retroactive and can bring past actions or disputes into the agreement to arbitrate. “[I]f [an] arbitration clause contains retroactive time-specific language, e.g., a phrase reading ‘this agreement applies to all transactions occurring before or after this agreement,’ then [the court] may apply the arbitration provision to events relating to past events. Or, if the arbitration clause contains language stating that it applies to ‘all transactions between us’ or ‘all business with us,’ then [the court] may apply the arbitration clause retroactively.” B.C. Rogers Poultry, Inc. v. Wedgeworth, 911 So. 2d 483, 489 (Miss. 2005) (quoting Beneficial Nat’l Bank, U.S.A. v. Payton, 214 F. Supp. 2d 679, 688-89 (S.D. Miss. 2001)).

3. Exemplar Broad Form Arbitration Clause:

ARBITRATION AND WAIVER OF JURY TRIAL. Except as expressly provided herein, you and we agree that either
any controversy, claim, counterclaim, dispute or disagreement between you and us, whether asserted or brought in a direct, derivative, assignee, survivor, successor, beneficiary or personal capacity and whether arising before or after the effective date of this Agreement (any “Claim”). Claim has the broadest possible meaning and includes, but is not limited to, any controversy, claim, counterclaim, dispute or disagreement arising out of, in connection with or relating to any one or more of the following: (1) the interpretation, execution, administration, amendment or modification of the Agreement or any agreement; (2) any account; (3) any charge or cost incurred pursuant to the Agreement or any agreement; (4) the collection of any amounts due under the Agreement, any agreement or any account; (5) any alleged contract or tort arising out of or relating in any way to the Agreement, any account, any agreement, any transaction, any advertisement or solicitation, or your business, interaction or relationship with us; (6) any breach of any provision of the Agreement; (7) any statements or representations made to you with respect to the Agreement, any agreement, any account, any transaction, any advertisement or solicitation, or your business, interaction or relationship with us; (8) any property loss, damage or personal injury; (9) any claim, demand or request for compensation or damages from or against us; (10) any damages incurred on or about our premises or property; or (11) any of the foregoing arising out of, in connection with or relating to any agreement which relates to the Agreement, any account, any credit, any transaction or your business, interaction or relationship with us. If either party elects to arbitrate, the Claim shall be settled by BINDING ARBITRATION under the Federal Arbitration Act (“FAA”).

contractually bound himself to arbitrate, not litigate, any disputes he might have with Regions).

5. Claims of personal injuries (e.g. slip and fall) can also be a “dispute” between a business and a customer, and subject to arbitration. See Hawkins v. Regions, 944 F. Supp. 2d 528, (N.D. Miss. 2013) (compelling arbitration of plaintiff’s personal injury allegations against Regions).

6. Signature/Privity Requirements

- “[S]tate law principles might provide for the arbitration of disputes between a nonsignatory and a signatory to a contract, where there are allegations of substantially interdependent and concerted misconduct. A non-signatory should have standing to compel arbitration where the non-signatory has a close legal relationship, such as, alter ego, parent/subsidiary, or agency relationship, with a signatory to the agreement.” B.C. Rogers Poultry, Inc. v. Wedgeworth, 911 So. 2d 483, 491–92 (Miss. 2005).

- In Terminix Int’l, Inc. v. Rice, 904 So. 2d 1051, 1055 (Miss. 2004), a husband and wife sued Terminix over the treatment of their home. Because only the husband signed the contract containing the arbitration clause, the wife alleged that it was not enforceable against her. The Court held that because she was suing seeking benefits under the same contract, the arbitration clause was enforceable against her. “In the arbitration context, the doctrine [of estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.” Id. at 1058.

II. Enforcing/Resisting Arbitration

A. Federal Arbitration Act, 9 U.S.C. §§ 1-16

1. “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in

1 “Commerce” is defined as “commerce among the several States or with foreign nations.” 9 U.S.C. § 1. Note also that the FAA does not apply to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”
writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

2. The FAA provides that a person may petition a court to enforce an arbitration agreement. “A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4.

B. Procedural/Substantive Unconscionability

1. “Two strains of unconscionability are recognized—procedural and substantive. Procedural unconscionability can be shown by: (1) lack of knowledge; (2) lack of voluntariness; (3) inconspicuous print; (4) the use of complex, legalistic language; (5) disparity in sophistication or bargaining power of the parties; and/or (6) lack of opportunity to study the contract and inquire about the terms. Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive.” Caplin Enterprises, Inc. v. Arrington, 145 So. 3d 608, 614 (Miss. 2014) (citations omitted).

2. “A contract is substantively unconscionable if there is an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” Entergy Miss., Inc. v. Burdette Gin Co., 726 So. 2d 1202, 1207 (Miss. 1998).

3. The Mississippi Supreme Court has held that an admissions agreement between nursing home and resident containing an arbitration clause was substantively unconscionable and unenforceable due to the overreaching contained in the provision. See Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock, 14 So. 3d 695 (Miss. 2009).

C. First Options Clauses

1. Many arbitration agreements contain a clause that delegates to the arbitrator, rather than to a court, the decision as to whether a particular dispute falls within the arbitration clause to the arbitrator.
2. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995), the Supreme Court held that where the parties have contracted to arbitrate the issue of arbitrability, that issue is for the arbitrator, not a court—“[w]e agree with First Options, therefore, that a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration.” *Id.* (citations omitted) (emphasis added).

3. An exemplar “First Options clause” includes the following:

   Any dispute regarding whether a particular controversy is subject to arbitration, including any claim of unconscionability and any dispute over the enforceability, scope, reach or validity of this agreement to arbitrate disputes or of this entire Agreement, shall be decided by the arbitrator(s).

4. Furthermore, an attack on the arbitration provision is an attack on the entire arbitration provision, not just the delegation clause. The Supreme Court of the United States has held that such an attack on the entire arbitration provision is for the arbitrator to decide. *See Rent-A-Center, West, Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772 (2010).

5. In *Rent-A-Center*, after an employee sued his employer, the employer moved to compel arbitration based on an arbitration provision in the employee's contract. The employee opposed arbitration on the basis that “the arbitration agreement in question is clearly unenforceable in that it is unconscionable.” *Id.* at 2775 (internal quotation marks omitted). However, the arbitration provision contained a *First Options* delegation clause that provided that the arbitrator would determine “any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or part of this Agreement is void or voidable.” *Id.* (internal quotation marks omitted).

6. Because the employee challenged the arbitration agreement as a whole rather than the delegation clause, the Supreme Court held that whether the arbitration agreement was unconscionable was an issue for the arbitrator. *See Allen v. Regions Bank*, 389 Fed. Appx. 441, 445 (5th Cir. 2010) (holding that under *Rent-A-Center*, a *First Options* delegation clause in an arbitration agreement “unmistakably commands that disputes as to its applicability are for the arbitrator.”).

III. Initiating Arbitration

A. The arbitration agreement will generally provide the procedures for initiating arbitration, most often with the American Arbitration Association or FINRA.
B. However, the FAA provides a mechanism if no process is provided in the arbitration agreement, or if the process provided does not work. “If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.” 9 U.S.C. § 5.

IV. Administration of the Arbitration

• Most arbitration agreements designate with whom the parties chose to arbitrate their dispute and incorporate the rules of procedure for that forum. The American Arbitration Association (“AAA”) is commonly designated. If your dispute arises out of an investment account, the conduct of a financial advisor, or a dispute with a broker-dealer, your arbitration agreement will designate the Financial Industry Regulatory Authority (“FINRA”) as the arbitral forum and will incorporate its code of procedure.

  o Because arbitration is a matter of contract, courts must “rigorously enforce” arbitration agreements according to their terms, including terms that “specify with whom [the parties] choose to arbitrate their disputes,” and “the rules under which that arbitration will be conducted.” Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013) (citations omitted).

• FINRA was created in 2007 through the consolidation of the National Association of Securities Dealers (“NASD”) and the member regulation, enforcement and arbitration operations of the New York Stock Exchange. FINRA is subject to Securities and Exchange Commission (“SEC”) oversight and the SEC must approve FINRA’s arbitration and mediation rules.

  o FINRA is not a part of the government. It is a not-for-profit organization authorized by Congress to protect America’s investors by making sure the broker-dealer industry operates fairly and honestly. It is the largest independent regulator for all securities firms doing business in the United States. The American securities industry is self-regulated and FINRA is the entity that oversees the regulation.
All securities firms and brokers must be licensed and registered through FINRA and must comply with FINRA’s rules in addition to federal and state securities laws, and state and federal common law and statutes.

FINRA is specifically designed to resolve securities-related disputes between and among investors, securities firms, and individual brokers.

If you arbitrate a claim in FINRA, you should familiarize yourself with the FINRA Customer Code (if your dispute is between a customer and a FINRA member), the FINRA Industry Code (if your dispute is between FINRA members), and the FINRA Arbitrator’s Guide.

V. Arbitrating your claim in FINRA

A. Terminology – Court vs. Arbitration

1. Plaintiff – Claimant; Code §12100(g)
2. Defendant – Respondent; Code §12100(z)
3. Complaint – Statement of Claim; Code §12100(aa)
4. Pleadings – Pleadings; Code §12100(v)
5. Hearing – Prehearing Conference; Code §12100(w)
6. Trial – Hearing; Code §12100(o)

B. Timing Considerations

1. The FINRA Eligibility Rule

   a. “No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.” Code §12206(a).

   i. “The panel has the authority to interpret and determine the applicability of all provisions of the rules. The panel’s interpretations are final and binding upon all the parties.” Arb. Guide p. 43.

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2 https://www.finra.org/arbitration-and-mediation/code-arbitration-procedure
3 https://www.finra.org/arbitration-and-mediation/arbitrators-guide
ii. “The arbitrators may find that there is a continuing occurrence or event giving rise to the dispute. For example, although a customer purchased a stock 10 years ago, there are allegations of ongoing fraud starting with the purchase, but continuing to a date within six years of the date the claim was filed.” Arb. Guide p. 48.

b. “Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.” Code §12206(b).

c. “The rule does not extend the applicable statute of limitations; nor shall the six-year time limit on the submission of claims apply to any claim that is directed to arbitration by a court of competent jurisdiction upon the request of a member or associate person. However, when a claimant files a statement of claim in arbitration, any time limits for the filing of the claim in court will be tolled while FINRA retains jurisdiction of the claim.” Code §12206(c).

d. “If a party submits a claim to a court of competent jurisdiction, the six-year limitation will not run while the court retains jurisdiction of the claim matter.” Code §12206(d).

2. The Statute of Limitations

a. Whether the statute of limitations applies to a claim submitted to arbitration is an open question. Mississippi has no statute expressly stating that the statute of limitations applies to arbitration proceedings, and no Mississippi appellate court, Mississippi Federal District Court, or 5th Circuit opinion addresses this issue.

b. The Mississippi general statute of limitations, Miss. Code Ann. §15-1-49, provides that “all actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.” Miss. Code Ann. §15-1-49 (emphasis added).

i. Is an arbitration proceeding an “action”?

c. “All persons ... may, by instrument of writing, submit to the decision of one or more arbitrators any controversy which may be
existing between them, which might be the subject of an action ....” Miss. Code Ann. §11-15-1 (emphasis added).

d. In Raymond James Financial Services, Inc. v. Phillips, 126 So.3d 186 (Fla. 2013), the issue was whether the Florida statute of limitations applied to an arbitration proceeding.

i. The pertinent statute of limitations applied to “actions.”

ii. Florida statute defined the term “action” as “a civil action or proceeding.” The term “civil action or proceeding” was not further defined in Florida law. The issue turned to whether an arbitration proceeding was a “civil action or proceeding.”

1. The court cited Black’s Law Dictionary which defined “civil action” as “an action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation,” and which defined “proceeding” as “any procedural means for seeking redress from a tribunal or agency.”

2. The lower court reasoned that because neither definition included the term “arbitration,” the meaning of the words “civil action or proceeding” did not convey a clear and definite meaning. The Florida Supreme Court found that the lower court erred by not considering whether an arbitration was a form of “tribunal.”

a. The court noted that Black’s Law Dictionary defined “tribunal” as “a court or other adjudicatory body.” It also defined “adjudication” as “the legal process of resolving a dispute” and “the process of judicially deciding a case.” It defined “adjudicator” as “a person whose job is to render binding decisions.”

3. The court ruled stated “arbitration is clearly within the meaning of the term adjudication since the parties to an arbitration are engaging in ‘the legal process of resolving a dispute’ by seeking redress from an ‘adjudicatory body’” and because “the arbitrator as an adjudicator who has the authority
and obligation to render an binding decision and resolve the parties’ dispute.

4. The court stated “whereas civil actions may be limited to court cases, a proceeding is clearly broader in scope.”

5. The court concluded that the term “proceeding,” as used in the Florida statute that defined an “action,” is broad enough to include arbitration, and ruled that “the Legislature intended to subject arbitration proceedings to the statute of limitations because arbitration proceeding is an ‘action’ broadly defined in section 95.011 to encompass any ‘civil action or proceeding,’ including arbitration proceedings.”

e. This issue was addressed in Egan Jones Ratings Co. v. Pruette, 2017 WL 4883155 at *3 (E.D. Pa. Oct. 30, 2017), the issue was whether an arbitrator “manifestly disregarded the law” by expressly not making a finding on whether the statute of limitations barred a claim in whole or in part.

i. The court recognized a split in authority as to whether a statute of limitations defense can be applied in an arbitration proceeding:

ii. “Only three states have passed laws that expressly apply the statute of limitations to arbitration proceedings, New York (N.Y. C.P.L.R. § 7502), Georgia (Ga. Code Ann. § 9-9-5 (2016)) and Washington (Wash Rev. Code § 7.04A.090(3)(2016)). The remaining states are inconsistent on the question of whether arbitration proceedings should be subject to a limitations period. The Florida Supreme Court held that the statute of limitations does apply to arbitration proceedings. Raymond James Financial Services, Inc. v. Phillips, 126 So.3d 186 (Fla. 2013). However, many other states have come to the opposite conclusion, finding that the statute of limitations does not apply to arbitration proceedings. See e.g., NCR Corp. v. CVS Liquor Control, Inc., 874 F.Supp. 168, 172 (S.D. Ohio 1993); Broom v. Morgan Stanley DW, Inc., 236 P.3d 182 (Wash. 2010); Manhattan Loft, LLC v. Mercury Liquors, Inc., 173 Cal. App. 4th 1040, 1051 (Cal. App. 2d Dist. 2009); Lewiston Firefighters Ass’n v. City of Lewiston, 354 A.2d 154, 167 (Me. 1976); Skidmore, Owings & Merrill v. Conn.
The court ruled as follows: “[a]fter reviewing this split of authority, and failing to find caselaw directly on point in Pennsylvania, I find that the arbitrator’s failing to reach the statute of limitations defense in his partial final award is not a manifest disregard of the law. "Manifest disregard for the law means more than mere legal error or misunderstanding. Rather, the decision must fly in the face of clearly established legal precedent.” Silicon Power Corp., 661 F.Supp.2d at 542. As there is no consensus amongst the state or federal courts as to whether a statute of limitations does in fact apply to arbitration proceedings, there is no clearly established legal precedent on this issue in Pennsylvania. Thus, there is no “egregious impropriety” on the part of the arbitrator, and I find that vacatur of the arbitration award on this ground would be improper.

f. Mississippi has no comparable statute that defines the term “action,” so there is no statute that includes the term “proceeding” within the definition of the term “action.”

i. In Mississippi, a civil “action” is “commenced by filing a complaint with the court.” Miss. R. Civ. P. 3. An arbitration proceeding is not commenced by filing anything with the court. A FINRA arbitration is instituted by filing a Statement of Claim with the FINRA Director through the FINRA party portal. Code §12300(b)(1).

ii. Miss. Code Ann. §75-71-701(a) (within the Mississippi Securities Act of 2010) provides: “[t]he predecessor chapter exclusively governs all actions or proceedings that are pending on January 1, 2010, or may be instituted on the basis of conduct occurring before January 1, 2010, but a private civil action may not be maintained to enforce any liability under the predecessor chapter unless instituted within any period of limitation that applied when the cause of action accrued or within five (5) years after January 1, 2010, whichever is earlier.” Miss. Code Ann. §75-71-701(a) (emphasis added).

iii. Miss. Code Ann. §15-1-5 provides: “[t]he limitations prescribed in this chapter shall not be changed in any way
whatsoever by contract between parties, and any change in such limitations made by any contracts stipulation whatsoever shall be absolutely null and void, the object of this section being to make the period of limitations for the various *causes of action* the same for all litigants. *Miss. Code Ann.* §15-1-5.

iv. Miss. Code Ann. §15-1-1 provides: “[t]he provisions of this chapter shall not apply to any *suit* which is or shall be limited by any statute to be brought within a shorter time than is prescribed in this chapter, and such *suit* shall be brought within the time that may be limited by such statute.” *Miss. Code Ann. 15-1-1* (emphasis added).

3. Black’s law dictionary defines “suit” as “any proceeding by a party or parties against another in a court of law.” A “suit” is “a more narrow term that only involves court proceedings.” Raymond James Financial Services, Inc. v. Phillips, 126 So.3d 186, 192 (Fla. 2013).

C. **Pleadings**

1. A claimant commences an arbitration by filing a Statement of Claim with the Director through the Party Portal. Code §12300(b)(1).
   b. Statements of Claim may be amended at any time before a panel is appointed and after a panel is appointed with the panel’s consent upon motion. Code §12309.
   c. Multiple claimants may join in one Statement of Claim if they assert any right to relief jointly or severally, or the claims arise out of the same transaction or occurrence, or series of transactions or occurrences. Code §12312.

2. A signed and dated (form) submission agreement should be filed with the Statement of Claim. Code §12302(a).
   a. This document is the party’s signed agreement to submit the controversy to arbitration in accordance with FINRA By-laws, Rules, and Code of Arbitration procedure, and to be bound by those procedures and rules.

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3. Claimant must pay the filing fee with the Statement of Claim. Code §12302(b).

   a. The amount of the filing fee is determined by the amount of damages being sought. The fee amount ranges from $50 (for claims of less than $1,000) to $2,250 (for claims of over $5,000,000). Code §12900(a).

4. A Respondent must file an answer to the Statement of Claim within 45 days of service and must also include a submission agreement. Code §12303(a).

   a. Counterclaims, cross claims, and third party claims are allowed. Code §12303(b).

D. Selection of Arbitrators

1. Arbitrator selection is similar to jury selection. The parties will receive a list of pre-selected arbitrators to choose from and an instruction form on how to submit the party’s selection. The parties may peremptorily strike a specific number of arbitrators (four to six) then must rank the remaining arbitrators in accordance with most desired to least desired. The parties may also submit challenges for cause on the basis of bias or partiality. The parties do not see the other side’s selections, strikes, or challenges. Once the process is complete, FINRA will notify the parties of the chosen arbitrators. Code Part IV §12400-12410.

E. Prehearing Procedure

1. After the panel is appointed, the Director will schedule an Initial Prehearing Conference before the panel. This will be a telephonic conference with the entire panel and all counsel. During this conference the panel will set discovery, briefing, and motion deadlines, schedule the hearing dates, and address other preliminary matters. This is similar to a Rule 16 conference in federal court. Code §12500.

F. Motions

1. A party may make motions in writing, or orally during any hearing session. Before making a motion, a party must make an effort to resolve the matter that is the subject of the motion with the other parties. Every motion, whether written or oral, must include a description of the efforts made by the moving party to resolve the matter before making the motion. Code §12503(a)(1).
2. Written motions are not required to be in any particular form, and may take the form of a letter, legal motion, or any other form that the panel decides is acceptable. Written motions must be served on each other party and must be filed with the Director. Code §12503(a)(2).

3. Parties have 10 days to respond to a motion and 5 days to reply to the response. Code §12503(b)-(c).

4. Motions to Dismiss; Code §12504.
   a. Motions to dismiss a claim before conclusion of a party’s case in chief are discouraged.
   b. Motions to dismiss are decided by the full panel and the decision must be unanimous.
   c. The panel may not grant the motion unless an in-person or telephonic prehearing conference is held or waived by the parties.
   d. The panel cannot act upon a motion to dismiss unless the panel determines that the non-moving party previously released the claim, the moving party was not associated with the accounts, securities, or conduct at issue, or the claim has been previously adjudicated on the merits.

G. Discovery

1. The FINRA Discovery Guide contains a list of documents that are presumed to be discoverable in all arbitrations between a customer and a member/associated person. Code §12506.

2. Parties must produce the documents contained in the Discovery Guide within 60 days of the answer being filed. Code §12506.

3. Parties may request additional documents or information from any party by serving a written request on the party. Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute. Such requests should be reasonable in number and not require narrative answers or fact finding. Standard interrogatories are generally not permitted. Code §12507.
   a. Responses to the additional discovery requests are due within 60 days. Code §12507(b).

4. Motions to compel are allowed. Code §12509.
5. Depositions are strongly discouraged and may only be permitted by the panel under very limited circumstances such as: to preserve testimony of a dying or ill witness, to accommodate essential witnesses who are unwilling to travel for a hearing and may not otherwise be required to participate in the hearing, and other extraordinary circumstances. Code §12510.

6. Arbitrators have authority to issue subpoenas for the production of documents or the appearance of witnesses. Subpoenas are typically requested from the panel via written motion. Code §12512.

H. Hearing Exhibits and Witness Lists

1. No later than 20 days before the first scheduled hearing session, the parties must exchange all documents they intend to use as exhibits at trial, as well as a list of all witnesses they may call. Code §12514.

2. The parties will also be required to provide the panel with a prehearing brief at the 20 day exchange deadline. This brief summarizes the claims and defenses and provides the panel with a solid overview of what to expect the evidence to prove.

I. The Hearing

1. This is your “trial” on the merits.

2. Burdens of proof are the same as in court. A party has the burden to prove its own claim or defense.

3. Opening statements and closing arguments are allowed.

4. The examination of witnesses will be conducted as if you are in court. Objections are allowed and will be ruled on as if you are in court. Testimony is made under oath or affirmation.

5. The panel will decide what evidence to admit, and it is not required to follow state or federal rules of evidence.

6. The evidence is presented similarly to a courtroom trial: the claimants present their case in chief, followed by the respondents’ defense, then the claimants may present a rebuttal.

7. The panel has wide discretion and latitude on how to manage the case.

8. Documentary evidence is presented through witness binders, where you put all of the documents you intend to use with a particular witness in
one binder and provide a copy of that binder to each arbitrator and counsel.

9. For lengthy cases, it is not uncommon for the hearing to be spread out over long periods of time with extensive breaks in between. You could have four weeks of testimony spread out over six months of time.

J. Fees/Costs

1. The panel decides how to assess forum fees. Hearing session fees are set forth in Section 12902 of the Code. This assessment will be included in the award.

K. Awards

1. All awards are made in writing and require a majority vote of the arbitrators.

2. The reason for the award will not be explained unless the parties file a joint request for an explained award at least 20 days before the first scheduled hearing session. Code §12514(d).

3. All awards must be paid within 30 days of the award unless a motion to vacate is filed. If a motion to vacate is filed and ultimately denied, legal interest will be applied to the award. Code §12904(j).

VI. Award Confirmation/Appeal

A. Once an award is made, the FAA provides that a court of competent jurisdiction may confirm the award and reduce it to an enforceable judgment. “If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.” 9 U.S.C. § 9.

B. Under 9 U.S.C. § 10, there are only very limited situations where an arbitration award may be vacated by a court:

In any of the following cases the United States court in and for the district wherein the award was made may make an
order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

C. In certain circumstances, under 9 U.S.C. § 11, a court may make limited modifications or corrections to an arbitration award:

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.