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Recent Developments: The Uniform Arbitration Act

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RECENT DEVELOPMENTS: THE UNIFORM ARBITRATION ACT*

TABLE OF CONTENTS

I.	VARIATIONS ON THE UAA	208
II.	VALIDITY OF ARBITRATION AGREEMENTS	211
	A. <i>Statutory Construction</i>	211
	B. <i>Application of Contract Principles</i>	212
	C. <i>Time Limits on Raising the Invalidity Defense</i>	214
	D. <i>Statutory Causes of Action</i>	215
III.	WAIVER	215
	A. <i>Dilatory Conduct</i>	216
	B. <i>Participating in the Judicial Process</i>	217
IV.	ARBITRABILITY	218
	A. <i>Scope of the Contract</i>	219
	B. <i>Severability of Claims</i>	227
	C. <i>Arbitrability of Specific Claims</i>	228
	D. <i>Proper Forum for Determining Arbitrability</i>	229
V.	PROCEEDINGS TO COMPEL OR STAY ARBITRATION	231
	A. <i>Staying Court Proceedings</i>	231
	B. <i>Compelling Arbitration</i>	234
VI.	AWARDS	241
	A. <i>Grounds for Attacking an Award</i>	241
	B. <i>Modification by Arbitrators</i>	245
	C. <i>Binding Effect</i>	246
	D. <i>Reasons for Awards</i>	251
VII.	FEES AND EXPENSES	251
VIII.	CONFIRMATION AND VACATION OF AWARDS	255
	A. <i>Confirmation</i>	255
	B. <i>Vacation</i>	258
IX.	APPEALS	265
X.	JUDICIAL PROCEEDINGS	269
	A. <i>Jurisdiction</i>	269
	B. <i>Procedural Matters</i>	269
	C. <i>Venue</i>	270
	D. <i>Standing</i>	270
XI.	JUDICIAL REVIEW	271
XII.	TIMELINESS	277
	A. <i>Demand for Arbitration</i>	277
	B. <i>Motions to Vacate</i>	277

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C. Appeals from an Award	279
XIII. CONCLUSION	280

The Uniform Arbitration Act (UAA),¹ proposed by the National Conference on Uniform State Laws in 1955, has been adopted by slightly more than half the states.² The purpose of this survey is to explain the principles underlying court decisions interpreting the UAA, and provide a framework for analyzing future cases.³

I. VARIATIONS ON THE UAA

Many states have adopted versions that differ from the model act.⁴ Iowa recently adopted the UAA⁵ and omitted,⁶ modified,⁷ and added⁸ some significant provisions. The most significant omissions were sections 21 and 22. Section 21 provides for uniform interpretation of the UAA.⁹ Iowa has determined that its judiciary should interpret the statute without regard to the interpretation of other jurisdictions. This defeats the goal of uniformity. The UAA stipulates that all its provisions are severable.¹⁰ Its omission permits the entire Iowa arbitration statute to be stricken if one section of the act is declared

1. UNIFORM ARBITRATION ACT §§ 1-25 (1955), 7 U.L.A. 4 (1978) [hereinafter cited as UAA].

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

3. See *Recent Developments: The Uniform Arbitration Act*, 48 MO. L. REV. 137 (1983) [hereinafter cited as *Recent Developments*]. The 1983 survey collected recent cases interpreting and applying the UAA decided before September, 1982. This article surveys cases decided between September, 1982 and September, 1983.

4. See, e.g., *Recent Developments, supra* note 3, at 139-46.

5. IOWA CODE §§ 679A.1-.19 (1983).

6. Sections 13(c), 15, 17, 21, 22, and 23 of the UAA were omitted from the Iowa statute.

7. Sections 1, 3, 5, 7(d), and 8(b) of the UAA were modified in the Iowa statute.

8. Sections 679A.12(f) and 679A.19 were added to the Iowa statute, neither of which is found in the UAA.

9. UAA § 21 states: "This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it."

10. UAA § 22 states:

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

unconstitutional. The absence of a severability provision may make it more difficult for a court to hold that a section of the statute is unconstitutional since such a ruling would invalidate the entire Act.¹¹

Iowa also modified several provisions of the UAA. First, Iowa modified section 1 of the UAA¹² to prohibit arbitration of contracts of adhesion, employment contracts, or "any claim sounding in tort, whether or not involving a breach of contract."¹³

Second, Iowa modified the law concerning the appointment of arbitrators by the court if an appointed arbitrator fails or is unable to act. Section 3 of the UAA gives an appointed arbitrator "all the powers of one specifically named in the agreement."¹⁴ The Iowa provision replaces "all the powers" with "the same powers."¹⁵ Although only a majority of the arbitrators is required to exercise power under both acts,¹⁶ a neutral arbitrator appointed by the court or the American Arbitration Association (AAA) may have the additional power to serve as chairperson under the UAA.¹⁷

Third, the Iowa statute changed section 5 of the UAA, which allows the parties, by mutual consent, to postpone the hearing to a time later than that fixed by the agreement.¹⁸ Iowa does not permit postponement beyond the time

11. Five other states have also omitted this section from their versions of the UAA: Alaska, Arkansas, Kansas, Massachusetts, and Nevada. 7 U.L.A. 81 (1978).

12. UAA § 1:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereof arising between the parties is 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].

13. IOWA CODE § 679A.1 (1983); *cf.* MO. REV. STAT. § 435.350 (Supp. 1983) (prohibits arbitration of contracts of insurance and contracts of adhesion).

14. UAA § 3 states:

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

15. IOWA CODE § 679A.3 (1983).

16. *Id.* § 679A.5 (1983); UAA § 5.

17. *See* *Foley Co. v. Grinsted Prods., Inc.*, 233 Kan. 339, 345, 662 P.2d 1254, 1255 (1983).

18. 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

fixed by the agreement.¹⁹ The UAA allows the parties to apply to a court for a motion to compel the arbitrators to proceed even though a party duly notified fails to appear.²⁰ The Iowa statute provides that the arbitrators may proceed, but does not grant the right to request a judicial motion to compel.²¹ Finally, the UAA provides that if an arbitrator ceases to act, the remaining arbitrators "appointed to act as neutrals" may continue and render judgment.²² An arbitrator is appointed to act as a neutral under the UAA if he is chosen by the court or by the AAA.²³ Iowa allows the remaining arbitrators to proceed whether or not they are appointed to act as neutrals.²⁴

Fourth, Iowa modified section 8(b) of the UAA, which governs the time for making an award. The Iowa statute provides that an arbitration award must be made within thirty days after the arbitration hearing unless otherwise agreed.²⁵ The UAA provides a more flexible yet complicated rule. It requires that the award be made within the time fixed by the agreement, or if not so fixed, the time fixed by a court order entered upon application by a party. Parties may extend this time period by a written stipulation before or after expiration of the time period. A party objecting that the time for making the award has expired must notify the arbitrators before delivery of the award, or the objection is waived.²⁶

Iowa has introduced some new provisions. First, the state has added an additional ground for vacating an award: when "substantial evidence on the record does not support the award."²⁷ A party's right to request review for

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. (b) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing. (c) 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 determine the controversy.

19. IOWA CODE § 679A.5 (1983).

20. UAA § 5.

21. IOWA CODE § 679A.5 (1983).

22. UAA § 5.

23. *Id.*

24. IOWA CODE § 679A.5 (1983).

25. *Id.* § 679A.8.

26. UAA § 8(b).

27. IOWA CODE § 679A.12(f) (1983).

substantial evidence is waived, however, if: the parties have agreed otherwise; the claimant fails to produce the record; or the "arbitration has been conducted under the auspices of the AAA."²⁸

Second, Iowa added a provision requiring that disputes between governmental agencies be arbitrated. The agencies are each allowed to pick an arbitrator, and the governor picks the third. All litigation between governmental agencies is absolutely prohibited, and the arbitrators' decision is final and unappealable.²⁹

II. VALIDITY OF AN ARBITRATION AGREEMENT

The UAA enforces written arbitration agreements except when legal or equitable grounds exist to revoke the contract.³⁰ The arbitrators' jurisdiction is entirely dependent on the existence of a valid arbitration agreement.³¹ An arbitration agreement may be challenged by raising typical contract defenses, and may also be declared unenforceable for reasons of public policy.³² Recent cases suggest four considerations affecting the validity of an arbitration agreement: (1) whether the arbitration statute should be construed to avoid statutory exceptions; (2) whether principles of construction found in contract law should be applied to arbitration agreements; (3) when the defense of the invalidity of the arbitration agreement may be raised; and (4) whether public policies outside of the arbitration statute restrict the enforceability of agreements.

A. Statutory Construction

Exceptions to the UAA restricting arbitrability are narrowly construed to bring as many agreements as possible within the coverage of the arbitration statute.³³ This principle was ignored in a recent Kansas case. In *National Education Association v. Unified School District*,³⁴ a Kansas appellate court interpreted the scope of the validity clause of the Kansas version of the UAA.³⁵

28. *Id.*

29. *Id.* § 679A.19.

30. UAA § 1.

31. *See, e.g.,* Arrow Overall Supply Co. v. Peloquin Enterprises, 414 Mich. 95, 98, 323 N.E.2d 1, 2 (1982).

32. *See, e.g.,* Hannon v. Original Gunite Aquatech Pools, Inc., 385 Mass. 813, —, 434 N.E.2d 611, 617-18 (1982) (arbitration would not be enforced in violation of consumer protection laws or regulations).

33. *See, e.g.,* National Camera, Inc. v. Love, 644 P.2d 94 (Colo. Ct. App. 1982); *see also Recent Developments, supra* note 3, at 147.

34. 7 Kan. App. 2d 529, 644 P.2d 1006 (1982).

35. While the Kansas arbitration statute basically conforms to the UAA, the two acts differ on whether employment contracts are arbitrable. The UAA expressly extends its coverage to such contracts. UAA § 1. The Kansas statute excludes such contracts from its coverage. KAN. STAT. ANN. § 5-401 (1982). Instead, such contracts are governed by another statute. *Id.* § 72-5424(a) (1982).

The plaintiff was a teacher seeking confirmation of an arbitration award relating to his contract with the school district.³⁶ The court held that the Kansas act did not apply to the plaintiff's employment contract because the statute was "plain and unambiguous" in its exclusion of all employment contracts, regardless of whether the employer was in the private or public sector.³⁷

B. Application of Contract Principles

Recent cases have raised the question whether contract principles should be applied in determining the validity of arbitration agreements. The general rule is that contract principles governing construction and interpretation apply to arbitration agreements.³⁸

In *Willis Flooring, Inc. v. Howard S. Lease Construction Co.*,³⁹ a contractor and a subcontractor entered into a contract to install a floor. The contract gave the contractor the sole option to require arbitration of any dispute arising under the contract. When the contractor attempted to compel arbitration, the subcontractor claimed that the arbitration clause was invalid for lack of mutuality. The court applied common law contract principles and concluded that the clause was valid.⁴⁰ The arbitration clause was binding to the extent that the whole contract was binding. The court reasoned that such a clause need not be supported by separate consideration.⁴¹

In *Himmelstein v. Valenti Development Corp.*,⁴² the plaintiff contracted to buy a home from the defendant builder. The contract contained several express warranties concerning the quality of the home, and a clause requiring arbitration of disputes.⁴³ Before conveyance of the property, the plaintiff observed water leaking through a crack in a basement wall. The architect examined the building as the contract required.⁴⁴ Although he found no structural defects, the architect could not predict with certainty whether the seepage problem had been fully repaired. The defendant interpreted the archi-

36. 7 Kan. App. 2d at ____, 644 P.2d at 1007.

37. 7 Kan. App. 2d at ____, 644 P.2d at 1009.

38. *Recent Developments*, *supra* note 3, at 147.

39. 656 P.2d 1184 (Alaska 1983).

40. *Id.* at 1185.

41. *Id.* at 1185-86.

42. 103 Ill. App. 3d 911, 431 N.E.2d 1299 (1983).

43. Article 8 of the contract provided:

Any dispute between Purchaser and Seller with respect to labor and/or material, or whether the residence has been constructed as herein required, shall be determined by the architect preparing plans and specifications and such determination shall be conclusive and binding upon Purchaser and Seller.

Id. at 912-13, 431 N.E.2d at 1300.

44. *Id.*

tect's report to mean that no substantial defect existed in the premises,⁴⁵ so it scheduled a closing. The plaintiff refused to accept a deed to the property or tender the balance owing on the contract, and the defendant invoked a forfeiture clause. The plaintiff sought to enjoin the forfeiture, reform or rescind the contract, and collect damages for the builder's pre-contract tortious misrepresentation. The trial court dismissed all counts of plaintiff's petition except the misrepresentation count. In dictum, the appellate court found that the refusal to dismiss the misrepresentation count was correct.⁴⁶ It reasoned that since arbitration agreements are not enforceable if grounds exist for revoking the contract, the arbitration clause in the contract could not extend to the misrepresentation issue.⁴⁷

In *Computer Corp. of America v. Zarecor*,⁴⁸ the plaintiff, Computer Corporation of America (CCA), and European Market Consultants (EMC) entered into a licensing agreement which provided that all disputes between the parties would be arbitrated.⁴⁹ Defendants Copeland and Zarecor negotiated the contract for EMC, and Copeland signed the agreement as president of EMC. When CCA later sued Copeland and Zarecor individually for the initial licensing fee, Copeland moved for arbitration of the dispute. The court found that the contract showed no intent to bind Copeland or Zarecor, and held that neither could enforce the arbitration clause.⁵⁰

A disagreement arose concerning the sale of a business in *Saltner v. Farner*.⁵¹ Just prior to trial, the parties signed an agreement to arbitrate the dispute. The agreement did not require the arbitrator to take an oath. Although a Colorado court rule required arbitrators to take an oath before conducting arbitration,⁵² the Colorado version of the UAA did not.⁵³ Neither party had submitted an oath form to the arbitrator. The court held that the arbitrator's failure to take an oath did not invalidate the award.⁵⁴ It reasoned that the arbitration statute controlled a pre-existing, inconsistent procedural rule and that the arbitration agreement controlled in the absence of consistent

45. The contract required the builder to repair, replace, or otherwise attend to "substantial defects" in the real estate for one year after possession was delivered to the buyer. *Id.* at 912, 431 N.E.2d at 1300.

46. The appellate court did not question the propriety of the trial court's action in not dismissing the tort count. *Id.* at 916, 431 N.E.2d at 1302.

47. *Id.*

48. 16 Mass. App. Ct. 456, 452 N.E.2d 267 (1983).

49. The contract provided that the "agreement shall be binding upon, and inure to the benefit of CCA and licensee and their respective legal representatives, successors and permitted assigns" and that the "agreement is personal to the licensee." *Id.* at —, 452 N.E.2d at 269.

50. *Id.* at —, 452 N.E.2d at 269-70.

51. 653 P.2d 413 (Colo. Ct. App. 1982).

52. See COLO. R. CIV. P. 109(c).

53. See COLO. REV. STAT. § 13-22-207 (1973).

54. *Salter*, 653 P.2d at 414.

statutory requirements.⁵⁵

C. Time Limits on Raising the Invalidity Defense

A third consideration affecting the validity of an arbitration agreement is whether there are any time limitations placed on raising the invalidity defense. Where the party seeking to raise the defense participated in a prior arbitration proceeding without raising the defense, no right exists to raise the defense in a judicial proceeding to confirm the award.⁵⁶ Where the party challenging validity opted not to appear at the arbitration proceeding, he may then raise that defense in later judicial proceedings.⁵⁷

This question was discussed in *Arrow Overall Supply Co. v. Peloquin Enterprises*.⁵⁸ The plaintiff sought to have an arbitrator's award confirmed. The defendant did not appear at the prior arbitration proceeding, although he acknowledged receiving a notice of submission of the claim to arbitration and a notice of the award. In the confirmation proceeding, the defendant for the first time challenged the validity of the agreement. The Michigan Supreme Court held that the defense was timely.⁵⁹ The court also held that an arbitrator cannot decide whether a contract to arbitrate exists or whether such a contract is enforceable.⁶⁰ While agreeing that a "wait and see" approach to challenging the validity of an arbitration agreement is not allowed where the party participated in the arbitration proceeding, the court found that a party who chooses not to participate in the proceeding is not required to seek an injunction to stay the arbitration proceeding in order to preserve the invalidity defense. The receipt of a notice letter imposes no duty on someone not bound by an arbitration agreement.⁶¹ As long as the party does not participate, the defense may be timely raised in the later confirmation proceeding.⁶²

55. *Id.*

56. *Arrow Overall Supply Co. v. Peloquin Enters.*, 414 Mich. 95, 101, 323 N.E.2d 1, 3 (1982).

57. *Id.* at 100, 323 N.W.2d at 3.

58. *Id.* at 95, 323 N.W.2d at 1.

59. *Id.* at 101, 323 N.W.2d at 3.

60. *Id.* at 99, 323 N.E.2d at 2.

61. "If a burden must be placed on one of the parties to seek a preliminary judicial determination, it should be on the party seeking to compel arbitration." *Id.* at 100, 323 N.E.2d at 3.

62. Plaintiff also asserted that the defense was, in essence, an application to vacate the award and should have been filed within twenty days of the delivery of a copy of the award. *See* MICH. GEN. CT. R. 769.9(2).

An application under this Rule shall be made within 20 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 20 days after such grounds are known or should have been known.

The court rejected this argument because the defendant was not seeking to

D. *Statutory Causes of Action*

A fourth consideration affecting the validity of an arbitration agreement is a state policy favoring litigation of certain statutory causes of action, which renders unenforceable an arbitration agreement covering this activity.⁶³

In *Hannon v. Original Gunite Aquatech Pools, Inc.*,⁶⁴ the plaintiff had purchased a swimming pool from the defendant. Before construction was completed, the plaintiff filed an action against the defendant alleging violations of the Massachusetts Consumer Protection Law.⁶⁵ The statute provided, "Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action under this section."⁶⁶ The trial court stayed the lawsuit and compelled arbitration. The appellate court held that the trial court erred in requiring arbitration, finding that arbitration pursuant to a contract fell into either the statutory or common law category.⁶⁷ The Consumer Protection Law claims were not arbitrable, but other issues relating to the contract were unaffected, and the defendant could compel arbitration on those separate issues.⁶⁸

III. WAIVER

The right to demand arbitration may be waived.⁶⁹ A party who participates in litigation which results in a final judgment on the merits without demanding arbitration usually waives his right to do so.⁷⁰ Some lesser degree of participation in litigation may constitute a waiver. Waiver can also occur through dilatory tactics that result in unreasonable delay or prejudice to the opposing party.⁷¹ For example, if a party does not heed a requirement in his contract that a motion to compel arbitration be filed within a reasonable time,

vacate the award, but instead opposing its confirmation. Therefore, there was no time limit on raising the invalidity defense. *Arrow*, 414 Mich. at 101 323 N.E.2d at 3.

63. *Recent Developments, supra* note 3, at 152.

64. 385 Mass. 813, 434 N.E.2d 611 (1982).

65. MASS. GEN. LAWS ANN. ch. 93A, § 2 (West Supp. 1982).

66. *Id.* § 9(6). *But cf.* *Southland Corp. v. Keating*, 104 S. Ct. 852 (1984) (California franchise law permitting franchisee to sue franchisor without exhausting any other remedies held to conflict with Federal Arbitration Act and thus was preempted by federal legislation).

67. *Hannon*, 385 Mass. at _____, 434 N.E.2d at 618-19.

68. *Id.*

69. *Recent Developments, supra* note 3, at 154.

70. *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1152 (10th Cir.), *cert. denied*, 459 U.S. 838 (1982).

71. *See Post Tensioned Eng'g Corp. v. Fairways Plaza Assocs.*, 412 So. 2d 871, 874 (Fla. Dist. Ct. App.), *petition denied*, 419 So. 2d 1197 (Fla. 1982), *appeal allowed*, 429 So. 2d 1212 (Fla. Dist. Ct. App. 1983).

waiver may occur.⁷² Likewise, a party who acts in a manner inconsistent with his right to arbitrate may waive that right.⁷³ Nevertheless, waiver will not be inferred from equivocal acts or language;⁷⁴ intent to waive the right of arbitration must be clearly shown.⁷⁵

A. Dilatory Conduct

*Stauffer Construction Co. v. Board of Education*⁷⁶ involved a contract for the renovation of a school. The school board filed a judicial action seeking a stay of arbitration. The trial court found that the company had waived its right to demand arbitration because it had waited too long in filing its demand for arbitration. The court recognized the possibility that a party could waive its right to arbitrate either by waiting too long to demand arbitration or by filing a lawsuit against the opposing party.⁷⁷

Waiver based upon dilatory conduct was asserted in *County of Clark v. Blanchard Construction Co.*⁷⁸ A subcontractor brought suit against his contractor, who then filed a third-party claim against the owner. One year after filing suit, the subcontractor and the contractor moved to compel arbitration, and their motion was granted. The arbitrator found in favor of the subcontractor and allowed the contractor indemnification from the owner. The owner contended that the contractor had waived his right to arbitration by filing the third-party claim. The Nevada Supreme Court refused to find a waiver of the contractor's right to arbitrate. The court held that only unreasonable delay in demanding arbitration constitutes waiver and that participation in litigation constitutes waiver only if it prejudices the other party.⁷⁹ The court also rejected the notion that the mere existence of conduct claimed to be inconsistent with asserting a right to arbitrate, without more, could constitute waiver.⁸⁰

72. *Stauffer Constr. Co. v. Board of Educ.*, 54 Md. App. 658, 667-71, 460 A.2d 609, 614-16 (1983).

73. *Post Tensioned Eng'g Corp. v. Fairways Plaza Assocs.*, 412 So. 2d at 871. *But see County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 491, 653 P.2d 1217, 1220 (1982).

74. *Charles J. Frank, Inc. v. Associated Jewish Charities, Inc.*, 294 Md. 443, 444, 450 A.2d 1304, 1305 (1982).

75. *Id.*

76. 54 Md. App. 658, 460 A.2d 609 (1983).

77. On remand, the trial court was instructed to determine whether the company waived its right to arbitration by failing to make a timely demand for arbitration, by filing a lawsuit against the board, or by failing to comply with the general conditions of the construction contract. *Id.* at 672, 460 A.2d at 616.

78. 98 Nev. 488, 653 P.2d 1217 (1982).

79. *Id.* at 491, 653 P.2d at 1220.

80. *Id.*

B. *Participating in the Judicial Process*

In *Post Tensioned Engineering Corp. v. Fairway Plaza Associates*,⁸¹ the defendant-contractor failed to bind a subcontractor to an arbitration agreement, which breached the contract between the contractor and the owner-plaintiff.⁸² The owner argued that the contractor's breach waived his right to arbitrate his dispute with the owner. The court agreed that a party waives its right to arbitration if it acts in a manner inconsistent with that right, but found that the defendant's failure to join the subcontractor to the contract was not inconsistent with the contractor's right to arbitrate with the owner.⁸³

In *Hanslin Builders, Inc. v. Britt Development Corp.*,⁸⁴ the court held that when a party to an arbitration contract becomes involved in judicial proceedings, arbitration must be demanded at the proper time to prevent waiver.⁸⁵ The plaintiff-builder brought suit against the defendant-developer to recover on two promissory notes executed by the defendant. Although the developer nominated an arbitrator, moved to dismiss the judicial proceeding based on the the arbitration clause, and moved to stay the proceedings pending arbitration, it never demanded arbitration during the trial. The court held that the developer waived its right to arbitration by participating in the trial.⁸⁶ The court reasoned that allowing the defendant to challenge the judgment by raising the issue of arbitration when defendant had never moved for an order to compel arbitration would defeat the purposes of the arbitration statute and the policy of finality.⁸⁷

Waiver can be limited by an agreement between the parties. In *Atlas v. 7101 Partnership*,⁸⁸ a partnership agreement provided that any claims would be settled according to the rules of the AAA.⁸⁹ Section 47(a) of the AAA rules provides: "No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate."⁹⁰ After the defendant filed suit, the plaintiff filed two motions for preliminary injunctions, which were denied, and a motion to compel arbitration. Based on AAA rule 47(a), the court held that the filing of motions for prelimi-

81. 412 So. 2d 871, 874 (Fla. Dist. Ct. App.), *petition denied*, 419 So. 2d 1197 (Fla. 1982), *appeal filed*, 429 So. 2d 1212 (Fla. Dist. Ct. App. 1983).

82. *Id.* at 872-73.

83. *Id.* at 874; *But see* *County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 491, 653 P.2d 1217, 1220 (1983) (*per curiam*) (rejected the "inconsistency" test and required a party claiming waiver to show prejudice if arbitration allowed).

84. 15 Mass. App. Ct. 319, 445 N.E.2d 188 (1983).

85. *Id.* at —, 445 N.E.2d at 190-91.

86. *Id.*

87. *Id.*

88. 109 Ill. App. 3d 236, 440 N.E.2d 381 (1982).

89. *Id.* at 240, 440 N.E.2d at 383.

90. AMERICAN ARBITRATION ASSOCIATION RULES § 47(a).

nary injunctions was not inconsistent with the right to demand arbitration.⁹¹

The extent of the waiver caused by inconsistent conduct may be limited. In *Charles J. Frank, Inc. v. Association of Jewish Charities*,⁹² the plaintiff-contractor agreed to build a community center for defendant-owner. While the job was in progress, a dispute arose, and a subcontractor sued the contractor. The contractor brought a third-party claim against the defendant-owner seeking compensation for extra work done by the subcontractor. Although the issue was arbitrable, none of the parties demanded arbitration, and the matter was settled. Upon completion of the project, the owner refused to make the final payment to the contractor because some of the work was faulty. The contractor sought to compel arbitration. The owner argued that the contractor had waived his right to demand arbitration by filing the third-party claim in the earlier lawsuit. The court found that the contractor had waived its right to arbitrate as to the extra work issue by engaging in the prior litigation, but not its right to demand arbitration of other unrelated issues.⁹³ An intention to waive the right to arbitration must be established by unequivocal acts or language and waiver of an issue through litigation is not inconsistent with an intent to arbitrate unrelated issues arising under the same contract.⁹⁴

IV. ARBITRABILITY

Almost any dispute can be submitted to arbitration if the parties have agreed to arbitrate their disputes, manifested their intention in an arbitration agreement, and presented an appropriate dispute for decision.⁹⁵ Michigan has established a three-part test to determine whether an issue is arbitrable: (1) whether there is an enforceable arbitration agreement between the parties; (2) whether the dispute is covered by the agreement; and (3) whether the arbitration agreement expressly exempts the particular dispute.⁹⁶

91. 109 Ill. App. 3d at 241, 440 N.E.2d at 383.

92. 294 Md. 443, 450 A.2d 1304 (1982).

93. A lesser degree of participation might constitute a waiver. *Id.* at 449-55, 450 A.2d at 1306-07. The court noted that a number of cases have held that pursuing litigation to a final judgment is sufficient participation to constitute a waiver. *Id.* at 449 n.2, 450 A.2d at 1307 n.2.

94. The court recognized a line of cases holding that litigation of one issue waives the right to demand arbitration of all issues. The court distinguished those cases on the ground that the issues litigated and the issues sought to be arbitrated were interrelated in each such case. *Id.* at 458-60, 450 A.2d at 1308-09.

95. Arbitration of some disputes may be prohibited by public policy or statute. *See Recent Developments, supra* note 3, at 159.

96. *Armoudlian v. Zedah*, 116 Mich. App. 659, 323 N.W.2d 502 (1982). In *Zedah*, plaintiffs sought dissolution of a partnership because of the alleged misconduct of defendant partners. The court, after reciting the three-part test, decided that an enforceable agreement existed, that no exemption applied, and that plaintiffs' claims were subject to compulsory arbitration under a clause in the partnership agreement. The court dismissed defendant's judicial action as beyond the court's jurisdiction.

A. Scope of the Contract

Analyzing the agreement is the first task a court faces in resolving a dispute involving arbitration. Questions as to the scope of the contract generally arise in three areas: (1) whether a given dispute is covered by the agreement; (2) whether a party may compel arbitration under the contract; and (3) whether an arbitrator has exceeded the agreement of the parties in reaching his decision.

The arbitrator's goal is to implement the intent of the parties. Courts generally rely on standard contract principles in determining intent. They look to the arbitration clause, other contract provisions, and documents related to or incorporated in the contract. Courts also consider the policy behind the UAA, the language of the UAA adopted in the jurisdiction, and local substantive law. Some generally recognized principles are: (1) parties may make the agreement as broad or narrow as they wish;⁹⁷ (2) a party cannot be forced to arbitrate a dispute not within the arbitration agreement;⁹⁸ (3) parties may by mutual consent submit issues not within the scope of the original agreement;⁹⁹ (4) a party may not be compelled to arbitrate by a nonparty, and vice versa;¹⁰⁰ (5) an arbitration agreement applies to all issues arising after the execution of the agreement;¹⁰¹ (6) parties are not bound to arbitrate issues arising after the contract has expired;¹⁰² and (7) interpretation of arbitration rules is up to the arbitrator.¹⁰³

1. Breadth of the Arbitration Clause

In *Himmelstein v. Valenti Development Corp.*,¹⁰⁴ a contract for construction of a home contained an arbitration clause which required an architect to determine whether the house conformed to contract requirements. The buyer sued the builder after cracks developed in the basement walls. The builder had

97. See, e.g., *Grover-Remond Assocs. v. American Arbitration Ass'n*, 297 Minn. 324, 326, 211 N.W.2d 787, 788 (1973).

98. See, e.g., *Christmas v. Cimarron Realty Co.*, 98 N.M. 330, 332, 648 P.2d 788, 790 (1982).

99. See, e.g., *Cabus v. Dairyland Ins. Co.*, 644 P.2d 93, 93-94 (Colo. Ct. App. 1982).

100. See, e.g., *Board of Educ. v. Meridian Educ. Ass'n*, 112 Ill. App. 3d 558, 562, 445 N.E.2d 864, 867 (1983) (nonparty cannot be compelled to arbitrate).

101. See, e.g., *Post Tensioned Eng'g Corp. v. Fairways Plaza Assocs.*, 412 So. 2d 871, 873-74 (Fla. Dist. Ct. App.), *petition denied*, 419 So. 2d 1197 (Fla. 1982), *appeal filed*, 429 So. 2d 1212 (Fla. Dist. Ct. App. 1983).

102. See, e.g., *Lehman v. Eugene Matansky & Assocs., Inc.*, 107 Ill. App. 3d 985, 989-90, 438 N.E.2d 614, 618 (1982).

103. See, e.g., *Bernard v. Hemisphere Hotel Management, Inc.*, 16 Mass. App. Ct. 261, —, 450 N.E.2d 1084, 1086, *appeal denied*, 390 Mass. 1102, 454 N.E.2d 1276 (1983).

104. 103 Ill. App. 3d 911, 431 N.E.2d 1299 (1982).

obtained an architect's report on the house before suit was brought, but the parties could not agree on what the report meant. The court stated that the arbitration clause was broad enough to cover the dispute presented because it concerned the quality of the material or workmanship; however, the court found the architect's initial report insufficient to resolve the dispute.¹⁰⁵

In *Board of Education v. Ballweber*,¹⁰⁶ the board sought a declaratory judgment that certain matters were not arbitrable in a dispute with a teacher's association. The collective bargaining agreement contained a sick leave policy and established a grievance procedure that permitted arbitration as a final method of settling disputes. The board adopted a different sick-leave policy. The court found arbitrable the dispute over which sick-leave policy was in effect.¹⁰⁷ While recognizing that some management decisions are not subject to arbitration, the court limited the class of nonarbitrable issues to those specifically established by statute.¹⁰⁸

In *Premier Electrical Construction Co. v. Ragnar Benson, Inc.*,¹⁰⁹ a subcontractor sued a general contractor for wrongfully rejecting claims made under the dispute resolution provision. The contract provided that all disputes concerning questions of fact were to be initially decided by the general contractor. The subcontractor could appeal decisions of the general contractor to the owner, whose decision was final and conclusive. The clause also provided that a dispute would be settled by arbitration if the owner did not have "jurisdiction" over the dispute.¹¹⁰ During construction, the subcontractor submitted three claims, all of which were rejected by the general contractor and the owner. When the subcontractor later filed suit on the same claims against the general contractor and owner, the trial court dismissed the subcontractor's complaint for lack of jurisdiction.¹¹¹

The first claim involved a dispute over whether the owner was liable for loss of material on the job site by theft. Reasoning that the owner could not be the judge of his own liability, the court held that the owner had no jurisdiction

105. The architect's report confirmed the existence of some repairs by defendant in the basement. While the report stated that no structural defects existed and that the house looked like it was built in a workmanlike manner, it also noted that the walls might not survive a "wet season." *Id.* at 914-15, 431 N.E.2d at 1302.

106. 105 Ill. App. 3d 412, 434 N.E.2d 448 (1982).

107. *Id.* at 416-17, 434 N.E.2d at 452.

108. *Id.* at 417-18, 434 N.E.2d at 453. The court found that by including the sick leave policy in the collective bargaining agreement, the board was incorporating a permissible decision into the contract, and was bound by that decision for the duration of the contract. The court also held that the board's decision to reduce teachers' salaries after shortening the school year was subject to arbitration because arbitration did not amount to an impermissible delegation of the board's authority to set the length of the school year. *Id.*

109. 111 Ill. App. 3d 855, 444 N.E.2d 726 (1982).

110. *Id.* at 859-60, 444 N.E.2d at 727.

111. *Id.* at 857, 444 N.E.2d at 728.

over the first claim and the dispute was arbitrable.¹¹² The second claim involved an expense the subcontractor incurred by using higher priced material than contemplated by the bid. The court found that this dispute involved interpretation of the contract, a question of law. The arbitration clause was limited to questions of fact. Therefore, the trial court erred in dismissing the subcontractor's complaint on that issue.¹¹³ The third issue concerned an extra expense the subcontractor incurred when installing certain fixtures. The court held that this was a question of fact within the scope of the arbitration clause and that the owner's decision was final.¹¹⁴

In *Myers v. State Farm Mutual Automobile Insurance Co.*,¹¹⁵ the plaintiffs sought to recover uninsured motorist benefits. The policy provided for arbitration of disputes as to the liability of the uninsured motorist or the amount of damages. The plaintiff moved to compel arbitration. The court stated that coverage disputes should be submitted to arbitration if it is "reasonably debatable" whether the dispute is included in the arbitration clause.¹¹⁶ Nevertheless, the court noted that where the question of coverage goes not to the merits of the claim, but to whether a claim exists, an arbitration clause must be "quite broad" to encompass arbitrability of coverage.¹¹⁷ Where insurance coverage is conditioned on establishing certain facts, the facts should be resolved by the trial court. If the conditions are not met, the policy does not provide coverage, and arbitration is not authorized. In effect, the court carved out a specific exception for automobile insurance from the "reasonably debatable" standard. The appellate court ultimately held that the uninsured motorist coverage did not apply; therefore, there was nothing to arbitrate.¹¹⁸

In *Freeman v. Duluth Clinic, Ltd.*¹¹⁹ the issue was the arbitrability of a covenant not to compete contained in an employment contract. The contract called for arbitration of all disputes arising under the contract. The physician resisted arbitration on several theories, including lack of consideration for the covenant not to compete. The court vacated an award in favor of the clinic, holding that the issue of lack of consideration was not within the scope of the arbitration agreement.¹²⁰ Under Minnesota's equivalent of section 1 of the UAA, arbitration agreements are enforceable except where legal or equitable grounds exist to revoke the contract.¹²¹ Since an allegation of lack of consideration supporting the arbitration clause, like a claim of fraud, affects the agreement to arbitrate, it should be determined by a court before arbitration is

112. *Id.* at 864-65, 444 N.E.2d at 731.

113. *Id.* at 864-65, 444 N.E.2d at 732.

114. *Id.* at 863, 444 N.E.2d at 731.

115. 336 N.W.2d 288 (Minn. 1983).

116. *Id.* at 290-91.

117. *Id.*

118. *Id.* at 291-92.

119. 334 N.W.2d 626 (Minn. 1983).

120. *Id.* at 629-30.

121. MINN. STAT. ANN. § 572.08 (1982).

compelled.¹²²

The Colorado Supreme Court faced the issue of the arbitrability of a public collective bargaining agreement in *City of Denver v. Denver Firefighters Local No. 858*.¹²³ The union sought injunctive relief, claiming that the city and county had breached their collective bargaining agreement by refusing to arbitrate certain grievances. The arbitration clause covered only complaints alleging a violation of an express provision of the agreement. The agreement specifically excluded matters requiring a change in any terms or conditions of employment as established in the agreement, and those not specifically covered by any provisions of the agreement. The court drew a distinction between "interest arbitration" and "grievance arbitration."¹²⁴ It held that a provision for grievance arbitration must be limited to disputes arising under express provisions of the collective bargaining agreement and must not involve the delegation of discretion to the arbitrator over any matter reserved to the discretion of management under the agreement. Because the language of the instant agreement was interpreted as leaving the dispute in question to management discretion, the court vacated the arbitrator's award.¹²⁵

In *Barber-Greene Co. v. Zeco Co.*,¹²⁶ plaintiff sued to terminate a dealership agreement with defendant-debtor, which was involved in a bankruptcy proceeding. Defendant counterclaimed, and plaintiff moved to dismiss the counterclaim or to compel arbitration. The dealership agreement contained a clause providing for arbitration of "any controversy or claims arising out of or relating to this contract, or breach thereof."¹²⁷ The bankruptcy court com-

122. 334 N.W.2d 626, 629 (Minn. 1982).

123. 663 P.2d 1032 (Colo. 1983) (en banc).

124. *Id.* at 1038. Interest arbitration involves the terms and conditions of public employment in a collective bargaining agreement. This has been found unconstitutional in Colorado as an impermissible delegation of legislative power to a party not answerable to the electorate. *Id.* at 1036-37 (contrasting grievance arbitration with interest arbitration). Thus, a contract interpreted as including interest arbitration within its scope is void. Grievance arbitration concerns factual findings by the arbitrator, who interprets and applies specific contract provisions by reading the agreement as a whole and discerning the intent of the parties. Grievance arbitration arises only after the terms and conditions of employment have been established.

In general, a public employee may agree to submit any dispute to binding arbitration, other than a collective bargaining agreement. This is true even though an arbitrator's award may require appropriation of public funds to pay any award that may be made against the public employee. In approaching the issue of arbitrability, the arbitrator must initially decide whether the application of certain provisions of the agreement will resolve the dispute. If so, the arbitrator must proceed to find the facts and apply the contract. If the arbitrator exceeds his authority by going beyond the contract terms and enacting new binding terms and conditions of employment, the dissatisfied party may ask a court to vacate the award. *Id.* at 1039-40.

125. *Id.* at 1040.

126. 17 Bankr. 248 (D. Minn. 1982).

127. *Id.* at 249.

pelled arbitration.¹²⁸

2. Forcing Arbitration of Issues Not Within the Agreement

A party usually may not be forced to arbitrate a dispute not covered by the agreement. This principle was applied in *Christmas v. Cimarron Realty Co.*¹²⁹ A real estate agent sued a broker to collect a commission allegedly due, and the broker moved to compel arbitration. The contract incorporated by reference a trade provision calling for arbitration of disputes between realtors from different firms. The court stated that the parties are only bound to arbitrate those issues which by clear language they have agreed to arbitrate without extension by construction or implication.¹³⁰ Because the controversy arose when the parties were with the same firm, the dispute was not within the scope of the agreement to arbitrate.

3. Nonparty Cannot Compel Party to Arbitrate

A person not a party to an arbitration agreement cannot compel arbitration. Likewise, a party may not force a nonparty to arbitrate a dispute. For example, *Board of Education v. Meridian Education Association*¹³¹ involved a dispute between substitute teachers and a school board over which of two sick-leave policies was in effect. The teachers commenced arbitration pursuant to the collective bargaining agreement. The arbitrator found that the substitute teachers were covered by the agreement because they were mentioned in it. The appellate court reversed.¹³² Whether a person can compel arbitration is determined by the language of the agreement giving rise to the arbitration. A nonparty to an arbitration agreement cannot compel a party to arbitrate. Even though the substitutes were mentioned in the agreement, they were not parties to it and could not force the school board to arbitrate.¹³³

In *Greenleaf Engineering & Construction Co. v. Teradyne, Inc.*¹³⁴ a developer had contracts with a construction company and an engineering firm, both of which were run by the same person. The contract with the engineering firm contained a broad arbitration clause, but there was no arbitration provision in the construction contract. The developer wanted to arbitrate a dispute with both corporations. A Massachusetts appellate court held that absent fraud, unconscionability, or ambiguous behavior requiring disregard of corporate entities, an arbitration clause in a contract with one corporation does not

128. *Id.* at 250.

129. 98 N.M. 330, 648 P.2d 788 (1982).

130. *Id.* at 332, 648 P.2d at 790 (quoting *Flood v. Country Mutual Ins. Co.*, 41 Ill. 91, 94, 242 N.E.2d 149, 151 (1968)).

131. 112 Ill. App. 3d 558, 445 N.E.2d 864 (1983).

132. *Id.* at 562-63, 445 N.E.2d at 867.

133. *Id.*

134. 15 Mass. App. Ct. 571, 447 N.E.2d 9 (1983).

apply to a second corporation, even though both are controlled by the same person.¹³⁵

In *Paine, Webber, Jackson & Curtis, Inc. v. Lucas*,¹³⁶ clients of a broker had two accounts, one of which had an arbitration clause. The clients sued the firm on a claim arising exclusively out of a transaction involving the account not covered by an arbitration clause. The firm moved to compel arbitration, but the trial court denied the motion. The appellate court affirmed on the ground that the scope of the arbitration clause could not extend beyond the contract that contained the clause.¹³⁷

4. Agreement Applies to All Issues Arising After Execution

In *Post Tensioned Engineering Corp. v. Fairways Plaza Associates*,¹³⁸ the owner sued a contractor for breach of a construction contract. The agreement provided for arbitration of all contract disputes involving the contractor and the owner. The appellate court stated that a breach of contract does not vitiate an arbitration clause, and a breach was an arbitrable event under the arbitration clause involved. The court reasoned that if the basis of a claim that the contract containing an arbitration clause is invalid lies in factual matters that occurred after the making of the contract, the issue is arbitrable.¹³⁹ The arbitration provision is a separate contract. Only an attack on the arbitration provision itself would be outside the scope of the contract language. Since there was no challenge to the contract as a whole or the arbitration clause, the clause was valid. Therefore, all issues, including the breach of contract question, were within the scope of the arbitration agreement.¹⁴⁰

5. Determining the Authority of the Arbitrator

Normally, parties can provide the arbitrator with the authority to decide as many or few issues as they desire. An arbitrator may not ignore these limitations unless the parties agree to submit additional issues for his decision.

In *Arrowhead Public Service Union v. City of Duluth*,¹⁴¹ the court vacated an arbitration award reinstating employees laid off because of budget cuts because it found that the arbitrator exceeded his powers in ordering the reinstatement. The contract limited the arbitrator's authority to make decisions to those based upon the terms of the contract. It expressly deprived the arbitrator of the power to make decisions inconsistent with state law. The arbi-

135. *Id.* at ____, 447 N.E.2d at 11.

136. 411 So. 2d 1369 (Fla. Dist. Ct. App. 1982).

137. *Id.* at 1370.

138. 412 So. 2d 871, 874 (Fla. Dist. Ct. App.), *petition denied*, 419 So. 2d 1197 (Fla. 1982), *appeal filed*, 429 So. 2d 1212 (Fla. Dist. Ct. App. 1983).

139. *Id.* at 874.

140. *Id.* at 873 n.3.

141. 336 N.W.2d 68 (Minn. 1983).

trator had ordered the employees reinstated on the theory that the city had relinquished the right to terminate unless it could show financial necessity or lack of work. The Minnesota Supreme Court stated that such a relinquishment must be expressed in the contract in clear and unmistakable language and found that the language of the contract did not meet that standard.¹⁴²

In contrast to *Arrowhead*, a Colorado appellate court held in *Red Carpet Armory Realty Co. v. Golden West Realty*,¹⁴³ that an arbitration panel did not exceed its powers. The plaintiff charged that the panel had exceeded its powers by awarding an amount not requested by the parties. The arbitration agreement provided that both parties would "abide absolutely by the award and findings of the arbitrators."¹⁴⁴ The court held that the arbitrators' decision was within the scope of the agreement.¹⁴⁵

In *Cabus v. Dairyland Insurance Co.*,¹⁴⁶ an insurer sought to have an award vacated because the arbitrator had allowed stacking of uninsured motorist policies. Although not required by the policies, the parties agreed to submit the "stacking" issue to arbitration. After the arbitration hearing, but before the award, the insurer attempted to withdraw that issue. The arbitrator refused to withdraw the issue and gave an award to the insured. The court stated that the parties may expand the powers of an arbitrator under a contract for arbitration by mutual consent and that the new agreement is binding on both parties.¹⁴⁷ Once submitted, an issue remains with the arbitrator unless the parties mutually agree to withdraw it.¹⁴⁸

In *Lynch v. Three Ponds Co.*,¹⁴⁹ an agreement among joint venturers allowed the managing partner to borrow funds at a 25% interest rate. One member sought arbitration against three other members, claiming that the agreement was void because the interest rate was commercially unreasonable. The joint venture agreement contained a provision for formal arbitration of irreconcilable differences between members, and incorporated the rules of the AAA. The arbitrator first classified the funds, and then ruled in plaintiff's favor on the interest issue. The arbitrator's decision was challenged by defendants as exceeding the scope of the issues submitted by the parties. The court agreed, finding that the part of the arbitrator's decision dealing with the classification of the funds was void. The court reasoned that the arbitrator's jurisdiction to make an award was limited to those issues which were expressly submitted to him for determination by the parties.¹⁵⁰

142. *Id.* at 71-72.

143. 644 P.2d 93 (Colo. Ct. App. 1982).

144. *Id.* at 94.

145. *Id.*

146. 656 P.2d 54 (Colo. Ct. App. 1982).

147. *Id.* at 55.

148. *Id.* at 56.

149. 656 P.2d 51 (Colo. Ct. App. 1982).

150. *Id.* at 53.

6. Effect of Expiration of the Agreement to Arbitrate

In *Lehman v. Eugene Matansky & Associates, Inc.*,¹⁵¹ the owners of a mobile-home park sought to enjoin defendant real estate broker from arbitrating his claim for a commission. The parties' agreement contained a generic arbitration clause¹⁵² and a fixed termination date. The owners sent a termination notice as the contract required. After the termination date of the contract, the broker communicated to the owners an offer from a prospective purchaser, which became the basis for the broker's claim for commission. The broker contended that the contract had not been terminated. The appellate court found that the contract was completely terminated prior to the offer on which the broker based his claim. The court held that a party may not rely on an arbitration clause in an expired contract to force arbitration of a claim arising after the contract's expiration.¹⁵³

7. Interpretation of Arbitration Rules

In *Bernard v. Hemisphere Hotel Management, Inc.*,¹⁵⁴ the contract required that all disputes arising under the contract be submitted to arbitration in accordance with the rules of the AAA. A dispute arose during arbitration that required interpretation of the rules. Before the AAA rendered a decision on the issue, the plaintiff secured an order from the trial court requiring arbitration to continue. The appellate court reversed, stating that if parties to a contract agree to submit all of their disputes to arbitration, the power of adjudication rests with the arbitrators, and the scope of the judicial role is narrow. The court held that the interpretation of arbitration rules was within the scope of the agreement and was solely for the arbitrators to determine.¹⁵⁵

8. Arbitrability Involving Government Entities

Government units may enter into binding arbitration agreements in the absence of a statutory prohibition. In *Bingham County Commission v. Interstate Electric Co.*,¹⁵⁶ the commission contracted with IEC for electrical work. A delay occurred, and IEC sought compensation for cost overruns and submitted the claim to arbitration. The county filed a motion to vacate an award in favor of IEC, asserting that claims against the county could not be arbitrated.

151. 107 Ill. App. 3d 985, 438 N.E.2d 614 (1982).

152. The clause stated, "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment thereon may be entered in any court having jurisdiction thereof." *Id.* at 987, 438 N.E.2d at 616.

153. *Id.* at 989-90, 438 N.E.2d at 618.

154. 16 Mass. App. Ct. 261, 450 N.E.2d 1084, *appeal denied*, 390 Mass. 1102, 454 N.E.2d 1276 (1983).

155. *Id.* at —, 450 N.E.2d at 1085.

156. 105 Idaho 36, 665 P.2d 1046 (1983).

The trial court vacated the award, relying on an Indiana case, *Myers v. Gibson*.¹⁵⁷ The Idaho Supreme Court refused to accept the *Myers* rationale, and ruled that counties have implied power to submit a claim to binding arbitration unless prohibited from doing so by statute. Because Idaho had no applicable statutory prohibition, the award was reinstated.¹⁵⁸

Most questions concerning the scope of contract language are determined by analyzing the agreement to determine whether the parties intended for the dispute to trigger arbitration. There is some disagreement about how to treat issues that may affect the validity of the underlying contract. Some states only require that it appear "reasonably debatable" from the nature of the claim and the language of the arbitration clause that the issue is within the scope of the agreement. In those states, a claim is first subject to arbitration and a dissatisfied party may ask a court to vacate the award.¹⁵⁹ Other states hold that the validity of the underlying contract is initially decided by the court. If the contract is invalid arbitration cannot be compelled.¹⁶⁰

B. Severability of Claims

The issue of severability arises when a claim submitted is not arbitrable. The question is whether the arbitrable issue can be heard separately by the arbitrator or must be heard by the court. To promote judicial economy and to give the parties the benefit of their bargain to the extent possible, claims are usually severed.¹⁶¹

In *Himmelstein v. Valenti Development Corp.*,¹⁶² the court held that a claim of pre-contract tortious misrepresentation was not subject to arbitration. It severed that claim from the other claims that were remanded to the arbitrator for his decision.¹⁶³

In *City of Hot Springs v. Gunderson's, Inc.*,¹⁶⁴ the city sued an architectural firm and a contractor for negligence and breach of contract in the design and construction of a golf course. The contractor's contract contained an arbitration clause, but the architect's contract did not. The trial court denied the

157. 147 Ind. 452, 46 N.E. 914 (1897). In *Myers*, a taxpayer sought to overturn an arbitration award in favor of the board of county commissioners. The taxpayer argued that the commission lacked power to submit a claim to binding arbitration. The Indiana Supreme Court ruled for the taxpayer and vacated the award.

158. 105 Idaho at _____, 665 P.2d at 1050-51.

159. See, e.g., *Myers v. State Farm Mut. Auto. Ins. Co.*, 336 N.W.2d 288, 290-91 (Minn. 1983).

160. See, e.g., *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 629 (Minn. 1983).

161. See, e.g., *City of Hot Springs v. Gunderson's, Inc.*, 322 N.W.2d 8, 11 (S.D. 1982).

162. 103 Ill. App. 3d 911, 431 N.E.2d 1299 (1982).

163. *Id.* at 91-15, 431 N.E.2d at 1302.

164. 322 N.W.2d 8 (S.D. 1982).

contractor's motion to compel arbitration because of the likelihood that multiple suits would result if the motion was granted. The court of appeals held that denial of the motion was improper because a court must consider the propriety of severing claims before denying arbitration on the ground that multiple suits might result in different forums.¹⁶⁵

In *Lynch v. Three Ponds Co.*,¹⁶⁶ part of an arbitrator's award was void because it concerned an issue that was not arbitrable. The court held that the part of the award concerning matters covered by the arbitration agreement was severable from the void portion and could not be set aside absent a showing of other grounds to vacate.¹⁶⁷

In *Barber-Greene v. Zeco. Co.*,¹⁶⁸ the court held that the question whether there was appropriate cause to terminate a dealership agreement was arbitrable. The court ordered the claim severed because the law favors arbitration and there was no compelling reason to retain the claim.¹⁶⁹

C. Arbitrability of Specific Claims

One jurisdiction has recently implied that issues affecting the public interest may not be arbitrable.¹⁷⁰ In *Greenleaf Engineering & Construction Co. v. Teradyne, Inc.*,¹⁷¹ a construction company brought suit against a developer to recover for services rendered on a contract. The developer counterclaimed and filed a third-party claim against an engineering firm for engaging in unfair and deceptive trade practices. The developer appealed from an order compelling all the parties to arbitrate on the ground that the strong public interest in litigating deceptive trade practice claims made arbitration inappropriate. The court acknowledged the possibility that a sufficient public interest could render an issue nonarbitrable.¹⁷² Nevertheless, it found that the private commercial dispute involved in the instant case did not present any issues implicating any strong public policy.¹⁷³

Arbitration can be improper when it involves nondelegable legislative duties. In *City of Denver v. Denver Firefighters Local No. 858*,¹⁷⁴ the parties executed a collective bargaining agreement. Arbitration was the final step in the grievance procedure. The city refused to arbitrate an employer discrimination claim. The Colorado Supreme Court ordered binding arbitration after it

165. *Id.* at 11.

166. 656 P.2d 51 (Colo. Ct. App. 1982).

167. *Id.* at 54.

168. 17 Bankr. 248 (D. Minn. 1982).

169. *Id.* at 250.

170. The court compelled arbitration, but it acknowledged that a sufficient public interest could make an issue nonarbitrable. *Id.*

171. 15 Mass. App. Ct. 571, 447 N.E.2d 9 (1983).

172. *Id.* at _____, 447 N.E.2d at 12.

173. *Id.* at _____, 447 N.E.2d at 12-13.

174. 663 P.2d 1032 (Colo. 1983).

categorized the union's claim as grievance arbitration. The court explained that interest arbitration is arbitration occurring during negotiations leading to the formation of a contract. Grievance arbitration arises under the terms of an existing collective bargaining agreement. The court invalidated interest arbitration as an unconstitutional delegation of legislative authority under the Colorado state constitution because it allows the arbitrator to substitute his judgment on matters entrusted only to public officials.¹⁷⁵ The court upheld grievance arbitration as a proper judicial function of an arbitrator under Colorado constitutional principles.¹⁷⁶

D. *Proper Forum for Determining Arbitrability*

The arbitration agreement generally controls which forum should determine arbitrability. Under the UAA, the question of arbitrability arises when one of the parties denies that it has agreed to arbitrate a particular dispute. Absent an agreement to the contrary, the general rule is that the determination of whether a particular dispute is arbitrable is a legal question for the court¹⁷⁷ rather than the arbitrator.¹⁷⁸ Although recent decisions adhere to this general principle, one case illustrates how an arbitration agreement may result in arbitrability being determined by the arbitrator even if the parties have not so agreed.¹⁷⁹

In *Lehman v. Eugene Matansky & Associates*,¹⁸⁰ the parties entered into a brokerage contract containing an arbitration clause. The contract required the plaintiff to notify the defendant before terminating the agreement. Four months after plaintiff gave defendant notice, the defendant sought to arbitrate a contract claim against the plaintiff. The plaintiff sued to enjoin arbitration, arguing that the brokerage contract had been properly terminated. The trial court enjoined arbitration, and the appellate court affirmed.¹⁸¹ It reasoned that under the UAA, the trial court determines arbitrability when one of the par-

175. *Id.* at 1037-38.

176. *Id.* at 1040.

177. UAA § 2. *See* *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960).

178. 5 AM. JUR. 2D *Arbitration and Award* § 15 (1962). The strong presumption in favor of the court's determination of arbitrability may be rebutted by inserting the following clause:

The parties agree that in the event a dispute arises as to whether or not any claim, dispute, or controversy arising under the terms of this contract is subject to the arbitration provision set forth herein the matter shall be decided by arbitration in the same manner and with the same effect as all other controversies arising hereunder.

2 AM. JUR. LEGAL FORMS 2D § 23.44 (1971).

179. *Hiller v. Allstate Ins. Co.*, 300 Pa. Super. 149, 446 A.2d 273 (1982).

180. 107 Ill. App. 3d 985, 438 N.E.2d 614 (1982).

181. *Id.* at 991-92, 438 N.E.2d at 619-20.

ties denies that it has agreed to arbitrate.¹⁸² Therefore, the issue was properly decided by the trial court.¹⁸³

In *Premier Electrical Construction Co. v. Rangar Benson, Inc.*,¹⁸⁴ another court agreed that the contractual nature of arbitration makes the determination of arbitrability a decision for the courts. A subcontractor sued his general contractor on three separate claims for additional payment. The contract contained a mechanism for dispute resolution.¹⁸⁵ The general contractor argued that the arbitration clause precluded litigation of the subcontractor's claims. The trial court found these claims to be arbitrable and dismissed the lawsuit. Ironically, the general contractor argued on appeal that arbitrability initially should be determined by the arbitrator. The appellate court held that the trial court must determine the arbitrability of the claims in the first instance.¹⁸⁶

In *Arrowhead Public Service Union v. City of Duluth*,¹⁸⁷ the issue was whether the city had violated the labor arbitration clause of a collective bargaining agreement when it laid off one of its employees because of budget cuts. The arbitrator ruled that the dispute was arbitrable and that the city violated the agreement because the city failed to show that the layoffs were motivated by financial necessity. The trial court vacated the award because the arbitrator exceeded his authority in determining the arbitrability of the dispute. The appellate court affirmed because the arbitrability of employee grievance disputes must be judicially determined.¹⁸⁸

*Hiller v. Allstate Insurance Co.*¹⁸⁹ illustrates how an arbitration agreement may ultimately result in an arbitrator determining arbitrability in spite of the general rule. In *Hiller*, the arbitration clause contained a limitation on the amount awardable through arbitration for uninsured motorist coverage.¹⁹⁰

182. *Id.* at 988, 438 N.E.2d at 617; see ILL. ANN. STAT. ch. 10, § 102 (Smith-Hurd 1975) (section identical to U.A.A. § 2).

183. *Lehman*, 107 Ill. App. 3d at 988, 438 N.E.2d at 617.

184. 111 Ill. App. 3d 855, 444 N.E.2d 726 (1982).

185. The phrase "mechanism for dispute resolution" is used here to distinguish this agreement from those utilizing more ordinary procedures for binding arbitration. This agreement provided in part: "All disputes concerning questions of fact, arising under the Agreement, shall be decided by the Contractor subject to written appeal by the Subcontractor within seven (7) days to the Contractor, who in turn will submit said appeal to the owner or his representative, whose decision shall be final and conclusive upon the parties thereto." *Id.* at 858, 444 N.E.2d at 728.

186. *Id.* at 861, 444 N.E.2d at 730. (quoting *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960)). "[A] court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is 'arbitrable' is inescapably for the court."

187. 336 N.W.2d 68 (Minn. 1983).

188. *Id.* at 70.

189. 300 Pa. Super. 149, 446 A.2d 273 (1982).

190. The arbitration clause stated:

The arbitrators made an award in excess of the policy limit.¹⁹¹ The trial court vacated the award as beyond the scope of the arbitration agreement. The appellate court followed the principle that arbitrability is a question for the court and affirmed.¹⁹² The court recognized, however, that the language of the arbitration clause made the arbitrability of plaintiff's claim depend on the value the arbitrators placed on the claim.¹⁹³ If the arbitrators determined the value of the claim to be within the limits of the agreement, then the claim would be arbitrable. The claim could not be arbitrable if the arbitrators decided that its value exceeded the policy limits.

Few recent cases have addressed the question of which forum, arbitration or litigation, should determine arbitrability. The decisions demonstrate that courts presume the parties intended for courts to determine arbitrability in the absence of an express agreement to the contrary. Parties may avoid the effect of the general rule by consent, so attorneys should make the agreement reflect any preference for having the arbitrator determine arbitrability of a dispute in order to rebut the normal presumption.

V. PROCEEDINGS TO COMPEL OR STAY ARBITRATION

A. *Staying Court Proceedings*

When an arbitrable issue is the subject matter of a pending lawsuit, the suit must be stayed upon a showing that arbitration has been ordered or that an application for an order to arbitrate has been made.¹⁹⁴ If the arbitrable issue is severable from the other issues in the suit, the stay may be applied to the litigation of that issue only. If the demand for arbitration is directed to the trial court,¹⁹⁵ the court must include in its order to arbitrate a stay of the

When we arbitrate, the decision in writing will be binding up to the limits required under the Financial Responsibility law of Pennsylvania, and may be entered as a judgment in a proper court. When an award exceeds those limits, either party has a right to trial on all issues in a court of competent jurisdiction.

Id. at 149, 446 A.2d at 274.

191. The arbitrators awarded \$30,000, the maximum amount recoverable under the policy. *Id.* That award exceeded the \$15,000 per person requirement of the Financial Responsibility law. 75 PA. CONS. STAT. ANN. § 1747 (Purdon Supp. 1984).

192. *Hiller*, 300 Pa. Super. at 149, 446 A.2d at 274.

193. *Id.*

194. 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.

195. UAA § 16.

court proceedings.¹⁹⁶

Courts generally encourage enforcement of executory arbitration agreements¹⁹⁷ and provide for expeditious, inexpensive dispute resolution without judicial involvement.¹⁹⁸ Litigation may be stayed even though the parties have not executed an agreement to arbitrate when the need for litigation may be obviated by the results of other, related arbitration.¹⁹⁹

Some disputes can be litigated without first submitting them to arbitration. A recent Massachusetts case held that a party asserting a claim under a statute prohibiting unfair trade practices may proceed with his lawsuit without submitting the claim to arbitration, even though the contract from which the dispute arose contained an arbitration clause.²⁰⁰

The policy favoring enforcement of executory arbitration agreements controlled the decision in *Charles J. Frank, Inc. v. Associated Jewish Charities, Inc.*²⁰¹ The court held that the prospect of inconsistent judgments in arbitration and related litigation with a third-party is not a compelling reason to stay arbitration.²⁰² The plaintiff-contractor agreed to build a community center for defendant-owner, and the plaintiff subcontracted the excavation work. Both contracts contained arbitration clauses. The plaintiff later demanded that defendant pay the balance due under the contract. The defendant refused because it claimed the construction work was faulty. When the plaintiff invoked the arbitration clause in its contract, defendant moved to stay arbitration and sued the plaintiff, its surety, and the architect. The trial court refused to order arbitration.²⁰³ The defendant's contract with the architect did not contain an arbitration clause. It argued on appeal that forcing it to arbitrate with the plaintiff and litigate with the architect might result in inconsistent judgments.²⁰⁴ The appellate court held that arbitration should have been compelled.²⁰⁵ First, the policy favoring arbitration would be undermined if the

196. *Id.* § 2(d).

197. *Charles J. Frank, Inc. v. Associated Jewish Charities, Inc.*, 450 A.2d 1304, 1312 (Md. 1982).

198. Comment, *The Uniform Arbitration Act in Missouri*, 46 Mo. L. REV. 627, 630 (1981).

199. *Post Tensioned Eng'g Corp. v. Fairways Plaza Assocs.*, 429 So. 2d 1212 (Fla. Dist. Ct. App. 1983).

200. *Hannon v. Original Gunite Aquatech Pools, Inc.*, 385 Mass. 813, 434 N.E.2d 611 (1982).

201. 294 Md. 443, 450 A.2d 1304 (Md. 1982).

202. *Id.* at 455-60, 450 A.2d at 1311-12.

203. *Id.* at 445-47, 450 A.2d at 1305-06.

204. *Id.* at 445, 450 A.2d at 1305-06.

205. The court recognized that there is a split of authority on this issue, citing cases where the opposite result was reached. *County of Jefferson v. Barton-Douglas Contractors, Inc.*, 282 N.W.2d 155 (Iowa 1979); *Prestressed Concrete, Inc. v. Adolfsen & Peterson Inc.*, 308 Minn. 20, 240 N.W.2d 551 (1976); *J.F. Inc. v. Vicik*, 99 Ill. App. 3d 815, 426 N.E.2d 257 (1981). The prospect of duplicative proceedings with the po-

agreement were not enforced.²⁰⁶ Second, the UAA contemplates the possibility of multiple proceedings.²⁰⁷ Under UAA section 2(d), litigation involving an issue subject to arbitration may be stayed with respect to that issue alone if the issue is severable.²⁰⁸ The court recognized that the evidence introduced at both proceedings would be duplicative and that the expense involved in conducting dual proceedings would probably exceed the cost of determining the merits of all the parties' claims in either arbitration or litigation. Nevertheless, when a court is asked to stay arbitration the sole issue is whether a valid arbitration agreement exists.²⁰⁹ Matters of efficiency are not within the judge's discretion. Third, it would be unfair to require a party to an arbitration agreement to litigate when his opponent's voluntary action of signing another contract not containing an arbitration agreement created the possibility of inconsistent results.²¹⁰

In *Post Tensioned Engineering Corp. v. Fairways Plaza Associates*,²¹¹ court proceedings between parties who had not executed an arbitration agreement were stayed pending the outcome of arbitration, which might have obviated the need for litigation. Fairways filed suit against a general contractor, several subcontractors, and a design engineer, alleging negligence in the construction and design of an office building. Only Fairways' contract with the general contractor contained an arbitration clause. The trial court refused to stay Fairways' suit even though the dispute was arbitrable.²¹²

The appellate court determined that the dispute between Fairways and all of the contractors was arbitrable. The court not only stayed the litigation involving the general contractor, but also the litigation involving subcontractors with whom Fairways had never agreed to arbitrate.²¹³ The court based its holding on the doctrine of respondeat superior. If the arbitrator found that the general contractor was not negligent, further litigation would be unnecessary.²¹⁴ The court affirmed the order lifting the stay of the litigation involving the design engineer. His negligence, if any, was deemed independent of the negligence of the contractor and subcontractors by the court and was thus severable from the arbitrable issue of the contractors' negligence.²¹⁵

In *Hannon v. Original Gunite Aquatech Pools, Inc.*,²¹⁶ the court held that

tential for inconsistent results and the obvious inefficiency of dual adjudications underpin these courts' decisions.

206. *Frank*, 294 Md. at 457, 450 A.2d at 1311.

207. *Id.*

208. UAA § 2(d).

209. *Id.* §§ 2(a), (b).

210. *Frank*, 294 Md. at 458-59, 450 A.2d at 1311-12.

211. 429 So. 2d 1212 (Fla. Dist. Ct. App. 1983).

212. *Id.* at 1215.

213. *Id.*

214. *Id.* at 1214.

215. *Id.*

216. 385 Mass. 813, 434 N.E.2d 611 (1982).

court proceedings predicated on an unfair trade practices claim need not be stayed when the claim is submitted to arbitration.²¹⁷ The parties executed a construction contract that contained an arbitration clause. Hannon sued Aquatech under a Massachusetts unfair trade practice statute.²¹⁸ The trial court stayed Hannon's claim. The appellate court held that the unfair trade practices claim was not arbitrable²¹⁹ because the statute allows a person alleging injury from an unfair trade practice to bring his action without initiating, pursuing, or exhausting "any remedy established by any regulation, administrative procedure, local, state, or federal law or statute or the common law."²²⁰ The court reasoned that the stay was improper²²¹ because arbitration is a statutory remedy²²² and unfair trade practices actions can be stayed only under limited circumstances not present in Hannon's case.²²³

Arbitration is generally viewed as a quick, inexpensive method of settling a dispute. In the course of day-to-day business dealings, for example, disagreements may arise as to the duties of parties to a contract or the proper interpretation to be given to a contract. Where parties have agreed in advance to submit such disputes to arbitration, their agreement is to be given full effect absent fraud, duress, or any of the other contract defenses. The *Hannon* court looked beyond the express requirements of the UAA²²⁴ to create an artificial, statutory defense to arbitration. The court misperceived the purpose of arbitration in so doing.²²⁵ This decision allows parties to escape from some arbitration agreements by classifying a particular contract breach as an unfair trade practice. The courts in *Frank* and *Fairways* were forced to balance the policy favoring enforcement of arbitration agreements against the policy of promoting efficiency in the administration of justice, policies which at times conflict. In both cases, the courts were able to achieve results which minimized this conflict to the extent possible under the UAA.

B. Compelling Arbitration

Section 2 of the UAA permits proceedings to compel or stay arbitration.²²⁶ Any party to an arbitration agreement may apply for an order to compel arbitration. If the other party denies that there is an agreement, the court

217. *Id.* at _____, 434 N.E.2d at 613.

218. MASS. GEN. LAWS ANN. ch. 93A, § 2 (West Supp. 1983-84).

219. *Hannon*, 385 Mass. at _____, 434 N.E.2d at 618.

220. MASS. GEN. LAWS ANN. ch. 93A, § 9(7) (West Supp. 1983-84).

221. *Hannon*, 385 Mass. at _____, 434 N.E.2d at 613.

222. *Id.* at _____, 434 N.E.2d at 618-19.

223. *Id.* at _____, 434 N.E.2d at 619.

224. UAA § 1; MASS. GEN. LAWS ANN. ch. 251, § 1 (West Supp. 1983-84).

225. "Arbitration is a dispute settlement device; it is not a remedy." *Northern Ill. Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 275 (7th Cir. 1982).

226. See UAA § 2(a), (b).

decides the issue.²²⁷ A court must compel arbitration if a valid arbitration agreement exists.²²⁸ Because arbitration is a contractual remedy, the contract determines the limitations, conditions, and restrictions on arbitration.²²⁹

If an arbitration agreement between the parties exists, the UAA strongly favors enforcing the agreement.²³⁰ Agreements to resolve disputes extra-judicially are favored by courts because arbitration settles disputes faster and more economically than judicial action.²³¹ Section 2 of the UAA provides a quick and efficient means of compelling parties to carry out their arbitration agreements.

While arbitration is seen as a forum for settling differences and not as a remedy in itself,²³² courts have imposed certain requirements and limitations upon its use. First, an adequate demand for arbitration must be made. If no demand is made, arbitration will not be compelled even if an arbitration agreement exists.²³³ Second, only parties to an arbitration agreement may apply for an order compelling arbitration. Even if a third-party is mentioned in the agreement and would benefit by arbitration, he has no right to compel arbitration.²³⁴ Third, there must be an arbitration clause in the contract between the parties.²³⁵ Thus, a court will not order one corporation to arbitrate a dispute with a person merely because another corporation having the same president has an arbitration clause in its contract with the same person.²³⁶

In *City of Hot Springs v. Gunderson's, Inc.*,²³⁷ the court held that the UAA limits judicial review of motions to compel arbitration to three factors: (1) whether an agreement to arbitrate exists; (2) whether the defendant has a duty to arbitrate under the agreement; and (3) whether the defendant has breached this duty.²³⁸ The parties executed a construction contract that contained several arbitration provisions. The city also entered into an architect-

227. See UAA § 2(a).

228. *Id.*

229. *Christmas v. Cimarron Realty Co.*, 98 N.M. 330, 332, 648 P.2d 788, 790 (1982).

230. *City of Hot Springs v. Gunderson's, Inc.*, 322 N.W.2d 8, 10 (S.D. 1982).

231. *E.g., Rhine v. Union Carbide Corp.*, 343 F.2d 12, 16 (6th Cir. 1965); *Arrieta v. Volkswagen Ins. Co.*, 343 So. 2d 918, 921 (Fla. Dist. Ct. App. 1977).

232. *Northern Ill. Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 275 (7th Cir. 1982).

233. *Hanslin Builders, Inc. v. Britt Dev. Corp.*, 15 Mass. App. Ct. 319, —, 445 N.E.2d 188, 190 (1983).

234. *Board of Educ. v. Meridian Educ. Ass'n*, 112 Ill. App. 3d 558, 562, 445 N.E.2d 864, 867 (1983).

235. UAA § 2(a).

236. *Greenleaf Eng'g & Constr. Co., Inc. v. Teradyne, Inc.*, 15 Mass. App. Ct. 571, —, 447 N.E.2d 9, 11 (1983).

237. 322 N.W.2d 8 (S.D. 1982).

238. *Id.* at 11. The court stated that this view is a radical departure from the common law.

tural contract with Phelps-Benz, but this agreement did not provide for arbitration.²³⁹ The city sued both Gunderson's and Phelps-Benz for negligent construction and design. The trial court refused to compel arbitration. The appellate court reversed because the trial court based its decision on its finding that the risk of adverse consequences from multiple suits in different forums was too great.²⁴⁰ This went beyond the three permissible considerations and was contrary to the strong policy favoring the arbitration of disputes.²⁴¹

In *Hanslin Builders, Inc. v. Britt Development Corp.*,²⁴² the court held that an adequate demand for arbitration must be made before a trial court may dismiss an action or stay the proceeding.²⁴³ Plaintiff-builder and defendant-developer executed a construction contract containing an arbitration clause.²⁴⁴ The defendant wrote to the plaintiff advising that payment would not be made because the houses were improperly constructed. Although the final sentence of the letter nominated an individual to arbitrate the disputes, the defendant never demanded arbitration. The plaintiff commenced an action to collect payment, and the trial court refused to stay the proceeding. The appellate court held that the request for a stay was properly denied²⁴⁵ because arbitration was never expressly demanded²⁴⁶ and because the defendant never sought an order to compel arbitration under section 2(a) of the Massachusetts Arbitration Act.²⁴⁷ There was nothing in the record to indicate that the court or the parties treated the motion to stay as a motion to compel arbitration.²⁴⁸

In *Board of Education v. Meridian Education Association*,²⁴⁹ the court applied the rule that a nonparty cannot compel arbitration.²⁵⁰ Following a teachers' strike, the school district and the Meridian Education Association

239. *Id.* at 9.

240. *Id.* at 11.

241. *Id.* at 10.

242. 15 Mass. App. Ct. 319, 445 N.E.2d 188 (1983).

243. *Id.* at _____, 445 N.E.2d at 190.

244. *Id.* at _____, 445 N.E.2d at 189.

245. *Id.*

246. *Id.* The court stated that the last sentence in the defendant's letter was not an express demand.

247. *Id.* at _____, 445 N.E.2d at 190. The Massachusetts statute provides that:

A party aggrieved by the failure or refusal of another to proceed to arbitration under an agreement described in section one may apply to the Superior Court for an order directing the parties to proceed to arbitration. 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, if it finds for the applicant, order arbitration; otherwise, the application shall be denied.

MASS. GEN. LAWS ANN. ch. 251, § 2(a) (West Supp. 1983-84). This is substantively the same as U.A.A. § 2.

248. *Hanslin*, 15 Mass. App. Ct. at _____, 445 N.E.2d at 190.

249. 112 Ill. App. 3d 558, 445 N.E.2d 864 (1983).

250. *Id.* at 562, 445 N.E.2d at 867.

(MEA) executed a collective bargaining agreement which included a non-reprisal clause²⁵¹ and a recognition clause.²⁵² The agreement provided for a grievance procedure culminating in arbitration.²⁵³ The MEA filed a grievance concerning substitute teachers based on the non-reprisal clause. The arbitrator decided that although substitute teachers were not covered by the recognition clause, they were entitled to arbitrate.²⁵⁴ The trial court affirmed the order compelling arbitration on the theory that the substitute teachers were third-party beneficiaries of the non-reprisal clause.²⁵⁵

The appellate court held that the substitute teachers could not force arbitration because they were not parties to nor covered by the collective bargaining agreement.²⁵⁶ In response to the argument that the MEA, representing the substitutes, was a party to the agreement, the court stated that the MEA could not compel arbitration of grievances pertaining to members who were not specifically covered by the collective bargaining agreement. To allow the MEA to compel arbitration would endorse a fiction by allowing the substitutes to do what they could not do in their own names.²⁵⁷ Thus, even though the substitutes were mentioned in the non-reprisal clause as "other parties," they were not considered parties to the agreement.

In *Greenleaf Engineering & Construction Co. v. Teradyne, Inc.*,²⁵⁸ the court held that two corporations should be treated separately for the purpose of compelling arbitration, even though the two corporations had the same president.²⁵⁹ The record indicated that plaintiff had dealt sufficiently with the two corporations as separate entities to permit the trial judge to treat the corpora-

251. *Id.* at 559-60, 445 N.E.2d at 865. The non-reprisal clause provided that neither party "shall cause reprisals or recriminations against the other party nor against individual employees, students, or other parties who might be subject to same as a result of the work stoppage." *Id.*

252. *Id.* at 560, 445 N.E.2d at 865. The MEA was recognized by the district "as the exclusive and sole negotiation agent for all regularly employed full-time certificated teaching personnel, except the Superintendent, Assistant Superintendent, Principals, and other central office professional staff." *Id.*

253. *Id.* If a grievance was not resolved, it would be submitted to arbitration.

254. *Id.*

255. *Id.*

256. *Id.* at 562-63, 445 N.E.2d at 867.

257. *Id.* at 563, 445 N.E.2d at 867-868. The court speculated that the substitute teachers might have a cause of action for breach of contract as third-party beneficiaries under the non-reprisal clause, but it did not decide the issue. *Id.*

258. 15 Mass. App. Ct. 571, 447 N.E.2d 9 (1983).

259. *Id.* at ____, 447 N.E.2d at 11. Plaintiff-builder's contract with corporation A contained an arbitration clause, but his contract with corporation B did not. *Id.* at ____, 447 N.E.2d at 10. Both corporations had the same president. The appellate court affirmed the trial court's ruling that compelled arbitration as to corporation A, but refused to compel arbitration as to corporation B. *Id.* at ____, 447 N.E.2d at 11. The plaintiff argued that the relationship among the president and the two corporations was close and that the president's influence in the affairs of both corporations was pervasive.

tions separately with respect to arbitration.²⁶⁰

In *Christmas v. Cimarron Realty Co.*,²⁶¹ the court relied on the principle that the arbitration agreement determines whether the parties must arbitrate. The plaintiff, a realtor, alleged that the defendant, her former employer, owed her commission fees. The defendant moved to compel arbitration under the Realtor's Code of Ethics, which requires controversies arising from relationships between realtors of different firms to be settled through arbitration. The court applied the plain meaning of the Code and held that arbitration could not be compelled because the dispute arose from a contractual relationship between the parties when they were members of the same firm.²⁶² The court reasoned that to compel the plaintiff to arbitrate would be tantamount to inserting a new clause into an otherwise unambiguous contract.²⁶³

The decision in *Kodiak Oilfield Haulers v. Local 879, Hotel Employees Union*²⁶⁴ was also based on contract considerations. *Kodiak* involved two arbitration hearings. The first hearing occurred after the parties' arbitration agreement had expired. *Kodiak*, after agreeing to submit to arbitration, was ordered to reinstate an employee. After the employee was fired a second time, he again demanded arbitration. Although *Kodiak* did not agree to participate in this second hearing, the arbitrator conducted the hearing and entered an award against *Kodiak* on the theory that he had continuing authority over the matter because *Kodiak* failed to properly comply with the first order. The appellate court reasoned that arbitration is a matter of contract and that a party cannot be required to arbitrate any dispute which he has not agreed to submit to arbitration. Thus, *Kodiak* was not bound by the second order because it was not decided under an existing arbitration agreement.²⁶⁵

In *Loomis, Inc. v. Cudahy*,²⁶⁶ plaintiff, Smith, contracted to perform architectural services for the defendant, Cudahy. Smith moved to compel arbitration of his dispute with Cudahy. The trial court granted the motion. Cudahy appealed on the ground that the trial court's evidentiary hearing on the matter was too restrictive. The Idaho Supreme Court held that the inquiry under Idaho Code § 7-902(a)²⁶⁷ must be limited²⁶⁸ because a review of the merits would frequently "emasculate the benefits of arbitration."²⁶⁹

260. *Id.* at ____, 447 N.E.2d at 11.

261. 98 N.M. 330, 648 P.2d 788 (1982).

262. *Id.* at 332, 648 P.2d at 790.

263. *Id.*

264. 641 P.2d 11 (Alaska 1982).

265. *Id.* at 13.

266. 104 Idaho 106, 656 P.2d 1359 (1983).

267. IDAHO CODE § 7-902(a) (1975). The language in subsection (a) is identical to the language used in UAA § 2(a).

268. 104 Idaho at ____, 656 P.2d at 1362.

269. *Id.* The dissent argued that arbitration should not be compelled for two reasons. First, the arbitration agreement was inequitable and should be deemed invalid under IDAHO CODE § 7-901 (1975). This statute states that arbitration agreements are

In *Post Tensioned Engineering v. Fairways Plaza*,²⁷⁰ Fairways sued its contractor, Commercial, who in turn moved to compel arbitration. The court limited its review to determining whether a valid arbitration agreement existed.²⁷¹ Fairways' sole objection to arbitration was that Commercial had breached the contract. The court decided that the question whether the contract was breached, although justiciable, is one which the arbitrator must decide.²⁷² The court also held that the claim was not too complex for arbitration.²⁷³ The strong policy favoring arbitration rendered untenable the proposition that a party to an arbitration agreement may avoid his obligation by joining nonparties as defendants in litigation.²⁷⁴

Similarly, in *City of Pompano Beach v. Meiroff*,²⁷⁵ the court held that its inquiry was limited when arbitration is sought to be compelled. Meiroff sought arbitration of a wage dispute between himself and the city. The trial court compelled arbitration and defined the main issue for the arbitrator to consider. The appellate court held that the trial court properly compelled arbitration, but that it exceeded its authority by defining the issue to be decided in arbitration.²⁷⁶

In *Paine, Webber, Jackson & Curtis, Inc. v. Lucas*,²⁷⁷ Lucas had two accounts with the brokerage firm. Only one account was governed by an arbitration clause. Lucas sued Paine, Webber about matters concerning only the other account. Paine, Webber moved to compel arbitration because of the other account's arbitration provision, but the trial court denied this motion. The appellate court recognized that to permit the parties to litigate at all when one of the parties has a right to compel arbitration completely frustrates that right.²⁷⁸ Nevertheless, the court held that the arbitration clause applied only to

"valid, enforceable and irrevocable, save upon grounds as exist at law or in equity for the revocation of any contract." Second, this complex lawsuit should be judicially resolved so all of the claims, counterclaims, and cross-claims could be contemporaneously decided. This case originally involved not only Cudahy and Smith, but also Loomis, Inc., the contractor who filed a mechanic's lien against Cudahy's house, and Ronald Liese and Liese & Associates Ins., Inc., who issued a performance bond. In multi-party actions involving multiple claims, the dissent argued that the goal of fast and inexpensive dispute resolution is better served by the judicial remedy of joinder than by arbitration. *Loomis*, 104 Idaho at _____, 656 P.2d at 1376.

270. 412 So. 2d 871 (Fla. Dist. Ct. App.), *petition denied*, 419 So. 2d 1197 (Fla. 1982), *appeal filed*, (Fla. Dist. Ct. App. 1983).

271. *Id.* at 873.

272. *Id.* at 874.

273. Fairways claimed that it had, and would later, sue others with whom it had no arbitration agreement. *Id.*

274. 412 So. 2d at 875.

275. 410 So. 2d 663 (Fla. Dist. Ct. App. 1982).

276. *Id.* at 664.

277. 411 So. 2d 1369 (Fla. Dist. Ct. App. 1982).

278. *Id.*

one account. The parties' rights to arbitrate are controlled by the terms of their agreement, and only one of the two separate agreements permitted arbitration.²⁷⁹

In *Frontier Materials, Inc. v. City of Boulder*,²⁸⁰ the court examined whether an interlocutory order compelling arbitration is appealable. The trial court ordered arbitration, and defendant appealed. The appellate court dismissed the appeal because Colorado law²⁸¹ does not specifically allow for appeals of orders compelling arbitration.²⁸²

*Continental Insurance Co. v. Hull*²⁸³ involved the application of a statute designed to promote the efficient resolution of small claims.²⁸⁴ The plaintiffs sued to recover damages suffered in an automobile accident. The trial court dismissed the suit because Nevada law required submission of the plaintiffs' claim to arbitration.²⁸⁵ The appellate court held that while arbitration was required, the dismissal was improper.²⁸⁶ The court agreed that Nevada law precluded plaintiffs from proceeding to trial,²⁸⁷ but it decided that plaintiffs' complaint should be viewed as a "refusal to arbitrate" which allows a court to compel arbitration.²⁸⁸

The most common issues found in proceedings to compel arbitration are: (1) whether there is a valid arbitration agreement; (2) whether the arbitration agreement applies to the dispute; (3) what the proper scope of judicial inquiry into the question of compelling arbitration should be; (4) whether a dispute would be better handled within the courts because of its complexity; and (5) whether a trial court's order compelling arbitration can be immediately appealed. In resolving these issues, courts are guided by two principles. First, the questions are considered in light of the policies encouraging arbitration. Sec-

279. *Id.* at 1371.

280. 663 P.2d 1065 (Colo. Ct. App. 1983).

281. COLO. REV. STAT. § 13-22-221 (Supp. 1982). This statute is identical to UAA § 19.

282. 663 P.2d at 1066. In citing *Sandefur v. District Court*, 635 P.2d 547 (Colo. 1981), without comment, the court may have been implying that orders compelling arbitration may be immediately reviewable by writ of mandamus.

283. 98 Nev. 542, 654 P.2d 1024 (1982).

284. NEV. REV. STAT. § 38.215(1) (1979) provides that,

[A]ll civil actions for damages for personal injury, death, or property damage arising out of the ownership, maintenance or use of a motor vehicle, where the cause of action arises in the State of Nevada and the amount in issue does not exceed \$3000, shall be submitted to arbitration, in accordance with the provisions of N.R.S. 38.015 and 38.205 inclusive.

285. *Id.* § 38.225 states that, "No cause of action specified in N.R.S. 38-215 shall be tried until there has been compliance with all provisions of N.R.S. 38-215 to 38-245, inclusive."

286. 98 Nev. at 543-44, 654 P.2d at 1026.

287. *See* NEV. REV. STAT. § 38.225 (1979).

288. *Id.* § 38.045(1). This section is identical to UAA § 2.

ond, the arbitration agreement determines the parties' rights and duties in arbitration.

VI. AWARDS

A. Grounds for Attacking an Award

The UAA recognizes five grounds for attacking an award.²⁸⁹ The most common ground is that the arbitrator exceeded his authority. Given the heavy judicial caseload, courts recognize that the UAA should be liberally interpreted²⁹⁰ to allow parties to settle their disputes without resorting to litigation.²⁹¹

A reviewing court generally will not overrule an award.²⁹² The arbitrator's decision is considered final on questions of law and fact in the absence of an agreement limiting his authority.²⁹³ Arbitrators are peculiarly competent to adjudge the merits of an arbitration²⁹⁴ because they are familiar with the customs of the industry, business, or parties involved. A party aggrieved by an award will usually have a very difficult time obtaining judicial relief.

1. Awards Inconsistent with Law

The UAA requires a court to vacate an award when the arbitrator has exceeded his power in making the award.²⁹⁵ Courts differ on what is sufficient

289. UAA § 12 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 rights of any party; (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.

290. *See, e.g., Konicki v. Oak Brook Racquet Club*, 110 Ill. App. 3d 217, 221-22, 441 N.E.2d 1333, 1338 (1982).

291. *See, e.g., Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, —, 665 P.2d 1046, 1051 (1983).

292. *See, e.g., Taunton Mun. Light Plant v. Paul L. Geiringer & Assocs.*, 560 F. Supp. 1249, 1251-1252 (D. Mass.), *aff'd mem.*, 725 F.2d 664 (1st Cir. 1983).

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

294. *See Board of Educ. v. Daniels*, 108 Ill. App. 3d 550, 555, 439 N.E.2d 27, 31 (1982).

295. UAA § 12(3).

to sustain a finding that an arbitrator exceeded his authority. In recent cases, the following events 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;²⁹⁶ (2) the award was granted in manifest disregard of the arbitration agreement;²⁹⁷ or (3) the award contravened public policy.²⁹⁸

Errors of law or fact usually will not justify setting aside an arbitrator's award. In *Taunton Municipal Light Plant v. Paul L. Geiringer & Associates*,²⁹⁹ the court held that even if a gross error of law or fact were made, it would be legally insufficient to set aside an award.³⁰⁰ Taunton appealed an arbitration order because it believed an error of fact affected the arbitrator's interpretation of the contract.³⁰¹ The award was confirmed because the court found that the error was inconsequential.³⁰²

In *Cabus v. Dairyland Insurance Co.*,³⁰³ the court held that arbitrators are not bound by substantive law unless the agreement provides otherwise.³⁰⁴ Cabus and Kavanaugh were injured in an automobile accident with an uninsured motorist. Dairyland's uninsured motorist policy limits were \$15,000 per person and \$30,000 per accident, and each policy contained an "anti-stacking" provision.³⁰⁵ The arbitrator ruled that each party was entitled to a \$30,000 recovery. Dairyland argued that the arbitrator exceeded his authority in making the award because he did not follow Colorado substantive law.³⁰⁶ The court decided that even if the arbitrator failed to apply Colorado law, that failure did not constitute grounds for setting aside the award.³⁰⁷ The UAA does not require an arbitrator to apply any particular substantive law.³⁰⁸

A recent Michigan decision, *Detroit Automobile Inter-Insurance Exchange v. Gavin*,³⁰⁹ set out this standard of review for arbitration awards:

296. See, e.g., *Detroit Auto Inter-Ins. Exch. v. Gavin*, 416 Mich. 407, 430, 331 N.W.2d 418, 428 (1982) (error of law).

297. See *Board of Educ. v. Daniels*, 108 Ill. App. 3d 550, 553, 439 N.E.2d 27, 29 (1982).

298. See *Konicki v. Oak Brook Racquet Club*, 110 Ill. App. 3d 217, 223-24, 441 N.E.2d 1333, 1338 (1982).

299. 560 F. Supp. 1249 (D. Mass.), *aff'd mem.*, 725 F.2d 664 (1st Cir. 1983).

300. *Id.* at 1251-1252.

301. *Id.* at 1249.

302. *Id.* at 1253.

303. 656 P.2d 54 (Colo. Ct. App. 1982).

304. *Id.* at 56.

305. *Id.* at 55.

306. *Alliance Mut. Casualty Co. v. Duerson*, 184 Colo. 117, 518 P.2d 1177 (1974). The Supreme Court of Colorado held that "other insurance" clauses, more often called anti-stacking provisions, are not contrary to public policy and are enforceable.

307. 656 P.2d at 56.

308. *Id.*

309. 416 Mich. 407, 331 N.W.2d 418 (1982).

whether the award rests on errors of law so material that the arbitrators exceeded their authority in making the award.³¹⁰ In two consolidated cases, arbitrators made awards of \$39,000 and \$35,000 even though the insurance policies had \$20,000 limits. The arbitrators had stacked policies to make the awards, which was expressly forbidden in the insurance contract.³¹¹ The court established a "but for" test for determining what constitutes material error of law. It vacated the awards because the arbitrators committed errors of law in disregarding the anti-stacking provision, and "but for" such errors, the award would have been substantially different.³¹²

In *Bingham County Commission v. Interstate Electric Co.*,³¹³ the court stated that judicial review of an arbitrator's decision is more limited than judicial review of a trial court's decision.³¹⁴ It held that an arbitrator's findings of law and fact are final and that the only grounds available for attacking the decision are those established by the UAA.³¹⁵ Even though a reviewing court might find that an error of law has been committed, the arbitrator's decision is binding on the court.³¹⁶ An arbitrator's misinterpretation of an arbitration agreement is not open to judicial review.³¹⁷

Two recent cases illustrate the type of conduct which will establish that an arbitrator has exceeded his authority. In *In re Arbitration between Johns Construcion Co. and Unified School District*,³¹⁸ the court held that in the absence of fraud or misconduct, an award will not be set aside even though based on incorrect findings of law or fact.³¹⁹ The school wanted to reduce its obligation to Johns because of allegedly defective work done by him. The arbitrator found some merit in the allegations of each party and made his award accordingly. The school then moved to vacate the award. The court found no fraud or arbitrary action on the part of the arbitrators, so it affirmed the award.³²⁰ In *Foley Co. v. Grindsted Products, Inc.*,³²¹ the court used the same reasoning as *Johns* and also noted that when parties have agreed to arbitration, errors of law or fact, or an erroneous decision of the issues do not justify vacating an award.³²² The court required an arbitration award to be "completely irra-

310. *Id.* at 434, 331 N.W.2d at 430.

311. *Id.* at 414-16, 331 N.W.2d at 421-422.

312. *Id.* at 445, 331 N.W.2d at 435.

313. 105 Idaho 36, 665 P.2d 1046 (1983).

314. *Id.* at _____, 665 P.2d at 1052.

315. *Id.* at _____, 665 P.2d at 1051-1052.

316. *Id.* at _____ n.7, 665 P.2d at 1052 n.7.

317. *Id.*

318. 233 Kan. 527, 664 P.2d 821 (1983).

319. *Id.* at 528, 664 P.2d at 822.

320. *Id.* at 530, 664 P.2d at 824.

321. 233 Kan. 339, 662 P.2d 1254 (1983).

322. *Id.* at 347, 662 P.2d 1264 (quoting unreported trial court opinion with approval).

tional" before it is subject to judicial revision.³²³

A party may ask that an arbitration award be vacated because the arbitrator exceeded his authority by disregarding the terms of the arbitration agreement or basing the award on issues beyond his power. In *In re Pacre Corp.*,³²⁴ a bankruptcy court determined that the relief granted was so far beyond the scope of the issues presented for arbitration that vacation of the award was appropriate. The court was convinced that the arbitrator did not have a clear concept of what he was empowered to decide.³²⁵ A real estate contract for the purchase of a single-family house provided that in the event of seller's default the purchaser could enforce the contract or compel the seller to return the deposit. The arbitrator awarded the buyer \$95,000 over the deposit, gave the buyer the option to close on the home, and decided to award substantial damages to buyer if no sale occurred. The court held that the arbitrator clearly exceeded his authority because the award bore no relationship to the relief provided for in the contract.³²⁶

Arbitrators derive their authority from the arbitration agreement.³²⁷ A court will review an arbitrator's interpretation of the agreement only to determine whether the award drew its essence from the agreement.³²⁸

In *Board of Education v. Daniels*,³²⁹ the question was whether it was proper for the Board to freeze the salaries of teachers who had not completed certain education requirements. The arbitrator determined that the Board's actions were improper.³³⁰ The standard of review was whether the arbitrator had manifestly disregarded the agreement.³³¹ The court held that interpretation of the agreement was part of the arbitrator's function because it was the arbitrator's interpretation that was bargained for.³³²

2. 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 *Konicki v. Oak Brook Racquet Club*,³³³ the court held that an arbitrator's award in contra-

323. *Id.* (quoting trial court).

324. 21 Bankr. 759 (S.D. Fla. 1982).

325. *Id.* at 762.

326. *Id.* at 762-63.

327. *State v. Thomas Constr. Co.*, 8 Kan. App. 2d 283, _____, 655 P.2d 471, 474 (1982).

328. *Board of Educ. v. Daniels*, 108 Ill. App. 3d 550, 553, 439 N.E.2d 27, 29-30 (1982).

329. 108 Ill. App. 3d 550, 439 N.E.2d 27 (1982).

330. *Id.* at 552-53, 439 N.E.2d at 28-29.

331. *Id.*

332. *Id.*

333. 110 Ill. App. 3d 217, 441 N.E.2d 1333 (1982).

vention of public policy could not stand.³³⁴ The court stated that the arbitrator's enforcement of a non-competition clause in a contract could violate paramount considerations of public policy.³³⁵ The court reasoned that, "just as we will not enforce a private agreement which is repugnant to established norms of public policy, we may not ignore the same public policy concerns when they are undermined through the process of arbitration."³³⁶

There appears to be some confusion among courts as to the extent that an arbitrator should be bound by the substantive law of the jurisdiction where arbitration occurs. Some courts find that if the arbitration agreement is silent on the issue of applicable law, then no particular application is required and the bargained-for interpretation of the arbitrator will be binding.³³⁷ Other courts take the position that arbitrators should apply the substantive law of the jurisdiction and hold that the award will be binding so long as any error of law is not egregious, material or substantial.³³⁸ The better approach would be to allow courts to review arbitration awards to determine if the substantive law was fairly followed. It is recognized that arbitrators derive their authority from the agreement to arbitrate, and it should be implicit within the agreement that the parties intended an arbitral decision to be based on a substantially correct reading and interpretation of the law. It should not be presumed by courts that the intention of the parties to submit to an arbitrator's decision includes a coincident intention to permit the arbitrator to ignore the law in reaching his decision.

B. *Modification by Arbitrators*

Section 9 of the UAA allows an arbitrator to modify or correct an award for the reasons stated in section 13.³³⁹ Section 9 allows arbitrators to correct

334. *Id.* at 223-24, 441 N.E.2d at 1337-38.

335. *Id.*

336. 110 Ill. App. 3d 217, 223, 441 N.E.2d 1333, 1337 (1982) (quoting *Board of Trustees v. Cook County College Teachers Union*, 74 Ill. 2d 412, 424, 386 N.E.2d 47, 52 (1979)).

337. *See, e.g., Board of Educ. v. Daniels*, 108 Ill. App. 3d 550, 439 N.E.2d 27 (1982).

338. *See, e.g., Detroit Auto. Inter-Ins. Exch. v. Gavin*, 416 Mich. 407, 331 N.W.2d 418 (1982) (arbitrators disregarded express provision of insurance policy).

339. Section 9 states:

On application of a party or, if an application to the court is pending under Sections 11, 12 or 13, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in paragraphs (1) and (3) of subdivision (a) of Section 13, or for the purpose of clarifying the award. The application shall be made within twenty days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within ten days from the notice. The award so modified or corrected is subject to the provi-

their own mistakes or clarify an award without one or both of the parties having to institute judicial action. This promotes speedy dispute resolution, a major purpose of arbitration.³⁴⁰ Judicial review of an award which has undergone modification under section 9 is the same as review of an unmodified award. The ninety-day provisions of UAA sections 12 and 13 are tolled by a section 9 application for modification.³⁴¹

A court applied these principles in *Konicki v. Oak Brook Racquet Club*³⁴² where Oak Brook sought review of an award concerning a covenant not to compete in Konicki's contract. Under UAA sections 12 and 13, a party seeking review of an arbitration award must file a petition in circuit court within ninety days after the award is made.³⁴³ The issue was the effect of a pending section 9 application upon the time period for filing a petition to vacate an award under section 12. The court held that an application to modify under section 9 tolls the time for seeking review in the circuit court until the application is finally disposed of by the arbitrator, whether the relief requested is granted or denied.³⁴⁴ The court decided that this interpretation of section 9 is necessary so that judicial review of modified and unmodified awards be conducted in the same manner³⁴⁵ because the UAA places no time restrictions upon an arbitrator's disposition of a petition under section 9.³⁴⁶

The interpretation given section 9 by the Illinois court is consistent with the UAA's purpose of encouraging arbitration. If arbitration is to have the desired effect of reducing clogged court calendars, arbitrators must have a chance to correct their errors before the parties seek judicial relief. By interpreting section 9 to toll the ninety-day periods of sections 12 and 13, the court allows the arbitrator to reach a final decision without risk to either party.

C. *Binding Effect of an Award*

One of the main reasons for the increased use of arbitration is the enormous backlog in judicial dockets.³⁴⁷ For arbitration to decrease the amount of time and money expended by disputants, an arbitration award must be binding. Otherwise, parties must bear the cost of both court proceedings and essen-

sions of Sections 11, 12, and 13.

340. *Red Carpet Armory Realty Co. v. Golden West Realty*, 664 P.2d 93, 94 (Colo. Ct. App. 1982); *Saville Int'l Inc. v. Galanti Group*, 107 Ill. App. 3d. 799, 802, 438 N.E.2d 509, 512 (1982).

341. UAA §§ 12(b), 13(a).

342. 110 Ill. App. 3d. 217, 441 N.E.2d 1333 (1982).

343. UAA §§ 12(b), 13(a).

344. 110 Ill. App. 3d. at 222, 441 N.E.2d at 1337 (1982).

345. *Id.*

346. *Id.* at 221, 441 N.E.2d at 1336.

347. *See Red Carpet Armory Realty Co. v. Golden Realty*, 664 P.2d 93, 94 (Colo. Ct. App. 1982); *Saville Int'l Inc. v. Galanti Group*, 107 Ill. App. 3d. 799, 802, 438 N.E.2d 509, 512 (1982).

tially meaningless arbitration proceedings. The provisions of the UAA make arbitration awards binding by giving courts limited authority to vacate or modify awards³⁴⁸ and by allowing a court order confirming, modifying, or correcting an award to be enforced just like any other judicial judgment or decree.³⁴⁹ A confirmed award becomes *res judicata* and time limits for review of the award will be strictly enforced. To have binding arbitration, however, there must have been notice of a hearing and a hearing at which evidence was actually taken.³⁵⁰

In *Taunton Municipal Light Plant Commission v. Paul L. Geiringer & Associates*,³⁵¹ the court treated an arbitration award with extreme deference and refused to inquire into the merits of the award.³⁵² An arbitration award was issued in favor of Geiringer, and Taunton asked that the award be vacated. The court recognized that arbitration awards are viewed with great deference³⁵³ and that Massachusetts law requires confirmation of all awards except those falling within certain well-defined categories.³⁵⁴ An arbitrator may not award relief that offends public policy, requires a result contrary to express statutory provisions, or transcends the limits of the contract.³⁵⁵

In *Mayor of Baltimore v. Ohio Casualty Ins. Co.*,³⁵⁶ the court held that for arbitration awards to be binding, there must have been notice of arbitration and a hearing at which evidence was received.³⁵⁷ The city hired two contractors to do repair work on a school building. The city did not pay the contractors because their work was allegedly substandard. When the surety under the contract filed a declaratory judgment action against the city, the city responded that binding arbitration had precluded the lawsuit. It claimed that the assistant superintendent, whom the contract appointed to decide all disputes about the construction work, had written a letter to the contractors in which he gave them three days to resume work or be considered in default.³⁵⁸

348. An award can be vacated by a court only when it was procured by corruption or fraud, there was partiality by an arbitrator, the arbitrator exceeded his or her powers, the arbitrator refused to postpone upon good cause shown or refused to hear material evidence, or there was no arbitration agreement. UAA § 12. An award can be modified or corrected by a court if there was an evident miscalculation or mistake, the arbitrators have awarded upon a matter not submitted to them, or the award is imperfect in form. UAA § 13.

349. UAA § 14.

350. *Mayor of Baltimore v. Ohio Casualty Ins. Co.*, 50 Md. App. 455, 460, 438 A.2d 933, 937 (1982).

351. 560 F. Supp. 1249 (D. Mass.), *aff'd mem.*, 725 F.2d 664 (1st Cir. 1983).

352. *Id.* at 1251-52.

353. *Id.* at 1251.

354. *Id.* at 1250; MASS. GEN. LAWS ANN. CH. 251, § 12(A)(3) (West 1983-84).

355. 560 F.Supp. at 1251-52.

356. 50 Md. App. 455, 438 A.2d 933 (1982).

357. *Id.* at 461, 438 A.2d at 937.

358. *Id.* at 457-58, 438 A.2d at 935.

The contract provided that his determinations were final and conclusive upon the parties.³⁵⁹ The court held that no binding arbitration had taken place because no evidence of arbitration was in the record. Therefore, the letter warning of default could not also serve as an arbitration award,³⁶⁰ and it did not bind the contractors.³⁶¹ In *Red Carpet Armory Realty Co. v. Golden West Realty*,³⁶² the court held that an arbitration agreement which contained no restrictions on the power of the arbitrators bound the parties absolutely to the award.³⁶³ Red Carpet closed the sale of a business and received a commission. Golden West claimed that it was entitled to 40% of the commission. The Board of Realtors, acting as arbitrators, awarded 32% to Golden West. Red Carpet claimed that the panel exceeded its powers by awarding a different amount from that requested. Settlement of disputes by arbitration is strongly favored, and the court decided that the parties had agreed to abide absolutely by the decision.³⁶⁴ The court held that it is within the power of the arbitrator to award an amount different from that sought.³⁶⁵

In *Cabus v. Dairyland Insurance Co.*,³⁶⁶ the court held that an expanded agreement to arbitrate is a binding contract which provides the arbitrator with jurisdiction to determine all matters so submitted.³⁶⁷ An insured motorist sought to recover from her insurance company, and the arbitrator awarded the motorist twice the single policy uninsured motorist coverage by stacking coverage. The insurer had voluntarily agreed to submit the issue of "stacking" to the arbitrator even though it was not required to do so. The company sought

359. *Id.* at 460-61 n.4, 438 A.2d at 936-937 n.4.

360. *Id.* at 463, 438 A.2d at 938.

361. *Id.* at 464, 438 A.2d at 939. In *Saville Int'l, Inc. v. Galanti Group*, 107 Ill. App. 3d 799, 438 N.E.2d 509 (1982), Galanti appealed from the trial court's confirmation of part of an award in favor of Saville. The appellate court upheld the award. It reasoned that because of the increased burden on court systems, the status of an arbitrator is virtually equal to that of a judge. Awards made by an arbitrator will be upheld unless an applicant can show that the award should be vacated for one of the grounds in UAA §§ 12 or 13. *Id.* at 802, 438 N.E.2d at 512. In *Board of Educ. v. Daniels*, 108 Ill. App. 3d 550, 439 N.E.2d 27 (1982), the court held that because the parties have bargained for an arbitrator's interpretation of the agreement, a court will not overturn an award just because its interpretation of the agreement is different from that of the arbitrator. *Id.* at 553, 439 N.E.2d at 29. The court upheld the award because of the overriding interest in finality inherent in arbitration. Because it is the arbitrator's interpretation of the contract for which the parties bargained, his interpretation of the contract will be binding on them. A court will only review an arbitrator's interpretation to determine whether the award drew its "essence" from the agreement so as to prevent manifest disregard of the agreement. *Id.*

362. 644 P.2d 93 (Colo. Ct. App. 1982).

363. *Id.* at 94.

364. *Id.*

365. *Id.*

366. 656 P.2d 54 (Colo. Ct. App. 1982).

367. *Id.* at 55.

to withdraw the issue prior to the award, but the arbitrator ruled on it anyway. Dairyland claimed on appeal that it had the power to unilaterally withdraw the stacking issue.³⁶⁸ The court decided that if parties agree to expand an original contract by mutual consent, the parties thereby also agree to expand the arbitrator's jurisdiction to decide all matters so submitted. Once an issue is submitted, it can only be withdrawn if the parties mutually agree to do so.³⁶⁹

In *Bingham County Commission v. Interstate Electric Co.*,³⁷⁰ the court held that a court may not overrule an award on the ground that it would have reached a different decision because arbitration inherently involves a decision by the parties to submit their disputes to the final and binding judgment of an arbitrator.³⁷¹ Interstate Electric Co. (IEC) sought to arbitrate its dispute with the county, and the arbitrator made an award to IEC. The county filed a motion to vacate the award. The court refused to vacate because an essential element of arbitration is the parties' decision to accept final and binding arbitration. Where parties so agree, they necessarily have accepted the fact that the arbitrator's interpretation of the law and facts might be different from that of a court or themselves. The court held that the arbitrator's award will be binding on them except in the limited circumstances set out in UAA sections 12 or 13.³⁷² A court cannot even review a question of law on which the arbitrator's decision is wrong.³⁷³

In *State v. Thomas Construction Co.*,³⁷⁴ the court held that an award confirmed by a court has the same res judicata effect as any judgment.³⁷⁵ The State of Kansas asked for a dismissal without prejudice of what it characterized as a permissive counterclaim filed in an arbitration proceeding. The arbitrators granted the dismissal without prejudice and then made an award which stated that it was in full settlement of all claims submitted to arbitration. The award was confirmed.³⁷⁶ Later, the State filed a state court action to recover on the claims that were withdrawn. The trial court dismissed the State's claim on the ground that it was tantamount to a compulsory counterclaim and was precluded by the prior award.³⁷⁷ The appellate court reversed because the rules of civil procedure are not applicable to an arbitration proceeding in the absence of a mutual agreement to the contrary. Counterclaims are not compulsory in arbitration, and it was error for the trial court to dismiss the State's

368. *Id.*

369. *Id.* at 55-56.

370. 105 Idaho 36, 665 P.2d 1046 (1983).

371. *Id.* at ____ n.6, 665 P.2d at 1051 n.6.

372. *Id.*

373. *Id.* at ____, 665 P.2d at 1052 n.7.

374. 8 Kan. App. 2d 283, 655 P.2d 471 (1982).

375. *Id.* at ____, 655 P.2d at 471.

376. *Id.* at ____, 655 P.2d at 473.

377. *Id.* at ____, 655 P.2d at 473-474.

claim on that ground.³⁷⁸ The court decided that an award confirmed by a court is *res judicata* as to all matters actually submitted,³⁷⁹ but the parties are only precluded as to matters that were actually heard and covered by an award.

In *Foley Co. v. Grindsted Products*,³⁸⁰ the court decided that a court cannot substitute its judgment for that of the arbitrator on the merits of the dispute.³⁸¹ It held that a court cannot review an arbitration award *de novo* because to permit such a review would make arbitration a "dress rehearsal" for litigation rather than a less expensive and more efficient alternative to litigation.³⁸²

In *Goldberger v. Hofco, Inc.*,³⁸³ the court held that a party who relies on a confirmed award is bound by the terms of that award.³⁸⁴ Hofco filed a motion for summary judgment in a pending mechanic's lien action relying on a confirmed arbitration award. The trial court granted the motion and entered judgment for the amount of the award plus interest. The award expressly denied Hofco's right to interest and therefore conflicted with the trial court's decision.³⁸⁵ The appellate court held that the trial court was bound by the terms of the arbitration award and could not award Hofco interest when the arbitrators expressly denied it.³⁸⁶

In *Haskell v. Forest Land & Timber Co.*,³⁸⁷ Forest Land, on a judgment confirming an arbitration award, asked for interest from the date the original judgment was entered. The appellate court found that Forest Land was entitled to the statutory rate of interest, but that the interest should run only from the date that the award was confirmed by the highest court to which it was appealed. This result is necessary to avoid unfairness in forcing an appellant to assume the burden and expense of appealing an improper award, but at the same time also holding him liable for interest from the date of the original award.³⁸⁸

The decisions addressing the binding effect of awards have been uniform. In virtually all of the cases, an award was held binding on parties in the same way that the judgment of a court is binding. Courts usually reason that the strong public policy favoring arbitration requires such a result. A binding award is necessary to secure the benefits of arbitration because no one will

378. *Id.* at ____, 655 P.2d at 474.

379. *Id.* at ____, 655 P.2d at 475.

380. 233 Kan. 339, 662 P.2d 1254 (1983).

381. *Id.* at 348-49, 662 P.2d at 1262.

382. *Id.*

383. 422 So. 2d 898 (Fla. Dist. Ct. App. 1982).

384. *Id.* at 899.

385. *Id.*

386. *Id.* at 899-900.

387. 426 So. 2d 1251 (Fla. Dist. Ct. App. 1983).

388. *Id.* at 1253-54.

arbitrate unless courts accord proper respect to arbitrators' decisions.

D. *Reasons for Awards*

The UAA does not require arbitrators to give reasons for their awards.³⁸⁹ Courts likewise generally do not require arbitrators to justify their decisions.³⁹⁰ In no case has an arbitrator's award been vacated for failure to specify or give reasons for the award.

In *Hilltop Construction Inc. v. Lou Park Apartments*,³⁹¹ the court recognized that arbitrators do not need to present reasons for their decision.³⁹² Lou Park appealed from an award that was not itemized with respect to the various claims.³⁹³ The court refused to vacate the award because "[a]n arbitration award which awards a sum of money in satisfaction of various claims of the parties need not separately treat each claim or explain the arbitrators reasoning process."³⁹⁴ Although a trial court has the authority to order an arbitrator to clarify or explain his reasoning process, the exercise of that power is purely discretionary.³⁹⁵

VII. FEES AND EXPENSES

Under the UAA, the arbitrators' fees and expenses, along with other expenses incurred in the conduct of the litigation, shall be paid as provided in the award unless the arbitration agreement otherwise provides.³⁹⁶ Attorney's fees are specifically excluded from the list of expenses which may be awarded.³⁹⁷ The arbitrator is vested with considerable discretion to determine the assessment of costs where the arbitration agreement is silent on the matter.

Courts generally will confirm an award of costs when taxed pursuant to the arbitration agreement or when particularly described in the award.³⁹⁸ Although attorneys' fees incurred prior to and during arbitration are not recoverable,³⁹⁹ such expenses incurred in proceedings to confirm, modify, or correct an award have been held to be recoverable by some courts under UAA section

389. UAA § 12.

390. *Hilltop Constr. Inc. v. Lou Park Apartments*, 324 N.W.2d 236 (Minn. 1982).

391. *Id.*

392. *Id.* at 240.

393. *Id.* at 237.

394. *Id.* at 240.

395. *Id.*

396. UAA § 10.

397. *Id.*

398. *See Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, 665 P.2d 1046 (1983); *Mirabella v. Safeway Ins. Co.*, 114 Ill. App. 3d 680, 449 N.E.2d 258 (1983).

399. *Bingham County*, 105 Idaho at _____, 665 P.2d at 1052.

14.⁴⁰⁰ One court, however, has limited recoverable expenses to the court costs of such an action.⁴⁰¹

Special problems arise where the provision governing fees and expenses in the arbitration agreement is held invalid because it conflicts with particular statutes, especially those relating to uninsured motorist coverage in automobile insurance policies. At least one court has denied the claims of arbitrators to recover their fees from an insurer under those circumstances.⁴⁰² Another court has allowed an insured to recover costs from his insurer under nearly identical circumstances⁴⁰³ by classifying the insured's request as a motion to modify the award even though the award made no mention of costs and the grounds for modification fell outside those permitted by UAA section 13.⁴⁰⁴ The fact that an award of fees or expenses may be erroneous in a particular case will not necessarily cause the entire award to be invalid.⁴⁰⁵

In *Bingham County Commission v. Interstate Electric Co.*,⁴⁰⁶ the court looked to the plain meaning of UAA section 10⁴⁰⁷ in deciding that attorneys' fees could not be assessed in an arbitration award without the parties' consent.⁴⁰⁸ The arbitrator had awarded attorney's fees to IEC in addition to damages sustained because of a dispute with the county over a construction contract.⁴⁰⁹ The trial court vacated the attorneys' fee award,⁴¹⁰ and the appellate court affirmed because section 10 "militates against the power of an arbitrator to award attorney fees to one of the parties absent a contractual agreement to do so."⁴¹¹

Attorney's fees incurred while seeking confirmation, modification, or correction of an award may be recovered. UAA section 14 gives the trial court discretion to award the costs of an application to confirm, modify, or correct an award and of the proceedings which follow such an application. In *County of Clark v. Blanchard Construction Co.*,⁴¹² the court held attorneys' fees to be part of the costs recoverable on such an application, taxable in the discretion

400. *County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 653 P.2d 1217 (Nev. 1983).

401. *Heyman v. Vonelli*, 413 So. 2d 1254 (Fla. Dist. Ct. App. 1982).

402. *Mirabella v. Safeway Ins. Co.*, 114 Ill. App. 3d 680, 449 N.E.2d 258 (1983).

403. *American Indem. Co. v. Comeau*, 419 So. 2d 670 (Fla. Dist. Ct. App. 1982).

404. FLA. STAT. ANN. § 682.11 (West Supp. 1983).

405. *Saville Int'l, Inc. v. Galanti Group, Inc.*, 107 Ill. App. 3d 799, 438 N.E.2d 509 (1982).

406. 105 Idaho 36, 665 P.2d 1046 (1983).

407. IDAHO CODE § 7-910 (1979).

408. 105 Idaho at ____, 665 P.2d at 1052-53.

409. *Id.* at ____, 665 P.2d at 1048.

410. *Id.*

411. *Id.* at ____, 665 P.2d at 1052.

412. 98 Nev. 488, 653 P.2d 1217 (1982).

of the trial court. Blanchard and a subcontractor had sought an order confirming an arbitration award. They also sought attorney's fees even though the agreement to arbitrate and the award were silent on the subject. The trial court confirmed the award and ordered payment of attorney's fees. The appellate court held that UAA section 14⁴¹³ permits an award of attorney's fees incurred to have the basic award confirmed because those costs are distinguishable from an award of attorney's fees incurred to obtain the award.⁴¹⁴

A court combined the principles set out in the foregoing cases with some variations in deciding *Heyman v. Vonelli*.⁴¹⁵ Heyman sought to arbitrate a dispute involving the breach of a construction contract by Vonelli. Vonelli filed suit in circuit court to foreclose on a mechanic's lien involved in the same dispute. Heyman had the suit dismissed, and Vonelli then asserted the lien as a counterclaim to Heyman's demand for arbitration. Vonelli was successful on his counterclaim and was awarded costs by the arbitrator. The trial court confirmed this award and awarded Vonelli attorney's fees and costs incurred in the lien litigation.⁴¹⁶ The appellate court reversed the order granting additional fees and expenses because the only additional expenses that could be assessed by the trial court were the court costs incurred pursuant to confirming the award.⁴¹⁷ The court pointed out that recovery of attorney's fees was specifically excluded under the UAA.⁴¹⁸

An arbitration clause in an uninsured motorist provision which requires the insured to pay a portion of the arbitrators' fees and expenses is invalid⁴¹⁹ because it dilutes the mandatory uninsured motorist coverage required by state insurance laws.⁴²⁰ A court applying UAA section 10 may have a difficult time reaching an equitable result when arbitrators of uninsured motorist disputes fail to make an award of costs and the parties rely on such an invalid provision.⁴²¹ In *Mirabella v. Safeway Insurance Co.*,⁴²² two arbitrators sued an insurance company to recover their fees for settling an uninsured motorist coverage dispute between the company and its insured. The policy required the insured to pay part of the arbitrators' fees and expenses, and the arbitration award was silent as to costs. The trial court awarded \$400 to each plaintiff. The appellate court held that the arbitrators could not recover under the

413. See NEV. REV. STAT. § 38.165 (1979).

414. *Blanchard*, 98 Nev. at 492, 653 P.2d at 1220.

415. 413 So. 2d 1254 (Fla. Dist. Ct. App. 1982).

416. *Id.* at 1255.

417. *Id.* at 1256.

418. FLA. STAT. ANN. § 682.11 (West Supp. 1983).

419. See *American Indem. Co. v. Comeau*, 419 So. 2d 670 (Fla. Dist. Ct. App. 1982); *Nickla v. Industrial Fire & Casualty Ins. Co.*, 38 Ill. App. 3d 931, 349 N.E.2d 644 (1976).

420. See, e.g., *Nickla*, 38 Ill. App. 3d at 931, 349 N.E.2d at 647.

421. These provisions usually require each party to pay the costs of his chosen arbitrator and split the costs of the neutral arbitrator. *Id.*

422. 114 Ill. App. 3d 680, 449 N.E.2d 258 (1983).

UAA⁴²³ because the policy provision was invalid and the award made no mention of arbitrator's fees.⁴²⁴

In *American Indemnity Co. v. Comeau*, the court faced a similar issue.⁴²⁵ The insured rather than the arbitrators sought arbitration expenses. His arbitration award did not award him costs, and the insurance policy expense clause was invalid. The trial court assessed costs against the insurance company, and the appellate court affirmed. Although the insured sought an award of fees by a motion to tax costs,⁴²⁶ the appellate court treated the insured's request for costs as an application to modify the arbitrator's award.⁴²⁷ The court relied on UAA section 14⁴²⁸ to support its decision to award costs to the insured and indicated that costs may always be assessed against an insurance company in arbitration concerning uninsured motorist coverage.⁴²⁹

When fees are erroneously assessed, the rest of the award is still valid. In *Saville International, Inc. v. Galanti Group*,⁴³⁰ the arbitrators ordered the parties to share arbitration fees and expenses. The trial court vacated the assessment of arbitrator's costs. The appellate court affirmed because the arbitrators exceeded their authority in allowing themselves compensation, but it rejected the argument that the entire award must be vacated under such circumstances.⁴³¹

Courts which apply the plain meaning rule to UAA section 10 generally produce satisfactory results. That section is explicit in excluding attorney's fees from recoverable costs and in describing the circumstances under which other costs may be assessed. The uninsured motorist cases present a unique situation because the arbitrators in those cases omitted any reference to costs in their awards in reliance upon the express provisions of the policy. Arbitrators have failed to recover their costs because courts charge them with notice that the policy's payment provision is void.⁴³² Cases in which the insured seeks to have such costs assessed against the insurer are much more difficult. If the court leaves the parties as it finds them, its action can be justified as an application of the plain meaning of UAA section 10. Some courts have refused to so apply section 10 because that would effectively revive the invalid provision

423. ILL. ANN. STAT. ch. 10, § 110 (Smith-Hurd Supp. 1983-84).

424. *Mirabella*, 114 Ill. App. 3d at 683, 449 N.E.2d at 260.

425. 419 So. 2d 670 (Fla. Dist. Ct. App. 1982).

426. *Id.*

427. *Id.* at 672.

428. FLA. STAT. ANN. § 682.15 (West Supp. 1983).

429. *Id.* at 671.

430. 107 Ill. App. 3d 799, 438 N.E.2d 509 (1982).

431. "[W]here arbitrators have exceeded their authority in one respect such as allowance of fees, their decision is unenforceable only to the extent that such authority was exceeded." *Id.* at 801, 438 N.E.2d at 511 (citing *Board of Educ. v. Champaign Educ. Ass'n*, 15 Ill. App. 3d 335, 340, 304 N.E.2d 138, 142 (1973)).

432. Such clauses have been void in Illinois since 1976. See *Nickla v. Industrial Fire & Casualty Ins. Co.*, 38 Ill. App. 3d 927, 349 N.E.2d 644 (1976).

in the insurance policy and diminish the uninsured motorist protection required by law. Such courts should rest their decisions on the ground that the insurer should be held responsible for placing invalid provisions in its policies instead of inserting language into UAA section 10 which substantially alters its intent and effect. This achieves the same result and is more defensible.

Unlike section 10, section 14 is ambiguous about whether attorney's fees are recoverable when incurred in proceedings to confirm, modify, or correct an award. There is a good argument that attorney's fees were intended to be taxable in proceedings under section 14 because section 10 specifically excludes attorney's fees from recoverable costs and section 14 does not.

VIII. CONFIRMATION AND VACATION OF AWARDS

A. Confirmation

The UAA permits confirmation⁴³³ or vacation⁴³⁴ of arbitration awards. A motion to vacate must be made within ninety days of the award unless based on fraud, corruption, or other undue means.⁴³⁵ Some courts impose the ninety-day limit on defenses to a confirmation proceeding;⁴³⁶ others do not.⁴³⁷ There is no time limit on raising nonstatutory defenses.⁴³⁸ The ninety-day period does not begin to run until the party opposing the award receives constructive notice of the grounds for vacation.⁴³⁹

Substantively, courts narrowly construe both grounds to vacate and defenses to confirmation. Arbitrators can exceed their powers when ruling on subjects not presented for arbitration, but the party opposing the award must clearly prove the abuse. This can be difficult because parties have no right to demand clarification of arbitration awards.⁴⁴⁰ Partiality is also difficult to prove because minor prior contact with a party⁴⁴¹ or a party's clients⁴⁴² are insufficient grounds for vacation. A more effective way of challenging an arbitration award is to challenge the arbitrability of the dispute. An arbitrability

433. UAA § 11.

434. UAA § 12.

435. UAA § 12(b).

436. *E.g.*, *T & M Properties v. ZVFK Architects & Planners*, 661 P.2d 1040, 1042 (Wyo. 1983).

437. *E.g.*, *Arrow Overall Supply Co. v. Peloquin Enters.*, 414 Mich. 95, 101, 323 N.W.2d 1, 3 (1982).

438. *McDonald v. Allstate Ins. Co.*, 408 So. 2d 580 (Fla. Dist. Ct. App. 1981).

439. *T & M Properties v. ZVFK Architects & Planners*, 661 P.2d 1040, 1042 (Wyo. 1983).

440. *Hilltop Constr., Inc. v. Lou Park Apartments*, 324 N.W.2d 236, 237 (Minn. 1982).

441. *Foley Co. v. Grinsted Prods., Inc.*, 233 Kan. 339, 343-44, 662 P.2d 1254, 1258 (1983).

442. *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1144 (10th Cir.), *cert. denied*, 459 U.S. 838 (1982).

argument is more favored because it directly affects the jurisdiction of both courts and arbitrators.⁴⁴³ Nonstatutory grounds for vacation are also allowed.⁴⁴⁴ Errors of law or fact committed by an arbitrator in good faith are insufficient grounds for vacating an award unless they demonstrate a completely irrational reading of the contract.⁴⁴⁵

In *Arrow Overall Supply Co. v. Peloquin Enterprises*,⁴⁴⁶ the trial court refused to let defendant deny the validity of the arbitration agreement when the defense was raised for the first time more than ninety days after the award was delivered to him. The Michigan Supreme Court reversed because it decided that the ninety-day rule does not apply to defenses to a confirmation proceeding.⁴⁴⁷ Defendant's arbitrability defense was a direct attack on the jurisdiction of both the court and the arbitrators, so the court reasoned that an award cannot be enforced unless the court first determines that it has jurisdiction to act.⁴⁴⁸ Therefore, the trial court itself should have decided the arbitrability issue, regardless of the statutory time limits.⁴⁴⁹

A different decision on a similar issue was reached in *T & M Properties v. ZVFK Architects & Planners*.⁴⁵⁰ A party raised the defense that the arbitrators had exceeded their powers by deciding an issue not submitted to arbitration. This defense was raised after more than ninety days had elapsed. The appellate court decided that a motion to vacate and a motion raising defenses to confirmation should have identical time limits because they both essentially raise the same claims and because dilatory tactics are inappropriate for arbitration.⁴⁵¹ The court noted that the ninety-day requirement might be extended if a party did not have constructive knowledge of the grounds for a valid defense at the time of delivery of the award to him.⁴⁵²

In *McDonald v. Allstate Ins. Co.*,⁴⁵³ the defendant argued that the claim had been satisfied before arbitration. This defense was raised after the ninety day limit. The appellate court held that an arbitration award cannot be summarily confirmed after the ninety-day period expires because nonstatutory defenses remain valid.⁴⁵⁴ The defense of satisfaction and accord remains valid

443. *Arrow Overall Supply Co. v. Peloquin Enters.*, 414 Mich. 95, 98, 323 N.W.2d 1, 2 (1982).

444. *McDonald v. Allstate Ins. Co.*, 408 So. 2d 580, 582 (Fla. Dist. Ct. App. 1981).

445. *Foley Co. v. Grinsted Prods., Inc.*, 233 Kan. 339, 347, 662 P.2d 1254, 1262 (1983) (quoting unreported trial court opinion with approval).

446. 414 Mich. 95, 323 N.W.2d 1 (1982).

447. *Id.* at 101, 323 N.W.2d at 3.

448. *Id.* at 98, 323 N.W.2d at 2.

449. *Id.*

450. 661 P.2d 1040 (Wyo. 1983).

451. *Id.* at 1042.

452. *Id.* at 1044.

453. 408 So. 2d 580 (Fla. Dist. Ct. App. 1981).

454. *Id.*

beyond the time limit because it is extrinsic to the arbitration process.⁴⁵⁵ This was true in *McDonald* even though the defense obliquely implicated the statutory ground that the arbitrators had exceeded their powers by deciding an issue not submitted to arbitration.⁴⁵⁶

In *Bernard v. Hemisphere Hotel Management, Inc.*,⁴⁵⁷ possible grounds for disqualification of the arbitration chairman became apparent during the hearing. Before the American Arbitration Association could interpret its rules on the subject, the trial court disqualified the arbitrator and ordered that the hearing proceed with the remaining arbitrators. The appellate court reversed because the trial judge improperly interpreted arbitration rules during the arbitration hearing.⁴⁵⁸ The court held that a trial court must accept the association's interpretation of its rules while arbitration is proceeding. The trial court is not bound by the association's decision as to bias, but it only has the power to grant post-award relief.⁴⁵⁹

In *Hilltop Construction Inc. v. Lou Park Apartments*,⁴⁶⁰ the arbitrators awarded damages which were not itemized. An ambiguity in the award permitted the inference that the panel had ruled on a contract that was not involved in the dispute. The party opposing the award asked the trial court to compel the arbitrators to clarify the award, but the motion was denied.⁴⁶¹ The appellate court affirmed because parties are not entitled to clarification or itemization of an award as a matter of right.⁴⁶² The trial judge has the discretionary authority to require arbitrators to clarify awards,⁴⁶³ and the ambiguity in the award was insufficient to sustain the burden of clearly showing an abuse of discretion by the trial judge.⁴⁶⁴

In *Foley Co. v. Grinsted Products, Inc.*,⁴⁶⁵ an arbitrator had engaged in minor business dealings with a party five years before the hearing. Another arbitrator assumed the duties as chairman of the panel when the possible bias was discovered. The appellate court confirmed the award because minimum prior contact between an arbitrator and a party does not amount to evident partiality.⁴⁶⁶ In the court's view, even errors of law and fact committed by the

455. *Id.* at 582.

456. *Id.*

457. 16 Mass. App. 261, 450 N.E.2d 1084, *appeal denied*, 390 Mass. 1102, 454 N.E.2d 1276 (1983).

458. *Id.* at —, 450 N.E.2d at 1086.

459. *Id.*

460. 324 N.W.2d 236 (Minn. 1982).

461. The Minnesota Supreme Court affirmed this part of the decision on the ground that the judge did not abuse his discretion when he denied the request to seek clarification from the arbitrators. *Id.* at 240.

462. *Id.* at 240.

463. *Id.* at 236.

464. *Id.* at 239.

465. 233 Kan. 339, 662 P.2d 1254 (1983).

466. *Id.* at 345-46, 662 P.2d at 1258.

arbitrators in good faith are insufficient grounds for vacation unless they demonstrate a completely irrational reading of the contract.⁴⁶⁷

In *Loomis, Inc. v. Cudahy*,⁴⁶⁸ Cudahy challenged the arbitrability of the dispute for the first time after the award had been confirmed. She argued that the arbitration proceeding was invalid because the dispute, with one exception, involved a complex series of contracts and parties not subject to the arbitration agreement and that her rights were impaired by arbitration of only one such contract. The court confirmed the award. It held that her defense could not be timely raised for the first time in a motion to reconsider confirmation.⁴⁶⁹ The court decided that lack of arbitrability is a defense to confirmation only if the contract is void, and the court will not review the merits of the controversy to determine this threshold question.⁴⁷⁰

Courts are extremely reluctant to overturn arbitrators' awards in a confirmation proceeding. Courts do not want arbitration to be a mere rehearsal for litigation.⁴⁷¹ To avoid this result, courts should determine the timeliness of motions raising defenses to confirmation by the same time limits as motions to vacate,⁴⁷² and limit the initial inquiry into arbitrability to that threshold question.⁴⁷³

B. Vacation

After an arbitrator has issued an award, a dissatisfied party may move to set it aside. Five specific grounds in the UAA warrant vacation of an award.⁴⁷⁴

467. *Id.* at 347, 662 P.2d at 1261 (quoting unreported trial court opinion with approval).

468. 104 Idaho 106, 656 P.2d 1359 (1982).

469. *Id.* at ____, 656 P.2d at 1360.

470. *Id.* at ____, 656 P.2d at 1362. Cudahy originally raised the defense of lack of arbitrability with the trial judge. The trial court briefly examined the issue because neither party had access to the recently-enacted arbitration rules, and it declared the dispute arbitrable. The dissent argued that a full opportunity to litigate the question whether the contract is void is necessary to the determination of arbitrability because a close scrutiny of the merits is required to resolve the issue. *Id.* at ____, 656 P.2d at 1367. It also agreed with Cudahy that arbitration of only one of a series of related contracts deprived her of her rights. *Id.* at ____, 656 P.2d at 1365.

471. *Ormsbee Dev. v. Grace*, 668 F.2d 1140, 1153 (10th Cir.), *cert. denied*, 459 U.S. 838 (1982).

472. *T & M Properties v. ZVFK Architects & Planners*, 661 P.2d 1040, 1042 (Wyo. 1983).

473. *Loomis, Inc. v. Cudahy*, 104 Idaho 106, ____, 656 P.2d 1359, 1362 (1983).

474. UAA § 12(a) states:

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 rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused

Unless a motion to vacate is based upon specified statutory grounds, courts will not consider it. For example, fraud is a recognized ground for vacation,⁴⁷⁵ but failure of an arbitrator to take an oath is not.⁴⁷⁶ The UAA mandates judicial confirmation of the award unless specified statutory grounds for vacation or modification are found.⁴⁷⁷

1. Exceeding the Arbitrator's Authority

Under the UAA, a court may vacate an arbitration award on the ground that the arbitrator exceeded his powers.⁴⁷⁸ Courts follow several principles in determining whether an arbitrator has exceeded his powers. The agreement determines the scope of an arbitrator's authority if the agreement does not restrict the power of the arbitrator and the parties agree to abide absolutely his decision. A court may not override the agreement in those circumstances. An arbitrator can exceed his powers by considering issues not submitted to him by the parties or issues beyond the scope of the agreement. Partial vacation is sometimes required because an arbitrator's decision can only be vacated to the extent that his authority was exceeded. A court must accept an arbitrator's substantive interpretation of an agreement or contract even though the court's interpretation differs from that of the arbitrator unless the award indicates that it is tainted by dishonesty or based on a completely irrational interpretation of the agreement. An award must not offend public policy or require a result that contravenes an express statutory provision, but it is valid if there is any rational basis for concluding that the award is lawful. An award may be vacated where the arbitrator commits an egregious mistake of law.

In *Red Carpet Armory Realty v. Golden West Realty*,⁴⁷⁹ the court held that it may not override an arbitration agreement which does not restrict the power of the arbitrator if the parties agree to abide absolutely by his decision.⁴⁸⁰ The arbitration panel awarded Golden West a percentage of a sales

to postpone the hearing upon sufficient cause being shown therefor 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 proceeding 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.

475. UAA § 12(a)(1) allows a court to vacate an award "procured by corruption, fraud or other undue means."

476. See, e.g., *Salter v. Farner*, 653 P.2d 413 (Colo. 1982).

477. *Id.* at 414.

478. UAA § 12(a)(3).

479. 644 P.2d 93 (Colo. Ct. App. 1982).

480. *Id.* at 93-94.

commission received by Red Carpet, but the award was less than the amount claimed. Red Carpet argued that the panel exceeded its powers because it should have awarded either the entire commission or nothing at all.⁴⁸¹ The court held that Red Carpet was bound by the panel's decision⁴⁸² because the parties had agreed to give the arbitrators blanket authority to decide the dispute.⁴⁸³

In *Watson v. Duval County School Board*,⁴⁸⁴ the court held that an arbitrator cannot award relief that the parties have not requested.⁴⁸⁵ Watson demanded arbitration of a dispute concerning the school's refusal to remove two memorandums in her personnel file and reinstate her as a teacher's aid. The arbitrator ordered Watson's reinstatement and the removal of four other documents in addition to the two challenged memos.⁴⁸⁶ The appellate court affirmed the trial court's vacation of the award because the arbitrator exceeded his powers in removing the unchallenged documents. The court reasoned that the board was not on notice that the disputed material included the four documents and therefore did not have an opportunity to object to their removal. Vacation of the reinstatement portion of the award also was proper because reinstatement was based on the arbitrator's conclusion that all six letters contributed to the board's refusal to renew her contract.⁴⁸⁷

In *Bingham County Commission v. Interstate Electric Co. (IEC)*,⁴⁸⁸ the court affirmed the principle that an arbitrator exceeds his power only when he considers issues not submitted to him by the parties or beyond the scope of the parties contract.⁴⁸⁹ IEC subcontracted with the county to provide electrical work on a construction project. Arbitration resulted when the county denied IEC's claim for additional compensation to cover cost overruns due to delay. The arbitrator awarded damages, fees, and expenses to IEC.⁴⁹⁰ The court affirmed and vacated parts of the award. It found that the arbitrator did not exceed his powers in awarding damages and expenses because the contract between the parties contemplated a damage award against the county if it was responsible for the delay. The court ruled that the arbitrator did exceed his powers in awarding attorney's fees because there was no agreement between the parties to award fees.⁴⁹¹

481. *Id.* at 93.

482. *Id.* at 94.

483. The arbitration agreement stated that both parties would "abide absolutely by the award and findings of the arbitrators." *Id.* at 94.

484. 408 So. 2d 1053 (Fla. Dist. Ct. App. 1981).

485. *Id.* at 1056.

486. *Id.* at 1053-54.

487. *Id.* at 1055-56.

488. 105 Idaho 36, 665 P.2d 1046 (1983).

489. *Id.* at _____, 665 P.2d at 1052.

490. *Id.* at _____, 665 P.2d at 1047-48.

491. *Id.* at _____, 665 P.2d at 1052.

In *T & M Properties v. ZVFK Architects and Planners*,⁴⁹² the court held that a motion to vacate an award because the arbitrator exceeded his authority must be timely filed.⁴⁹³ The award was based on three contracts, two of which involved ZVFK and Miracle Enterprises. T & M elected not to attend the arbitration hearing, but it later claimed that the demand for arbitration failed to put it on notice that Miracle would be involved in the dispute. It argued that the arbitrator exceeded his authority in granting an award based on the Miracle contract. The court decided that T & M's failure to move to vacate the award within ninety days precluded vacation of the award because the award was sufficient to put T & M on notice that the arbitrator had ruled on the Miracle contract.⁴⁹⁴

In *Saville International, Inc. v. Galanti Group, Inc.*,⁴⁹⁵ the court affirmed a partial vacation of an award on the ground that an arbitrator's award can be vacated only to the extent that it exceeds the arbitrator's authority.⁴⁹⁶ The award directed payment of damages, as permitted by the agreement, and ordered that fees and expenses of the AAA be paid equally by each party. Because the agreement did not authorize the arbitrator to award fees, the court vacated only that portion of the award addressing payment of fees.⁴⁹⁷

Two related principles governed the decision of the court not to vacate an award in *Foley Co. v. Grindsted Products, Inc.*⁴⁹⁸ First, a court must accept an arbitrator's substantive interpretation of an agreement or contract even though the court's interpretation differs from that of the arbitrator. Second, a court may not vacate an arbitrator's award unless it is tainted by dishonesty or based on a completely irrational interpretation of the contract.⁴⁹⁹ The controversy involved amounts allegedly owed to a subcontractor resulting from change orders and interference by the general contractor. The arbitrators awarded the subcontractor \$247,980. The general contractor argued that the arbitrators exceeded their powers by entering an excessive award, by entering an award not supported by the evidence, and by granting pre-decision and post-decision interest.⁵⁰⁰ The court refused to vacate the award because the general contractor offered no credible reason to vacate the award and was simply asking the court to substitute its interpretation of the contract for that of the arbitrator.⁵⁰¹

492. 661 P.2d 1040 (Wyo. 1983).

493. *Id.* at 1044-45.

494. *Id.* at 1044.

495. 107 Ill. App. 3d 799, 438 N.E.2d 509 (1982).

496. *Id.* at 801, 438 N.E.2d at 511.

497. *Id.*

498. 233 Kan. 339, 662 P.2d 1254 (1983).

499. *Id.* at 347, 662 P.2d at 1261-62.

500. *Id.* at 347, 662 P.2d at 1261.

501. *Id.* at 348, 662 P.2d at 1262.

In *Starr v. Abrams Construction Co.*,⁵⁰² the court's decision was based on the principle that an award is valid if there is a rational basis for enforcing it and it does not violate statutory provisions or public policy.⁵⁰³ Abrams contracted with Starr to construct a nursing home, and the parties orally agreed that Starr would pay Abrams the costs of completing construction in excess of the contract price. The trial court held that the arbitrators did not exceed their authority in awarding Abrams \$66,856 on the oral agreement. Starr moved to vacate the award on the theory that the arbitrators had exceeded their powers by enforcing the oral agreement, thereby condoning illegal conduct and violating public policy on the issue of non-disclosure.⁵⁰⁴ The court disagreed and presented four reasons why a rational basis existed for enforcing the award. First, neither the oral agreement nor its performance were per se illegal. Second, Starr was also a party to the allegedly fraudulent statement. Third, the claim appeared to represent only actual extra costs of construction. Fourth, the agreement in substance did not significantly undermine FHA mortgage insurance policies and practices.⁵⁰⁵

In *Detroit Automobile Inter-Insurance Exchange v. Gavin*,⁵⁰⁶ the court announced the principle that an arbitrator exceeds his authority by acting in manifest disregard of the law.⁵⁰⁷ Two cases were consolidated in the opinion. In both cases, the defendants were injured in automobile accidents involving uninsured motorists. Each defendant carried several insurance policies on his vehicles issued by the plaintiff, and each policy contained a standard \$20,000 limit of liability. The defendants asked the arbitrators to stack the policies to increase the amount recoverable even though the policies contained a clear anti-stacking clause.⁵⁰⁸ The arbitrators granted awards in excess of \$20,000 to each defendant based on the stacking theory.⁵⁰⁹ The court held that by disregarding the "anti-stacking" provision of the contracts, the arbitrators committed errors of law so substantial that, but for such errors, the awards would have been substantially different.⁵¹⁰

*Ragin v. Royal Globe Insurance Co.*⁵¹¹ similarly held that an award may be vacated where relief has been granted under an egregious mistake of law.⁵¹² The arbitration panel allowed an award under an uninsured motorist provision of Ragin's policy even though the driver of the other vehicle was insured and

502. 16 Mass. App. Ct. 74, 448 N.E.2d 1311 (1983).

503. *Id.* at ____, 448 N.E.2d at 1314.

504. *Id.* at ____, 448 N.E.2d at 1312-14.

505. *Id.* at ____, 448 N.E.2d at 1314-15.

506. 416 Mich. 407, 331 N.W.2d 418 (1982).

507. *Id.* at 445, 331 N.W.2d 430.

508. *Id.* at 412-15, 331 N.W.2d at 421-22.

509. *Id.* at 411, 331 N.W.2d at 422.

510. *Id.* at 451, 331 N.W.2d at 435.

511. 461 A.2d 856 (Pa. Super. Ct. 1983).

512. *Id.* at 858.

Ragin recovered under that policy.⁵¹³ The court held that the arbitrators' conclusion that an underinsured driver was equivalent to an uninsured driver constituted an egregious mistake of law.⁵¹⁴

2. Bias or Misconduct

An award may be vacated when there is evidence of arbitrator bias or partiality to a party or arbitrator misconduct that prejudiced the rights of a party.⁵¹⁵ It is difficult to get an award set aside on the ground of bias because most courts strictly interpret this provision. Several principles guide the courts in this area. First, a party to an arbitration hearing is entitled to a fair and impartial hearing. Second, courts favor the finality of the arbitration process and require a very strong evidentiary showing of arbitrator bias or prejudice before an award will be vacated. Third, courts view an arbitrator's status in the arbitration proceeding as practically equivalent to a judge's status in a trial. Fourth, courts rely on the principle that minimal contacts between an arbitrator and a party are not sufficient to establish partiality or prejudice.

In *Ronwin v. Piper, Jaffray & Hopwood, Inc.*⁵¹⁶ the court refused to vacate an award because the party failed to present clear and convincing evidence that the arbitrators were biased.⁵¹⁷ Ronwin, an investor, attributed his substantial losses in the commodities market to Piper, a commodities broker. The arbitrators denied Ronwin's claim, so he moved to vacate the award. Ronwin argued that the arbitrators showed their partiality to the other party by "leaping" to the party's aid during questioning and by interfering with Ronwin's cross-examination of a witness.⁵¹⁸ The court held that these events were merely demonstrations of consideration and attentiveness to both parties.⁵¹⁹

In *Saville International, Inc. v. Galanti Group, Inc.*,⁵²⁰ the court refused to vacate an award because no arbitrator was shown to have a direct interest in the outcome of the proceedings.⁵²¹ The arbitration panel entered an award for the plaintiff, and the trial court confirmed the award.⁵²² Defendant asked that the award be vacated because the arbitrators were not impartial.⁵²³ His evidence of partiality consisted of an allegedly leading question asked by an

513. *Id.* at 857.

514. *Id.* at 858.

515. UAA § 12(a)(2).

516. 113 Ill. App. 3d 687, 447 N.E.2d 954 (1983).

517. *Id.* at 692-93, 447 N.E.2d at 958.

518. *Id.*

519. *Id.*

520. 107 Ill. App. 3d 799, 438 N.E.2d 509 (1982).

521. *Id.* at 800, 438 N.E.2d at 511.

522. *Id.* at 799-803, 438 N.E.2d at 510-13.

523. The motion was brought under ILL. REV. STAT. ch. 10, § 12 (1981), which is identical to UAA § 12(a).

arbitrator, a comment by the arbitrator about payment of arbitration fees, and an allegedly improper discussion between the arbitrator and the plaintiff.⁵²⁴ The appellate court refused to vacate the award because it decided that an arbitrator, like a trial judge, should have the right to ask leading questions if they are necessary to obtain the truth or clarify the issues. Defendant's examples of partiality were not strong and convincing evidence of prejudice or bias,⁵²⁵ so the court concluded that the defendant had received a fair and impartial arbitration hearing.⁵²⁶

The court held in *Foley Co. v. Grindsted Products, Inc.*⁵²⁷ that minimal prior contact between a neutral arbitrator and a party was not sufficient evidence of partiality to support vacation.⁵²⁸ The arbitration panel entered an award in Foley's favor, and the court refused to vacate it for two reasons. First, it would be unreasonable to infer bias on the arbitrator's part from the minor previous business relationship that the defendant proved.⁵²⁹ Second, the contract required each arbitrator to have expertise in mechanical contracting, the field of the dispute. Because this requirement limited the number of individuals in the community who could serve as arbitrators, the court held that minimal contacts between the arbitrator and the parties were to be anticipated.⁵³⁰

In *Commonwealth v. Holt Hauling & Warehousing Systems, Inc.*,⁵³¹ the court held that an award was properly vacated because the arbitrator was previously involved with one of the parties.⁵³² The Pennsylvania Liquor Control Board and Holt had executed a contract that obligated Holt to perform certain services for the Board. A dispute was submitted to an arbitrator, the deputy attorney general, who found in the Board's favor. Holt sought to have the award vacated on partiality grounds because the arbitrator, as deputy attorney general, had approved the contract in his capacity as counsel for the Board.⁵³³ The court decided that the award was properly vacated because a party is entitled to a full and fair hearing conducted by an arbitrator not a party to the proceeding.⁵³⁴

A party must present clear and convincing evidence of bias before a court

524. 107 Ill. App. 3d at 801-02, 438 N.E.2d at 511-12.

525. *Id.* at 801-03, 438 N.E.2d at 512-13.

526. *Id.* at 803, 438 N.E.2d at 513.

527. 233 Kan. 339, 662 P.2d 1254 (1983).

528. *Id.* at 346, 662 P.2d at 1259-60.

529. KAN. STAT. ANN. § 5-412 (1982) is identical to UAA § 12.

530. 233 Kan. at 344, 662 P.2d at 1259.

531. 64 Pa. Commw. 481, 440 A.2d 707 (1982).

532. *Id.* at _____, 440 A.2d at 708.

533. PA. STAT. ANN. tit. 5, § 170(b) (Purdon 1963), provides that, "The court shall make an order vacating the award upon the application of any party to the arbitration . . . where there was evident partiality or corruption on the part of the arbitrators, or any of them."

534. 64 Pa. Commw. at _____, 440 A.2d at 708.

will vacate an award on the basis of partiality or prejudice.⁵³⁵ A court will be reluctant to vacate an award unless presented with direct and definite evidence that a party was denied a full and impartial arbitration hearing.

3. Fraud

Fraud is a recognized ground for vacation of an award under the UAA.⁵³⁶ Courts have required that the fraud be established by clear and convincing evidence.

In *Foley Co. v. Grindsted Products, Inc.*,⁵³⁷ the court held that an alleged ex parte communication by one of the parties to the arbitrators was not sufficient evidence of fraud to support vacation of the award. The defendant alleged that plaintiff sent a letter to the arbitrators on the day the arbitrators were to discuss the evidence. Defendant argued that the letter was an ex parte communication that influenced that arbitrators to decide in plaintiff's favor and that the award was therefore procured by fraud, corruption, and other undue means.⁵³⁸ The court found that the evidence did not demonstrate that the letter affected the arbitrators' decision.⁵³⁹ The record disclosed that the arbitrators did not even read the letter, so the court refused to vacate the award on grounds of fraud.⁵⁴⁰

4. Other Grounds

The UAA requires judicial confirmation of an award unless specified statutory grounds for vacation or modification are found. In *Salter v. Farner*,⁵⁴¹ the court held that the failure of the arbitrators to take an oath before commencing their deliberations is not a ground upon which an award can be vacated.⁵⁴² The arbitrators were not required by Colorado law or the arbitration agreement to take an oath.⁵⁴³ The court decided that the award could not be vacated because the UAA requires courts to confirm arbitration awards unless specified statutory grounds for vacation or modification are found.⁵⁴⁴

IX. APPEALS

UAA section 19 specifies the conditions under which appeals from court

535. *E.g., Saville*, 107 Ill. App. 3d at 800, 438 N.E.2d at 511.

536. UAA § 12(a)(1).

537. 233 Kan. 339, 662 P.2d 1254 (1983).

538. *Id.* at 346, 662 P.2d at 1261.

539. *Id.* at 346, 662 P.2d at 1260-61.

540. *Id.* at 346, 662 P.2d at 1261.

541. 653 P.2d 413 (Colo. 1982).

542. 653 P.2d at 414.

543. *See* COLO. REV. STAT. §§ 13-22-201 *et seq.* (1973).

544. 653 P.2d at 414.

orders and judgments may be brought.⁵⁴⁵ Courts follow several general rules to determine the appealability of lower court orders. When arbitration is conducted pursuant to a statute, a court order confirming an arbitration award is appealable.⁵⁴⁶ So is an order granting a petition to enforce the arbitrating agreement.⁵⁴⁷ In at least one case, however, an appeal from a trial court order compelling arbitration was held premature because the order from which the appeal was taken was not final.⁵⁴⁸ A party appealing from an arbitration award is not required to demonstrate that the appeal is taken in good faith.⁵⁴⁹

In Florida, the common law writ of certiorari is an appropriate method for review of an order denying a motion to compel arbitration where the right to arbitration exists.⁵⁵⁰ The rationale is that forcing a party to wait until a final judgment is entered to appeal the order denying arbitration is an inadequate remedy.⁵⁵¹ If the trial judge denies a motion to compel arbitration without prejudice in order to study the complaint and answer, a petition for writ of certiorari is premature and must be denied.⁵⁵²

In *Hiller v. Allstate Insurance Co.*,⁵⁵³ the court held that a court order

545. Under UAA § 19(a), an appeal may be taken from: (1) an order denying an application to compel arbitration 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 the Act. Section 19(b) provides that appeals are to be taken in the manner and to the same extent as from orders or judgments in civil actions.

546. *Hiller v. Allstate Ins. Co.*, 300 Pa. Super. 149, ____, 446 A.2d 273, 274 (1982); 42 PA. CONS. STAT. ANN. § 7320 (Purdon 1982).

547. *Brennan v. General Accident Fire & Life Assurance Corp.*, 307 Pa. Super. 288, ____, 453 A.2d 356, 357 (1982) (citing *Wilson v. Keystone Ins. Co.*, 289 Pa. Super. 101, 432 A.2d 1071 (1981)).

548. *Frontier Materials, Inc. v. City of Boulder*, 663 P.2d 1065, 1066 (Colo. Ct. App. 1983); COLO. REV. STAT. §§ 13-22-201 *et. seq.* (Supp. 1982).

549. *Belsky v. Rutenberg*, 297 Pa. Super. 397, ____, ____, 443 A.2d 1181, 1182 (1983) (citing *Dickerson v. Hudson*, 223 Pa. Super. 415, 302 A.2d 444, (1973)). The *Belsky* case involved an interpretation of Rule 180, VII (A) (1) of the Arbitration Rules of Philadelphia County rather than Pennsylvania's statutory version of the U.A.A., 42 PA. CONS. STAT. ANN. § 7301 (Purdon 1982). See *Belsky v. Rutenberg*, 297 Pa. Super. at ____, 443 A.2d at 1182 n.1. The *Dickerson* case involved a statutory predecessor to Pennsylvania's current version of the U.A.A.

550. *Lipton Professional Soccer, Inc. v. Mijatovic*, 416 So. 2d 1236, 1236 (Fla. Dist. Ct. App. 1982); *Paine, Webber, Jackson & Curtis v. Lucas*, 411 So. 2d 1369, 1371 (Fla. Dist. Ct. App. 1982).

551. *Lucas*, 411 So. 2d at 1370.

552. *Calloway Homes, Inc. v. Smiley*, 422 So. 2d 49, 50 (Fla. Dist. Ct. App. 1982).

553. *Hiller v. Allstate Ins. Co.*, 300 Pa. Super. 149, 446 A.2d 273 (1982); 42 PA. CONS. STAT. ANN. § 7320 (Purdon 1982).

confirming an arbitration award is appealable where arbitration is conducted pursuant to statute.⁵⁵⁴ Hiller appealed from an order denying his petition to confirm an arbitration award. Arbitration was required by the uninsured motorist clause in his automobile insurance policy. The court held that appealability of an order depends on the type of arbitration involved. The court found that the arbitration clause in the policy provided for common law arbitration. Therefore, the trial court order denying appellant's petition to confirm the arbitration award was not appealable because the appellant was not out of court and because there was no statute or rule making the order appealable.⁵⁵⁵

In *Frontier Materials, Inc. v. City of Boulder*,⁵⁵⁶ an appeal from a trial court order compelling arbitration was deemed premature because the order was not final.⁵⁵⁷ The court determined that a court order compelling parties to arbitrate is not one of the specified orders from which an appeal may be taken under UAA section 19. Therefore, defendant's appeal was dismissed without prejudice.⁵⁵⁸

In *Belsky v. Rutenberg*,⁵⁵⁹ the court held that a party appealing from an arbitration award is not required to demonstrate that the appeal is taken in good faith.⁵⁶⁰ *Belsky* involved an appeal from a lower court order which quashed defendants' appeal from an adverse arbitration award rendered at a hearing which they did not attend. The lower court denied defendants' appeal on the ground that the appeal was not taken in good faith.⁵⁶¹ The appellate court reversed because the lower court did not have the authority to inquire into the good faith of the defendants' appeal.⁵⁶²

Lipton Professional Soccer, Inc. v. Mijatovic,⁵⁶³ held that the common law writ of certiorari is an appropriate procedural device to obtain review of an order denying a motion to compel arbitration.⁵⁶⁴ The appellate court decided that an employment contract between the parties explicitly required binding arbitration of disputes arising under the contract. Consequently, Lip-

554. *Hiller*, 300 Pa. Super. at ____, 446 A.2d at 274.

555. *Id.* at ____, 446 A.2d at 274 (citing *Capezio & Things, Inc. v. Wynnewood Meredith Corp.*, 455 Pa. 84, 314 A.2d 20 (1974); *P. Agnes, Inc. v. Philadelphia Police Home Ass'n*, 439 Pa. 448, 266 A.2d 696, (1970)).

556. *Frontier Materials, Inc. v. City of Boulder*, 663 P.2d 1065, 1066 (Colo. Ct. App. 1983).

557. COLO. REV. STAT. §§ 13-22-201 *et seq.* (Supp. 1982).

558. 663 P.2d at 1066.

559. *Belsky v. Rutenberg*, 297 Pa. Super. 397, 443 A.2d 1181 (1983).

560. *Id.* at ____, 443 A.2d at 1182.

561. *Id.* at ____, 443 A.2d at 1182. The lower court apparently concluded that the defendants had ignored the arbitration hearing because they thought their right of appeal was absolute.

562. *Id.* at ____, 443 A.2d at 1182.

563. *Lipton Professional Soccer, Inc. v. Mijatovic*, 416 So. 2d 1236 (Fla. Dist. Ct. App. 1982).

564. *Id.* at 1236.

ton's petition for certiorari was granted, the lower court's order was quashed, and the case was remanded with instructions that the dispute between the parties be remitted to arbitration proceedings.⁵⁶⁵

The common law writ of certiorari was also held to be an appropriate device for obtaining review of an order denying a motion to compel arbitration in *Paine, Webber, Jackson & Curtis, Inc. v. Lucas*.⁵⁶⁶ Lucas had two accounts with the brokerage firm, but only one account agreement provided for arbitration of any disputes. Lucas sued the firm on a claim arising exclusively from its handling of the non-arbitrable account. When the firm's motion to compel arbitration was denied, it sought a writ of certiorari to review the non-final order of the trial court.⁵⁶⁷ The appellate court denied the writ on the ground that no right of arbitration existed.⁵⁶⁸ The court recognized, however, that a writ of certiorari is a proper method to obtain review of a lower court's order denying a motion to compel arbitration.⁵⁶⁹ The court reasoned that permitting the parties to litigate where there is a right to arbitration completely frustrates that right. Forcing a party to wait until final judgment is entered to appeal an order denying arbitration is an inadequate remedy.⁵⁷⁰

In *Calloway Homes, Inc. v. Smiley*,⁵⁷¹ the court held that a petition for writ of certiorari is premature and must be denied when the trial judge denies a motion to compel arbitration without prejudice in order to study more fully the complaint and answer.⁵⁷² Smiley executed an agreement which obligated Calloway to build a house for him. Smiley alleged that this agreement provided for arbitration of all disputes. The trial court denied without prejudice Smiley's motion to compel arbitration during a pretrial hearing so that the court could review the pleadings in the case. Rather than wait for a determinative ruling from the trial court, Smiley filed a petition for a writ of certiorari. The appellate court held the petition to be premature under the circumstances.⁵⁷³

565. *Id.* at 1237. Although the court cited a section of Florida's arbitration statute, FLA. STAT. ANN. § 682.03 (1981), it noted that this statute may not have been applicable. The court pointed out, however, that "the obligation to arbitrate persists through federal law, [9 U.S.C. §§ 1 (1982)] and Florida courts are bound to enforce that obligation." 416 So. 2d at 1237.

566. *Paine, Webber Jackson & Curtis, Inc. v. Lucas*, 411 So. 2d 1369, 1371 (Fla. Dist. Ct. App. 1982).

567. *Id.* at 1370.

568. *Id.* at 1371.

569. In a concurring opinion, Judge Cowart agreed with the result reached by the majority—denial of the writ of certiorari—but disagreed that a writ of certiorari is a proper remedy under these circumstances. In his opinion, an appeal from final judgment provided an adequate remedy. *Id.* at 1371 (Cowart, J., concurring).

570. *Id.* at 1370.

571. 422 So. 2d 49 (Fla. Dist. Ct. App. 1982).

572. *Id.* at 50.

573. *Id.* at 49-50.

X. JUDICIAL PROCEEDINGS

A. Jurisdiction

Under the UAA, a valid arbitration agreement confers jurisdiction on the courts to enforce,⁵⁷⁴ confirm,⁵⁷⁵ correct, modify, or vacate⁵⁷⁶ the award. In *Kemling v. Country Mutual Insurance Co.*,⁵⁷⁷ the court held that a court's jurisdiction over a dispute is created by the existence of an enforceable arbitration agreement.⁵⁷⁸ The plaintiff's insurance contract stated that any issue concerning an uninsured motorist's negligence would be submitted to binding arbitration. After an award in plaintiff's favor, the defendant argued that the trial court lacked jurisdiction under the UAA to compel arbitration.⁵⁷⁹ Although the appellate court vacated the award on other grounds, it decided that the trial court had jurisdiction to compel arbitration because the insurance contract clearly provided for arbitration.⁵⁸⁰

In *Arrow Overall Supply Co. v. Peloquin*,⁵⁸¹ the court ruled that an attack on the validity of the arbitration agreement is a direct attack on the jurisdiction of the arbitrator to settle the dispute.⁵⁸² A commercial arbitration award in plaintiff's favor was entered after the defendant failed to appear for arbitration. When plaintiff sought to have the award confirmed, the defendant raised the invalidity of the agreement as a defense. The appellate court held that the arbitration agreement is the jurisdiction-granting element for arbitration,⁵⁸³ and that defendant's invalidity defense could be raised for the first time when judicial confirmation of the award was sought.⁵⁸⁴

B. Procedural Matters

In *State v. Thomas Construction Co.*,⁵⁸⁵ the court held that the parties to an arbitration agreement may displace the rules of civil procedure with their own rules.⁵⁸⁶ The parties had agreed to arbitrate by the Construction Industry

574. UAA § 17.

575. UAA § 11.

576. UAA §§ 12, 13.

577. 107 Ill. App. 3d 516, 437 N.E.2d 1253 (1982).

578. *Id.* at 519, 437 N.E.2d at 1253.

579. *Id.* at 519, 437 N.E.2d at 1255.

580. *Id.* at 521, 437 N.E.2d at 1257. The trial and appellate courts treated the particular proceeding as a suit for declaratory judgment. *Id.*

581. 414 Mich. 95, 323 N.W. 2d 1 (1982).

582. *Id.* at 98, 323 N.W.2d at 2.

583. *Id.*

584. This decision is a logical extension of the principle that a party or court may question the court's subject matter jurisdiction to settle a dispute at any time before final disposition of the case by the court.

585. 8 Kan. App. 2d 283, 655 P.2d 471 (1982).

586. *Id.* at —, 655 P.2d at 475.

Arbitration Rules of the AAA. The court decided that the Kansas Rules of Civil Procedure were inapplicable to matters covered by the construction industry's rules based on the terms of the parties' contract and the language of the construction industry rules.⁵⁸⁷

In *Cres Rivera Concrete Co v. Bill Stuckman Construction Co.*,⁵⁸⁸ a bankruptcy court held that an arbitration agreement is enforceable even though one party has filed for bankruptcy before arbitration begins.⁵⁸⁹ The plaintiff declared bankruptcy after completing construction work but before receiving payment from defendant. When the trustee requested payment, defendant refused to pay because it argued that it had agreed with plaintiff to resolve any disputes through arbitration. The bankruptcy court, applying New Mexico law,⁵⁹⁰ ordered arbitration to proceed between defendant and the trustee.⁵⁹¹

C. Venue

In *Hedron Construction Co. v. District Board of Trustees*,⁵⁹² the court held that a Florida statute establishing a particular venue for arbitration actions displaced the general venue provision. The college board of trustees filed a petition to stay arbitration of the dispute involving itself and Hedron, and the construction company moved to transfer the venue of the arbitration proceeding pursuant to a special venue statute for arbitration.⁵⁹³ The lower court denied this motion because it reasoned that the venue of an arbitration hearing is the same as for any other civil action. The appellate court reversed because a suit brought under a specific state statute creating special venue rules overrides the general venue statute.⁵⁹⁴

D. Standing

The court held in *Computer Corp. of America v. Zarecor*⁵⁹⁵ that only the parties to a contract which contains an arbitration clause have standing to compel arbitration. Defendant sought to compel plaintiff to arbitrate based on a contract executed by plaintiff and defendant, who was then acting as a promoter for an unformed corporation. The contract indicated that neither the plaintiff nor the defendant intended for defendant to be a party to the contract. The court held that defendant lacked standing to compel plaintiff to

587. *Id.* at _____, 655 P.2d at 475.

588. 21 Bankr. 155 (D.N.M. 1982).

589. *Id.* at 158.

590. N.M. STAT. ANN. §§ 44-7-1 to -22 (1978).

591. 21 Bankr. at 156.

592. 420 So. 2d 393 (Fla. Dist. Ct. App. 1982).

593. FLA. STAT. ANN. § 682.19 (West Supp. 1983).

594. *Hedron*, 420 So. 2d at 393.

595. 16 Mass. App. Ct. 456, 452 N.E.2d 267 (1983).

arbitrate because defendant was not a party to the contract.⁵⁹⁶

XI. JUDICIAL REVIEW

In contrast to the review of a trial, judicial review of an arbitration award is much more limited. Ordinarily, arbitration awards are viewed with great deference. They cannot be upset except under exceptional circumstances. For example, an award usually will not be set aside for mistakes of law or fact. Judicial review is limited to the grounds established by the jurisdiction's arbitration statute⁵⁹⁷ because the parties have chosen arbitration to settle their disputes. A limited scope of review encourages parties to arbitrate by giving arbitral awards finality.⁵⁹⁸ Because appellate review is limited, the person moving to modify or vacate the award must prove by clear, precise and convincing evidence that action by the court is warranted.⁵⁹⁹

In *Daniels Insurance Agency, Inc. v. Jordan*,⁶⁰⁰ the court examined the jurisdiction of courts to review arbitration awards. The UAA grants courts jurisdiction to confirm, vacate, modify or correct an arbitration award.⁶⁰¹ The parties submitted an employment dispute to arbitration, and the contract provided that any disputes were to be settled by arbitration in accordance with the rules of the AAA. The arbitrator entered an award for Jordan, and Daniels filed a motion to vacate or modify the award.⁶⁰² The trial court applied AAA rules and found that it lacked subject matter jurisdiction. The appellate court held that the AAA rules could not regulate judicial proceedings and that the UAA therefore governed judicial review of an award.⁶⁰³

In *In re Arbitration between Johns Construction Co. and Unified School District No. 210*,⁶⁰⁴ the court held that where the parties have a binding arbitration agreement, errors of law and fact or an erroneous decision of matters submitted to the arbitrators are insufficient to invalidate an award fairly and honestly made. Unless there is fraud, misconduct, or other valid objections, nothing related to the merits of the action can constitute grounds for setting aside the award.⁶⁰⁵ The school board appealed from an arbitration award on the theory that it was denied a fair hearing because the arbitrators excluded all witnesses from the hearing except when they were testifying. The court

596. *Id.* at ____, 452 N.E.2d at 269.

597. *Konicki v. Oak Brook Racquet Club*, 110 Ill. App. 3d 217, 223, 441 N.E.2d 1333, 1337 (1982).

598. *Burchell v. Marsh*, 58 U.S. 344, 349 (1854).

599. *Ronwin v. Piper, Jaffray & Hopwood, Inc.*, 113 Ill. App. 3d 687, 692-93, 447 N.E.2d 954, 958 (1983).

600. 99 N.M. 297, 657 P.2d 624 (1982).

601. N.M. STAT. ANN. §§ 44-7-11 to -13 (1978).

602. 99 N.M. at 298, 657 P.2d at 625.

603. *Id.* at 299, 657 P.2d at 626.

604. 233 Kan. 527, 664 P.2d 821 (1983).

605. *Id.* at 528, 664 P.2d at 822.

found that the arbitrators excluded all witnesses of both parties and that arbitrators have the discretionary power to exclude witnesses during the testimony of other witnesses. The court did not find any fraud, misconduct, or improper action by the arbitrators that denied the school board a fair hearing.⁶⁰⁶

In *City of Hot Springs v. Gunderson's, Inc.*,⁶⁰⁷ the court considered whether the UAA requires arbitration to be compelled when it is undisputed that an agreement to arbitrate exists and the opposing party refuses to arbitrate. The court decided that the UAA permits a court to consider only three factors in making its decision: whether an arbitration agreement exists; whether the agreement imposes a duty on the defendant to arbitrate; and whether the defendant breached this duty.⁶⁰⁸ If there is doubt as to whether an agreement to arbitrate exists, it should be resolved in favor of arbitration.⁶⁰⁹ Phelps-Benz was under contract with Hot Springs to design and supervise the construction of the city's golf course. Gunderson's contracted with the City to build the course. After problems with the underground sprinkler system at the course were discovered, the City filed suit against the architect and the contractor for breach of their respective contracts. Gunderson's moved to compel arbitration, but the trial court denied the motion because Phelps-Benz's contract did not contain an arbitration clause and it therefore could not be compelled to arbitrate. The trial court wanted to prevent multiple suits from arising out of the same factual setting. The appellate court held that denial of Gunderson's motion was error because the trial court considered something other than the three factors in reaching its decision. The appellate court ordered arbitration to proceed because the parties did not contest that the dispute between the City and Gunderson's was subject to arbitration.⁶¹⁰

The bankruptcy court in *Cres Rivera Concrete Co. v. Bill Stuckman Construction Co.*⁶¹¹ held that the UAA limited it to a determination of whether there is an agreement to arbitrate unless the arbitration agreement limits areas or matters to be arbitrated.⁶¹² There was a conflict over whether arbitration was to be conducted pursuant to American Arbitration Association rules or the UAA, but both parties agreed that the dispute was subject to arbitration. The court construed the ambiguities in the contract against the drafters and ordered the parties to proceed with arbitration.⁶¹³

Taunton Municipal Light Plant Commission v. Paul L. Geiringer & As-

606. *Id.* at 530, 664 P.2d at 823.

607. 322 N.W.2d 8 (S.D. 1982).

608. *Id.* at 11.

609. *Id.* at 10.

610. *Id.* at 11.

611. 21 Bankr. 155 (D.N.M. 1982).

612. *Id.* at 157 (citing *K.L. House Constr. Co. v. City of Albuquerque*, 91 N.M. 492, 576 P.2d 752 (1978) which interpreted N.M. STAT. ANN. §§ 44-7-1, -2E (1978)).

613. *Id.* at 157.

sociates,⁶¹⁴ discussed the standards for judicial review of arbitration awards. An arbitration award may not offend public policy, require a result contrary to an express statutory provision, or exceed the limits of the contract containing the arbitration clause. Within these limitations, however, arbitrators have broad authority to fashion remedies. If arbitrators commit an error of law or fact in deciding issues properly before them, a court may not substitute its judgment for that of the arbitrator. Even if arbitrators commit a gross error of law or fact, the decision is binding on the parties in the absence of fraud.⁶¹⁵ Arbitration awards are viewed with great deference, and courts will not inquire into the merits of an award that the parties agreed the arbitrator could make. The arbitrators decided that Taunton was responsible for obtaining all required drawings from prime contractors and delivery of those drawings to Geiringer. The consulting agreement between the parties, however, required Geiringer to provide those drawings to Taunton. Consequently, Taunton asked the trial court to overturn the arbitrator's decision as incongruous, violative of the contract, and exceeding the scope of the arbitrators' authority. The appellate court decided that Geiringer was still required to provide drawings to Taunton as the contract provided, but only after Taunton had delivered the drawings to Geiringer. The arbitrators simply required Taunton to deliver drawings to Geiringer as a condition precedent to Geiringer's redelivery of the same drawings to Taunton. The court held that the arbitrators' decision did not exceed the scope of their authority or violate the terms of the submission presented for arbitration⁶¹⁶ and that the arbitrators made no error of law or fact of sufficient gravity to justify setting aside the award.⁶¹⁷

In *Loomis v. Cudahy*,⁶¹⁸ the court held that a hearing on a motion to compel or stay arbitration must be limited to examining whether there is an agreement to arbitrate.⁶¹⁹ Cudahy and Loomis executed a real estate construction contract that contained an arbitration clause. When a dispute arose, Cudahy opposed arbitration on the ground that the agreement was no longer valid because it specifically required the house to be built on a particular lot and the house was built on another lot. The trial court refused to consider her argument because her testimony went to the issue of whether the contract was performed and not to its validity. The trial court reasoned that evidence of a breach of contract does not invalidate a contract. Therefore, a valid agreement to arbitrate existed between the parties even if the contract itself was breached by nonperformance. The appellate court affirmed because the record did not disclose that the trial court's findings were clearly erroneous.⁶²⁰

614. 560 F. Supp. 1249 (D. Mass.), *aff'd mem.*, 725 F.2d 664 (1st Cir. 1983).

615. *Id.* at 1252.

616. *Id.* at 1251.

617. *Id.* at 1253.

618. 104 Idaho 106, 656 P.2d 1359 (1982).

619. *Id.* at _____, 656 P.2d at 1362.

620. *Id.* at _____, 656 P.2d at 1363.

In *Bingham County Commission v. Interstate Electric Co.*,⁶²¹ the court declared that judicial review of arbitration decisions is more limited than review of judicial proceedings.⁶²² On issues of both law and fact, the arbitrator is the final judge.⁶²³ The contract in this case contemplated recovery of damages for delay on a construction contract caused by the county, and the parties submitted their dispute to arbitration. The arbitrator found that the county was responsible for delay that caused the electric company financial loss. The county argued that the arbitrator exceeded his powers in awarding the electric company damages. The appellate court confirmed the award because the arbitrator's award decided the dispute submitted by the parties under a reasonable construction of the contract.⁶²⁴

In contrast to the majority of states, Michigan does not follow the general rule that errors of law are insufficient to vacate an arbitration award. In *Detroit Automobile Inter-Insurance Exchange v. Standfest*,⁶²⁵ the court set out the standard of review to be employed by Michigan courts acting on a motion to vacate or confirm an award. A Michigan statute specifies that the courts retain all their equitable powers over arbitration proceedings.⁶²⁶ Thus, the court held that vacation is proper where it clearly appears that the arbitrators have arrived at an erroneous conclusion because of an error of law and that, but for the error, the award would have been substantially different.⁶²⁷ The insurance exchange contended that arbitration awards against it should be vacated because the arbitrators exceeded their powers by refusing to enforce the "anti-stacking" language of an insurance contract. The court held that because an unambiguous provision precluded stacking benefits, the awards were erroneous as a matter of law.⁶²⁸

In *State Farm Mutual Automobile Insurance Co. v. Stuckey*,⁶²⁹ the court denied State Farm's claim that the arbitrators exceeded their powers in refusing to apply a dead man's statute to bar Stuckey's testimony.⁶³⁰ Stuckey was involved in an automobile accident with an uninsured motorist, and he sought to recover under his insurance policy with the defendant. The uninsured motorist died before Stuckey's claim against defendant was submitted to arbitration. At the proceedings, the defendant sought to bar Stuckey's testimony. The arbitrators refused to apply the dead man's statute and allowed Stuckey to testify. The contract provided that arbitration should be conducted in accordance

621. 105 Idaho 36, 665 P.2d 1046 (1983).

622. *Id.* at _____, 665 P.2d at 1051.

623. *Id.* at _____, 665 P.2d at 1052.

624. *Id.* at _____, 665 P.2d at 1052.

625. 416 Mich. 407, 331 N.W.2d 418 (1982).

626. *Id.* at 418, 331 N.W.2d at 423 (citing MICH. COMP. LAWS ANN. § 600.5035 (1968)).

627. *Id.* at 445, 331 N.W.2d at 434.

628. *Id.* at 434, 331 N.W.2d at 426-27.

629. 112 Ill. App. 3d 647, 445 N.E.2d 791 (1983).

630. ILL. REV. STAT. ch. 51, § 2 (1981).

with the usual rules governing procedure and admission of evidence. The court held that an arbitrator's award cannot be set aside because of an error in judgment or a mistake of law or fact made by him.⁶³¹ The court rejected State Farm's claim that the arbitrators exceeded their powers by refusing to apply an applicable evidentiary rule at the arbitration hearing, contrary to the express provisions of the insurance contract.⁶³² It reasoned that this case involved statutory interpretation by the arbitrator, which is a decision of law and thus unreviewable by the courts.⁶³³

In *Konicki v. Oak Brook Racquet Club*,⁶³⁴ the court held that an arbitration award will be vacated where upholding the award would violate public policy.⁶³⁵ Konicki was part owner of the OBRC Corporation, an athletic club. OBRC agreed with him to assume his interests in the club, and the agreement required Konicki not to establish a competing business within ten square miles of the Club. Two years later, Konicki set up a competitive establishment within the area. The arbitrators decided that the non-competition clause was valid, and OBRC was awarded damages.⁶³⁶ The court decided that it would not enforce a private agreement which is repugnant to public policy whether the court reviews the decision after litigation or arbitration.⁶³⁷ The court held that non-competition clauses will only be enforced after the court considers the reasonableness of the time and location restrictions and the proprietary interest to be protected because such clauses frequently violate public policy.⁶³⁸

In *Bernard v. Hemisphere Hotel Management, Inc.*,⁶³⁹ the court held that a lower court's order requiring arbitration proceedings continue with two of the three arbitrators was reviewable.⁶⁴⁰ Plaintiff and defendant submitted a dispute to arbitration, and the proceedings were conducted in accordance with the rules of the AAA. Once proceedings were begun, the parties learned an arbitrator had been convicted of various crimes, and defendant moved to have him removed as unfit under an AAA rule.⁶⁴¹ The lower court ordered the arbitrator's removal, and the AAA removed him two days later. The appellate court reversed the lower court's order because arbitrators have the power to

631. 112 Ill. App. 3d at 651, 445 N.E.2d at 792.

632. *Id.*

633. *Id.* at 652, 445 N.E.2d at 794.

634. 110 Ill. App. 3d 217, 441 N.E.2d 1333 (1982).

635. *Id.* at 223-24, 441 N.E.2d 1338.

636. *Id.* at 218-19, 441 N.E.2d at 1334-1335.

637. *Id.* at 223, 441 N.E. 2d at 1337 (quoting *Board of Trustees v. Cook County College Teacher Union, Local 1600*, 74 Ill. 2d 412, 424, 386 N.E.2d 47, 52 (1979)).

638. *Id.*

639. 16 Mass. App. Ct. 261, 450 N.E.2d 1084 (1983).

640. *Id.* at _____, 450 N.E.2d at 1085.

641. This rule states that, "if any arbitrator should . . . be disqualified . . . the American Arbitration Association may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled . . . and the matter shall be reheard unless the parties shall agree otherwise." *Id.* at _____, 450 N.E.2d at 1085.

interpret arbitration rules. By ordering the arbitrator's removal, the lower court preempted a decision by the AAA.⁶⁴² It would have been a different matter if the Association had decided to allow the arbitrator to act as an arbitrator and a party had then moved for judicial action. In that event, a lower court could justify removal of the arbitrator under the UAA.⁶⁴³

In *Ragin v. Royale Globe Insurance Co.*,⁶⁴⁴ the court held that awards based on an egregious mistake of law must be vacated.⁶⁴⁵ A car driven by Ragin collided with another vehicle, and Ragin was injured. The other driver's insurance company paid him \$15,000. Ragin felt that this amount did not fully compensate him. Because \$15,000 was the maximum amount that he could recover from the other driver's insurance policy, he filed a claim against his own automobile insurer to recover more money. Ragin argued that because the other driver was underinsured, he (Ragin) should be able to collect under the underinsured motorist provision of his policy. The arbitrator awarded him an additional \$15,000. After that award was vacated by a lower court, Ragin appealed. The appellate court first held that under Pennsylvania law, a driver who carries the legal minimum amount of liability insurance coverage, although possibly underinsured, is not uninsured. This was critically important to the court because Ragin could only collect under his policy if the other driver was uninsured.⁶⁴⁶ Because of the wording of Ragin's policy, the court held that Ragin could collect nothing from his insurer. The court justified its decision by observing that under Pennsylvania law, a reviewing court can correct or modify an award where "the award is contrary to law and such that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict."⁶⁴⁷ The court upheld the lower court's decision to vacate the award under that standard of review.⁶⁴⁸

Courts conduct only a limited review of arbitration awards because the parties have chosen to resolve their dispute by a method other than traditional litigation. Because of the nature of that process, arbitrators have greater independence to decide disputes without judicial scrutiny. Mistakes of law or fact

642. *Id.* at ____, 450 N.E.2d at 1086.

643. See MASS. GEN. LAWS ANN. § 12(a)(2) (West Supp. 1983). This section parallels UAA § 12(a)(2), which allows the court to vacate an award where "[t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." UAA § 12(a)(2).

644. 461 A.2d 856 (Pa. Super. Ct. 1983).

645. *Id.* at 859. Pennsylvania law sets the minimum amount of liability insurance coverage at \$15,000 per person. 40 PA. CONS. STAT. ANN. § 1009.104(a) (Purdon 1974).

646. 461 A.2d at 857.

647. 42 PA. CONS. STAT. ANN. § 7302(a)(2) (Purdon 1982).

648. Although the UAA does not have this same provision, § 12(a)(3) allows an award to be vacated where arbitrators have exceeded their powers. It can be argued that rendering an award contrary to law is the equivalent of "exceeding their powers" within the meaning of the UAA provision.

that might be error in a judicial setting are sometimes ignored because the courts presume the parties wanted the arbitrator's decision, whether it is the same decision a court might reach or not. Such a limited scope of review for arbitration awards is necessary to promote the purpose of arbitration: to provide a speedy and efficient method of resolving disputes without resort to litigation. If the arbitration process is simply a prelude to a searching judicial review of the arbitration award, that goal is not achieved because the inevitable delays and inefficiencies of the judicial process become engrafted onto the arbitration process as well. Recent cases indicate that arbitration awards are accorded a greater degree of finality by reviewing courts than similar judicial decisions. An important purpose of arbitration is to reduce the amount of time and money required to settle disputes. By extending great deference to arbitrators' decisions and promoting the finality of those decisions, courts further that purpose by discouraging parties from resorting to litigation after arbitration is over.

XII. TIMELINESS

A. *Demand for Arbitration*

In *City of Dearborn v. Freeman-Darling, Inc.*,⁶⁴⁹ the court ruled that it is for the arbitrator to decide whether a demand for arbitration is brought within a reasonable time.⁶⁵⁰ Freeman contracted with Dearborn to renovate city hall. After an award in defendant's favor, plaintiff claimed that the trial court erred in allowing the arbitrator to determine whether the demand for arbitration was made within a reasonable time. The appellate court held that the reasonableness of the plaintiff's delay was a question of fact to be decided by the arbitrator.⁶⁵¹

B. *Motions to Vacate*

Even if a party's motion to vacate has substantive merit, a court may still deny the motion if it is not made in a timely fashion. The UAA establishes time limits during which a motion to vacate must be filed.⁶⁵² Courts strictly apply the limits because rigid compliance promotes arbitration and ensures prompt challenges to awards. At least one court, however, has refused to interpret the time restrictions strictly. It held that a party loses its absolute right to proceed when it makes an untimely motion, but a court does not lose its dis-

649. 119 Mich. App. 439, 326 N.W.2d 831 (1982).

650. *Id.* at 444, 326 N.W.2d at 834.

651. *Id.*

652. UAA § 12 (a)(1) provides, "Upon application of a party, the court shall vacate an award where: . . . The award was procured by corruption, fraud or other undue means."

cretion to permit the untimely motion.⁶⁵³

In *Bernstein v. Gramercy Mills Inc.*,⁶⁵⁴ the court refused to vacate an arbitration award because defendant's motion to vacate was made after the thirty-day statutory limit had expired.⁶⁵⁵ The court strictly construed the language of the arbitration statute to promote the finality of arbitration awards.⁶⁵⁶ The defendant argued that his attack was timely because it was in the form of a counterclaim and not an application to vacate. The court rejected this distinction.⁶⁵⁷

In *Haskell v. Forest Land & Timber Co.*,⁶⁵⁸ the court held that a party seeking to vacate an award must take some affirmative action to obtain relief within the statutory time period. The party seeking to vacate the award did not file a motion to vacate until two and one-half years after the arbitration award was entered. The lower court allowed the party to challenge the award in this manner. The appellate court reversed because the arbitration statute made it clear to the court that the legislature sought to limit the grounds for overturning an award and to require challenges to awards to be initiated promptly.⁶⁵⁹

In *Bingham County Commission v. Interstate Electric Co.*,⁶⁶⁰ the court held that failure to comply with the statutory time limits when seeking to vacate an arbitration award absolutely bars a motion to vacate.⁶⁶¹ The arbitrator entered the award on February 9, 1980, but the county did not seek to vacate the award until January 5, 1981. The court held that the motion to vacate was untimely and should have been denied by the trial court because the motion was not made until nearly eleven months after the arbitrator's decision was issued. The court held that a court cannot extend this ninety-day period even if the party seeking to vacate the award asserts a valid ground under the applicable statute.⁶⁶²

*Detroit Automobile Inter-Insurance Exchange v. Gavin*⁶⁶³ did not follow the general rule that an untimely motion prevents a court from vacating an award. Instead, the Michigan Supreme Court held that a court in its discretion may permit an untimely motion to vacate upon a showing of excusable

653. See, e.g., *Salter v. Farner*, 653 P.2d 413 (Colo. 1982).

654. 16 Mass. App. Ct. 403, 452 N.E.2d 231 (1983).

655. *Id.* at ____, 452 N.E.2d at 234-35.

656. MASS. GEN. LAWS ANN. ch 251, § 12 (West Supp. 1983-1984).

657. 16 Mass. App. Ct. at ____, 452 N.E.2d at 235-36.

658. 408 So. 2d 811 (Fla. Dist. Ct. App. 1982).

659. *Id.* at 812.

660. 105 Idaho 36, 665 P.2d 1046 (1983).

661. *Id.* at ____, 665 P.2d at 1049. IDAHO CODE § 7-912(b) (1979) is identical to UAA § 12(b).

662. *Id.* at ____, 665 P.2d at 1049.

663. 416 Mich. 407, 331 N.W.2d 418 (1982).

neglect.⁶⁶⁴ The motion to vacate the award was filed three days after the twenty-day statutory time limit had expired.⁶⁶⁵ The circuit court and the court of appeals both denied the motion to vacate on the ground that it was not timely filed. On appeal to the supreme court, the party opposing vacation argued that the circuit court lacked jurisdiction to hear the motion to vacate because it was not filed in a timely manner. The court reviewed the explicit language of the twenty-day rule and the policy behind it⁶⁶⁶ and concluded that the rule does not curtail a circuit judge's discretionary power to permit a party to file a motion to vacate beyond established time limits upon a showing of excusable neglect.⁶⁶⁷ The court emphasized that since the delay was only three days and the defendant was not prejudiced by permitting the delayed filing, the circuit court did not abuse its discretion by entertaining the untimely motion to vacate the arbitration award.⁶⁶⁸

C. Appeals from an Award

In *Meade v. Lumbermens Mutual Casualty Co.*,⁶⁶⁹ the court held that the ninety-day statutory limit on filing appeals from arbitration awards does not apply to issues that were not submitted to the arbitration panel.⁶⁷⁰ An insurance company wanted to challenge an arbitration award because it exceeded the policy limits. The trial court refused to let the insurance company raise the excessiveness defense because the ninety-day limit had expired. The appellate court reversed because the ninety day rule was not applicable. The court reasoned that the insurance company's defense was proper because it had not been presented to the arbitration panel.⁶⁷¹

In *Farmer v. Polen*,⁶⁷² the court held that a party cannot rescind a contract containing an arbitration agreement if he fails to challenge the validity of the arbitration agreement within the statutory time period established for filing appeals.⁶⁷³ Plaintiff-employee obtained an arbitration award against defendant-employer, and he filed a petition to confirm the award after defendant unsuccessfully attempted to have the award modified. The employer counterclaimed for breach of contract. The trial court denied the counterclaim, and

664. *Id.* at 424-25, 331 N.W.2d at 426.

665. MICH. COMP. LAW ANN. § 769.9(2) (1967) provides that an application to vacate an award "shall be made within 20 days after delivery of a copy of the award to the applicant."

666. The court stated that the policy behind the rule is to move disputes in a timely fashion through the judicial process. 416 Mich. at 423, 331 N.W.2d at 425.

667. *See* MICH. COMP. LAWS ANN. § 108.7(2) (1967).

668. 416 Mich. at 423, 331 N.W.2d at 425.

669. 423 So. 2d 905 (Fla. 1982).

670. *Id.* at 909.

671. *Id.* at 910.

672. 423 So. 2d 1035 (Fla. Dist. Ct. App. 1982).

673. *Id.* at 1037.

the employer filed an amended answer seeking rescission of the contract. The answer asking for that relief was filed after the ninety day statutory time period had expired. The trial court refused to confirm plaintiff's arbitration award. The appellate court reversed and directed the trial judge to confirm the arbitration award because defendant had never challenged either the validity of the arbitration clause or the arbitration proceedings until plaintiff moved to confirm the award. The court decided that defendant's actions of participating in the the earlier arbitration proceeding and initially only seeking to modify the award were inconsistent with an intention to seek rescission of the original employment contract.⁶⁷⁴ It reasoned that by failing to timely challenge the validity of either the arbitration agreement or the subsequent arbitration proceedings, the employer had ratified and confirmed the contract.⁶⁷⁵

XIII. CONCLUSION

Courts appear to be interpreting the UAA so as to promote arbitration. Recent cases demonstrate that courts are enforcing arbitration agreements and limiting the opportunities of parties to resort to litigation when such an agreement exists.

Substantively, courts have broadly interpreted arbitration clauses to encompass more disputes by using the same rules of construction applicable to contracts. The doctrine of waiver has been restrictively applied. When parties have agreed to submit their disputes to arbitration, their agreement is given full effect absent fraud, duress, or some other contract defense. Only when a strong state policy exists favoring litigation of certain claims will a court refuse to require arbitration of a claim covered by an arbitration agreement.

Procedurally, courts have limited a party's right to stay arbitration and have strongly favored compelling arbitration when a valid arbitration agreement exists. When litigation is necessary, courts are willing to sever those claims that must be litigated and compel arbitration of the rest of the dispute.

Once a party has obtained an arbitration award, courts are very reluctant to change it. Arbitrators are normally peculiarly competent to adjudge the merits of a dispute because they are familiar with the parties, business, or industry involved. Therefore, judicial review of arbitration awards is limited because an arbitration award is viewed with great deference. The finality of arbitration awards is such that most courts will not change an award even if an arbitrator committed errors of law or fact in reaching his decision. Courts narrowly construe both the grounds for vacation in the UAA and the defenses to confirmation proceedings, and no nonstatutory grounds for vacating an award will be considered. The time limits established by the UAA for filing motions to vacate are generally strictly applied in order to ensure prompt challenges to awards. The courts are promoting the finality and binding effect of

674. *Id.*

675. *Id.*

arbitration awards by restricting the ability of a challenger to attack the award.

