

1986

## Uniform Arbitration Act, The

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# THE UNIFORM ARBITRATION ACT\*

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In 1955, the Uniform Arbitration Act (UAA) was proposed by the National Conference of Commissioners on Uniform State Laws.<sup>1</sup> Since that time, well over half of the states have adopted statutes modeled after the UAA.<sup>2</sup> The purpose of this survey is to explain the principles underlying recent court decisions interpreting the UAA, and provide a framework for analyzing future cases.<sup>3</sup>

### I. VALIDITY OF ARBITRATION AGREEMENTS

The UAA provides that a written agreement to submit any present or future controversy to arbitration "is valid, enforceable and irrevocable, save upon such grounds as exist at law or equity for the revocation of any contract."<sup>4</sup> Several states that have adopted the UAA, however, have tempered the breadth of this provision by forbidding arbitration agreements to cover certain matters.<sup>5</sup> Recent decisions suggest various considerations affecting the

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1. UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 4 (1978) [hereinafter cited as UAA].

2. Jurisdictions that have enacted statutes modeled after the UAA included Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and Wyoming.

3. See *Recent Developments: The Uniform Arbitration Act*, 1985 Mo. J. DISPUTE RESOLUTION 173 [hereinafter cited as *Recent Developments 1985*]; *Recent Developments: The Uniform Arbitration Act*, 1984 Mo. J. DISPUTE RESOLUTION 207 [hereinafter cited as *Recent Developments 1984*]; *Recent Developments: The Uniform Arbitration Act*, 48 Mo. L. REV. 137 (1983) [hereinafter cited as *Recent Developments 1983*]. The 1985 survey collected cases interpreting and applying the UAA decided between September, 1983 and September, 1984. The 1984 survey collected cases interpreting and applying the UAA decided between September, 1982 and September, 1983. The 1983 survey collected cases interpreting and applying the UAA decided before September, 1982. This article surveys cases decided between September, 1984 and September, 1985.

4. UAA § 1 provides:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in their agreement].

5. See *Recent Developments 1983*, *supra* note 3, at 146.

validity of an arbitration agreement: (1) the statute may be construed so as to promote a policy of enforcing arbitration agreements;<sup>6</sup> (2) the possibility of piecemeal resolution of a dispute may render an arbitration agreement invalid;<sup>7</sup> (3) the terms of the contract and the conditions surrounding its execution may dictate whether an arbitration clause is enforceable, and by whom;<sup>8</sup> (4) one party may be a member of a class that is not included in the statute or which requires special attention;<sup>9</sup> and (5) particular state provisions may be superceded in interstate commerce by the Federal Arbitration Act.<sup>10</sup>

### A. Statutory Construction

Generally, state courts have chosen to construe arbitration statutes broadly in order to promote a policy of enforcing arbitration agreements.<sup>11</sup> However, two seemingly contradictory arbitration statutes will be construed narrowly, if feasible, so that the later act will not operate as a repealer by implication. For example, in *Forest Hills v. Weber Inc.*,<sup>12</sup> a dispute arose in a renovation and construction work contract between the contractor and contractee. As a result, the contractor filed a demand for arbitration pursuant to their agreement.<sup>13</sup> The trial court granted a motion by defendants to stay arbitration proceedings because when the Missouri legislature enacted the UAA making arbitration agreements valid and enforceable, they failed to repeal a statute<sup>14</sup> which renders executory arbitration agreements voidable.<sup>15</sup> The court of appeals declared that the two statutes were not irreconcilably inconsistent in that Missouri's arbitration act only applies to written arbitration agreements between commercial persons.<sup>16</sup> Missouri's version of the UAA does not apply to other arbitration contracts such as oral arbitration agreements or written arbitration agreements between non-commercial persons.<sup>17</sup> The

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6. See, e.g., *Forest Hills v. Weber Inc.*, 691 S.W.2d 361 (Mo. Ct. App. 1985).

7. See, e.g., *Baldwin Co. v. Weyland Mach. Shop Inc.*, 14 Ark. App. 118, 685 S.W.2d 537 (Ark. Ct. App. 1985).

8. See, e.g., *St. Luke's Hosp. v. Midwest Mechanical Constr.*, 681 S.W.2d 482 (Mo. Ct. App. 1984).

9. See e.g., *Obstetrics and Gynecologists v. Pepper*, 101 Nev. 105, 693 P.2d 1259 (1985).

10. See, e.g., *Old Dominion Ins. Co. v. Dependable Reinsurance Co.*, 472 So. 2d 1365 (Fla. Dist. Ct. App. 1985).

11. See *id.* at 1366.

12. 691 S.W.2d 361 (Mo. Ct. App. 1985).

13. *Id.* at 362.

14. MO. REV. STAT. § 435.010 (1978). This statute, which rendered arbitration agreements void, was subsequently repealed by the Missouri legislature. *Forest Hills*, 691 S.W.2d at 362 n.1.

15. *Forest Hills*, 691 S.W.2d at 362.

16. *Id.* at 363.

17. *Id.*

court held that the UAA applied since the contract in question was between commercial persons and contained a mandatory arbitration clause.<sup>18</sup>

*Forest Hills* also involved the issue whether noncompliance with a provision in Missouri's version of the UAA renders an arbitration agreement unenforceable. Specifically, the respondent argued that the arbitration agreement was unenforceable because it did not contain a notice of arbitration as required by Missouri's arbitration act.<sup>19</sup> Although the Missouri statute requires that notice be included in each contract, the court reasoned that the law favors a statutory reading which results in a reasonable interpretation. Accordingly, the court held that the purpose of the statute would be satisfied where the parties have actual notice of the arbitration clause.<sup>20</sup>

In *Howard County Board of Education v. Howard County Education Association*,<sup>21</sup> the court found that the arbitration clause in a collective bargaining agreement did not satisfy the requirements of the Maryland Arbitration Act, yet the arbitration agreement was nonetheless held enforceable. *Howard County* involved a grievance filed by a teacher in response to a classroom observation report of a supervisor.<sup>22</sup> The Board maintained that the arbitration clause in the collective bargaining agreement was invalid because it did not contain an explicit reference to the Maryland Arbitration Act.<sup>23</sup> However, the court found that even though the arbitration agreement was invalid under the statute it was enforceable under the common law.<sup>24</sup> The court, acknowledging that common law traditionally disfavored arbitration, relied on the legislative intent demonstrated by passage of Maryland's arbitration act to augment a public policy argument that the common law should be changed.<sup>25</sup>

### B. Piecemeal Resolution

In *Baldwin Company v. Weyland Machine Shop Inc.*,<sup>26</sup> an admittedly valid arbitration agreement was successfully attacked by suppliers who as-

18. *Id.*

19. Mo. REV. STAT. § 435.460 (Supp. 1982) requires contracts containing arbitration clauses to contain the following notice: "This contract contains a binding arbitration provision which may be enforced by parties." For a discussion of the Missouri arbitration statute, including the notice requirements, see *Recent Developments* 1983, *supra* note 3, at 140-42.

20. *Forest Hills*, 691 S.W.2d at 363; see also, *State ex rel. Tri-City Constr. v. Marsh*, 668 S.W.2d 148 (Mo. Ct. App. 1984).

21. 61 Md. App. 631, 487 A.2d 1220 (Md. Ct. Spec. App. 1985), *cert. granted*, 306 Md. 47, 506 A.2d 1190 (1986).

22. *Id.* at 631, 487 A.2d at 1221.

23. *Id.* at 634, 487 A.2d at 1223. Absent specific reference to the statute, the act does not apply to contractual relations between employers and employees. See MD. CTS. & JUD. PROC. CODE ANN. § 3-206(b) (1984).

24. *Howard County*, 61 Md. App. at 635, 487 A.2d at 1224.

25. *Id.*

26. 685 S.W.2d 537 (Ark. Ct. App. 1985).

serted that they were not parties to the original agreement and were therefore not bound by it. *Baldwin* involved a general contractor who contracted with the University of Arkansas at Pine Bluff, subcontracted with a third party, and contracted with other parties to supply materials to be used by the subcontractor.<sup>27</sup> After problems arose, Baldwin attempted to compel not only the subcontractor but also the suppliers to submit to arbitration pursuant to the provisions of the principal contract.<sup>28</sup> The court was concerned with two worthy but possibly conflicting policies: notice/consent versus liberal joinder. Written consent is necessary before a party can be compelled to submit to arbitration.<sup>29</sup> Given such a policy the court was hesitant to imply consent upon the part of a third party. On the other hand, in order to promote efficiency and insure that the arbitration affords complete relief, the court found it judicious to provide for liberal joinder in arbitration proceedings. The pertinent provision in the arbitration clause in the principal contract between Baldwin and the University referred to other persons "substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded" as fit subjects for joinder.<sup>30</sup> Baldwin argued that the provision *required* joinder, but the court held that it simply allowed joinder of additional consenting parties.<sup>31</sup> Thus, the suppliers were not required to submit to arbitration; however, the subcontractor was ordered to submit to arbitration.<sup>32</sup>

### C. Application of Contract Principles

Many decisions determining the validity of arbitration agreements involve an analysis of the contractual language and relationships. Recent cases indicate that ordinary rules of contract interpretation apply in determining the validity of a particular provision.

In a dispute involving two parties to a contract containing an arbitration agreement, the fact that a contractor sues to recover amounts for a subcontractor does not render the arbitration agreement invalid.<sup>33</sup> In *Board of County Commissioners v. Cam Construction Co.*,<sup>34</sup> the prime contractor on a building project in a dispute with the owner demanded arbitration in accordance with the terms of the contract. The contract had a clause stating that, "All claims, and disputes arising out of the contract shall be decided by arbitration in accordance with the rules of the AAA."<sup>35</sup> The owner refused to arbitrate

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27. *Id.* at 538.

28. *Id.*

29. *Id.*

30. *Id.* at 539.

31. *Id.*

32. *Id.*

33. *Board of County Comm'r v. Cam Constr.*, 300 Md. 643, 480 A.2d 795 (1984).

34. *Id.*

35. *Id.* at 645, 480 A.2d at 796.

saying that he had no obligation to deal with the subcontractors, although it was only the general contractor who was demanding arbitration.<sup>36</sup> The court stated that although the subcontractors were not parties to the contract, a contractor may bring such claims on behalf of a subcontractor, and that lack of privity between the subcontractor and the contractee is not a bar to the action.<sup>37</sup> Accordingly, the court held that the losses allegedly suffered by the subcontractors were sufficient to carry the matter to arbitration.<sup>38</sup>

Another frequently encountered problem involving validity arises where one party tries to use an arbitration agreement to force a dispute over the existence of the underlying contract to arbitrate. Generally, courts have held that if the contract's existence is disputed, a party cannot rely on the arbitration provision of the contract in question to force arbitration.

In *McCrary Engineering Corp. v. Town of Upland*,<sup>39</sup> Richard Puckett, who had been given authorization to perform services for the town of Upland, signed an employment contract with McCrary Engineering to perform engineering services for the town.<sup>40</sup> The town board voted to terminate McCrary's contract which Puckett had signed. McCrary argued that the dispute of whether or not Puckett was authorized to sign this contract must be arbitrated in accordance with the clause in the contract.<sup>41</sup> The court rejected this argument and held that, "Because Upland challenges the very existence of the contractual relationship between McCrary and the town, it was proper for the trial court to determine the threshold question of whether an agreement to arbitrate existed."<sup>42</sup>

Where a third party has contractual rights dependent upon a contract between two principals, if he can sue on the basis of that contract, it seems fair to make an arbitration clause binding upon him. For example, a property owner's association, as third-party beneficiary to a contract between the design and construction parties on the one hand and the developer on the other, wanted a trial on damages resulting from defective design and construction of a condominium. In *Zac Smith & Company, Inc. v. Moonspinner Condominium Association, Inc.*,<sup>43</sup> the court held that, since the third-party beneficiary's rights depend upon terms of the contract between promisor and promisee, the arbitration clause in that contract is valid and binding on the third-party beneficiary.<sup>44</sup>

However, merely because a contract between two parties gives rise to actionable damages suffered by a third party does not necessarily mean the

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36. *Id.* at 643, 480 A.2d at 795.

37. *Id.* at 647, 480 A.2d at 797.

38. *Id.* at 649-53, 480 A.2d at 798-800.

39. 472 N.E.2d 1305 (Ind. Ct. App. 1985).

40. 472 N.E.2d at 1306.

41. *Id.*

42. 472 N.E.2d at 1307.

43. 472 So. 2d 1324 (Fla. Dist. Ct. App. 1985).

44. *Id.*

third party should be bound to the arbitration clause in that contract. In a sewer construction case, *Cocke County Board of Highway Commissioners v. Newport Utilities Board*,<sup>45</sup> the trial court held Newport liable to the Highway Board for damages caused by Newport's contractor.<sup>46</sup> According to the Highway Board, the contractor failed to repair roads intersected by sewer construction.<sup>47</sup> The appellate court affirmed the award of damages but added that Newport was entitled to indemnification by the contractor.<sup>48</sup> The Tennessee Supreme Court maintained that, although disputes between Newport and the contractor were subject to the general arbitration clause, the clause contained no references to litigation directed against Newport.<sup>49</sup> Thus, the indemnification clause in the contract prevails over the arbitration clause since it refers specifically to litigation against Newport. The court also held that the arbitration clause is not valid and binding upon the Highway Board because the Board was not party to the original contract.<sup>50</sup>

#### D. Protected Classes

Occasionally, the validity of an arbitration agreement is disputed because one of the parties is a member of a protected class against whom the agreement is not enforceable. Although the majority of these classes are specifically recognized in state arbitration acts,<sup>51</sup> some categories have been identified only by courts.<sup>52</sup>

For example, one such class may consist of medical patients who have agreed to submit malpractice claims to arbitration.<sup>53</sup> In *Obstetrics and Gynecologists v. Pepper*,<sup>54</sup> the plaintiff had signed a standardized adhesion contract which contained an agreement to arbitrate. The medical clinic required all patients to sign this form prior to treatment. The court refused to enforce the arbitration clause because the clinic did not show that the plaintiff made an informed decision to consent to arbitration.<sup>55</sup> The plaintiff did not recall either signing the agreement to arbitrate or receiving any notice of its presence or explanation of its meaning. The clinic could not prove that the plaintiff had received such notice or explanation because it was not the clinic's policy to give an explanation unless a patient requested it. The court, in dicta,

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45. 690 S.W.2d 231 (Tenn. 1985).

46. *Id.*

47. *Id.* at 234.

48. *Id.*

49. *Id.* at 237.

50. *Id.*

51. See *Recent Developments* 1983, *supra* note 3, at 146.

52. See, e.g., Annot., 18 A.L.R.3d 1264 (1968).

53. For a further discussion of medical malpractice arbitration, see *Recent Developments* 1983, *supra* note 3, at 214.

54. 101 Nev. 105, 693 P.2d 1259 (1985).

55. *Id.* at —, 693 P.2d at 1261.



stated that where the agreement to arbitrate is contained within an adhesion contract under which the adhering party had little if any ability to negotiate terms of the the provision, a court should not enforce the agreement against him unless it can be said that he knew of its existence, understood it and willingly entered into the agreement.<sup>56</sup>

### E. Federal Arbitration Act

An agreement which is unenforceable under state law may be revived under the Federal Arbitration Act.<sup>57</sup> In *Old Dominion Insurance Co. v. Dependable Reinsurance Co.*<sup>58</sup> the court compelled arbitration despite the fact that arbitration clause was unenforceable under the Florida Arbitration Act. The arbitration clause was unenforceable because a "retrocession contract" between the parties contained a provision allowing for removal of the arbitration to Bermuda.<sup>59</sup> However, the court found that arbitration was enforceable under the Federal Arbitration Act providing for arbitration where the contractual relations between the two parties involved interstate commerce.<sup>60</sup> The court also demonstrated the effect of this presumption favoring arbitration in its treatment of a clause elsewhere in the contract providing for service of suit. The court held that doubts concerning provisions apparently incompatible with the arbitration clause should be resolved in favor of arbitration.<sup>61</sup>

## II. WAIVER

Although there is no UAA provision regarding waiver, the issue generally arises in the following two contexts. First, a party's behavior may serve as an implied waiver of contractual arbitration rights.<sup>62</sup> Second, where parties contractually waive their rights to a judicial remedy, the courts may reserve jurisdiction where one party asserts the illegality or invalidity of the contract's arbitration provision.<sup>63</sup>

### A. Implied Waiver

Implied waiver disputes often arise when one or both parties seek judicial resolution of a dispute contractually governed by an arbitration clause. Mere

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56. *Id.*

57. 9 U.S.C. §§ 1-14 (1976); *See infra* notes 627-81 and accompanying text.

58. 472 So. 2d 1365 (Fla. Dist. Ct. App. 1985).

59. *Id.* at 1367.

60. *Id.*

61. *Id.*

62. *See, e.g.,* Capital Mortgage Co. v. Coopers & Lybrand, 142 Mich. App. 531, 369 N.W.2d 922 (1985).

63. *See, e.g.,* Grissom v. Greener & Summer Constr., 676 S.W.2d 709 (Tex. Ct. App. 1984).

filing of a pleading does not necessarily waive the right to compel arbitration.<sup>64</sup> Courts have indicated however, that public policy should promote fairness by inferring waiver where a party has participated in litigation to a degree so extensive as to prejudice the other party's position in an arbitration forum.<sup>65</sup>

### 1. Jurisdiction

Initial rejection by the designated arbitrating body does not always surrender jurisdiction of the dispute to the courts. In *Jorgenson Realty, Inc. v. Box*,<sup>66</sup> a dispute between a realty company and the state's Realtors Association's Professional Standards Committee, the committee initially declined to resolve a dispute as provided for by Association rules. Thereafter, plaintiff realty company filed suit and subsequently learned from the Association that the arbitrability issue could be appealed to the state association. On the appeal, the Association determined that the dispute was subject to mandatory arbitration. The court then stayed its proceedings and the arbitrator rendered judgment in favor of the Association. The court confirmed the judgment of the arbitrator, holding that where an association provides its own scheme for appellate review of disputes which are initially rejected by the arbitrator, such procedures are within the scope of the Association's rules by which a member (here, the plaintiff) agrees to be bound upon joining.<sup>67</sup> A waiver of the Association's jurisdiction could not therefore be inferred from the committee's initial rejection.

### 2. Mere Filing

In *Cyclone Roofing Co. v. David M. LaFave Co.*,<sup>68</sup> the court held the right to compel arbitration could not be waived *per se* by participation in or filing a lawsuit. The court noted that the state's statute reflected the legislature's contemplation that a party making application for arbitration do so after filing suit. In the absence of demonstrated prejudice to the party opposing the motion, public policy favored arbitration as the preferred method of dispute resolution.

*Burd Inc. v. Stoneville Furniture Co.*,<sup>69</sup> reached a similar conclusion, stating that "[t]here must be judicial litigation of the merits of arbitrable

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64. *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984).

65. *Servomation Corp. v. Henry Constr. Co.*, 74 N.C. App. 479, 328 S.E.2d 843 (1985).

66. 701 P.2d 1256 (Colo. Ct. App. 1985).

67. *Id.* at 1257-58.

68. 312 N.C. 224, 321 S.E.2d 872 (1984).

69. 134 Ill. App. 3d 149, 479 N.E.2d 962 (1985).

issues"<sup>70</sup> before waiver occurs. The court acknowledged that waiver could occur prior to judgment on the merits and reiterated the following factors to be considered: "Whether the party seeking arbitration (1) has previously taken steps inconsistent with the intent to invoke arbitration; (2) is unreasonably delayed in seeking arbitration; (3) has acted in bad faith or with willful misconduct; or (4) has caused undue prejudice."<sup>71</sup>

Other decisions have placed emphasis on the parties' intent. In *Riverfront Properties, Ltd. v. Max Factor III*,<sup>72</sup> the court refused to foreclose the respondent's arbitration rights for failure to file a motion to compel arbitration where the substance of the pleading established that claimant's sole objective in filing was to gain judicial recognition and enforcement of arbitration rights.

Similarly, the court in *District Moving & Storage Co. v. Gardiner & Gardiner*,<sup>73</sup> stated that "waiver of the right to arbitrate cannot be inferred in the absence of a clear expression of intent."<sup>74</sup> Thus, where defendant's actions consisted of (1) filing demurrers to plaintiff's declaration, amended declaration, and second declaration; (2) submitting memoranda in support of their demurrer to the first amended petition accompanied by an assertion that plaintiff should be bound by arbitration clauses in the disputed contracts; (3) maintaining a consistent position in all subsequent pleadings; and (4) no final judgment on the merits occurred; the court held that defendant had not waived the right to compel arbitration because such acts did not evidence a clear expression of intent to do so.

### 3. Extensive Participation

Offensive maneuvers which extend participation in the litigation process are more likely to be adjudged an implied waiver of arbitration rights. For example, the court so held in *Capital Mortgage Co. v. Coopers & Lybrand*,<sup>75</sup> on the theory that "summary judgment is the procedural equivalent of a trial and is a judgment on the merits which bars relitigation on the principles of res judicata."<sup>76</sup>

Where a lawsuit proceeds through extensive discovery before a demand

70. *Id.* at \_\_\_\_\_, 479 N.E.2d at 964.

71. *Id.* at \_\_\_\_\_, 479 N.E. 2d at 964 (citing *Christenson v. Dewor Dev.*, 33 Cal. 3d 778, 783, 661 P.2d 1088, 1090, 191 Cal. Rptr. 8, 10 (1983)).

72. 460 So. 2d 948 (Fla. Dist. Ct. App. 1984).

73. 63 Md. App. 96, 492 A.2d 319, *cert. granted*, 304 Md. 362, 499 A.2d 191 (1985).

74. *Id.* at 105, 492 A.2d at 324 (quoting *Charles J. Frank v. Assoc. Jewish Charities*, 294 Md. 443, 450 A.2d 1304 (1983)).

75. 142 Mich. App. 536, 369 N.W.2d 922 (1985).

76. *Id.* at 536, 369 N.W.2d at 925 (quoting *City of Detroit v. Nortown Theatre*, 116 Mich. App. 386, 323 N.W. 2d 411 (1982)).

for arbitration is made, courts are particularly sensitive to the possible prejudice a party may incur vis a vis his arbitration position.<sup>77</sup> In *Servomation Corp. v. Henry Construction Co.*,<sup>78</sup> the defendant pleaded several defenses including failure to submit the dispute to arbitration as required by contract. Defendant also filed a complaint for third party indemnity, served numerous interrogatories (which plaintiff answered), and filed a motion for summary judgment, alternatively requesting an order to stay litigation and compel arbitration. Upon remand following the final *Cyclone Roofing* decision,<sup>79</sup> the court of appeals upheld the trial court's refusal to compel arbitration. The court reasoned that public policy still favored application of waiver principles where extensive discovery resulted in "manifest detriment" to the opposing party.<sup>80</sup>

### B. Other Waiver Issues

Extensive participation in arbitration proceedings may waive the defense of non-arbitrability. In *Jaffe v. Nocera*,<sup>81</sup> the court refused to allow the defendant to contest the arbitrator's award on the theory that the arbitrator had exceeded his powers in holding defendant personally liable after defendant participated in two days of arbitration hearings, testifying and defending his case on the merits, without raising the issue of personal liability.

On the other hand, a refusal to honor an arbitration agreement does not necessarily subject that party to automatic liability.<sup>82</sup> *Cunningham v. Prudential Property & Casualty Insurance Co.*<sup>83</sup> refused to recognize a new cause of action which would conclusively presume the insurer liable to pay an uninsured motorist claim upon failure to timely honor an arbitration provision. The traditional cause of action to compel arbitration was deemed to be a sufficient remedy.

Although parties to a contract may waive their right to a judicial remedy by express consent,<sup>84</sup> courts allow judicial review where a party raises an

77. Implied waiver cases resulting from extensive proceedings which prejudice the opposing party's negotiation position should be distinguished from waiver under the applicable statute of limitations expressly provided in a contract. See, *W.J. Adams v. Nelsen*, 313 N.C. 442, 329 S.E.2d 322 (1985).

78. 74 N.C. App. 479, 328 S.E.2d 843 (1985).

79. *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984).

80. 70 N.C. App. 309, 318 S.E.2d 904 (1984) *aff'd after remand*, 74 N.C. App. 479, 328 S.E.2d 843 (1985), *rev'd*, 316 N.C. 543, 342 S.E.2d 853 (1986).

81. 493 A.2d 1003 (D.C. App. 1985).

82. Some jurisdictions hold that the insurer's breach of an agreement to arbitrate acts as a waiver of insurer's right to compel arbitration, effectively permitting the insured an opportunity to bring his claim in a court of law.

83. 340 Pa. Super. 130, 489 A.2d 875 (1985).

84. *Coronado v. Fireman's Fund Ins. Co.*, 131 Ill. App. 3d 450, 475 N.E.2d 1048 (1985).

allegation of the contract's illegality.<sup>85</sup> In *Grissom v. Greener & Summer Construction*,<sup>86</sup> the court ruled that since the legislature explicitly provided for judicial review in cases of fraud, mistake, or arbitrator misconduct,<sup>87</sup> an agreement to waive the parties' rights to an appeal was subject to judicial review only in those three instances.<sup>88</sup> The decision relied on the public policy of harmonizing legislatively mandated review with considerations of judicial economy which discourage reopening the merits of a case already decided through arbitration.<sup>89</sup>

### III. ARBITRABILITY

Unless prohibited by statute or public policy, almost any dispute may be submitted to arbitration provided the parties have agreed to arbitrate their disputes and have manifested that intention in an arbitration agreement. Parties, however, sometimes disagree on whether an arbitration agreement applies to a specific dispute. At this juncture, a court must be called upon to settle the issue of arbitrability.<sup>90</sup> The term "arbitrability" refers to whether a controversy is subject to arbitration.<sup>91</sup> When determining arbitrability, courts examine both the existence and scope of an arbitration agreement.<sup>92</sup> Michigan courts have established a three-prong test to determine whether an issue is arbitrable: (1) whether an enforceable arbitration agreement exists between the parties; (2) whether the disputed claim falls within the scope of the arbitration agreement; and (3) whether the arbitration agreement expressly exempts the particular dispute.<sup>93</sup>

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85. *E.g.*, *Obstetrics and Gynecologists v. Pepper*, 101 Nev. 105, 693 P.2d 1259 (1985). (The court refused to enforce an arbitration provision contained in a contract of adhesion. The contract required patients to sign before receiving medical services and contained no option for revocation.)

86. 676 S.W.2d 709 (Tex. Ct. App. 1984).

87. TEX. REV. CIV. STAT. ANN. art. 238 (Vernon 1973).

88. *Grissom*, 676 S.W.2d at 711.

89. The court in *I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp.*, 600 F. Supp. 92 (S.D. Fla. 1984), explained that because the judiciary may not enforce illegal contracts, courts are required to decide, *sua sponte* if necessary, the issue of legality before enforcing a contract. It would therefore appear to be impossible to waive the illegality defense since arbitration awards are subject to court suits for contractual enforcement.

90. The UAA restricts when arbitrability may be addressed by the courts. Courts may decide the issue of arbitrability when a party moves to compel or stay arbitration. UAA § 2. Further, courts may rule on arbitrability when a motion to vacate an award is made on the grounds that a valid arbitration agreement does not exist. UAA § 12(a)(5).

91. *See Connecticut Union of Tel. Workers v. Southern New England Tel. Co.*, 148 Conn. 192, 197, 169 A.2d 646, 649 (1961).

92. *E.g.*, *Fryer v. National Union Fire Ins. Co.*, 365 N.W.2d 249, 253 (Minn. 1985).

93. *Federal Kemper Ins. Co. v. American Bankers Ins. Co.*, 137 Mich. App. 134, 357 N.W.2d 834 (1984); *see also McCrary Eng'g Corp. v. Town of Upland*, 472

A. *Scope of the Contract*

In *Federal Kemper Insurance Co. v. American Bankers Insurance Co.*,<sup>94</sup> the Michigan Court of Appeals decided the case on the principle that a court, relying on the language of the contract, was to settle the issue of arbitrability.<sup>95</sup> According to the *Federal Kemper* opinion, a court is to consider (1) whether an arbitration clause exists, (2) whether the disputed issue arguably falls within the scope of arbitration, and (3) whether the disputed issue is expressly excluded from arbitration by the contract.<sup>96</sup>

*Federal Kemper* involved an automobile accident in which a dispute arose between the insured and her insurer regarding uninsured motorist coverage. The insurer filed a declaratory action to determine its liability. The trial court found in favor of the insurer despite the insured's claim that the issue should have been submitted to arbitration pursuant to the insurance contract.<sup>97</sup> The court of appeals relied on the above stated test to affirm the trial court's ruling that the dispute was not arbitrable. The court noted that the language of the contract specifically excluded issues of coverage from arbitration.<sup>98</sup> Because this exclusion was found to be controlling,<sup>99</sup> the court of appeals concluded that the contract language precluded arbitration.<sup>100</sup>

In a similar case, *Clark v. Mutual Insurance Co.*,<sup>101</sup> the defendant insurance company appealed from an order wherein it was forced to arbitrate a dispute arising out of an uninsured motorist claim on a general automobile liability insurance policy.<sup>102</sup> The circuit court granted insured plaintiff's mo-

N.E.2d 1305 (Ind. Ct. App. 1985) (requiring a party seeking arbitration to prove the existence of a valid arbitration agreement and a violation of that agreement).

94. 137 Mich. App. 134, 357 N.W.2d 834 (1984).

95. *Id.* at 139, 357 N.W.2d at 836-37.

96. *Id.* at 139-40, 357 N.W.2d at 837.

97. *Id.* at 139, 357 N.W.2d at 836.

98. The arbitration clause provided:

Arbitration. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of the uninsured automobile because of bodily injury to the insured, or do not agree to as the amount of payment which may be owing under this insurance, then upon written demand of either, the matter or matters, *excluding matters of coverage*, . . . shall be settled by arbitration

*Id.* at 140, 357 N.W.2d at 837 (emphasis added).

99. Although the coverage exclusion was not contained in the original policy, it was added by amendment nine years before the accident. The insurer introduced an affidavit stating that the amendment was in effect at the time of the accident. The appellate court accepted this unrefuted affidavit as "strong evidence" that the coverage issue was beyond the scope of arbitration. *Id.* at 141, 357 N.W.2d at 837-38.

100. *Id.* at 141, 357 N.W.2d at 837.

101. 131 Ill. App. 3d 633, 476 N.E.2d 4 (1985).

102. *Id.* at 635, 476 N.E.2d at 5.

tion to compel arbitration of the coverage dispute and the insured sought to have the arbitrator's award entered as a judgment.<sup>103</sup> The appeals court reversed the trial court decision, and held that the insurance company had not agreed to submit to arbitration the issue of coverage, and therefore it should have been tried in court.<sup>104</sup> The court confirmed that the arbitration agreement was valid, and noted if it is found in court that the plaintiff is covered by the terms of the agreement, the arbitration process will be enforced to determine liability and damages.<sup>105</sup>

Since agreements to arbitrate are contracts, the scope of such agreements are governed by the rules of contract interpretation. Furthermore, both legislative and public policy require that any doubt in the scope of an agreement to arbitrate be resolved in favor of arbitrability.<sup>106</sup> In *Village of Cairo v. Bodine Contracting Co.*,<sup>107</sup> the court of appeals set aside the trial court's order enjoining arbitration and remanded for arbitration in accordance with the agreement of the parties.<sup>108</sup> The plaintiff had contracted with defendant for the installation of a comprehensive sewage system. The contract contained an arbitration provision that included a clause stating that Bodine would continue work in progress during any arbitration proceedings.<sup>109</sup> Bodine failed to do so.<sup>110</sup> Cairo, in support of its overall position denying arbitration, claimed the clause should be construed as a condition precedent to the demand for arbitration.<sup>111</sup> Conversely, Bodine maintained that at worst, the work stoppage was a breach of contract, and, therefore, was a matter fit for arbitration.<sup>112</sup>

The court advanced several reasons for holding in favor of arbitrability. First, owing to strong public policy, ambiguities should be construed in favor of arbitration.<sup>113</sup> Second, even if work stoppage is construed as a breach of the agreement to arbitrate, it does not necessarily follow that the other party is excused from performing the contract: "A contract for arbitration, as any other contract, may be breached, but not every breach excuses the other party from the promise to arbitrate. . . ."<sup>114</sup> Third, for a breach to revoke the force of the agreement to submit to binding arbitration, the act of breach-

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103. ILL. REV. STAT. ch. 10, para. 101 et seq. (1983).

104. *Clark*, 131 Ill. App. 3d at 637, 476 N.E.2d at 6.

105. *Id.* at 638, 476 N.E.2d at 7.

106. "[O]nce the existence of an agreement to arbitrate is proven—the clause is construed in favor of the arbitrability of a dispute 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " *Village of Cairo v. Bodine Contracting Co.*, 685 S.W.2d 253, 259 (Mo. Ct. App. 1985).

107. 685 S.W.2d 253 (Mo. Ct. App. 1985).

108. *Id.* at 266.

109. *Id.* at 259.

110. *Id.* at 260.

111. *Id.* at 261.

112. *Id.* at 259.

113. *Id.*

114. *Id.* at 260.

ing must repudiate the arbitration agreement itself.<sup>115</sup> Finally, the performance of work could not be a condition precedent to arbitration because it referred to a condition of activity *during* the arbitration process, not an act prior to arbitration.<sup>116</sup>

In *State Highway Commission v. Brasel & Sims Construction Co.*,<sup>117</sup> the court focussed on contract language to determine whether the parties intended to be bound by the arbitration clause.<sup>118</sup> In this case the arbitration agreement stated that disputes between the parties were to be decided by the state's engineer. The engineer's determination was to be conclusive unless the parties appealed. Because the agreement provided for an appeal, the court reasoned that the parties did not intend to be bound by the arbitration.<sup>119</sup> A dissenting opinion in the case argued that doubt as to the intent of the parties should be resolved in favor of arbitrability.<sup>120</sup> Nevertheless, the majority concluded that in the absence of the requisite intent to be bound by the engineer's decision, an enforceable dispute resolution clause did not exist.<sup>121</sup>

In *Fryer v. National Union Fire Insurance Co.*,<sup>122</sup> the Minnesota Supreme Court reaffirmed the principle that arbitration should proceed when the arbitrability issue is reasonably debatable.<sup>123</sup> Following an automobile accident, Fryer presented an uninsured motorist claim to his insurer after an unsuccessful attempt to recover from the other driver's insurer. On the basis of his insurance policy, Fryer sought arbitration of the issue of uninsured motorist coverage. Five days before arbitration was to begin, the other driver's insurer admitted coverage. Over the objection of Fryer's insurer, arbitration proceeded and Fryer was awarded damages.<sup>124</sup>

On appeal from the denial of the insurer's motion to vacate the award, the Minnesota Supreme Court held that the issue of uninsured motorist coverage was reasonably debatable.<sup>125</sup> Thus, the court held the arbitrators were within their authority in settling the dispute.<sup>126</sup>

115. *Id.*

116. *Id.* at 261.

117. 688 P.2d 871 (Wyo. 1984).

118. *Id.* at 876.

119. *Id.* at 877.

120. *Id.* at 884 (Rooney, C.J., dissenting).

121. *Id.* at 877.

122. 365 N.W.2d 249 (Minn. 1985).

123. The court announced this principle in *United States Fidelity and Guar. Co. v. Fruchtman*, 263 N.W.2d 66, 71 (Minn. 1978).

124. The arbitrators decided only the issues of liability and damages, leaving the issue of coverage for later determination by the court. *Fryer*, 365 N.W.2d at 252.

125. The claimant's insurance policy defined an uninsured motor vehicle as, among other things, (1) an automobile for which an insurer denies coverage or (2) an "underinsured" automobile (i.e., a defendant's automobile for which insurance coverage was less than the coverage of the claimant's policy). *Id.* at 252 n. 1. The court held that although the eleventh-hour admission of coverage precluded uninsured motorist coverage under the first definition, the automobile which struck claimant's automobile fell within the second definition. *Id.* at 254.

126. *Id.*



It is a well established principle that parties are only bound to arbitrate those issues which they have agreed to arbitrate. In *United Food and Commercial Worker International Union v. County Line Cheese Co.*,<sup>127</sup> the parties negotiated and entered into a collective bargaining agreement containing an arbitration clause. Throughout the negotiation process the employer refused to adopt the Union's proposal for unionized trucking. Moreover, the written contract was silent on the issue of trucking. The union sought to compel arbitration of the trucking issue. However, the trial court granted the employer's motion for summary judgment on the basis that the issue was not arbitrable.<sup>128</sup> On appeal, the court of appeals affirmed the trial court's ruling finding that although the parties bargained with the issue in mind, the final agreement was silent on the issue and the court would not infer a provision covering the trucking issue.<sup>129</sup>

A limited number of jurisdictions state that issues arising out of the law of torts are not subject to written arbitration agreements. In *Jim Halsey Co., Inc. v. Bonar*,<sup>130</sup> the Supreme Court of Arkansas rejected the defendant's attempt to compel arbitration. The plaintiff, a concert promoter, had contracted with defendant, a booking agent, for the performance of Rick Nelson. A written agreement, containing an arbitration clause, was signed by plaintiff but was not signed by either Rick Nelson or his agent. Subsequently, Rick Nelson notified plaintiff that he would not perform as agreed, and plaintiff brought suit alleging breach of an oral contract, negligence, and fraud.<sup>131</sup> At the trial, defendant moved for summary judgment on the ground that the dispute was subject to arbitration pursuant to the arbitration clause in the written contract.<sup>132</sup>

The court rejected this argument on two grounds: First, since plaintiff had sued on the breach of an oral contract, which did not contain an arbitration provision, and the written contract was unsigned, the arbitration clause in the written contract was inapplicable;<sup>133</sup> and second, plaintiff's petition alleged fraud and thus precluded the issue from being determined by an arbitrator.<sup>134</sup>

Although some jurisdictions refuse to allow arbitration of tort claims, others reason that arbitrability is not to be determined by characterizing the claim as one of tort or contract. Instead, these latter jurisdictions focus on the language in the arbitration clause in order to ascertain whether the clause

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127. 469 N.E.2d 470 (Ind. Ct. App. 1984).

128. *Id.* at 471.

129. *Id.* at 473.

130. 284 Ark. 461, 683 S.W.2d 898 (1985).

131. *Id.* at 465, 683 S.W.2d at 902.

132. *Id.* at 472, 683 S.W.2d at 905.

133. *Id.* at 473, 683 S.W.2d at 906.

134. *Id.*; Arkansas' arbitration statute precludes written agreements to arbitrate issues in the law of torts. See ARK. STAT. ANN. § 34-511 (Supp. 1983).

is sufficiently broad to include tort claims. This approach is in keeping with the principle that arbitration agreements are contracts and the parties are free to define for themselves the scope of the arbitration clause.

In *Rodgers Builders, Inc. v. McQueen*,<sup>135</sup> the parties entered into a written contract for the construction of a multi-unit housing development. The contract contained an arbitration clause which was very broad in scope.<sup>136</sup> A dispute arose concerning plaintiff's alleged failure to complete the project on time and defendant's refusal to pay a requested draw. Plaintiff demanded arbitration of this dispute and an award was rendered in his favor. The plaintiff then instituted an action in court alleging fraud, unfair and deceptive trade practices, and praying for compensatory and punitive damages.<sup>137</sup> The trial court granted summary judgment on the grounds that it was barred by *res judicata*.<sup>138</sup> On appeal, plaintiff argued that he could not have brought these claims to arbitration because they present questions in the law of torts and also because he sought punitive damages.<sup>139</sup>

In deciding in favor of arbitrability of these issues, the court considered several factors. First, the court noted that there was no legislative bar to arbitrating tort claims, provided that they are sufficiently related to the contract or its breach.<sup>140</sup> Second, the very broad language in the arbitration clause was sufficiently broad to include any claim that arose out of or was related to the contract or its breach, regardless of the characterization of the claim as tort or contract.<sup>141</sup>

Where a contract provides a procedure, apart from arbitration, for the settlement of certain disputed issues, the decision reached through that procedure is not arbitrable. In *Hotel Employee and Restaurant Employees Union v. Criterion Restaurant*,<sup>142</sup> a dispute over a proposed wage increase broke out between the parties. Pursuant to the parties collective bargaining agreement, a six-member committee considered the proposed increase. The committee granted the increase and the matter was then heard by an arbitrator. The arbitrator found that absent a showing of bad faith, the committee's

135. 76 N.C. App. 16, 331 S.E.2d 726 (1985), *review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

136. *Id.* at \_\_\_\_\_, 331 S.E.2d at 728. The arbitration clause provided in pertinent part: "All claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof, . . . shall be decided by arbitration . . ." *Id.*

137. *Id.*

138. *Id.* at \_\_\_\_\_, 331 S.E.2d at 730.

139. *Id.* at \_\_\_\_\_, 331 S.E.2d at 731.

140. *Id.*; see N.C. GEN. STAT. § 1-567.2(a) (1983), which provides that parties "[M]ay include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof." *Id.*

141. *Rodgers*, 76 N.C. App. at \_\_\_\_\_, 331 S.E.2d at 731.

142. 352 N.W.2d 835 (Minn Ct. App. 1984).

*decision* was not arbitrable.<sup>143</sup> However, the court determined the arbitrator had construed the committee procedure very narrowly,<sup>144</sup> implying that a decision from a broader or more loosely defined procedural agreement may indeed be arbitrable.

### B. *Proper Forum*

The question of whether an issue is arbitrable is one of law, and a court must make its own determination on the issue. In *Poire v. Kaplan*,<sup>145</sup> one joint venturer brought suit against another joint venturer. The defendant filed a motion to dismiss on the grounds that the exclusive remedy was arbitration. The court ordered the parties to arbitration and an award was rendered for plaintiff. Defendant then claimed that the issues in her motion to dismiss were not arbitrable. The court of appeals rejected defendant's argument finding that the trial court had questioned the parties prior to arbitration and concluded that the entire dispute was subject to arbitration.<sup>146</sup>

In *Metropolitan Dade County v. Resources Recovery Construction Corp.*,<sup>147</sup> on appeal from an order to stay arbitration, the Florida Court of Appeals stated its test to determine which body should decide the issue of arbitrability. If the party seeking a stay disputes the existence of an arbitration agreement, the court decides the issue.<sup>148</sup> If the party acknowledges the agreement, but denies its applicability due to events occurring since its adoption, the arbitrator decides the issue.<sup>149</sup>

In *Dade County*, the parties entered into contracts containing arbitration agreements. An arbitrator, and later the parties themselves, revised the contracts. The revised versions did not contain arbitration agreements. In a later dispute, the parties disagreed whether or not they were required to submit to arbitration. The trial court denied the county's motion to stay and submitted the issue of arbitrability to the arbitrators.<sup>150</sup>

Because the county disputed the existence of an arbitration agreement, the court of appeals concluded that arbitrability should have been determined by the court, not the arbitrator.<sup>151</sup> As a result, the court of appeals reversed the lower court and remanded the action for further proceedings.<sup>152</sup>

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143. *Id.* at 836.

144. *Id.*

145. 491 A.2d 529 (D.C. 1985).

146. *Id.* at 533.

147. 462 So. 2d 570 (Fla. Dist. Ct. App. 1985).

148. *Id.* at 571 n.3.

149. *Id.*

150. *Id.* at 571.

151. *Id.* at 571 n.3.

152. The court ordered further proceedings to determine the parties' intent with regard to arbitration in revising the contracts. The court noted that any decision on arbitrability made before that determination would be premature. *Id.* at 571.

In *McCary Engineering Corp. v. Town of Upland*,<sup>153</sup> the Indiana Court of Appeals adhered to the principle that disputes concerning the existence of an arbitration clause are to be settled by the court.<sup>154</sup> Furthermore, a party seeking arbitration carries the burden of proving (1) the existence of a valid arbitration clause and (2) a violation of that clause by the opposing party.<sup>155</sup>

In *McCrary*, the Town of Upland employed an engineering corporation to prepare applications for federal grants. In a stack of forms requiring the signature of the town board's president, the corporation inserted a contract for additional services. Unknowingly, the president signed the forms and the contract. The town attempted to terminate the contract because the president had no authority to bind the town. In response, the corporation sought arbitration in accordance with the terms of the contract. The trial court granted a stay of arbitration.

On appeal, the court held that because the town questioned the authority of the president, it disputed the validity of the contract and its arbitration clause.<sup>156</sup> The appellate court concluded that the lower court had jurisdiction to determine arbitrability and affirmed the lower court's stay of arbitration.<sup>157</sup>

Where the language of an arbitration clause is unclear as to whether the disputed issue falls within the scope of the arbitration clause, the question of arbitrability should be left to the discretion of an arbitrator. In *Howard County Board of Education v. Howard County Education Association Inc.*,<sup>158</sup> the dispute focused on whether teacher observation reports were within the scope of the parties' arbitration clause. The appellate court found the arbitration clause ambiguous as to scope<sup>159</sup> and thus stated that the matter should be submitted to an arbitrator who must determine the arbitrability of the disputed issue.<sup>160</sup>

In *Board of County Commissioners v. Cam Construction Co.*,<sup>161</sup> the Maryland Court of Appeals ruled that arbitrators should decide whether disputes fall within the scope of an arbitration clause.<sup>162</sup> In this case, the

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153. 472 N.E.2d 1305 (Ind. Ct. App. 1985).

154. The court found support for this principle in the first section of the Indiana Arbitration Act, IND. CODE § 34-4-2-1 (1982); *Great Am. Trading v. I.C.P. Cocoa, Inc.*, 629 F.2d 1282, 1288 (7th Cir. 1980).

155. See *Shahan v. Brinegar*, 181 Ind. App. 39, 44, 390 N.E.2d 1036, 1040 (1979).

156. *McCrary*, 472 N.E.2d at 1307.

157. 472 N.E.2d at 1308.

158. 61 Md. App. 631, 487 A.2d 1220 (1985).

159. *Id.* at 643, 487 A.2d at 1226.

160. *Id.* "We are persuaded that when the language of an arbitration clause is unclear as to whether the subject matter of the dispute falls within the scope of the arbitration agreement, the legislative policy in favor of the enforcement of agreements to arbitrate dictates that ordinarily the question of substantive arbitrability initially should be left to the decision of the arbitrator." *Id.*

161. 300 Md. 643, 480 A.2d 795 (1984).

162. See *Gold Coast Mall, Inc. v. Lamar Corp.*, 298 Md. 96, 105, 468 A.2d 91, 96 (1983).

Frederick County Commission entered into a construction contract with Cam Construction Company. After the county refused Cam access to the construction site, the contractor demanded arbitration in accordance with the terms of the contract. The county sought an injunction to restrain arbitration. The parties disputed whether the contractor could seek arbitration for injuries sustained by subcontractors.

On appeal from the trial court's denial of injunctive relief, the appellate court concluded that the subcontractors' claims were not beyond the scope of the arbitration clause.<sup>163</sup> Thus, the court cleared the way for the arbitration panel to decide whether or not the disputed claims were within the arbitration clause.<sup>164</sup>

### C. Arbitrability of Specific Claims

In *Hall v. Metropolitan Life Insurance Co.*,<sup>165</sup> a Florida appellate court affirmed a trial court order compelling arbitration. It rejected the policyholder's contention that the claim was not arbitrable in that it violated provisions of the Florida Insurance Code guaranteeing an insured a right of access to the courts. The court explained that the statute relied upon by the policyholder is applicable only to disability policies—not to life insurance policies like that held by the plaintiff in the instant case.<sup>166</sup>

## IV. PROCEEDINGS TO COMPEL OR STAY ARBITRATION

### A. Compelling Arbitration

Arbitration agreements are statutorily recognized contracts and are subject to judicial enforcement by initiating a proceeding to compel arbitration. Thus, an order to compel arbitration is analogous to an order for specific performance.<sup>167</sup> Under the UAA, any party may compel arbitration by proving both an agreement to arbitrate and the opposing party's refusal to arbitrate.<sup>168</sup>

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163. *County Comm'r*, 300 Md. at 649, 480 A.2d at 798.

164. *Id.* at 653, 480 A.2d at 800.

165. 454 So. 2d 711 (Fla. Dist. Ct. App. 1984).

166. *Id.* at 713.

167. *Shaw v. Kuhnel & Assoc.*, 102 N.M. 607, \_\_\_\_, 698 P.2d 880, 881 (1985).

168. UAA § 2(a) provides:

On application of a party showing an agreement described in Section 1 [an arbitration agreement], and the opposing party's refusal to arbitrate, the Court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the Court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise the application shall be denied.

*Id.*

### 1. Jurisdiction

A court's power to compel arbitration is determined by statute.<sup>169</sup> Accordingly, lack of jurisdiction may cause a court to deny a motion to compel arbitration. For example, in *Shaw v. Kuhnel and Associates, Inc.*,<sup>170</sup> a dental group sued architects and contractors who designed and constructed their dental offices.<sup>171</sup> The construction contracts contained provisions for arbitrating disputes that might arise between the parties. Upon commencement of the action, the defendants moved to stay the court proceedings and compel arbitration.<sup>172</sup> The court denied the motions, finding the defendants were Texas corporations, not licensed to do business in New Mexico. The court reasoned that a motion to compel arbitration is in essence a suit for specific performance of the arbitration agreement.<sup>173</sup> Although the court noted that public policy would favor arbitration, New Mexico statutes specifically prohibit any unauthorized foreign corporation from maintaining any suit or proceeding.<sup>174</sup> Accordingly, the defendants were without power to compel Shaw to arbitrate.

### 2. Statute of Limitations

Enforceability of an arbitration clause depends upon enforceability of the contract with respect to the statute of limitation. In *Adams v. Nelson*,<sup>175</sup> the statute of limitations for pursuing an action for breach of contract was three years. Over three years had passed between the time of the alleged breach of the arbitration agreement and the time of suit to compel arbitration.<sup>176</sup> The court held that an action to compel arbitration following breach of an arbitration agreement is subject to the same statute of limitations as for breach of the underlying contract.<sup>177</sup> Therefore, since the statute of limitations had run the plaintiff could not invoke an order to compel arbitration.

### 3. Party Determination

As a general rule, a court can only compel arbitration between the parties to an arbitration agreement.<sup>178</sup> Occasionally, a party to a contract may wish

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169. *Detroit Auto Inter-Ins. Exch. v. Maurizo*, 129 Mich. App. 166, 175, 341 N.W.2d 262, 265-66 (1983).

170. 102 N.M. 607, 698 P.2d 880 (1985).

171. *Id.* at \_\_\_\_, 698 P.2d at 881.

172. *Id.*

173. *Id.*

174. N.M. STAT. ANN. § 53-17-20 (A) (1983).

175. 313 N.C. 442, 329 S.E.2d 322 (1985).

176. *Id.* at \_\_\_\_, 329 S.E.2d at 325.

177. *Id.* at \_\_\_\_, 329 S.E.2d at 325.

178. See UAA § 2(a).

to enforce an arbitration agreement against a third-party beneficiary. Recently, the Florida Court of Appeals held in *Zac Smith & Co., Inc. v. Moonspinner Condominium Association, Inc.*,<sup>179</sup> that where an arbitration agreement is legally enforceable as to the parties to a contract, third-party beneficiaries are bound to the same extent.<sup>180</sup>

In this case a condominium association brought suit alleging defects in the design and construction of a condominium. It claimed standing to bring suit as a third-party beneficiary. The defendant sought to compel arbitration pursuant to the arbitration clause within the contract. The court deemed the condominium association bound to the arbitration clause because third-party beneficiaries' rights are determined by contractual terms between the promisor and the promisee.<sup>181</sup>

Similarly, in *District Moving and Storage Co. v. Gardiner and Gardiner, Inc.*,<sup>182</sup> the principle of third party beneficiary was used in granting a motion to compel arbitration. In *Gardiner*, a lessee sued an architect and contractor of his leased warehouse for alleged defects.<sup>183</sup> The trial court granted a motion to compel arbitration.<sup>184</sup>

The question whether third-party beneficiaries were bound by their arbitration agreements was one of first impression in Maryland.<sup>185</sup> In affirming the trial court, the appellate court held that the "District should not be allowed to sue for breach of the contracts between [lessor and defendants] and thus benefit from those agreements without equally being made to abide by the terms. . . compelling arbitration of disputes. . . ."<sup>186</sup>

#### 4. Contract Determination

Before a court can compel arbitration, it must determine whether the parties are bound to the contract. If no valid agreement exists between the parties, compelling arbitration is not proper.<sup>187</sup>

In *St. Luke's Hospital v. Midwest Mechanical Contractors, Inc.*,<sup>188</sup> Midwest was not awarded a construction contract even though it had been the low bidder on the project. Consequently, Midwest attempted to utilize an arbitration provision in the contract to compel arbitration.<sup>189</sup> St. Luke's sought

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179. 472 So. 2d 1324 (Fla. Dist. Ct. App. 1985).

180. *Id.* at 1325.

181. *Id.*

182. 63 Md. App. 96, 492 A.2d 319 (1985).

183. *Id.* at 100, 492 A.2d at 321.

184. *Id.* at 101, 492 A.2d at 322.

185. *Id.* at 102, 492 A.2d at 322.

186. *Id.* at 104, 492 A.2d at 323.

187. *Wamego v. L.R. Foy Constr. Co., Inc.*, 9 Kan. App. 2d 168, 675 P.2d 912 (1984).

188. 681 S.W.2d 482 (Mo. Ct. App. 1984).

189. *Id.* at 485.

to stay threatened arbitration proceedings, contending that no arbitration agreement existed between the parties. The trial court's grant of St. Luke's motion to stay the arbitration was affirmed on appeal. The appellate court said that the statutory scheme for compelling or staying arbitration proceedings is premised upon the pre-existence of a valid agreement between the parties.<sup>190</sup> Moreover, the appellate court held that upon a showing that no valid agreement exists, the trial court may stay threatened arbitration proceedings.<sup>191</sup>

Once a court determines that a valid contract exists, courts will not characterize a dispute as one not in the contract. For example, in *Anderson-Parrish Associates, Inc. v. City of St. Petersburg Beach*,<sup>192</sup> a contractor sued the city for breach of a construction contract. The city brought Anderson-Parrish, the architects, into the action by means of a third party complaint.<sup>193</sup> The city then attempted to avoid an arbitration agreement it had with Anderson-Parrish by contending its claim was solely one of indemnification, and not based on contract. The trial court denied Anderson-Parrish's motion to compel arbitration.<sup>194</sup> The court reversed the denial on appeal, stating that if there is no dispute an arbitration agreement exists, a motion to compel arbitration must be granted.<sup>195</sup>

The trial court denied a motion to stay arbitration in *Grane v. Grane*.<sup>196</sup> Section 2(b) of the UAA provides a stay of arbitration if a dispute arises as to the existence of an agreement to arbitrate.<sup>197</sup> In *Grane*, a claim of fraud in the inducement was made,<sup>198</sup> but the motion to stay was denied.<sup>199</sup> On appeal, the court held that the stay should have been granted pending a hearing to determine the existence of a valid arbitration agreement.<sup>200</sup> Accordingly, a stay of arbitration proceedings is appropriate when there is an issue concerning the validity of the arbitration agreement.

Similarly, in *Gulf Interstate Engineering Co. v. Pecos Pipeline and Producing Co.*,<sup>201</sup> the court refused to enforce an arbitration clause which was fraudulently induced.<sup>202</sup> A prior contract between the parties had not

190. *Id.* at 486.

191. *Id.* at 487.

192. 468 So. 2d 507 (Fla. Dist. Ct. App. 1985).

193. *Id.* at 508.

194. *Id.*

195. *Id.*

196. 130 Ill. App. 3d 332, 473 N.E.2d 1366 (1985).

197. UAA § 2(b).

198. *Grane*, 130 Ill. App. 3d at 343, 473 N.E.2d at 1373 ("Fraud in the inducement vitiates the contract and renders the agreement voidable at the option of the injured party.').

199. *Id.* at 333, 473 N.E.2d at 1367.

200. *Id.* at 346, 473 N.E.2d at 1375.

201. 680 S.W.2d 879 (Tex. Ct. App. 1984).

202. *Id.* at 883.



contained an arbitration clause. When the defendant signed the current contract, he did so without consulting his attorney because a representative of the plaintiff had represented to defendant that defendant's lawyer had approved the contract. Defendant's attorney had, in fact, never seen the current contract which did include an arbitration clause.

### 5. Contract Interpretation

In *Clark v. Country Mutual Insurance Co.*,<sup>203</sup> Clark sued his insurer under an uninsured motorist policy. In addition, Clark sought arbitration of the dispute pursuant to arbitration provisions within the policy.<sup>204</sup> Country Mutual adamantly denied any coverage under the policy.<sup>205</sup> The motion to compel arbitration was eventually granted, and a motion to reconsider submitted by Country Mutual was summarily dismissed. The appellate court held that the trial court erroneously granted the motion to compel arbitration.<sup>206</sup> The court found the arbitration agreement to be limited in scope to matters concerning liability of the uninsured motorist and not applicable to policy coverage. The question of coverage was interpreted to present a threshold question of law and fact which the trial court should have resolved.<sup>207</sup> Accordingly, arbitration should not have been granted.

In *LaCourse v. Firemen's Insurance Co. of Newark, N.J.*,<sup>208</sup> the appellate court held that under Pennsylvania law a party can stay arbitration proceedings if it can establish that the arbitration agreement is limited in scope and does not reach the issue in controversy.<sup>209</sup> The appellate court reversed the trial court order compelling an insurance company to arbitrate a dispute over "policy limits."<sup>210</sup> It found that an agreement to arbitrate if the parties disagreed on the "amount of damages" did not encompass the "policy limits" dispute. Therefore, there was no agreement to arbitrate the issue and the court could not compel arbitration.<sup>211</sup>

### B. Staying Court Proceedings

When the subject matter of a pending lawsuit involves an arbitrable issue, a motion to compel arbitration is proper.<sup>212</sup> If the motion is granted,

203. 131 Ill. App. 3d 633, 476 N.E.2d 4 (1985).

204. *Id.* at 636, 476 N.E.2d at 6.

205. *Id.*

206. *Id.*

207. *Id.*

208. 756 F.2d 10 (3d Cir. 1985).

209. *Id.* at 12.

210. *Id.* at 14.

211. The court noted that Pennsylvania law generally favors arbitration but a party cannot be compelled to arbitrate absent an agreement covering the disputed issue. *Id.* at 12.

212. UAA § 2(a) (for text of § 2(a) see *supra* note 168).

the court's order must include a stay of the court proceedings.<sup>213</sup> In *Poire v. Kaplan*,<sup>214</sup> the parties agreed to arbitrate after suit was filed. The trial court stayed litigation and compelled arbitration pursuant to the parties' agreement. On appeal, the stay was affirmed.<sup>215</sup> The court stated that "[i]f during the course of litigation the parties agreed to arbitrate, a court may stay litigation and order arbitration to proceed under 'rule of court.'" <sup>216</sup>

## V. AWARDS

Six sections in the UAA specifically deal with awards.<sup>217</sup> These sections provide a framework for the form of awards as well as other guidelines and procedures concerning delivering, confirming, vacating, modifying or correcting an award.<sup>218</sup> In applying the UAA to arbitral awards, recent cases have dealt with (1) the grounds for attacking an award;<sup>219</sup> (2) the effect of an arbitrator's attempt to modify an award;<sup>220</sup> (3) the binding effect of an award;<sup>221</sup> and (4) the reasons an arbitrator must give for his decision.<sup>222</sup>

### A. Grounds For Attacking Awards

The UAA recognizes five grounds for attacking an award,<sup>223</sup> the most common of which is that the arbitrator exceeded his authority.<sup>224</sup> However, even with the UAA's grounds for attacking an award, courts are hesitant to overrule an award.<sup>225</sup> The arbitrator's decision is considered final on questions

213. UAA § 2(d) states:

Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefore has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

214. 491 A.2d 529 (D.C. Cir. 1985).

215. *Id.* at 533.

216. *Id.*

217. UAA §§ 8, 9, 11-14.

218. *Id.*

219. *See e.g.*, *David A. Brooks Enter. v. First Sys. Agencies*, 370 N.W.2d 434 (Minn. Ct. App. 1985); *Grissom v. Greener & Sumner Constr. Co.*, 676 S.W.2d 709 (Tex. Ct. App. 1984).

220. *See e.g.*, *Local P-9 United Food v. George A. Hormel & Co.*, 599 F. Supp. 319 (D. Minn. 1984), *rev'd*, 776 F.2d 1393 (8th Cir. 19).

221. *See e.g.*, *Western Casualty & Sur. Co. v. Gridley*, 362 N.W.2d 100 (S.D. 1985).

222. *See e.g.*, *Board of Educ., Unified School Dist. No. 215 v. L.R. Foy Constr. Co.*, 237 Kan 1, 697 P.2d 456 (1985).

223. UAA § 12(a) (for text of § 12 (a), *see infra* note 314).

224. *See Recent Developments 1984, supra* note 3, at 241.

225. *See e.g.*, *David A. Brooks Enter. v. First Sys. Agencies*, 370 N.W.2d 434 (Minn. Ct. App. 1985).

of law and fact in the absence of an agreement limiting his authority.<sup>226</sup> Accordingly, an aggrieved party will usually find it very difficult to obtain judicial relief.

### 1. Jurisdiction

Arbitral power and authority to render awards has been significantly limited in a jurisdictional sense, and it is the arbitration agreement that defines the boundaries. The agreement sets out those issues that the parties intend to arbitrate, and it is the agreement that effectively grants the arbitrator the jurisdiction to resolve certain enumerated issues.

In *Grissom v. Greener & Sumner Construction Co.*,<sup>227</sup> the Texas Court of Appeals upheld an arbitration award of exemplary damages for independent tortious conduct in connection with a contractual dispute.<sup>228</sup> The Texas Arbitration Act, which follows the UAA, provides for modification of an award if the arbitrators have awarded upon a matter not submitted to them.<sup>229</sup> The appellate court held, however, that the issue of exemplary damages (and their consequent effect upon attorneys' fees) had been expressly submitted by the parties in the arbitration agreement.<sup>230</sup> Accordingly, the award was upheld in the absence of any public policy grounds for modifying the award.

### 2. Awards Inconsistent with Law

The UAA requires a court to vacate an award when the arbitrator exceeds his powers in making the award.<sup>231</sup> Courts differ on what is sufficient to sustain a finding that an arbitrator exceeded his authority. Recent cases indicate the following events which have been used to vacate awards on the ground that the arbitrator exceeded his authority: (1) the award was based on an egregious error of law or fact;<sup>232</sup> (2) the award was granted in manifest disregard of the arbitration agreement;<sup>233</sup> or (3) the award contravened public policy.<sup>234</sup>

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226. See *Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, 41, 665 P.2d 1046, 1052 (1983).

227. 676 S.W.2d 709 (Tex. Ct. App. 1984).

228. *Id.* at 711.

229. TEX. STAT. ANN. art. 238 § A(2) (Vernon 1973).

230. *Grissom*, 676 S.W.2d at 711.

231. UAA § 12 (3).

232. See *e.g.*, *David A. Brooks Enter. v. First Sys. Agencies*, 370 N.W.2d 434 (Minn. Ct. App. 1985).

233. See *e.g.*, *Capozio v. American Arbitration Ass'n*, 490 A.2d 611 (D.C. Cir. 1985).

234. See *e.g.*, *Marino v. Tagaris*, 395 Mass. 397, 480 N.E.2d 286 (1985).

Generally, errors of law or fact will not justify setting aside an arbitrator's award. In *David A. Brooks Enterprises, Inc. v. First Systems Agencies*,<sup>235</sup> the court stated that an arbitration award should not be set aside simply because a court thinks that arbitrators erred as to the law or the facts.<sup>236</sup> *Brooks* involved a dispute between a warehouse owner and his insurance company over the amount of fire damage to a warehouse.<sup>237</sup> The issue was submitted to an appraisal umpire. The umpire entered an award for the warehouse owner.<sup>238</sup>

In reviewing this award, the Minnesota Court of Appeals first held that the state arbitration statute governed the awards of appraisal umpires.<sup>239</sup> The court then held an arbitration award could include prejudgment interest if it had been contested as an item of damages despite the court's recognition that awarding prejudgment interest is an error of law.<sup>240</sup> The court stated that Minnesota's Arbitration Act emphasizes the need to uphold arbitration awards even in the face of as mistake of law.<sup>241</sup> Arbitration awards should only be impeached if their conclusions are so at variance from conclusions which might legitimately be drawn so as to imply bad faith or failure to exercise honest judgment.<sup>242</sup>

In *Roseville Community District v. Federation of Teachers*,<sup>243</sup> the Michigan Court of Appeals stated that a reviewing court is only to consider whether the award draws its "essence" from the contract and is within the authority of the arbitrator.<sup>244</sup> The arbitrator's interpretation of the contract may be wrong.<sup>245</sup> *Roseville* involved a collective bargaining dispute concerning

235. 370 N.W.2d 434 (Minn. Ct. App. 1985).

236. *Id.* at 436.

237. *Id.* at 435.

238. *Id.* at 434-35.

239. *Id.* at 435.

240. *Id.* The appraisal umpire made an error of law because awarding prejudgment interest is contrary to MINN. STAT. ANN. § 549.09 (1982), which provides in pertinent part: "When the judgment is for the recovery of money, . . . interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk as provided in this section and added to the judgment." *Id.* (emphasis added).

241. *Brooks*, 370 N.W.2d at 436.

242. *Id.*

243. 137 Mich. App. 118, 357 N.W.2d 829 (1984).

244. *Id.* at 122, 357 N.W.2d at 832. The "essence" test was formulated by the United States Supreme Court in the *Steelworker's Trilogy*. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). The "essence test" states that "an arbitrator is confined to interpretation and application of the . . . agreement. . . . He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the . . . agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597.

245. *Roseville*, 137 Mich. App. 118, 357 N.W.2d 829.

the applicable seniority date in a conflict between a teacher and the school district.<sup>246</sup> The school district argued that the arbitrator's decision determining a seniority date for a reinstated teacher was so unreasonable that it constituted fraud.<sup>247</sup> The appellate court held that neither they nor the trial court stand in the position to overturn an arbitrator's decision on the merits of a grievance even if a mistake of fact exists.<sup>248</sup> Accordingly, the school district was not permitted to end run this long standing principle by equating an unreasonable mistake to fraud.<sup>249</sup>

In *Fryer v. National Union Fire Insurance Co.*,<sup>250</sup> a policeman was injured in an automobile accident while on duty.<sup>251</sup> The policeman recovered from National Union under their uninsured motorist policy. National Union sought to reduce the award by the amount of worker's compensation benefits Fryer had received.<sup>252</sup> In upholding the award, the appellate court stated that the arbitrator resolves all factual disputes and where the award is made for the purpose of compensating a party for damage resulting from an automobile accident, the award need not be reduced by the amount of worker's compensation benefits paid to the party.<sup>253</sup>

In *Capozio v. American Arbitration Association*,<sup>254</sup> a dispute arose between a homeowner and a contractor in which the homeowner attempted to have an adverse award modified to reflect in the original contract price the repair of three skylights.<sup>255</sup> The homeowner argued that any other interpretation of the contract was arbitrary. The appellate court upheld the award finding that the arbitrator did not make an egregious factual error because the original contract had been modified by a change order and the arbitrator's award reflected this change.<sup>256</sup>

When an arbitrator exceeds his power, thus invalidating one aspect of the award, the entire award is not necessarily invalid. In *School Committee v. Holbrook Education Association*,<sup>257</sup> the court held an award of damages is severable from an arbitrator's invalid order for an employer to recall an employee.<sup>258</sup>

*School Committee* involved a dispute between a teacher and a school committee. The teacher alleged the school committee had improperly hired

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246. *Id.* at 119, 357 N.W.2d at 830, 831.

247. *Id.* at 126, 357 N.W.2d at 834.

248. *Id.*

249. *Id.*

250. 365 N.W.2d 249 (Minn. 1985).

251. *Id.* at 251.

252. *Id.* at 255.

253. *Id.*

254. 490 A.2d 611 (D.C. Cir. 1985).

255. *Id.* at 612.

256. *Id.* at 619.

257. 395 Mass. 651, 481 N.E.2d 484 (1985).

258. *Id.* at \_\_\_\_\_, 481 N.E.2d at 489.

another person for a job for which the teacher was qualified. The teacher had been laid off several months before the disputed hiring and, under the terms of a labor agreement, had to be rehired before a job was offered to a new teacher. The arbitrator ruled the committee had to recall the teacher and awarded damages to the teacher.<sup>259</sup> The recall order was held invalid because the arbitrator had exceeded his powers since the order interfered with the management prerogative of the committee. However, the damage award did not so interfere and thus was valid and severable from the recall order.<sup>260</sup>

### 3. Awards Contravening Public Policy

An award may be vacated on the ground that the arbitrator exceeded his authority because the award contravened public policy. In *Marino v. Tagaris*,<sup>261</sup> a fee dispute arose between an attorney and client. At the arbitration hearing, the client represented herself. The arbitration board awarded the attorney the full amount of the fees he claimed were due. The client appealed on the ground that she had not been afforded a full and fair opportunity to present her claims to the board, claiming that she did not understand the nature of the proceedings and could not properly prepare for presentation to the board. She claimed she had relied on a characterization of the proceedings as "informal" in an "arbitration guide" pamphlet which was furnished to her before the session. She claimed to be further prejudiced by the panel's refusal to allow her to respond to the attorney's presentation, allegedly because they were "running behind schedule."<sup>262</sup>

The Supreme Court of Massachusetts, while acknowledging a general policy of judicial restraint in reviewing arbitration awards, held that the arbitration board had failed to adequately inform the client of the nature of the hearing and her right to challenge the award. Therefore, the board created a risk that public confidence in the conduct of attorneys and the the fairness of the judicial system would be undermined.<sup>263</sup> Given this important concern of public policy, the court vacated the award.<sup>264</sup>

In *Caputo v. Allstate Ins. Co.*,<sup>265</sup> an arbitration award was held reviewable because it violated public policy. The plaintiff was injured when the car he was driving collided with the car of a negligent uninsured motorist. The arbitrators did not allow the plaintiff to "stack" uninsured motorist coverage from three other vehicles owned by the plaintiff's father and insured by

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259. *Id.* at \_\_\_\_, 481 N.E.2d at 486.

260. *Id.* at \_\_\_\_, 481 N.E.2d at 488, 489.

261. 395 Mass. 397, 480 N.E.2d 286 (1985).

262. *Id.* at \_\_\_\_, 480 N.E.2d at 288.

263. *Id.* at \_\_\_\_, 480 N.E.2d at 289.

264. *Id.* at \_\_\_\_, 480 N.E.2d at 291.

265. 344 Pa. Super 1, 495 A.2d 959 (1984).

Allstate.<sup>266</sup> The plaintiff was covered by the insurance on one of his father's cars, which he had been driving when the accident occurred. The arbitration award was thus one-fourth what it would have been had Pennsylvania law been applied. The court held that the public policy which favored compensation of victims of uninsured motorists was strong enough to overcome the traditional reluctance of courts to review arbitration awards.<sup>267</sup>

### B. Modification by Arbitrators

Section 13 of the UAA provides that, on application of a party or on submission by the court, an arbitrator may modify an award if there was a miscalculation of figures or a mistake in the description of any person referred to in the award or if there was some other imperfection which does not affect the merits of the controversy.<sup>268</sup> Since one goal of arbitration is finality, that is, to provide an end to controversy and obviate the need for litigation,<sup>269</sup> courts have held that the power of an arbitrator to modify an award ceases when he has executed an award.<sup>270</sup>

For instance, in *Local P-9, United Food v. George A. Hormel & Co.*,<sup>271</sup> the court applied the principle of finality to invalidate an arbitrator's modification of an award. Specifically, the court held that an arbitrator's power to modify an award ceased after execution of the award.<sup>272</sup> The case involved a dispute between employees of a meat packing plant and Hormel concerning

266. *Id.* at 3, 495 A.2d at 960. "Stacking" of insurance coverage refers to the practice of allowing overlapping, cumulative coverage of the same loss-event by two or more policies owned by the same insured. The practice has been criticized as allowing a "windfall" to the insured.

267. *Caputo*, 344 Pa. Super 5, 495 A.2d 961. Ironically, the actual award was upheld on other grounds. *Id.* at —, 495 A.2d at 963 (insured vehicle had insufficient contacts with Pennsylvania to apply that state's law which permitted stacking of coverage).

268. Section 13 of the UAA provides for modification of an award:

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy. . . .

*Id.*

269. *Western Casualty & Sur. Co. v. Gridley*, 362 N.W.2d 100 (S.D. 1985).

270. *Local P-9, United Food v. George A. Hormel & Co.*, 599 F. Supp. 319 (D. Minn. 1984), *rev'd*, 776 F.2d 1393 (8th Cir. 1985).

271. *Id.*

272. *Id.* at 323.

the applicability of a newly instituted work schedule. The arbitrator entered an award favorable to the employees. Upon request by Hormel, the arbitrator reconsidered the award. The arbitrator then entered an award favorable to Hormel. The court held that the first award was final. When the award was executed, the arbitrator's power ceased, and he had no authority to modify the award.<sup>273</sup>

The court based its decision on two grounds. The first was the doctrine of *functus officio*, part of the federal common law of arbitration. The doctrine states that the authority of an arbitrator ceases when the award is executed.<sup>274</sup> The court also relied on the Minnesota Arbitration Act. The act contains only three grounds for modification, and none were applicable.<sup>275</sup> The court stated that the aim of the Minnesota act and the *functus officio* doctrine were consistent; to prevent an arbitrator from reconsidering the merits of a dispute after he had entered an award.<sup>276</sup>

### C. *Binding Effect of an Award*

As a general rule, an arbitrator's decision is binding upon the parties. This rule serves its purpose by allowing minimal judicial interference in the arbitration process. For example, in *Western Casualty & Surety Co. v. Griedley*,<sup>277</sup> the South Dakota Supreme Court said an arbitration award is presumptively correct and not subject to modification unless one of the statutory provisions is applicable.<sup>278</sup> In this case, both parties sought modification of the award. The circuit court granted the motions to modify the award to correct a mathematical error.<sup>279</sup> The supreme court held a further modification was impossible because no statutory provision was applicable under the facts of the case. That court stated the purpose of arbitration is the resolution of disputes without resort to litigation. To allow the losing party easy access to the courts would frustrate that purpose.<sup>280</sup>

In *Cyclone Roofing Co. v. David M. LaFave Co.*,<sup>281</sup> a party to the arbitration challenged the circuit court's confirmation of the award and moved for a modification based on alleged errors in the calculation of the arbitration

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273. *Id.* at 320, 321.

274. *Id.* at 321-22.

275. *Id.* at 323-24. The applicable Minnesota statute, MINN. STAT. ANN. § 572.20 (West 1985), is identical to § 13 of the UAA (for text of § 13, see *supra* note 268).

276. *Hormel*, 599 F. Supp. at 324.

277. 362 N.W.2d 100 (S.D. 1985).

278. *Id.* at 102.

279. *Id.* at 101.

280. *Id.* at 102. The South Dakota statute, S.D. CODIFIED LAWS ANN. § 21-25A-28 (1979) is identical to § 13 of the UAA (for text of § 13, see *supra* note 268).

281. 312 N.C. 224, 321 S.E.2d 872 (1984).



award.<sup>282</sup> The court denied the motion finding no errors nor other statutory grounds for modification. The court held the statutory grounds for modification of an award were exclusive.<sup>283</sup>

A set-off judgment is not an improper modification of an arbitration award.<sup>284</sup> The court in *Adam Martin Construction Co. v. Brandon Partnership*,<sup>285</sup> stated a set-off judgment was a proper modification because the award was not disturbed, and the substantive rights of the parties were not affected. An arbitrator has no power to implement an award; this action is a function of the courts. It is from their inherent authority to enforce judgments that the courts derive the power to order a set-off.<sup>286</sup> The award in question was rendered in a dispute involving a mechanics lien foreclosure action. The circuit court confirmed the respective awards to Martin and Brandon and then ordered the lesser award against Martin set off against Brandon's award. The court of appeals affirmed.<sup>287</sup>

#### D. Reason for Awards

Section 8 of the UAA does not require arbitrators to give reasons for their awards.<sup>288</sup> Nonetheless, awards have been attacked as being vague in that the arbitrators failed to specify their reasons justifying the award or specifically address each assertion of the parties. For example, in *Board of Education, Unified School District No. 215 v. L.R. Foy Construction Co.*,<sup>289</sup> an arbitrator's award was attacked as being void for vagueness in that the arbitrator failed to specifically address each contention raised by the parties when making the findings and award. The court upheld the award, holding that although it was not detailed, the award was not vague and was a proper attempt to resolve all the issues between the parties.<sup>290</sup> The court also held that a party's application for clarification of an award operated as an acknowledgment of the award's validity and the arbitrator's jurisdiction.<sup>291</sup>

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282. *Id.* at 227, 235, 321 S.E.2d at 875, 880.

283. *Id.* at 234, 321 S.E.2d at 880. The North Carolina statute dealing with modification, N.C. GEN. STAT. § 1-567.14(b) (1983), is identical to § 13 of the UAA (for text of § 13, see *supra* note 268).

284. *Adam Martin Constr. Co. v. Bradon Partnership*, 135 Ill. App. 3d 324, 481 N.E.2d 962, 964 (1985).

285. *Id.* at \_\_\_\_, 481 N.E.2d at 962.

286. *Id.* at \_\_\_\_, 481 N.E.2d at 964.

287. *Id.* at \_\_\_\_, 481 N.E.2d at 963-64.

288. UAA § 8.

289. 237 Kan. 1, 697 P.2d 456 (1985).

290. *Id.* at 2-3, 697 P.2d at 457.

291. *Id.* at 4, 697 P.2d at 458.

## VI. CONFIRMATION AND VACATION OF AWARDS

## A. Confirmation

Section 11 of the UAA provides that a court shall confirm an arbitration award unless grounds are urged for vacating, modifying, or correcting the award.<sup>292</sup> Moreover, a motion to vacate an award must be made within ninety days of the applicant's receipt of the award.<sup>293</sup>

A court will not confirm an arbitration award if the arbitrator exceeded his authority, however, a court will not review an arbitration proceeding on the merits.<sup>294</sup> In *Poire v. Kaplan*,<sup>295</sup> the District of Columbia Court of Appeals affirmed a superior court decision confirming an arbitration award and stated that an order of confirmation is an appealable decision.<sup>296</sup> On March 30, 1983, the arbitrator issued the award. Appellant filed his motion to reconsider on April 25, 1984.<sup>297</sup> Appellant's motion to reconsider was made more than ninety days after delivery of a copy of the award to the movant. The motion was therefore untimely, and the court found no error in the trial court's denial of the motion for reconsideration.<sup>298</sup>

The court also stated that since the arbitrator ruled only on the relevant arbitration clauses, he did not exceed his authority, and the lower court properly confirmed the award.<sup>299</sup> The arbitrator's failure to spell out his interpretation of the agreement in question did not make his award invalid.<sup>300</sup> The court also stated that it would not review an award on the merits.<sup>301</sup>

*State v. Davidson and Jones Construction Co.*<sup>302</sup> dealt with a motion to vacate granted by the trial court. The court of appeals stated that when a motion to vacate is granted, a motion to confirm is rendered moot.<sup>303</sup> The court supported this decision through an analysis of the relevant North Carolina statutes.<sup>304</sup> A court can modify an award and confirm it, or join an

292. UAA § 11 states: "Upon application of a party, the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13."

293. UAA § 12(b).

294. *E.g.*, *Poire v. Kaplan*, 491 A.2d 529, 533-34 (D.C. 1985).

295. 491 A.2d 529.

296. *Id.* at 531 n.1; UAA § 19 (a)(3).

297. *Poire*, 491 A.2d at 532.

298. *Id.* at 534.

299. *Id.* at 533-34.

300. *Id.* at 534.

301. *Id.*

302. 72 N.C. App. 149, 323 S.E.2d 466 (1984).

303. *Id.* at \_\_\_\_, 323 S.E.2d at 469.

304. N.C. GEN. STAT. § 1-567.13 (1983); *see also* UAA § 12(d).

application to confirm with an application to correct or modify.<sup>305</sup> “The vacating of an arbitration award does not deny a motion to confirm, but renders the consideration of an application to confirm moot.”<sup>306</sup>

In *Adam Martin Construction Co. v. Brandon Partnership*,<sup>307</sup> an Illinois appellate court held that a court imposed set-off of an arbitration award is a confirmation rather than a modification of an award. An arbitrator had issued awards to both parties in the arbitration proceeding. The trial court, in confirming the awards, ordered a set-off. The plaintiff contended the set-off was a modification which was impermissible because neither party had “urged” a modification pursuant to the Illinois statute patterned after section 11 of the UAA.<sup>308</sup> The state appellate court rejected the argument explaining that the amounts awarded to the parties were not disturbed and were therefore confirmed.<sup>309</sup> The appellate court noted that the trial court could order a set-off in its discretion because the arbitration act<sup>310</sup> provides that a court confirming an arbitration award should enforce it as any other judgment or decree.<sup>311</sup>

In *Hall v. Metropolitan Life Insurance Co.*,<sup>312</sup> a Florida appellate court reversed a trial court order confirming an arbitration award because the arbitrator did not provide a definitive answer to the question in controversy. The appellate court held that the trial court’s confirmation of the arbitrator’s decision lacked adequate foundation because the physician failed to offer a definite opinion whether the claimant’s injury prevented her from engaging in gainful employment as required by the arbitration agreement.<sup>313</sup>

### B. Vacation

A party to an arbitration agreement may apply for a court order to have an award vacated. Section 12 of the UAA sets out five grounds upon which such vacation shall be made.<sup>314</sup> This section also specifies procedure which

305. N.C. GEN. STAT. 1-567.14(b)-(c) (1983); see also UAA § 13(b)-(c).

306. *Davidson*, 72 N.C. App. at 149, 323 S.E.2d at 469.

307. 135 Ill. App. 3d 324, 481 N.E.2d 962 (1985).

308. ILL. REV. STAT. ch. 10, § 111 (1975).

309. *Adam Martin*, 135 Ill. App. 3d at \_\_\_\_, 481 N.E.2d at 964.

310. ILL. REV. STAT. ch. 10, § 114 (1975) (“Upon the granting of an order confirming, modifying or correcting an award, judgment shall be entered in conformity therewith and shall be enforced as any other judgment.”).

311. *Adam Martin*, 135 Ill. App. 3d at \_\_\_\_, 481 N.E.2d at 964.

312. 454 So. 2d 711 (Fla. Dist. Ct. App. 1984).

313. *Id.* at 713.

314. UAA § 12(a) states:

(a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the right of any party;

must be followed by both the movant<sup>315</sup> and the court<sup>316</sup> in the vacation process. Since courts are conscious of the fact arbitration is a tool designed to avoid formal litigation, judicial review of arbitration is circumscribed.<sup>317</sup> Courts do, however, review arbitration upon the timely filing of a motion to vacate. Courts generally hold that an arbitration award can be vacated only on the grounds specifically set forth in the UAA.

### 1. Fraud

In *Beebout v. St. Paul Fire & Marine Insurance Co.*,<sup>318</sup> the court noted the trial court's reason for vacating the arbitration award was because "the appraiser so completely failed to adequately arrive at the losses sustained by the plaintiff that it must be viewed in the same light as though fraud had in fact been perpetrated."<sup>319</sup> The court stated "[w]hen such is the circumstance, the appraiser's award must be vacated."<sup>320</sup>

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

*Id.*

315. UAA § 12(b) states:

An application under this Section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

*Id.*

316. UAA § 12(c) states:

In vacating the award on grounds other than stated in clause (5) of Subsection (a) the court may order a rehearing before new arbitrators are chosen as provided in the agreement, or in the absence thereof, by the court in accordance with Section 3, or if the award is vacated on grounds set forth in clauses (3) and (4) of Subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 3. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

*Id.* See also UAA § 12(d) ("If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.").

317. *Caputo v. All State Ins. Co.*, 344 Pa. Super. 1, , 495 A.2d at 959, 960 (1984) (citing *Allstate Ins. Co. v. Fioravanti*, 451 Pa. 106, 114 n.4, 299 A.2d 585, 589 n.4 (1973)).

318. 365 N.W.2d 271 (Minn. Ct. App. 1985).

319. *Id.* at 273.

320. *Id.*

The reviewing court concluded there was nothing in the record to support an inference of fraud, and that the mere allegation of inadequacy of an award, because of a different computation, was insufficient to sustain the theory.<sup>321</sup> The finding of a lack of sufficient proof because of mere allegation of fraud has been a common thread in the denial of motions to vacate in recent cases.<sup>322</sup>

## 2. Bias or Misconduct

In *AFSCME Council 65 v. Aitkin County*,<sup>323</sup> a county employee filed a written grievance pursuant to a collective bargaining agreement between the County and a bargaining unit (hereinafter "AFSCME"). The agreement provided for binding arbitration of grievances.<sup>324</sup>

The appellate court, in setting aside the vacation stated, "[t]he trial court's decision was clearly a judgment on the merits and thus invaded the jurisdiction of the arbitrator."<sup>325</sup> The appellate court found the arbitrator had properly considered the issue in question and had not conducted the hearing so as to substantially prejudice the County's rights.<sup>326</sup> The court concluded that the issue in question, which was cited in the written grievance, was properly before the arbitrator and the County should have been prepared.<sup>327</sup> The court justified this decision by stating "[i]f the County was unprepared, it could have requested a recess, a continuance, another hearing or clarification of the award."<sup>328</sup>

Likewise, the plaintiff in *Beebout* argued the award should be vacated because of misconduct prejudicing its rights.<sup>329</sup> There, an insurance company had contacted the neutral umpire.<sup>330</sup> The court held that the trial court erred

321. *Id.* at 274.

322. *See, e.g.*, *Metropolitan Dade County v. Molloy*, 456 So. 2d 1280, 1281 (Fla. Dist. Ct. App. 1984) (per curiam) (record devoid of any showing of prejudice); *Roseville Community School Dist. v. Roseville Fed'n of Teachers*, 137 Mich. App. 118, 126, 357 N.W.2d 829, 834 (1984) (plaintiffs claim that the arbitration decision was so unreasonable that it constituted fraud was dismissed because it represented nothing more than a "thinly veiled attack on the decision itself"); *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 235-36, 321 S.E.2d 872, 879-80 (1984) (record void of evidence of grounds on which to vacate based on the theory that the arbitrator exceeded his power, not directly alleged by a claim of incorrect calculation of the award, and no evidence of prejudice).

323. 357 N.W.2d 432, 434 (Minn. Ct. App. 1984).

324. *Id.*

325. *Id.* at 436.

326. *Id.* at 435; *see*, MINN. STAT. § 572.19.1(4) (1984).

327. *AFSCME*, 357 N.W.2d at 436.

328. *Id.*

329. *Beebout v. St. Paul Fire & Marine Ins. Co.*, 365 N.W.2d at 271, 274 (Minn. Ct. App. 1985).

330. *Id.*

in vacating the arbitration award noting, “[i]n other cases contacts with a neutral umpire might justify an inference of undue means, but here they do not.”<sup>331</sup> In its conclusion, the court in *Beebout* stated the trial court had not only erred in vacating the award, but had also erred in ordering a new trial.<sup>332</sup> The court noted that the UAA does not provide the authority for a trial court to order a jury trial on any issue.<sup>333</sup>

In *Burd, Inc. v. Stoneville Furniture Co.*,<sup>334</sup> the appellant argued he was prejudiced because he believed the right to arbitration had been waived upon the appellee’s filing suit and, therefore, did not brief the merits of the case pending before the arbitrator.<sup>335</sup> The court found while both disputes derived from the same original agreement, the disputes involved separate claims.<sup>336</sup> The court concluded the appellant’s argument was contrary to the policy that arbitration was designed to achieve.<sup>337</sup> Also, the court noted the arbitrator had addressed the merits in his decision.<sup>338</sup>

In a very abbreviated opinion, the court in *Metropolitan Dade County v. Molloy*<sup>339</sup> reviewed the vacation of an award which was originally granted in a dispute between an employee and his employer over salary level and employee classification. The court found the record devoid of any showing by the employee of prejudice to satisfy the statutory requirement concerning prejudice,<sup>340</sup> and therefore reversed the decision of the trial court.<sup>341</sup>

Although stating the appeal should be dismissed for mootness, the court in *State v. Davidson & Jones Construction Co.*,<sup>342</sup> reviewed the trial court finding of arbitrator misconduct. The arbitrator had requested an article from the plaintiff, which was written by his expert.<sup>343</sup> The other party was not notified of the request.<sup>344</sup> The court held, “[a]lthough we do not believe that this is the best or preferred manner for an arbitrator to receive evidence, we hold that it is not enough to vacate the award.”<sup>345</sup>

331. *Id.*

332. *Id.*

333. *Id.*; UAA § 12(c) allows the court to order rehearings in certain situations.

334. 134 Ill. App. 3d 149, 479 N.E.2d 962, (1985).

335. *Id.* at \_\_\_\_, 479 N.E.2d at 965.

336. *Id.* at \_\_\_\_, 479 N.E.2d at 964.

337. *Id.* at \_\_\_\_, 479 N.E.2d at 965-66. (The court stated that arbitration was designed to achieve a final disposition of disputes in a more expeditious and inexpensive manner than litigation.)

338. *Id.* at \_\_\_\_, 479 N.E.2d at 966.

339. 456 So. 2d 1280, 1281 (Fla. Dist. Ct. App. 1984) (per curiam).

340. FLA. STAT. ANN. § 682.13(1)(d) (1981).

341. *Metropolitan Dade County*, 456 So. 2d at 1281.

342. 72 N.C. App. 149, 323 S.E.2d 466 (1984).

343. *Id.* at 149, 323 S.E.2d at 469.

344. *Id.*

345. *Id.* at 149, 323 S.E.2d at 470.

## 3. Exceeding the Arbitrator's Powers

In *Fryer v. National Union Fire Insurance Co.*,<sup>346</sup> the issue on appeal was whether there was a claim to arbitrate. The court held when a liability carrier denies coverage but subsequently admits coverage prior to the arbitration hearing, there was no claim to present to the arbitration panel, and, therefore, the panel had exceeded its powers.<sup>347</sup> The court, however, concluded the dispute involved not only coverage but also underinsurance, and therefore, the arbitration panel did not exceed its power in deciding the claim.<sup>348</sup>

In *Burd, Inc. v. Stoneville Furniture Co.*,<sup>349</sup> the appellant argued that the arbitrator had exceeded his statutory powers by failing to address the question of jurisdiction and that the arbitration award should, therefore, be vacated.<sup>350</sup> The court stated that the appellee's actions in filing suit "did not constitute a waiver of arbitration" and did not rob the arbitration proceeding of its jurisdictional basis.<sup>351</sup> Accordingly, the court held that the arbitrator did not exceed his powers by "implicitly" reaching the correct result.<sup>352</sup> In reaching this conclusion, the court cited authority for the proposition that the appellant has the burden to prove the arbitrator exceeded his powers by "clear, strong, and convincing evidence," which the appellant had not done.<sup>353</sup>

In *Prince George County Educator's Association v. Board of Education*,<sup>354</sup> the court reversed a trial court which had refused to vacate an award in favor of the Board of Education. The court found that the arbiter's finding that a driver's education program instructor was not included in a collective bargaining agreement was "clearly erroneous and makes that award completely irrational."<sup>355</sup> The court found its authority to vacate the award, because of the error of fact, in the language of the UAA: first, that a completely irrational award would have to be reached by "undue means," and secondly, that the arbitrator had exceeded his authority by making a clearly erroneous finding of fact.<sup>356</sup>

In upholding an arbitrator's award against several challenges by the city, a Massachusetts appellate court applied a fundamentally different approach

346. 365 N.W.2d 249 (Minn. 1985).

347. *Id.* at 254; see MINN. STAT. § 572.19.1(30) (Supp. 1985).

348. *Fryer*, 365 N.W.2d at 254.

349. 134 Ill. App. 3d 149, 479 N.E.2d 962 (1985).

350. *Id.* at —, 479 N.E.2d at 965; ILL. REV. STAT. ch. 10, § 112 (1985).

351. *Burd*, 134 Ill. App. 3d at —, 479 N.E.2d at 965.

352. *Id.* at —, 479 N.E.2d at 965.

353. *Id.* at —, 479 N.E.2d at 965.

354. 61 Md. App. 249, 486 A.2d 228 (1985), *cert. granted*, Md. 114, 492 A.2d 616 (1985).

355. *Id.* at 256, 486 A.2d at 232.

356. *Id.* at 253, 486 A.2d at 231 (citing MD. CTS. & JUD. PROC. CODE ANN. § 3-224(b)(3) (1957)).

in *City of Worcester v. Granger Brothers, Inc.*<sup>357</sup> The starting point in the court's analysis was the rule that "an award made within the scope of the submission is not made invalid by a mistake of the arbitrator as to law or fact."<sup>358</sup> The city's petition for vacation alleged that the arbitrator had exceeded his authority in finding that an engineering firm consulted by a contractor, but not a party to the contract from which the arbitration arose, was not responsible to the city for problems encountered in the construction of a civic center. The court refused to vacate the award because it found that the arbiter could have reasonably found the engineering firm to be an agent of the party to the contract and thus within the terms of the submission.<sup>359</sup> The court also refused to vacate the award on grounds that the arbiter had misconstrued the contract in awarding a second contractor indemnification by the city. The city also brought a claim that the award was base upon insufficient evidence, a ground the appellate court deemed improper for review in arbitration cases.<sup>360</sup>

In *Duluth Police Union v. City of Duluth*,<sup>361</sup> the court affirmed the trial court's ruling that an arbiter had not exceeded his powers within the meaning of the Minnesota Arbitration Act.<sup>362</sup> The city sought vacation on the grounds that the arbiter had gone outside the scope of the submission by considering provisions of the the police manual and past department practices to reach his conclusion that the city had reassigned a senior officer in violation of the collective bargaining agreement.<sup>363</sup> The court quoted prior statements of state policy that include as proper instruments of labor arbitration past practices of the parties and of the industry so that the arbitrator may "ascertain the parties' intended standard of behavior."<sup>364</sup>

#### 4. Miscellaneous

The cases referred to in this section did not utilize one of the five specific grounds listed in Section 12 of the UAA as the main tool of analysis. The cases are included to show the analytical processes courts have followed in dealing with a diverse set of questions and problems encountered under the vacation provision.

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357. 19 Mass. App. 379, 474 N.E.2d 1151 (1985), *further appellate review denied*, 394 Mass. 1103, 477 N.E.2d 595 (1985).

358. *Id.* at \_\_\_\_\_, 474 N.E.2d at 1155 (citing *Jordan Marsh Co. v. Beth Israel Hosp. Ass'n.*, 331 Mass. 177, 186, 118 N.E.2d 79 (1954) (quoting from *Phanuef v. Corey*, 190 Mass. 237, 246-47, 76 N.E. 718, (1906)).

359. *Id.* at \_\_\_\_\_, 474 N.E.2d at 1155.

360. *Id.* at \_\_\_\_\_, 474 N.E.2d at 1156. The statute discussed is G.L.C. 150c § 11.

361. 360 N.W.2d 367 (Minn. Ct. App. 1985).

362. MINN. STAT. § 572.19, subd. 1(3) (1982).

363. *Duluth Police*, 360 N.W.2d at 369.

364. *Id.* at 370.



*Caputo v. Allstate Insurance Co.*<sup>365</sup> involved plaintiff's efforts to set aside, vacate or modify an award which had been granted to the plaintiff for uninsured motorist benefits from a motor vehicle accident.<sup>366</sup> The court did not find the arbitration award reviewable on specific statutory grounds, but allowed review based on an alleged violation of public policy.<sup>367</sup> After an analysis of the applicable state law, the court confirmed the award.<sup>368</sup>

In arguing that an arbitration award concerning a fee dispute with her attorney should be vacated, the plaintiff in *Marino v. Tagaris*<sup>369</sup> listed two reasons to vacate the award: (1) There was no "meeting of the minds" on the agreement to arbitrate, and (2) deprivation of property without due process of law.<sup>370</sup>

The court did not reach the issue of due process and based its decision on the insufficient advice and material given to the client by the arbitration board staff concerning the nature of the proceedings and her rights to challenge the award.<sup>371</sup> The material given to the plaintiff included a guide and a set of rules, neither of which explicitly referred to rights available by Massachusetts statute<sup>372</sup> concerning vacating, modifying or correcting the arbitration award.<sup>373</sup>

The court stated, "[T]he board's rules and guide did not adequately inform the client of the nature of the hearing or of the right to challenge the award."<sup>374</sup> The court said this procedure creates a risk that public confidence in the conduct of attorneys and the fairness of the judicial system may be undermined.<sup>375</sup> The court noted that, although self representation is encouraged in arbitration proceedings, in practice this can be unfair if a client is not given adequate advance information about the hearing.<sup>376</sup> The court noted, moreover, that the guide furnished by the board prompted the client's belief she could adequately represent herself because the proceedings were labeled "informal."<sup>377</sup> The court noted either ground claimed by the client would be adequate, if proven, to vacate the award.<sup>378</sup>

365. 344 Pa. Super. \_\_\_\_, 495 A.2d 959 (1985).

366. *Id.* at \_\_\_\_, 495 A.2d at 959.

367. *Id.* at \_\_\_\_, 495 A.2d at 959.

368. *Id.* at \_\_\_\_, 495 A.2d at 959.

369. 395 Mass. 397, 480 N.E.2d 286 (1985).

370. *Id.* at \_\_\_\_, 480 N.E.2d at 287.

371. *Id.* at \_\_\_\_, 480 N.E.2d at 287.

372. MASS. GEN. LAWS ANN. ch. 251, §§ 9, 12-13 (Supp. 1985). Under the statute, an application to vacate must be made within thirty days.

373. *Marino*, 395 Mass. at \_\_\_\_, 480 N.E.2d at 288.

374. *Id.* at \_\_\_\_, 480 N.E.2d at 289.

375. *Id.*

376. *Id.*

377. *Id.* at \_\_\_\_, 480 N.E.2d at 290.

378. *Id.* at \_\_\_\_, 480 N.E.2d at 291; see MASS. GEN. LAWS ANN. ch. 251, § 12(a)(4)-(5) (Supp. 1985).

Capozio was granted an extension of proceedings in the initial stages of arbitration in *Capozio v. American Arbitration Association*.<sup>379</sup> A second such extension, however, was denied.<sup>380</sup> The hearing, which counsel for Capozio stated they would not participate in, was held ex parte and an award was set.<sup>381</sup> Capozio, represented by new counsel, filed a motion to vacate, which was denied and later appealed.<sup>382</sup>

The first question considered by the appellate court was whether Capozio had actually presented a motion for an extension of time for the hearing to the arbitration authority, and if so, "whether she presented sufficient 'good cause' " for the extension.<sup>383</sup> The court noted the applicable law covered only refusals to postpone preliminary proceedings leading up to the hearing.<sup>384</sup> Regardless of this fact, the court found Capozio's request presented insufficient good cause for the extension.<sup>385</sup> Similarly, the court found insufficient good cause shown in the motion to vacate the notice of the hearing.<sup>386</sup> The motion was based on unproven contentions, undefined reasons, and merely inferred prejudicial conversations without proof.<sup>387</sup>

The court further stated that the movant's next argument for vacation, the ex parte nature of the hearing, was without merit because the rules of the association allow arbitration to proceed in the absence of a party who, after notice, failed to be present.<sup>388</sup> The appellate court also stated the actions of the trial court in forwarding a letter to the arbitrator did not violate the association's rules.<sup>389</sup>

*Grissom v. Greener & Sumner Construction, Inc.*<sup>390</sup> involved an appeal from a lower court's modification of an arbitration award. The appellate court noted the trial court could only properly review the award if fraud, mistake, or misconduct were alleged because the parties had expressly waived their rights to appeal in the arbitration agreement.<sup>391</sup> Two such conditions were alleged in *Grissom*: (1) partiality, and (2) prejudice.<sup>392</sup> The court found no evidence to warrant vacating the award on either ground.<sup>393</sup> The appellate

379. 490 A.2d 611, 613 (D.C. Cir. 1985).

380. *Id.*

381. *Id.* at 613-14.

382. *Id.* at 614.

383. *Id.* at 615; see D.C. CODE ANN. § 16-4311(a)(4) (1981).

384. *Capozio*, 490 A.2d at 615.

385. *Id.*

386. *Id.* at 616-17.

387. *Id.* at 614, 616-17.

388. *Id.* at 618; see American Arbitration Association Rule 30.

389. *Capozio*, 490 A.2d at 618-19; see American Arbitration Association Rule 40. This rule prohibits a party from communicating with an arbitrator absent notice to the other party and an opportunity to respond.

390. 676 S.W.2d 709 (Tex. Civ. App. 1984).

391. *Id.* at 710.

392. *Id.* at 712.

393. *Id.*

court found error in the trial court's modification of the arbitration award because the lower court utilized legal principles to conclude the award was improper.<sup>394</sup>

*Daniels Insurance Agency, Inc. v. Jordan*<sup>395</sup> involved an arbitration award which had been granted to a former employee in an action based on a covenant not to compete.<sup>396</sup> The employer moved to vacate alleging action in excess of power and partiality.<sup>397</sup> The award was affirmed in the district court but reversed on appeal.<sup>398</sup> The reversal included a directive to the lower court to "enter a new judgment or to order a new arbitration hearing."<sup>399</sup> After the lower court held that the new hearing involved a default judgment, the appellate court remanded for a second time to the lower court to determine if the first award should be vacated, stating the default judgment was a violation of constitutional due process.<sup>400</sup> The dissenting judge argued the hearing was ineffectual because the trial court had not followed the procedures agreed upon by the parties in securing a second arbitration hearing.<sup>401</sup>

In *Roseville Community School District v. Roseville Federation of Teachers*,<sup>402</sup> the school district challenged an award granted to a teacher involving seniority.<sup>403</sup> The district argued for vacation on jurisdictional grounds and conduct of the arbitrator.<sup>404</sup>

The appellate court agreed with the trial court's decision to grant summary judgment to the teacher stating this was outside the purview of judicial review because it involved interpreting the parties' agreement, and the court could not substitute its judgment for that of the arbitrator.<sup>405</sup> The court also dismissed the plaintiff's second jurisdictional claim that the award wasn't issued in a timely manner, stating the limits for filing are discretionary and not mandatory.<sup>406</sup>

Because of the policies inherent in arbitration, courts are reluctant to interfere with the decision of the arbitration panel. The courts do not hesitate,

394. *Id.* at 711; see TEX. REV. CIV. STAT. ANN. art. 237, § A(5) (Vernon 1973) ("[T]he fact that the relief was such that it could or would not be granted by a court of law or equity is not ground for vacating or refusing the award.").

395. 102 N.M. 162, 692 P.2d 1311 (1984).

396. *Id.* at \_\_\_\_, 692 P.2d at 1312.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* at \_\_\_\_, 692 P.2d at 1313. The appellate court determined sufficient notice had not been given pursuant to FED. R. Civ. P. 55(b). *Id.*

401. *Daniels*, 102 N.M. at 162, 692 P.2d at 1311 (Walters, J., dissenting). N.M. STAT. ANN. § 44-7-12(c) (1978) provides that when a court vacates an arbitration award because an arbitrator exhibited partiality, it may set the matter for a new arbitration *as provided by the agreement* (emphasis original).

402. 137 Mich. App. 118, 357 N.W.2d 829 (1984).

403. *Id.* at 120, 357 N.W.2d at 831.

404. *Id.* at 125-26, 357 N.W.2d at 833-34.

405. *Id.* at 124, 357 N.W.2d at 833.

406. *Id.* at 126, 357 N.W.2d at 833.

however, to review decisions which were allegedly procured by fraud; a product of arbitrator misconduct or partiality; a result of powers extended beyond proper boundaries; or for various other reasons as shown by cases in this section.

Realizing that arbitration is designed to avoid the courtroom, judges will not review the decision of the panel merely based upon allegations of impropriety. Courts do, however, strive to protect an innocent party, especially one who was unrepresented or received incorrect, inaccurate, or misleading information about the proceedings, from inequities in decisionmaking.

## VII. APPEALS

The UAA provides the right to appeal arbitration decisions under certain circumstances.<sup>407</sup> Section 19 of the UAA lists the appropriate circumstances for appeal when a trial court has rendered a decision regarding an arbitration proceeding and one party wishes to appeal this decision.<sup>408</sup> Some jurisdictions compare this process to the granting or denying of injunctions and effectively ignore the UAA.<sup>409</sup> Many jurisdictions, however, have adopted the UAA and strictly follow it, even when contrary to earlier case law.<sup>410</sup>

Cases dealing with section 19 of the UAA consistently rely on the same core of underlying principles. When a court is favorable to the UAA's appeal provision, it will typically cite policy reasons such as the avoidance of unnecessary interlocutory appeals and the resulting delay,<sup>411</sup> availability of ap-

407. UAA § 19 states:

(a) An appeal may be taken from:

(1) an order denying an application to compel arbitration made under Section 2;

(2) an order granting an application to stay arbitration made under Section 2(b);

(3) an order confirming or denying confirmation of an award;

(4) an order modifying or correcting an award;

(5) an order vacating an award without directing a rehearing; or

(6) a judgment or decree entered pursuant to the provisions of this act.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

*Id.*

408. This section does not discuss the "appeal" of an arbitrator's decision to a trial judge, for example, to modify or vacate the award. *See, e.g.*, *Grissom v. Greener & Sumner Const., Inc.*, 676 S.W.2d 709, 711 (Tex. Ct. App. 1984).

409. *See, e.g.*, *Grane v. Grane*, 130 Ill. App. 3d 332, 473 N.E.2d 1366, 1370 (1985).

410. *St. Francis Xavier Hosp. v. Ruscon/Abco*, 285 S.C. 584, \_\_\_\_, 330 S.E.2d 548, 550 (Ct. App. 1985). (The case involved an attempt to appeal the denial of an application to consolidate, which the appellate court found not appealable, despite the fact that the Supreme Court of South Carolina entertained an appeal of an order granting an application to consolidate.).

411. *See, e.g.*, *Burgie v. League Gen. Ins. Co.*, 355 N.W.2d 466, 468-69 (Minn. Ct. App. 1984) (interlocutory appeal from an order compelling arbitration denied);

peal after arbitration without unfairly prejudicing the parties,<sup>412</sup> and the promotion of the favored arbitration process.<sup>413</sup> A court that does not follow section 19 of the UAA (and is therefore more liberal in allowing appeals) sometimes justifies an immediate appeal because an order which requires parties to arbitrate, effectively forces them out of court. Before denying a judicial tribunal, these courts feel the parties should have an immediate right to appeal.<sup>414</sup> Another principle relied on by courts which do not follow the UAA's appeal provision is that the denial of an immediate right to appeal denies the party his or her right to a full and complete opportunity to challenge the existence of a valid arbitration agreement.<sup>415</sup>

#### A. Orders Denying a Stay of Arbitration

In *J.M. Huber v. Main-Erbauer, Inc.*,<sup>416</sup> the parties entered into a construction contract which contained a clause requiring all claims and disputes to be determined by arbitration. Huber requested a stay of the arbitration which the trial court denied.<sup>417</sup> The appellate court noted that the Maine arbitration statute (identical to section 19 of the UAA) allowed an appeal from an order denying an application to compel arbitration or from an order granting an application to stay arbitration.<sup>418</sup> There existed, however, no provision for an appeal from a denial of a stay of arbitration and therefore Huber could not immediately appeal the trial court's order.<sup>419</sup> In support of section 19 of the UAA's limitations, the court explained that this approach encouraged the favored arbitration process, avoided delay caused by unnecessary interlocutory appeals, and allowed later appeal without unfair prejudice after final judgment.<sup>420</sup>

In *Grane v. Grane*<sup>421</sup> and *Clark v. Country Mutual Insurance Co.*,<sup>422</sup> the Illinois courts addressed the same issue as was addressed in *Main-Erbauer*

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see also *J.M. Huber v. Main-Erbauer, Inc.*, 493 A.2d 1048, 1050 (Me. 1985).

412. *J.M. Huber v. Main-Erbauer, Inc.*, 493 A.2d 1048, 1050 (Me. 1985).

413. See, e.g., *Grane v. Grane*, 130 Ill. App. 3d at 332, 338-39, 473 N.E.2d 1366, 1370 (1985); *J.M. Huber v. Main-Erbauer, Inc.*, 493 A.2d 1048, 1050; *Burgie v. League Gen. Ins. Co.*, 355 N.W.2d 466, 469 (Minn. Ct. App. 1984).

414. E.g., *County of Durham v. Richards & Assoc. Inc.*, 742 F.2d 811, 813 (4th Cir. 1984) (order compelling arbitration by court effectively put the parties out of federal court and therefore rendered order immediately appealable).

415. See, e.g., *Grane v. Grane*, 130 Ill. App. 3d 332, 339, 473 N.E.2d 1366, 1370-71 (1985) (an order denying a stay of arbitration, which is not immediately appealable under U.A.A. § 19, held appealable).

416. 493 A.2d 1048 (Me. 1985).

417. *Id.* at 1049.

418. ME. REV. STAT. ANN. tit. 14, § 5945(1)(A)(B) (1964).

419. *J.M. Huber*, 493 A.2d at 1050.

420. *Id.*

421. 130 Ill. App. 3d 332, 473 N.E.2d 1366 (1985).

422. 131 Ill. App. 3d 633, 476 N.E.2d 4 (1985).

and concluded that an order denying a stay of arbitration by the trial court was appealable.<sup>423</sup> In *Grane* the court discussed the difference between the Illinois arbitration statute appeals provision and the UAA's similar provision.<sup>424</sup> The Illinois legislature chose not to adopt section 19(a) of the UAA and instead adopted only section 19(b) of the UAA.<sup>425</sup> Illinois, therefore, lacks any statutory list of appealable orders and simply states that appeals can be taken as they are allowed in civil cases.<sup>426</sup> In finding this order denying a stay of arbitration appealable, the *Grane* court relied on Illinois Supreme Court Rule 307 and 28 U.S.C. section 1292(a)(1).<sup>427</sup> The court held that this order was substantially similar to orders granting or denying injunctions and thus was appealable despite being interlocutory.<sup>428</sup>

According to the *Grane* court, the basic principle in support of Illinois' rather unique statutory modification of section 19 of the UAA is that the legislature felt the goal of promoting arbitration had to be reconciled with the countervailing interest that parties should not be forced into arbitration if no valid agreement to arbitrate exists. The existence of this agreement is a judicial determination that will be in part emasculated if an order denying a motion to stay arbitration is unappealable.<sup>429</sup>

The court in *Clark*, like the court in *Grane*, found that an order which compels arbitration and denies an application for a stay is an interlocutory order appealable under Illinois Supreme Court Rule 307(a) because it is injunctive in nature.<sup>430</sup> This court's ruling makes no mention of the Illinois statute, but rather relies on Illinois case law allowing such appeals.<sup>431</sup>

Section 19 of the UAA was adopted in toto by South Carolina and this is reflected in *St. Francis Xavier Hospital v. Ruscon/Abco*.<sup>432</sup> In *St. Francis*, the appellant applied to the circuit court for consolidation of three pending

423. *Grane*, 130 Ill. App. 3d at 339, 473 N.E.2d at 1370-71; *Clark*, 131 Ill. App. 3d at 636, 476 N.E.2d at 5-6.

424. *Grane*, 130 Ill. App. 3d at 335-36, 473 N.E.2d at 1368.

425. *Compare* ILL. REV. STAT. ch. 10, § 118 (1981) with UAA § 19 (1955) (the Illinois statute allows an appeal to be taken in the same manner as in any civil action, whereas the UAA lists the exact situations which can be appealed, and then as a procedural matter states in subsection (b) that these appeals are to be handled like any civil appeal).

426. *Grane*, 130 Ill. App. 3d at 335-36, 473 N.E.2d at 1368; ILL. REV. STAT. ch. 10, § 118 (1981).

427. ILL. SUP. CT. R. 307(a)(1); 28 U.S.C. § 1292(a)(1) (1976) (authorizing immediate appeal of order granting or denying preliminary injunctions).

428. *Grane*, 130 Ill. App. 3d at 337-38, 473 N.E.2d at 1370.

429. *Id.*

430. *Clark v. Country Mut. Ins. Co.*, 131 Ill. App. 3d 633, 636, 476 N.E.2d at 4, 5-6 (1985).

431. *Id.* See, e.g., *Sefren v. Board of Trustees of Addison Fire Protection Dist.*, 60 Ill. App. 3d 813, 816-17, 377 N.E.2d 341, 343-44 (1978).

432. 285 S.C. App. 584, 330 S.E.2d 548 (Ct. App. 1985); S.C. CODE ANN. § 15-48-200 (Law. Co-op. Supp. 1984) (effective date May, 1978) (exact duplicate of UAA § 19).

arbitration proceedings, the denial of which gave rise to this appeal.<sup>433</sup> Relying on section 15-48-200 of the South Carolina Code, which does not expressly allow an appeal from an order denying an application to consolidate,<sup>434</sup> the court held such an order was not immediately appealable.<sup>435</sup>

The holding of *St. Francis* may not be especially unique. What is interesting, however, is the way this court cast aside a South Carolina Supreme Court precedent which entertained an appeal from an order granting consolidation pending arbitration proceedings.<sup>436</sup> The *St. Francis* court acknowledged this precedent, then distinguished it in one brief sentence: "We do not believe [this] decision controls the appealability of an order denying an application to consolidate pending arbitration proceedings."<sup>437</sup> This supreme court decision came one year after the effective date of section 15-48-200.<sup>438</sup> The Supreme Court of South Carolina probably considered this statute but felt it was inapplicable to the action since the original dispute occurred before the effective date of section 15-48-200.

### B. Orders Confirming or Denying an Arbitrator's Award

In *Caputo v. Allstate Insurance Co.*,<sup>439</sup> an arbitration panel, in a two to one decision, entered an award in appellant's favor for \$15,000 in damages caused by a traffic accident. The dissenting arbitrator would have awarded appellant \$60,000 by allowing him to stack<sup>440</sup> other available uninsured motorist coverages. Appellant filed a petition to set aside, vacate or modify the arbitration award. That petition was denied by the trial court.<sup>441</sup> Despite pointing out that judicial review of an arbitration award is severely limited, the *Caputo* court allowed the order to be appealed because one of the issues involved was whether the arbitration award violated the public policy of Pennsylvania which favors the stacking of uninsured motorist coverages.<sup>442</sup> This holding is consistent with section 19(a)(3) of the UAA which permits

433. *St. Francis*, 285 S.C. at \_\_\_\_, 330 S.E.2d at 549.

434. S.C. CODE ANN. § 15-48-200 (Law. Co-op. Supp. 1984).

435. *St. Francis*, 285 S.C. at \_\_\_\_, 330 S.E.2d at 550.

436. *Id.*; *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 273 S.C. 181, 255 S.E.2d 451 (1979).

437. *St. Francis*, 285 S.C. at \_\_\_\_, 330 S.E.2d at 550.

438. *Episcopal* was decided in May of 1979; section 15-48-200 became effective in May of 1978.

439. 344 Pa. Super. 1, 495 A.2d 959 (1985).

440. "Stacking" would allow the appellant to combine two or more separate automobile policies containing uninsured motorist coverage, thereby increasing the total amount of insurance. For example, if three separate policies existed, each containing a statutory minimum of \$15,000 of uninsured motorist coverage, "stacking" would make \$45,000 of insurance available, as opposed to only \$15,000 if stacking was not permitted.

441. *Caputo*, 344 Pa. Super. at \_\_\_\_, 495 A.2d at 960.

442. *Id.* at \_\_\_\_, 495 A.2d at 961.

an appeal of an order confirming or denying the award of an arbitrator.<sup>443</sup> In this case, the trial court's refusal to modify the award acted as a confirmation of that award.

*Burgie v. League General Insurance Co.*<sup>444</sup> involved an insurance contract which contained a provision requiring certain disputes to be resolved by arbitration. The first judicial involvement was an order by the trial court affirming the arbitrability of this dispute and compelling arbitration. The insurer did not immediately appeal this decision. After the arbitrators found against the insurer and awarded damages to the insured, the insurer sought an order to vacate this award. The trial court denied this request, thereby effectively confirming the arbitrator's decision.<sup>445</sup>

According to section 19(a)(3) of the UAA which Minnesota has adopted, an immediate right to appeal exists after an order confirming an arbitrator's award is issued.<sup>446</sup> Because the trial court's denial of the motion to vacate acted as a confirmation of the arbitrator's award, this ruling was immediately appealable. The appellate court also allowed an appeal on the earlier ruling on the issue of arbitrability. This appeal was allowed despite the fact the time for appeal had run between the issuance of the decision by the trial court and this appeal.<sup>447</sup> This exception was permitted so as to allow for the arbitration to proceed to a conclusion before hearing an appeal on the arbitrability of the dispute. The policy reason behind this exception was the Supreme Court's desire to foster the use of arbitration.<sup>448</sup> "Adding an interlocutory appeal to this process "seems to run counter to [this] intent . . . ."<sup>449</sup> This approach saves one adjudicative step and is therefore judicially efficient because it forces all appealable disputes to wait until after the arbitration process is complete. To rule otherwise would allow for a preliminary appeal on the issue of arbitrability before the actual arbitration, and then a second appeal of the trial court's confirmation of the arbitrator's award.

### C. Orders Compelling Arbitration

The federal courts, as exemplified by *County of Durham v. Richards & Associates, Inc.*,<sup>450</sup> are not persuaded by the policies stated in *Burgie*. In *Durham*, a diversity action, the County of Durham appealed from an order compelling it to arbitrate a dispute with an electrical contractor.<sup>451</sup> Relying on 28 U.S.C. § 1291, this court held that the order compelling arbitration

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443. UAA § 19(a)(3).

444. 355 N.W.2d 466 (Minn. Ct. App. 1984).

445. *Id.* at 468.

446. UAA § 19(a)(3); MINN. STAT. § 572.26(3) (Supp. 1985).

447. *Burgie*, 355 N.W.2d at 468-69.

448. *Id.* at 469.

449. *Id.*

450. 742 F.2d 811 (4th Cir. 1984).

451. *Id.* at 812.



effectively "put the parties out of federal court" and is therefore an appealable final order despite being interlocutory.<sup>452</sup> The Durham court was not persuaded by the argument relied on in *Burgie*, namely, that this ruling may require an extra step in the adjudication process. It discarded this argument as no more than speculation and as such it should not bear on the issue of arbitrability.<sup>453</sup> The Federal Arbitration Act, 9 U.S.C. §§ 1-13 lacks any provision for appeals similar to section 19 of the UAA.<sup>454</sup>

The court in *Gardner v. Prudential Insurance Co.*,<sup>455</sup> expressly relied on the Pennsylvania statute governing arbitration appeals in holding that no right to appeal exists from an order compelling arbitration.<sup>456</sup> Under this statute, a party may appeal an order denying a petition to compel arbitration. However, no statutory authority exists for review of an order which compels arbitration.<sup>457</sup>

In *Eckblad v. Farm Bureau Insurance Co.*,<sup>458</sup> the plaintiff's decedent was killed in an auto accident and questions arose between two insurance companies as to the extent of their respective liabilities. Plaintiff brought an action to compel arbitration which was affirmed.<sup>459</sup> According to the Minnesota arbitration statute, an order to compel arbitration is not appealable because it is not a final order.<sup>460</sup> An appeal, however, was allowed in this case because one of the insurance companies addressed more than just the existence of coverage, it requested the trial court to interpret the policies. Thereafter, everyone treated the matter as a declaratory judgment.<sup>461</sup> Because a declaratory judgment action determines the rights and liabilities of the parties under the insurance agreements, it was found to be an appealable final order.<sup>462</sup>

#### D. Orders Denying the Compulsion of Arbitration

In *Servomation Corp. v. Hickory Construction Co.*,<sup>463</sup> an order denying a motion to compel arbitration was held to be immediately appealable because

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452. *Id.* at 813; 28 U.S.C. § 1291 (1982) (gives the courts of appeals jurisdiction to hear all appeals from any final decision). Durham cites eight other circuits which have concluded this issue in a similar manner. 742 F.2d at 813 (for list of circuits).

453. *Durham*, 742 F.2d at 814.

454. *Compare*, UAA § 19 with 9 U.S.C. §§ 1-13 (1982) (no equivalent provision in 9 U.S.C.).

455. 332 Pa. Super. 358, 481 A.2d 654 (1984).

456. *Id.* at \_\_\_\_, 481 A.2d at 655.

457. *Id.* PA. CONS. STAT. ANN. § 7320 (Purdon 1983) (adopts UAA § 19 with only slight modifications).

458. 371 N.W.2d 78 (Minn. Ct. App. 1985).

459. *Id.* at 79, 80.

460. *Id.* at 80; MINN. STAT. § 572.26 (Supp. 1985) (adopting UAA § 19).

461. *Eckblad*, 371 N.W.2d at 80.

462. *Id.*

463. 70 N.C. App. 309, 318 S.E.2d 904 (1984).

it involved a "substantial right" that could have been lost if appeal was delayed until the lawsuit was concluded.<sup>464</sup> The *Servomation* court never stated what that substantial right was.

States that have adopted the list of appealable orders of section 19 of the UAA consistently interpret this list as exhaustive and not merely suggestive.<sup>465</sup> For those jurisdictions whose statutes lack this specificity,<sup>466</sup> the appealability of a trial judge's order in an arbitration proceeding turns on factors such as the finality of the order or its similarity to an injunction.<sup>467</sup> The former approach allows for predictability as well as encouraging the use of arbitration as an alternative dispute resolution process. By denying appeals of many preliminary decisions until after the arbitration process is complete, the courts push the parties toward arbitration and away from the overloaded judicial system. By keeping the right to immediately appeal a trial court's decision regarding arbitration limited, the courts tend to support, and not usurp, the authority of the arbitrator. This is vital if arbitration is to continue to help lighten the judicial load.

## VIII. JUDICIAL PROCEEDINGS

### A. Jurisdiction

An agreement to arbitrate confers jurisdiction on the court to enforce the agreement and to enter judgment. Under the Idaho Arbitration Act "[t]he term 'court' means any court of competent jurisdiction and an agreement to submit to arbitration confers jurisdiction on the court to enforce the agreement and to enter judgment on any award thereunder."<sup>468</sup> In *Bingham County Commission v. Interstate Electric Company*,<sup>469</sup> the Idaho Supreme Court held

464. *Id.* at 310, 318 S.E.2d at 905.

465. See, e.g., *J.M. Huber v. Main-Erbauer, Inc.*, 493 A.2d 1048, 1050 (Me. 1985) (because no provision in the statute expressly allowed an appeal from a denial of a stay of arbitration, no appeal was allowed); *Gardner v. Prudential Ins. Co.*, 332 Pa. Super. 358, —, 481 A.2d 654, 655 (1984) (no statutory authority exists for review of an order which compels arbitration, therefore no appeal was allowed); *Francis Xavier Hosp. v. Ruscon/Abco*, 285 S.C. App. 584, —, 330 S.E.2d 548, 550 (1985) (because the statute does not expressly allow an appeal from an order denying an application to consolidate arbitration proceedings that are pending, no such appeal was allowed).

466. E.g., *County of Durham v. Richards & Assoc., Inc.*, 742 F.2d 811, 813 (4th Cir. 1984) (order compelling arbitration is appealable as a final order as required under 28 U.S.C. § 1291 (1982)).

467. E.g., *Grane v. Grane*, 130 Ill. App. 3d 332, 337-38, 473 N.E.2d 1366, 1370 (1985) (whether stay order can be appealed turns on its similarity to an injunction, which was found to be substantial and therefore appealable).

468. *Bingham County Comm'n v. Interstate Elec. Co.*, 108 Idaho 18, —, 697 P.2d 1195, 1197 (1985).

469. 108 Idaho 181, 697 P.2d 1195 (1985).

that an arbitrator's award was not the judgment of a competent tribunal.<sup>470</sup> "The award becomes enforceable when a court enters judgment on the award."<sup>471</sup>

In *Clark v. Country Mutual Insurance Co.*,<sup>472</sup> an Illinois appellate court stated that: "Where parties enter into an arbitration agreement, the circuit court is vested with jurisdiction to enforce the agreement and to enter judgment on an award."<sup>473</sup> In *Clark*, the trial court entered an order compelling arbitration. Country Mutual filed a motion to have that order reconsidered. The trial court denied the motion and Country Mutual appealed.<sup>474</sup> Country Mutual contended "that the circuit court has nothing more to do regarding this litigation concerning the rights and duties of the parties before it."<sup>475</sup> The appellate court found the order to be interlocutory and stated that "[i]f the parties were to proceed to arbitration under the present order, the circuit court would still retain jurisdiction to confirm the award, or to vacate, modify, or correct the award."<sup>476</sup>

Florida courts have subject matter jurisdiction over arbitration only when the agreement to arbitrate "is both subject to the Florida Arbitration Code and provides for arbitration in Florida."<sup>477</sup> In *Griffith v. ITT World Communications, Inc.*,<sup>478</sup> arbitration took place in New York.<sup>479</sup> The plaintiff sought to modify the award in a Florida state court and the action was removed to federal court.<sup>480</sup> The district court found that "Florida courts have limited jurisdiction to modify arbitration awards."<sup>481</sup> Since arbitration took place in New York,<sup>482</sup> Florida courts have no jurisdiction, and since the district court's jurisdiction in this case was derivative,<sup>483</sup> the district court also lacked jurisdiction.<sup>484</sup>

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470. *Id.* at —, 697 P.2d at 1197.

471. *Id.*

472. *Clark v. Country Mut. Ins. Co.*, 131 Ill. App. 3d 633, 476 N.E.2d 4 (1985).

473. *Id.* at 635, 476 N.E.2d at 5 (citing ILL. REV. STAT. ch. 10, para. 116 (1983)).

474. *Clark*, 131 Ill. App. 3d at 635, 476 N.E.2d at 5.

475. *Id.* at 636, 476 N.E.2d at 5.

476. *Id.* (Nonetheless, the court held the order could be appealed "as it is injunctive in nature." *Id.* at 636, 476 N.E.2d at 6. See also *Grane v. Grane*, 130 Ill. App. 332, 473 N.E.2d 1366 (1985)).

477. *Griffith v. ITT World Communications, Inc.*, 611 F. Supp. 1567, 1568 (S.D. Fla. 1985).

478. 611 F. Supp. 1567 (S.D. Fla. 1985).

479. *Id.* at 1568.

480. *Id.* at 1567.

481. *Id.* at 1568.

482. *Id.*

483. *Id.*

484. *Id.*

“Whether a party consented to arbitrate a dispute in the first instance is a jurisdictional question that must be decided by the court.”<sup>485</sup> In *Gaslin, Inc. v. L.G.C. Exports, Inc.*,<sup>486</sup> one party signed the arbitration agreement for a company involved in the dispute.<sup>487</sup> This party claimed the agreement did not give the arbitrator jurisdiction over him.<sup>488</sup> The court stated that “although the arbitrator is the final judge of law and fact, his power has not been extended to the degree that he may determine his own jurisdiction, that is, whether the arbitration tribunal has the requisite power to hear the particular case brought before it.”<sup>489</sup> The court stated that the determination of whether there was an agreement to arbitrate and which disputes fall under the agreement are matters for the court to decide.<sup>490</sup>

A party seeking arbitration must apply to the court by motion in order to stay litigation and compel arbitration.<sup>491</sup> In *Adams v. Nelson*,<sup>492</sup> the defendants alleged failure to state facts upon which relief could be granted.<sup>493</sup> Defendants claimed in the alternative that because the arbitration clause was appended to and incorporated by reference into plaintiff’s complaint, the court was ousted of its jurisdiction, and that the trial court was required to grant the Rule 12(b)(6) motion on jurisdictional grounds.<sup>494</sup> The Supreme Court of North Carolina held that the trial court was not ousted of its jurisdiction because the defendants failed to apply to the court by proper motion for arbitration.<sup>495</sup>

Under Illinois’ version of the UAA,<sup>496</sup> appellate courts have jurisdiction to entertain appeals from orders denying motions to stay arbitration.<sup>497</sup> Unlike the UAA, section 18 of the Illinois Act allows appeals “in the same manner, upon the same terms, and with like effect as in civil cases.”<sup>498</sup> In *Grane v. Grane*,<sup>499</sup> the court analogized such an order with the denial to grant an injunction and found jurisdiction to hear such an appeal.<sup>500</sup>

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485. *Gaslin, Inc. v. L.G.C. Exports, Inc.*, 334 Pa. Super. 132, \_\_\_\_, 482 A.2d 1117, 1121 (1984).

486. 334 Pa. Super. 132, 482 A.2d 1117 (1984).

487. *Id.* at \_\_\_\_, 482 A.2d at 1119.

488. *Id.*

489. *Id.* at \_\_\_\_, 482 A.2d at 1121.

490. *Id.*

491. *Adams v. Nelson*, 313 N.C. 442, \_\_\_\_, 329 S.E.2d 322, 325 (1985).

492. 313 N.C. 442, 329 S.E.2d 322 (1985).

493. *Id.* at \_\_\_\_, 329 S.E.2d at 323.

494. *Id.* at \_\_\_\_, 329 S.E.2d at 323-24.

495. *Id.* at \_\_\_\_, 329 S.E.2d at 324.

496. ILL. REV. STAT. ch. 10 §§ 101-123 (1969).

497. *Grane v. Grane*, 130 Ill App. 332, 334-39, 473 N.E.2d 1366, 1368-71 (1985).

498. *Id.* at 335, 473 N.E.2d at 1368 (quoting ILL. REV. STAT. ch. 10, para. 118 (1981)).

499. 130 Ill. App. 332, 473 N.E.2d 1366 (1985).

500. *Id.* at 334-39, 473 N.E.2d at 1368-71.

Such appeals are not allowed under the UAA.<sup>501</sup> The *Grane* court suggested that the UAA is designed to aid parties promptly resolve disputes.<sup>502</sup> However, the court declined to follow that approach stating that "[t]he structure of the Illinois arbitration statute . . . suggests that the legislature intended courts to determine at the outset whether the parties had in fact entered into an agreement to arbitrate."<sup>503</sup> The court observed that their approach would facilitate the speedy resolution of the dispute by avoiding arbitration where there is no agreement to arbitrate.<sup>504</sup>

In *Paine, Webber, Jackson, and Curtis, Inc. v. Bennett*,<sup>505</sup> the appellate court declined to hear an appeal from an order denying a motion to compel arbitration.<sup>506</sup> In *Paine*, the complaint that the appeal was based on had been dismissed with leave to amend.<sup>507</sup> The appeal was dismissed for lack of jurisdiction since it was not a final order and the appellate court would not issue advisory opinions.<sup>508</sup>

An appellate court has jurisdiction to review an otherwise non-appealable interlocutory order when that order departs from the requirements of law.<sup>509</sup> In *Ripple v. Packard*,<sup>510</sup> the trial court granted a motion to vacate an arbitrator's award under the Florida Arbitration Act without ordering a rehearing before the arbitrator.<sup>511</sup> The appellee challenged the appellate court's jurisdiction on appeal. In holding that the order was appealable, the court stated that "[a]n order vacating an arbitration award without directing a rehearing is a departure from the essential requirements of law."<sup>512</sup>

The court does not necessarily lose jurisdiction to review an arbitrator's award when proper service is not made within the statutory period.<sup>513</sup> In *Big Beaver Falls Area School District v. Big Beaver Falls Area Educational Association*,<sup>514</sup> the school district made service by regular mail rather than by deputized service as required by statute.<sup>515</sup> Before the thirty day statute<sup>516</sup> had run, the school board filed a petition for review as allowed under the

501. UAA § 19.

502. *Grane*, 130 Ill. App. 332 at \_\_\_\_\_, 473 N.E.2d at 1370.

503. *Id.* at 338, 473 N.E.2d at 1370.

504. *Id.* at 338-39, 473 N.E.2d at 1370.

505. 469 So. 2d 881 (Fla. Dist. Ct. App. 1985).

506. *Id.*

507. *Id.*

508. *Id.*

509. *Ripple v. Packard*, 471 So. 2d 1293, 1294 (Fla. Dist. Ct. App. 1985).

510. 471 So. 2d 1293.

511. *Id.* at 1294.

512. *Id.* at 1294 (order vacating an award without directing a rehearing is appealable under FLA. STAT. § 682.20(e)(1983)).

513. *Big Beaver Falls Area School Dist. v. Big Beaver Falls Area Educ. Ass'n.*, 89 Pa. Commw. 176, 492 A.2d 87 (1985).

514. 89 Pa. Commw. 176, 492 A.2d 87 (1985).

515. *Id.* at \_\_\_\_\_, 492 A.2d at 88.

516. 42 PA. CONS. STAT. ANN. § 7314(b) (1982).

Pennsylvania Rules of Civil Procedure.<sup>517</sup> The trial court dismissed the petition for lack of jurisdiction since proper service was not made.<sup>518</sup> The appellate court reversed holding that a reissuance of the petition was proper where there was no sign the party seeking review "sought to stall the legal machinery it set in motion by filing its petition for review."<sup>519</sup>

### B. *Judgment or Decree on Award*

Section 14 of the UAA provides that once a judgment or decree is entered in conformity with the granting of an order confirming, modifying, or correcting an arbitration award, that judgment or decree is to be enforced like any other judgment or decree.<sup>520</sup> Recent court decisions have underscored one aspect of judgments or decrees in the context of arbitration awards; the finality of those rulings.

In *Rodgers Builders, Inc. v. McQueen*,<sup>521</sup> a North Carolina appellate court held that the doctrine of res judicata applies to a judgment entered on an arbitration award just as it does to any other judgment. A construction company had sought damages from an owner for fraud, unfair and deceptive trade practices, and negligent misrepresentation after previously submitting the dispute to arbitration. The trial court granted the defendant's motion for a summary judgment explaining there was no genuine issue in controversy.<sup>522</sup> The appellate court affirmed, holding that a judgment entered on an arbitration award is conclusive on the issue in controversy, and bars subsequent litigation arising out of the same dispute or cause of action. The court concluded that, in light of North Carolina's policy favoring arbitration, the language of the arbitration clause in question was broad enough to include any claims, whether characterized as tort or contract, arising out of the parties' contractual relationship.<sup>523</sup>

Similarly, in *Western Casualty & Surety Co. v. Gridley*,<sup>524</sup> the court held that res judicata is applicable to an arbitrator's final award.<sup>525</sup> According to the court, actual claims<sup>526</sup> raised by Gridley and decided by the arbitration

517. *Big Beaver*, 89 Pa. Commw. at \_\_\_\_, 492 A.2d at 89.

518. *Id.* at \_\_\_\_, 492 A.2d at 88.

519. *Id.* at \_\_\_\_, 492 A.2d at 90.

520. UAA § 14 ("Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgement or decree.").

521. 76 N.C. App. 16, 331 S.E.2d 726 (1985), *reh'g denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

522. *Id.* at \_\_\_\_, 331 S.E.2d at 730.

523. *Id.* at \_\_\_\_, 331 S.E.2d at 732.

524. 362 N.W.2d 100 (S.D. 1985).

525. *Id.* at 103.

526. Res judicata applies to claims actually raised and to those claims that could have been raised. The court's holding was limited to claims Gridley actually raised in the arbitration proceedings. The court did not have occasion to address

panel were properly disposed of by the trial court in rendering a summary judgment against Gridley.<sup>527</sup>

In *Save Charleston Foundation v. Murray*,<sup>528</sup> a South Carolina appellate court held that prosecution of a claim on a different theory is barred when that same claim was properly adjudicated in arbitration. A vendor of property brought action on a promissory note following arbitration of a previous action based upon the note. The purchaser asserted an affirmative defense of prior arbitration and the trial court dismissed the claim.<sup>529</sup> The appellate court affirmed, relying on the common law doctrine of election of remedies. It explained that invocation of one remedy which reaches the stage of final adjudication will bar another remedy for the same wrong. The appellate court noted that South Carolina statutes established arbitration as one mode of procedure and relief. It further noted that to conclude otherwise would defeat the purpose of arbitration, that is, to avoid litigation.<sup>530</sup>

The courts consistently adhere to the text of the UAA and narrowly interpret its provisions. This promotes uniformity of interpretation since reference to the Act does not depend upon conflicting judicial inferences and exceptions. To effecuate this policy courts rely upon rules of civil procedure and deny declaratory relief as a collateral means of challenging an arbitrator's decision.

In *Liberty Mutual Insurance Co. v. Matuga*,<sup>531</sup> the court stated that the trial judge incorrectly granted summary judgment because Liberty Mutual's request for arbitration was pending at the time of summary judgment.<sup>532</sup> The court disposed of the case on procedural grounds that are somewhat related to the express policy of section 2(d) of the UAA.<sup>533</sup> The grant of summary judgement would have been a judicial gloss on the language of section 2(d). By denying the grant of summary judgment, the court adhered to a uniform interpretation of the act.

In *Detroit Automobile Inter-Insurance Exchange v. Sanford*,<sup>534</sup> the court limited the complaining party to the express relief provided for in the UAA.<sup>535</sup> It then refused to treat the complainant's petition for declaratory relief as a motion to vacate.<sup>536</sup> Detroit Automobile challenged the unfavorable arbitra-

whether res judicata applies to the counterclaims which Gridley could have raised. *Id.*

527. *Gridley*, 362 N.W.2d at 103.

528. 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985).

529. *Id.* at \_\_\_\_, 333 S.E.2d at 63.

530. *Id.* at \_\_\_\_, 333 S.E.2d at 64.

531. 471 N.E.2d 737 (Ind. Ct. App. 1984).

532. IND. CODE ANN. § 34-4-2-1 (Burns Supp. 1985).

533. UAA § 2(d) (for text of §2(d), see *supra* note 213).

534. 141 Mich. App. 820, 369 N.W.2d 239 (1985).

535. *Id.* at 825, 369 N.W.2d at 242. The only two methods in the UAA to challenge an arbitrator's decision are motions to vacate and motions to modify or correct. UAA §§ 12, 13.

536. *Detroit Automobile*, 141 Mich. App. at 827, 369 N.W.2d at 243.

tor's decision as contrary to the contract in question. The court held that declaratory relief was unavailable to Detroit Automobile because an arbitrator's decision can be challenged only as provided in the act.<sup>537</sup> The court also held that if a petition for declaratory relief is filed after the time requirement for a motion to vacate and without a showing of "excusable neglect," the petition will not be considered a motion to vacate.<sup>538</sup> This narrow construction indicates that parties must strictly adhere to the express provisions of the UAA.

#### IX. ARBITRATION PROCEEDINGS

Section 5 of the UAA prescribes the procedure to be followed in an arbitration hearing if the arbitration agreement itself does not provide otherwise.<sup>539</sup> It also provides that arbitrators may hear and determine the controversy even if a duly notified party fails to appear for the hearing.

In *Von Engineering v. R.W. Roberts Construction Co.*,<sup>540</sup> a Florida appellate court held that an arbitration award against a contractor was enforceable against the contractor's surety when the surety waived its right to participate in an arbitration hearing. A corporation had filed a claim against the contractor and its surety. The defendants, represented by the same counsel, moved to compel arbitration. The trial court granted the motion. The corporation filed its own demand for arbitration naming the contractor as the party upon which the demand was being made. The contractor counterclaimed but the surety did not participate. When the corporation later sought confirmation of the arbitration award, the surety moved for dismissal claiming it was not a party to the arbitration proceedings and the award was effective only against the contractor. The corporation then filed an amended complaint alleging that the surety had notice of the arbitration proceedings and elected not to participate.<sup>541</sup> The trial court dismissed the complaint, but

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537. *Id.* at 825, 369 N.W.2d at 242.

538. *Id.* at 827, 369 N.W.2d at 243.

539. UAA § 5 states:

Unless otherwise provided by the agreement:

(a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

*Id.*

540. 457 So. 2d 1080 (Fla. Dist. Ct. App. 1984).

541. *Id.* at 1082.



the appellate court reversed saying the arbitration award would be conclusive against the surety if it waived its right to appear at the arbitration hearing. The appellate court acknowledged that persons whose rights are affected by arbitration proceedings have a right to be heard after reasonable notice, but noted that common law recognizes a judgment against a principal may be conclusive against a surety even if the surety does not participate.<sup>542</sup>

A "waiver" of the entire arbitration hearing process was upheld by a Florida appellate court in *Hall v. Metropolitan Life Insurance Co.*<sup>543</sup> An insured had challenged the arbitration procedure outlined in her insurance policy because it did not include a provision for an evidentiary hearing. The appellate court rejected the challenge, noting that the Florida statute outlining the hearing procedure also provides, in language similar to that of section 5 of the UAA, that a hearing can be waived if it "[I]s otherwise provided by the agreement or provision for arbitration . . . ."<sup>544</sup> In other words, the appellate court concluded that the statutory language deferred to the arbitration agreement not only for the procedure of an arbitration hearing but also on the question of whether a hearing will be held at all.

Generally, courts will not inquire into the characteristics of arbitrators. In *Atrium Westwood VIII Venture v. Barrick Westwood Ltd. Partnership*,<sup>545</sup> the court held that a neutral arbitrator, selected and agreed upon by the parties, rendered a valid arbitration award even though the other two agreed-upon arbitrators did not participate in the hearing.<sup>546</sup> The arbitration agreement provided that three persons were to be selected to resolve the controversy; one by each party and a neutral third arbitrator decided upon by both parties. Atrium's arbitrator was unable to attend the hearing on the scheduled date. Consequently, Barrick's arbitrator withdrew from the arbitration panel. The neutral arbitrator conducted the hearing and entered an award favorable to Barrick. Despite Atrium's argument that the Texas Arbitration Act required all three arbitrators to conduct the hearing,<sup>547</sup> the court held that the hearing was properly conducted for several reasons. First, the appearing arbitrator was neutral. Second, Atrium neglected to appoint a substitute arbitrator. Finally, the court stated that "[T]he purpose of arbitration is to encourage speedy resolution of controversies."<sup>548</sup>

542. *Id.*

543. 454 So. 2d 711 (Fla. Dist. Ct. App. 1984).

544. *Id.* at 713; see FLA. STAT. ANN. § 682.06 (1967).

545. 693 S.W.2d 699 (Tex. Ct. App. 1985).

546. *Id.* at 700-01.

547. TEX. REV. CIV. STAT. ANN. art. 228 § C (Vernon 1973) states:

The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

*Id.*

548. *Atrium Westwood*, 693 S.W.2d at 701.

In *Orr v. Orr*,<sup>549</sup> the court held that arbitrators who were members of a designated church conducted a valid arbitration proceeding.<sup>550</sup> According to the arbitration agreement, the arbitration panel was to consist of members belonging to the same church as the parties. The defendant had argued the panel was, "in reality, an ecclesiastical court."<sup>551</sup> The court ruled that the mere fact "that the arbitrators were members of the designated church did not, without more," invalidate the arbitration proceedings.<sup>552</sup>

#### X. JUDICIAL REVIEW

Judicial review of an arbitrator's award is strictly limited. As the parties have chosen arbitration over a judicial proceeding, great deference is given to the arbitrator's decision.

A party seeking judicial review of an arbitrator's award must strictly comply with the procedures set out in the arbitration statute. For example, application for review must be made within the specified time limit.<sup>553</sup> A party who has not complied strictly with the procedure for review set out in the arbitration act will not be allowed to collaterally attack an arbitrator's decision in court.<sup>554</sup> The scope of judicial review is governed by the jurisdiction's arbitration act.<sup>555</sup> Absent a reason for judicial review recognized by the arbitration act, a court will not disturb an arbitrator's decision.

A court will stay arbitration upon evidence that grounds exist for the revocation of the contractual agreement to arbitrate.<sup>556</sup> Clear and convincing evidence is required, however, before a court will vacate an arbitrator's award.<sup>557</sup> A court may be more willing to vacate an arbitrator's decision resolving a dispute between an attorney and a client. The court has broader power to inquire into an attorney-client arbitration, based upon its "inherent power to regulate the practice of members of the bar and provide for proper administration of justice."<sup>558</sup>

A party seeking judicial review must apply to a court within the time limit specified by the arbitration statute. In *Orr v. Orr*,<sup>559</sup> two sons filed suit

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549. 108 Idaho 874, 702 P.2d 912 (1985).

550. *Id.* at \_\_\_\_, 702 P.2d at 914.

551. *Id.* at \_\_\_\_, 702 P.2d at 913.

552. *Id.* at \_\_\_\_, 702 P.2d at 914.

553. *Orr v. Orr*, 108 Idaho 874, \_\_\_\_, 702 P.2d 912, 914 (1985).

554. *Prudential Property and Casualty Ins. Co. v. McDaniel*, 342 Pa. Super. 557, \_\_\_\_, 493 A.2d 731, 732 (1985).

555. *City of Boulder City v. Gen. Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985).

556. *Gulf Interstate Eng'g v. Pecos Pipeline*, 680 S.W.2d 879, 881 (Tex. Ct. App. 1984).

557. *Burd, Inc. v. Stoneville Furniture Co.*, 134 Ill. App. 3d 149, \_\_\_\_, 479 N.E.2d 962, 965 (1985).

558. *Marino v. Tagaris*, 395 Mass. 397, \_\_\_\_, 480 N.E.2d 286, 289 (1985).

559. 108 Idaho 874, 702 P.2d 912 (1985).

against their father for an alleged breach of a lease for farmland and equipment. The parties agreed to discontinue the litigation and submit their dispute to arbitration. Following the arbitrators' decision in the sons' favor, the sons filed a motion in the district court where the litigation had been pending requesting confirmation of the arbitrators' decision.<sup>560</sup> The father filed an application to vacate the decision, alleging that the arbitration proceedings had been procedurally defective because the witnesses had not been under oath and attorneys were not allowed to appear for the parties. The father's application to vacate was filed five months after he received a copy of the arbitrators' decision, although the arbitration act required that such application be made within ninety days.<sup>561</sup> The court held that the father's failure to comply with the time limit was an absolute bar to the court considering the merits of his motion to vacate.<sup>562</sup>

A court will not allow a party to ignore the procedure for judicial review set out in the arbitration act and attack an arbitrator's decision collaterally in court. In *Prudential Property and Casualty Insurance v. McDaniel*,<sup>563</sup> an insurance company brought a declaratory judgment action to determine the validity of an arbitration award entered against it. The court stated that the proper procedure would have been for the insurance company to have filed an application to vacate.<sup>564</sup> The court held that Prudential could not obtain review of the arbitration award by a declaratory judgment proceeding.<sup>565</sup>

A court's scope of judicial review is governed by the jurisdiction's arbitration act. The UAA as adopted by Pennsylvania provides that where a controversy is submitted to arbitration by the Commonwealth government, or where it is submitted by a political subdivision and the controversy is with an employee or his representative, or where a person is required by law to submit a controversy to arbitration, a reviewing court shall modify the award where it is contrary to law.<sup>566</sup> In *Upper Merion Area School District v. Upper Merion Education Association*,<sup>567</sup> a school district and a teachers' association had engaged in collective bargaining following a teachers strike. The final agreement provided that the work year would be reduced to 174 days as a result of the strike. Subsequently, a Commonwealth Court of Pennsylvania ruled in the case of *Scanlon v. Mount Union Area Board of School Directors*,<sup>568</sup> that 180 instructional days per year were mandatory, and that a strike

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560. *Id.* at \_\_\_\_, 702 P.2d at 913.

561. *Id.* at \_\_\_\_, 702 P.2d at 914.

562. *Id.*

563. 342 Pa. Super. 557, 493 A.2d 731 (1985).

564. *Id.* at \_\_\_\_, 493 A.2d at 732.

565. *Id.*

566. 42 PA. CONS. STAT. ANN. § 7302(d) (Purdon 1982).

567. 85 Pa. Commw. 115, 482 A.2d 274 (1984).

568. 51 Pa. Commw. 83, 415 A.2d 96 (1980), *aff'd*, 499 Pa. 215, 452 A.2d 1016 (1982).

justified less than 180 days only if it rendered scheduling of additional days impossible.<sup>569</sup> Following the *Mount Union* decision, the Upper Merion Education Association asked the school district to reschedule the missed instructional days. When the school district refused, the issue was submitted to arbitration. The arbitrator noted that the school district had not provided 180 instructional days though it would have been possible to reschedule the missed days. The arbitrator ruled, therefore, that the 174-work day provision in the collective bargaining agreement was invalid and the teachers were entitled to pay for the additional work days which would have been required to meet the 180 day provision.<sup>570</sup> A Court of Common Pleas affirmed the arbitrator's award, and the school district appealed to the same Commonwealth Court which had decided *Mount Union*. The Court refused to affirm the arbitrator's award because it concluded that the *Mount Union* decision was addressed to instructional days, not work days. Therefore, the court held that the 174-work day provision in the collective bargaining agreement was not invalidated by the *Mount Union* decision as a matter of law.<sup>571</sup>

In *General Accident Insurance Co. v. St. Peter*,<sup>572</sup> an arbitrator had arrived at his awards to three injured passengers by stacking the driver's uninsured motorist benefits. The driver's uninsured motorist policy provided coverage of \$30,000 for each of the driver's three vehicles. Though only one of the vehicles was involved in the accident, the arbitrator awarded a total of \$90,000 to the three passengers by stacking, or totalling the coverage for all three vehicles. A lower court refused to vacate or modify the awards.<sup>573</sup> The Superior Court of Pennsylvania remanded the case with instructions to modify the awards, as claimants who do not pay premiums and are not named as beneficiaries of the driver's insurance policy are not allowed the privilege of stacking, according to Pennsylvania law.<sup>574</sup>

In *Abramovich v. Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board*,<sup>575</sup> the Pennsylvania Liquor Control Board awarded a warehouseman a contract to transport liquor. The warehouseman had used non-union labor rates in figuring his bid. When the union began picketing his warehouse, the warehouseman entered into a collective bargaining agreement with the union, requiring him to pay union wages. The contract, which included a provision for arbitration, authorized an adjustment of the bid should there be a mandatory requirement that the warehouseman change the rate of payment for labor.<sup>576</sup> The arbitrator denied the warehouseman's re-

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569. *Scanlon*, 51 Pa. Commw. at \_\_\_\_, 415 A.2d at 100.

570. *Mount Union*, 85 Pa. Commw. at \_\_\_\_, 482 A.2d at 276.

571. *Id.* at \_\_\_\_, 482 A.2d at 277.

572. 334 Pa. Super. 6, 482 A.2d 1051 (1984).

573. *Id.* at \_\_\_\_, 482 A.2d at 1052.

574. *Id.* at \_\_\_\_, 482 A.2d at 1054.

575. 86 Pa. Commw. 524, 485 A.2d 872 (1984).

576. *Id.* at \_\_\_\_, 485 A.2d at 873.

quest for an adjustment.<sup>577</sup> The court affirmed the arbitrator's denial of the adjustment, holding that there was no mandatory requirement that the warehouseman enter into the collective bargaining agreement and thereby change his rate of payment for labor.<sup>578</sup> In affirming the arbitrator's decision, the court noted that its scope of review was governed by Pennsylvania statute section 7302 (d)(2), which allows modification or correction of an award only if that award is contrary to law.<sup>579</sup>

The Nevada Supreme Court held that when a statute requires arbitration and the legislature intends that the decision of the arbitrator be final and binding, judicial review is governed by Nevada's Arbitration Act. In *City of Boulder City v. General Sales Drivers*,<sup>580</sup> a dispute between firemen and the city was submitted to arbitration pursuant to state statute.<sup>581</sup> The city petitioned for review of the arbitrator's decision, contending that the decision must be reviewed according to the broader standards established for governmental agencies by the Nevada Administrative Procedures Act. The court denied the city's petition for review, holding that when the legislature passed the statute requiring arbitration, it did so with the intention that the procedures of the UAA including its limited standards of judicial review, should apply.<sup>582</sup>

A court will stay arbitration upon evidence that grounds exist at law or in equity for revocation of the contractual agreement to arbitrate. In *Gulf Interstate Engineering v. Pecos Pipeline*,<sup>583</sup> evidence showed that a previous contract between Gulf and Pecos contained no arbitration clause, and that Gulf had falsely represented to Pecos that Pecos' attorney had approved a new contract containing the arbitration agreement. The Texas Court of Appeals affirmed the trial court's determination and stayed arbitration proceedings on the grounds that there was evidence Gulf had fraudulently induced Pecos into agreeing to arbitration.<sup>584</sup>

An arbitrator's award is presumed valid and will not be vacated absent clear and convincing evidence. In *Burd, Inc. v. Stoneville Furniture Company*,<sup>585</sup> a dispute over the value of certain accounts receivable was submitted to an arbitrator pursuant to a contract between Burd and Stoneville. Subsequently, Stoneville filed suit against Burd in a United States District Court, alleging breach of warranty of good title regarding real property Burd had transferred to Stoneville. Both parties agreed to stay the District Court action

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577. *Id.*

578. *Id.* at \_\_\_\_\_, 485 A.2d at 874.

579. *Id.*

580. 101 Nev. 117, 694 P.2d 498 (1985).

581. *Id.* at 118, 694 P.2d at 499.

582. *Id.* at 118-19, 694 P.2d at 500.

583. 680 S.W.2d 879 (Tex. Ct. App. 1984).

584. *Id.* at 883.

585. 134 Ill. App. 3d 149, 479 N.E.2d 962 (1985).

pending the arbitrator's decision. Burd twice requested that the arbitrator dismiss the arbitration on the basis that Stoneville's filing of the lawsuit was a waiver of the agreement to arbitrate which revoked the arbitrator's jurisdiction. The arbitrator failed to address jurisdiction and ruled in favor of Stoneville.<sup>586</sup> In considering Burd's motion to vacate the arbitrator's award on the grounds that the arbitrator had exceeded his power by failing to address jurisdiction, the court stated that Stoneville did not waive its right to arbitration by filing the lawsuit.<sup>587</sup> Given that determination, the court held that Burd did not meet its burden of proving by clear, strong and convincing evidence that the arbitrator had exceeded his powers.<sup>588</sup>

In *Prince George's County Educators' Association, Inc. v. Board of Education of Prince George's County*,<sup>589</sup> the Court of Special Appeals of Maryland held that an arbitrator's award is not subject to judicial revision unless it is "completely irrational."<sup>590</sup> A dispute arose between the educators' association and the school board when the school board refused to pay driver education teachers the amount set forth in its collective bargaining agreement. The two parties submitted the dispute to arbitration pursuant to the collective bargaining agreement.<sup>591</sup> The arbitrator ruled that because the Maryland General Assembly had abolished its requirement that each county board of education offer driver education, the driver education school was no longer a party to the collective bargaining agreement and, therefore, could not demand the pay specified in the agreement.<sup>592</sup> The court ruled that the driver education school was not a separate entity from the board of education, and was, therefore, still a party to the collective bargaining agreement. As the arbitrator's award was based on the erroneous factual conclusion that the driver education school was no longer a party to the collective bargaining agreement, the court vacated the arbitrator's award, holding that it was completely irrational.<sup>593</sup>

In *Marino v. Tagaris*,<sup>594</sup> the Supreme Judicial Court of Massachusetts indicated that a court will inquire more closely into arbitration involving an attorney-client dispute. An attorney had represented a client in a divorce proceeding in *Marino*. When a dispute over the attorney's fees arose, the client agreed to submit the controversy to the Legal Fee Arbitration Board of the Massachusetts Bar Association. The client received literature from the board which indicated that the arbitration hearing would be informal and

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586. *Id.* at \_\_\_\_\_, 479 N.E.2d at 963.

587. *Id.* at \_\_\_\_\_, 479 N.E.2d at 965.

588. *Id.*

589. 61 Md. App. 249, 486 A.2d 228 (1985), *cert. granted*, 492 A.2d 616 (1985).

590. *Id.* at 253, 486 A.2d at 231.

591. *Id.* at 251, 486 A.2d at 230.

592. *Id.*

593. *Id.* at 256, 486 A.2d at 233.

594. 395 Mass. 397, 480 N.E.2d 286 (1985).

that she would not need an attorney. At the arbitration hearing, the client spoke for two minutes, while the attorney made a lengthy presentation, which the client was given no time to rebut. The arbitrators ruled against the client. When the attorney brought an action to confirm the arbitrators' award, the client contended that she had not had adequate opportunity to present her case and that she was not informed that the arbitrators' award could have been vacated or modified in court.<sup>595</sup> In vacating the award, the court stated that it had broader power to inquire into an attorney-client arbitration based upon the court's "inherent power to regulate practices of members of the bar and to provide for the proper administration of justice."<sup>596</sup>

Cases interpreting the UAA seem to be consistent in their deference to the arbitrator's decision. The strict procedural requirements which must be met in order to challenge an arbitrator's award, along with the heightened standards of review indicate that courts would prefer that the arbitrator's decision be final and binding on the parties.

## XI. TIMELINESS

The substantive rights of a party under an arbitration agreement may be lost if they are not asserted in a timely fashion. Certain claims and defenses must be asserted within the proper time period, whether that period is set by statute or in the arbitration agreement.<sup>597</sup> Generally, timeliness issues arise in two different manners under the UAA. First, questions frequently concern the timeliness of a demand for arbitration.<sup>598</sup> Since the resolution of this question usually requires interpretation of the arbitration agreement, courts leave questions on this issue to the arbitrator. The UAA itself provides no guidelines for assessing the timeliness of demands for arbitration. Second, questions often arise as to the timeliness of motions to vacate, modify, or correct an arbitration award.<sup>599</sup> When faced with this issue, courts strictly apply the time limits provided by state versions of the UAA in order to determine the timeliness of the motion.<sup>600</sup>

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595. *Id.* at \_\_\_\_, 480 N.E.2d at 288.

596. *Id.* at \_\_\_\_, 480 N.E.2d at 289.

597. *Recent Developments* 1983, *supra* note 3, at 205.

598. *E.g.*, County of Durham v. Richards & Assoc., 742 F.2d 811 (4th Cir. 1984); Roseville Community School Dist. v. Roseville Fed'n of Teachers, 137 Mich. App. 118, 357 N.W.2d 829 (1984).

599. *E.g.*, Tung v. W.T. Cabe & Co., 492 A.2d 267 (D.C. Cir. 1985); Jaffe v. Nocera, 493 A.2d 1003 (D.C. Cir. 1985).

600. The UAA provides that applications to vacate, modify, or correct an arbitrator's award must be made within ninety days after the award is made. UAA §§ 12(b), 13(a). However, if a motion to vacate is based on allegations of "corruption, fraud or other undue means," the ninety day period does not begin to run until "such grounds are known or should have been known." UAA § 12(b). No other exceptions to this limitations period is specified in the UAA.

A. *Demand for Arbitration*

Courts routinely decline to consider whether a party has made a timely demand for arbitration. In *County of Durham v. Richards and Associates*,<sup>601</sup> the court held that a party cannot raise timeliness as a defense in an action to compel arbitration because that determination is reserved to the arbitrator.<sup>602</sup> The contract in question contained a clause requiring a party to file a demand before the running of the applicable statute of limitations. Although it appeared from the facts that the demand was untimely, the court nevertheless compelled arbitration.<sup>603</sup>

In *Roseville Community School District v. Roseville Federation of Teachers*,<sup>604</sup> the issue of timeliness centered around whether the grievance complained of was continuing or temporary in nature. The arbitrator had found the grievance to be continuing and held the demand for arbitration was timely. The plaintiff moved to vacate the award, asserting that this finding was error. The court refused to review the finding, however, holding that such a determination was a procedural matter that could only be determined by the arbitrator.<sup>605</sup>

B. *Motions to Vacate, Modify or Correct*

Courts have generally adhered to a strict application of the time limits governing motions to vacate, modify or correct arbitration awards.<sup>606</sup> The rationale behind strict application includes promotion of finality and certainty of arbitration awards, retention of arbitration as an expedient process, and assurance that any mistake in the arbitration proceeding will be promptly corrected. Only in situations where these purposes would not be served have the courts indicated that they might toll the statutory time limits.

In *Tung v. W. T. Cabe & Co.*,<sup>607</sup> the parties submitted to arbitration a dispute arising out of appellee's management of appellant's securities in accordance with the National Association of Security Dealers (NASD) Code of Arbitration Procedure. After issuance of the award by the arbitrator, appellant requested reconsideration of the award. The arbitrator denied reconsideration and the appellant moved to vacate the award. The trial court held the motion untimely because it had not been filed within the ninety days

601. 742 F.2d 811 (4th Cir. 1984).

602. *Id.* at 815.

603. *Id.*

604. 137 Mich. App. 118, 357 N.W.2d 829 (1984).

605. *Id.* at 124-25, 357 N.W.2d at 833.

606. The UAA § 12(b) ("An application under this section shall be made within ninety days after a delivery of a copy of this award to the appellant.').

607. 492 A.2d 267 (D.C. Cir. 1985).



of the receipt of the award by the appellant.<sup>608</sup> Appellant contended, however, that his request for reconsideration had tolled the statutory time limit and, since he had moved to vacate within ninety days of the denial of the reconsideration, the motion was timely. The court dismissed this contention because the guidelines did not contain a procedure for reconsideration of an award, and thus distinguished the case from those in which the arbitration guidelines provide for reconsideration, rehearing, or other forms of review by the arbitrator.<sup>609</sup>

In *Jaffe v. Nocera*,<sup>610</sup> the court held untimely an application by the defendant to vacate an arbitration award on the ground that he was not personally liable under a contract because it was filed more than ten months after issuance of the award.<sup>611</sup> The defendant argued that the statutory time limit had been tolled when he filed a timely motion for reconsideration of the award by the arbitrators. The court declined to decide whether such action would toll the statutory time limit, because the defendant had not raised lack of personal liability when he sought reconsideration.<sup>612</sup> Tolling the statute, the court said, might be proper when the arbitrators need time to correct their own errors and reach a final judgment, to prevent simultaneous consideration of the same issue by the court and the arbitrator, and to refrain from compelling a party to seek judicial review during reconsideration of the award by the arbitrator.<sup>613</sup> Since none of these situations were present here, it was concluded tolling the statute would serve no useful purpose.

In *Quirk v. Data Terminal Systems*,<sup>614</sup> the court held untimely a motion to correct and affirm an arbitration award which contained a clerical error because the motion was filed after the statutory time limit had expired. The plaintiff argued that under the Massachusetts Rules of Civil Procedure a judge could correct clerical errors in arbitration awards without regard to the statutory time limit.<sup>616</sup> The court found the procedural rule and the statutory time limit in conflict and, since the latter was more specific, the latter governed.<sup>617</sup>

In *Orr v. Orr*,<sup>618</sup> the appellant contended that the arbitration proceedings contained procedural defects which were valid grounds for vacating an award. However, the court held that failure to comply with the statutory time limit for vacating an arbitration award creates an absolute bar, even when the

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608. *Id.* at 269.

609. *Id.* at 269-70.

610. 493 A.2d 1003 (D.C. Cir. 1985).

611. *Id.*

612. *Id.* at 1012.

613. *Id.*

614. 394 Mass. 334, 475 N.E.2d 1208 (1985).

615. *Id.* at \_\_\_\_, 475 N.E.2d at 1211.

616. *Id.* at \_\_\_\_, 475 N.E.2d at 1211-12.

617. *Id.* at \_\_\_\_, 475 N.E.2d at 1212.

618. 108 Idaho 874, 702 P.2d 912 (1985).

party seeking to vacate the award has a valid reason for doing so under the statute.<sup>619</sup>

In *I.U.B.A.C. Local Union # 31 v. Anastasi Brothers, Corp.*,<sup>620</sup> the court stated that the failure to move to vacate an arbitration award within the applicable time limits would generally bar a party from later seeking the same relief in a counterclaim to an action to confirm an arbitration award.<sup>621</sup> The court, however, permitted the defendant's counterclaim, because the defendant alleged that the contract was illegal.<sup>622</sup> It reasoned that the validity of the contract must be determined before either the contract or the arbitration award will be enforced.<sup>623</sup>

In *Poire v. Kaplan*,<sup>624</sup> the court held that even though the parties' agreement to arbitrate was not in writing at the time arbitration was ordered by the court, once the parties submitted to arbitration in compliance with the statute, they also submitted to rules governing modification of the award.<sup>625</sup> As a result, failure to comply with the statutory time limit for moving to vacate an award barred the movant from seeking judicial review.<sup>626</sup>

## XII. PREEMPTION

State arbitration law has been preempted, in part, by the United States Supreme Court because of the national policy favoring the enforceability of arbitration agreements expressed by the congressional enactment of the Federal Arbitration Act (FAA).<sup>627</sup> From the perspective of state courts, preemption creates a body of federal substantive law which must be applied when the issue of enforceability of arbitration agreements falls within the scope of the FAA.<sup>628</sup> An arbitration agreement falls within the scope of the FAA where a written contract containing an arbitration agreement involves any maritime transaction or evidences a transaction involving interstate commerce.<sup>629</sup>

When deciding whether federal or state law is controlling, state courts may apply an objective test to determine if, at the time the agreement was signed, the parties contemplated "substantial interstate activity."<sup>630</sup> This anal-

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619. *Id.* at \_\_\_\_, 702 P.2d at 914.

620. 600 F. Supp. 92 (1984).

621. *Id.* at 94.

622. *Id.*

623. *Id.* at 94-95.

624. 491 A.2d 529 (D.C. Cir. 1985).

625. *Id.* at 534.

626. *Id.*

627. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

628. *See, e.g., Martin v. Norwood*, 395 Mass. 159, \_\_\_\_, 478 N.E.2d 955, 957 (1985).

629. 9 U.S.C. § 2 (1982).

630. *See, e.g., Riverfront Properties, LTD v. Max Factor III*, 460 So. 2d 948,

ysis, however, may be avoided if the choice between state and federal law is not outcome determinative,<sup>631</sup> or if the question of whether federal law is controlling, is not affirmatively asserted on appeal.<sup>632</sup> In addition, the right to have an arbitration agreement decided by federal law may be lost if not asserted at the trial court level.<sup>633</sup>

In *Riverfront Properties v. Max Factor III*,<sup>634</sup> the court applied an objective test to determine if, at the time the agreement was signed, the parties contemplated substantial interstate activity. In *Riverfront*, the parties entered into an agreement to use their jointly-owned property as security for a \$4,000,000 loan from a Florida lending institution.<sup>635</sup> Max Factor, after the execution of the loan agreement, filed a suit for partition and sale of the land being used as security.<sup>636</sup> Riverfront, contending this was a breach of the contract's provision which prohibited either party from doing anything which would lead to default, filed a motion to stay the partition proceeding pending arbitration.<sup>637</sup> The appeals court asserted that the trial court had denied the motion to stay because the contract incorporated the laws of California, and therefore, the arbitration agreement was not enforceable under Florida state law.<sup>638</sup> On appeal, Riverfront claimed that the arbitration agreement was enforceable under the FAA.<sup>639</sup>

The appeals court held that the arbitration agreement was not enforceable under federal law because at the time the parties entered into the agreement, they did not contemplate the sufficient degree of interstate activity "necessary to invoke the FAA."<sup>640</sup> In reaching its conclusion that the agreement did not contemplate a sufficient degree of interstate activity, the court noted that this was a joint venture of California corporations, represented by California counsel, with all communications between parties intrastate, and with the contract incorporating the laws of California.<sup>641</sup> The court

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953 (Fla. Dist. Ct. App. 1984) (quoting *Metro Industr. Painting v. Terminal Constr. Co.*, 287 F.2d 382, 387 (1961)).

631. See, e.g., *McCrary Eng'g. Corp. v. Town of Upland*, 472 N.E.2d 1305, 1306 (Ind. Ct. App. 1985); *Village of Cairo v. Bodine Contracting Co.*, 685 S.W.2d 253, 258 (Mo. Ct. App. 1985).

632. See, e.g., *Old Dominion Ins. Co. v. Dependable Reinsurance Co.*, 472 So. 2d 1365, 1367 (Fla. Dist. Ct. App. 1985).

633. See, e.g., *Williams v. Hardy*, 468 So. 2d 429, 430 (Fla. Dist. Ct. App. 1985).

634. 460 So. 2d 948 (Fla. Dist. Ct. App. 1984).

635. *Id.* at 949.

636. *Id.* at 950.

637. *Id.*

638. *Id.* at 952.

639. *Id.* at 954.

640. *Id.*

641. *Id.* at 953. The court indicated that there were three types of evidence important to the application of the test: 1) the terms of the contract, 2) how the parties expected the contract to be performed, and 3) how it was performed. *Id.* (citing *Metro Industr. Painting v. Terminal Constr. Corp.*, 287 F.2d 382 (1961)).

indicated that its decision was affected by Riverfront's failure to offer evidence of how the parties expected to perform the agreement and how the agreement was actually performed.<sup>642</sup> The court denied the petition for writ of certiorari and remanded the case for further proceedings in Max Factor's suit for partition.<sup>643</sup>

In *McCrary Engineering Corp. v. Town of Upland*,<sup>644</sup> the court avoided the question of whether the FAA preempted state law because the choice between state or federal law would not affect the outcome. The court declined to reach the constitutional question of whether Congress had the power to regulate a contract between a private corporation and an Indiana town.<sup>645</sup> The court applied both Indiana and federal law to the question of the enforceability of an arbitration agreement contained in a contract signed by an Indiana townboard president, who was not authorized by the board to sign.<sup>646</sup> The court ruled that the contract would not be enforceable under either state or federal law.<sup>647</sup>

In *Gulf Interstate Engineering v. Pecos Pipeline*,<sup>648</sup> the court reviewed the applicable state and federal laws and concluded that under both laws, an arbitration agreement was not enforceable if it was a product of fraud.<sup>649</sup> In *Gulf*, Pecos stopped making payments for operating a pipeline under an existing contract to Gulf and filed a suit against Gulf for deceptive trade practices.<sup>650</sup> Gulf moved to have the suit stayed pending arbitration.<sup>651</sup> Pecos claimed that the arbitration clause contained within their contract was unenforceable because Pecos had been fraudulently induced to enter into the arbitration agreement.<sup>652</sup> On appeal, the court held that an arbitration agreement, under both federal and state law, was not enforceable if it was a product of fraud.<sup>653</sup> The court then applied state law to determine if the arbitration agreement was enforceable.<sup>654</sup> The court held that the record contained sufficient indications that Gulf had falsely represented to Pecos that the arbitration agreement had been approved by the Pecos lawyers to warrant a finding that the arbitration agreement was unenforceable.<sup>655</sup> The court did not discuss federal law with respect to the issue of fraud.<sup>656</sup>

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642. *Riverfront*, 460 So. 2d at 954.

643. *Id.*

644. 472 N.E.2d 1305, 1306 (Ind. Ct. App. 1985).

645. *Id.* at 1306.

646. *Id.* at 1307.

647. *Id.* at 1308.

648. 680 S.W.2d 879 (Tex. Ct. App. 1984).

649. *Id.* at 880-81.

650. *Id.* at 880.

651. *Id.*

652. *Id.* at 881.

653. *Id.*

654. *Id.* at 882.

655. *Id.* at 883.

656. *Id.* at 880-81.

In *Village of Cairo v. Bodine Contracting Co.*,<sup>657</sup> the court stated that a choice between state and federal law was unnecessary. In *Cairo*, a dispute arose between the parties with respect to Cairo's progress payments to Bodine under contracts for the construction of a sewage and treatment system.<sup>658</sup> Cairo filed both a suit for breach of contract and a motion to stay arbitration.<sup>659</sup> The trial court granted Cairo's motion to stay arbitration because Bodine did not continue to perform during the dispute, thereby failing to fulfill a condition precedent to Bodine's right to demand arbitration.<sup>660</sup> The appeals court held that the language of the arbitration agreement did not create a condition precedent to Bodine's right of arbitration under either state or federal law.<sup>661</sup> The court noted that a choice between the two bodies of law would generally be unnecessary because states which have enacted the UAA "share the disposition of the FAA to enforce arbitration agreements as a matter of cogent public policy in favor of resolution of disputes without resort to the courts."<sup>662</sup>

Additionally in *Cairo*, the court indicated that it could apply either state or federal law because of Cairo's failure to affirmatively assert inadequate notice or want of involvement in interstate commerce on appeal.<sup>663</sup> Initially, Cairo had disputed the enforceability of the arbitration agreement in a trial court proceeding.<sup>664</sup> Cairo contended that the agreement was not enforceable under state law because it did not comply with a Missouri law requiring notice of the arbitration clause to be given in ten-point capital letters adjacent to or above the place for signature.<sup>665</sup> Cairo also challenged the enforcement of the agreement under federal law on the grounds that the contract did not evidence a transaction involving interstate commerce.<sup>666</sup> However, Cairo dropped these issues in later trial court proceedings and did not assert them on appeal.<sup>667</sup>

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657. 685 S.W.2d 253, 258 (Mo. Ct. App. 1985) (The case involved two contracts and two arbitration clauses. The second arbitration agreement contained an ambiguity which was construed against its proponent, Cairo.).

658. *Id.* at 256.

659. *Id.* at 257.

660. *Id.* at 259.

661. *Id.* at 261.

662. *Id.* at 258.

663. *Id.* at 257.

664. *Id.*

665. *Id.*; MO. REV. STAT. § 435.460 (Supp. 1986). Other states which have special notice laws are Texas, South Carolina, and Tennessee. TEX. REV. CIV. STAT. ANN. art. 224-1 (Vernon Supp. 1986); S.C. CODE ANN. § 15-48-10(a) (Law Co-op Supp. 1982). (Both states require a typed, underlined notice in capital letters on the first page of the contract.); TENN. CODE ANN. § 29-5-302 (Supp. 1986) (Requires that arbitration clauses in contracts involving farming or residence of a party must additionally be signed or initialed by the parties.).

666. *Cairo*, 685 S.W.2d 253, 257 (Mo. Ct. App. 1985).

667. *Id.* at 257.

In *Old Dominion Insurance v. Dependable Reinsurance*,<sup>668</sup> the court did not discuss the commerce question because Dependable made no assertion that the contract did not involve interstate commerce. In *Dominion*, a dispute arose pertaining to a payment due to Dependable under their retrocession agreement.<sup>669</sup> Dependable requested arbitration, however; Old Dominion wished to delay arbitration until they had an opportunity to inspect Dependable's records.<sup>670</sup> In response to Old Dominion's request to inspect the records, Dependable filed suit.<sup>671</sup> The trial court denied Old Dominion's motion to compel arbitration on the grounds that the arbitration agreement was not enforceable under Florida law.<sup>672</sup> In addition, the trial court ruled that Old Dominion was in default of the arbitration agreement because of Old Dominion's request for information and delay in appointing an arbitrator.<sup>673</sup> Old Dominion appealed the trial court's ruling on the grounds that the arbitration agreement was enforceable under federal law, and under federal law, Old Dominion was not in default.<sup>674</sup> The appeals court stated that Dependable had not disputed that the contract evidenced a transaction involving interstate commerce. The court ruled that Old Dominion was not in default, therefore; no bar existed to prevent the arbitration agreement from being enforced under federal law.<sup>675</sup>

In *Williams v. Hardy*,<sup>676</sup> the court held that the issue of federal preemption was waived because it was not raised at the trial court level. In *Williams*, the parties had entered into a contract containing an arbitration clause whereby Williams agreed to perform an outdoor concert.<sup>677</sup> Williams breached this contract, and the promoter filed a suit for damages. The arbitration agreement called for the laws of New York to control. Therefore, the arbitration agreement was not enforceable under Florida law.<sup>678</sup> On appeal, Williams asserted for the first time that the arbitration agreement was enforceable under federal substantive law. The appeals court held that Williams had waived this argument.<sup>679</sup> The court stated that its holding was necessary to prevent Williams, after losing his case to the jury, from getting a reversal

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668. 472 So. 2d 1365, 1367 (Fla. Dist. Ct. App. 1985).

669. *Id.* at 1366.

670. *Id.*

671. *Id.* at 1367.

672. *Id.* The arbitration agreement was not enforceable under Florida law because the agreement called on the laws of another jurisdiction to control in arbitration. See *Damora v. Stresscon Int'l, Inc.*, 324 So. 2d 80 (Fla. 1975); see FLA. STAT. ANN. § 682.02 (West Supp. 1986).

673. *Old Dominion*, 472 So. 2d at 1367.

674. *Id.* at 1368.

675. *Id.*

676. 468 So. 2d 429 (Fla. Dist. Ct. App. 1985).

677. *Id.* at 430.

678. *Id.*

679. *Id.*

on appeal enabling him to present his case for a second time to an arbitrator.<sup>680</sup>

The preemption of state law by the FAA may have limited impact in states which have enacted the UAA because of their similar policy orientation. Because courts have avoided the commerce question, they have not yet established the parameters of preemption. However, the policy behind federal preemption may be accomplished through the process of avoiding the commerce question, thereby encouraging the development of state arbitration law in agreement with federal arbitration law. On occasion, however, the preemption may allow enforcement of arbitration agreements where unique state laws would render an arbitration agreement unenforceable.<sup>681</sup>

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680. *Id.*

681. An arbitration agreement which does not comply with a state's notice provision could be enforced if it falls within the scope of the FAA. *See supra* note 665 and accompanying text. Also, an arbitration agreement was enforced under the FAA when it did not comply with state law prohibiting the agreements which incorporate the laws of another jurisdiction. *See, supra* note 672 and accompanying text; *see generally*, Note, *Federal Preemption of Arbitration*, 1984 Mo. J. DISPUTE RESOLUTION 197-99 (discussion of various unique state laws).