Journal of Dispute Resolution

Volume 1988 | Issue Article 14

1988

Recent Developments: The Uniform Arbitration Act

RECENT DEVELOPMENTS: THE UNIFORM ARBITRATION ACT[1]

1. This project was written and prepared by the Journal of Dispute Resolution Candidates under the direction of the Associate Editor in Chief Teresa A. Generous.

The National Conference of Commissioners on Uniform State Laws in 1955 proposed the Uniform Arbitration Act [hereinafter U.A.A.].[2] A large number of states have adopted arbitration statutes based upon the U.A.A.[3] The purpose of this survey is to explain the principles underlying recent court decisions interpreting the U.A.A. and provide a framework for analyzing future cases.[4]

I. VALIDITY OF ARBITRATION AGREEMENTS

A. *Application of Contract Principles*

The U.A.A. provides that a written agreement to submit a controversy to arbitration "is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."[5] Court decisions determining the validity of an arbitration agreement are affected by the court's application of controlling statutory provisions and contract principles.[6]

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

3. Over one-half of the states have enacted arbitration statutes. Jurisdictions which have enacted statutes modeled after the U.A.A. include: Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and Wyoming.

4. *See Recent Developments: The Uniform Arbitration Act*, 1987 MO. J. DISP. RES. 177 [hereinafter *Recent Developments* 1987]; *Recent Developments: The Uniform Arbitration Act*, 1986 MO. J. DISP. RES. 169 [hereinafter *Recent Developments* 1986]; *Recent Developments: The Uniform Arbitration Act*, 1985 MO. J. DISP. RES. 173 [hereinafter *Recent Developments* 1985]; *Recent Developments: The Uniform Arbitration Act*, 1984 MO. J. DISP. RES. 207 [hereinafter *Recent Developments* 1984]; *Recent Developments: The Uniform Arbitration Act*, 48 MO. L. REV. 137 (1983) [hereinafter *Recent Developments* 1983]. The 1987 survey collected cases interpreting and applying the U.A.A. decided between September, 1985 and September, 1986. The 1986 survey collected cases decided between September, 1984 and September, 1985. The 1985 survey collected cases decided between September, 1983 and September, 1984. The 1984 survey collected cases decided between September, 1982 and September, 1983. The 1983 survey collected cases decided before September, 1982. This article surveys cases decided between September, 1986 and September, 1987.

5. U.A.A. § 1.

6. *Id.*

1. The Writing Requirement

An arbitration agreement can be invalidated for lack of strict compliance with the writing requirements of a particular state's arbitration statute.[7] On the other hand, a showing of compliance may serve as prima facie evidence of the validity of arbitration agreements.[8]

The parties will be required to arbitrate when the written agreement is clearly set forth. In *Lake Plumbing v. Seabreeze Construction Corp.*,[9] the arbitration agreement provided that "all claims, disputes and other matters in question arising out of, or relating to, this subcontract, or the breach thereof, shall be decided by arbitration. . . ."[10] After performance had commenced under the contract, Lake Plumbing terminated the contract with Seabreeze and engaged another contractor to perform remedial work. Seabreeze filed suit in an effort to avoid "back charges" and secure damages for non-payment. Lake Plumbing's motion to compel arbitration was unsuccessful.[11]

The appellate court reversed the trial court. The court concluded that disputes in the construction industry are well-suited for arbitration as they involve issues unique to the industry which require specialized knowledge for resolution.[12] The court found the arbitration agreement to be "framed in binding, obligatory language"[13] and held that "[w]here . . . there is no issue as to the making of an agreement which contains a provision for compulsory arbitration, it is error for the trial court to deny a party the right to arbitrate and require that the dispute be litigated in court."[14] The appellate court reasoned that the state's version of the U.A.A.,[15] coupled with a standard, uncontested contract which contained an arbitration provision gave all parties to the agreement an affirmative right to arbitrate.[16]

The failure of parties to include a written statutory notice requirement within an arbitration clause in accordance with the state's arbitration act renders the clause unenforceable. In *Hefele v. Catanzaro*,[17] the partnership agreement which contained the arbitration clause was subject to the Missouri ver-

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7. *See* Hefele v. Catanzaro, 727 S.W.2d 475, 477 (Mo. Ct. App. 1987) (failure to comply with statement of notice requirement mandated by the Missouri Act invalidated the agreement).

8. *See* McKinstry v. Valley Obstetrics-Gynecology Clinic, 428 Mich. 167, 405 N.W.2d 88 (1987) (statutory presumption of validity accrues once evidence of agreement is satisfactorily established).

9. 493 So. 2d 1100 (Fla. Dist. Ct. App. 1986).

10. *Id.* at 1101.

11. *Id.*

12. *Id.* at 1102.

13. *Id.* at 1101.

14. *Id.* at 1102.

15. FLA. STAT. §§ 682.01-.22 (1985).

16. *Lake Plumbing*, 493 So. 2d at 1102.

17. 727 S.W.2d at 475.

sion of the U.A.A.[18] The Missouri Act required that any contract containing an arbitration clause include a statement in ten-point capital letters stating, "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."[19] If the agreement had contained the requisite notice language, the arbitration clause would have been validated by the ratification of the agreement by partners who joined the firm after the passage of the Act. However, without the required language, the arbitration clause was unenforceable and invalid. The Missouri court, while recognizing the relative harshness of this rule, noted the legislature's bona fide concern that entry into such agreements be voluntary.[20] While the arbitration clause could have been valid, the absence of the required language precluded a finding that the parties intended to absolutely foreclose recourse to the courts.[21]

2. Fraudulent Inducement

While both contract law and the U.A.A.[22] provide that fraud and misrepresentation serve to invalidate an agreement, fraudulent inducement to enter into a contract does not necessarily invalidate an arbitration clause within that contract.[23] To demonstrate either fraudulent or innocent misrepresentation sufficient to invalidate an arbitration agreement, a party must show that he acted in reliance upon such fraud or misrepresentation.[24]

In *Wetzel v. Covenant Oil Corp.*,[25] an allegation of fraudulent inducement in the execution of a limited partnership agreement containing an arbitration clause did not prevent the clause itself from being valid and enforceable.[26] In *Wetzel*, a motion to compel arbitration was resisted by one of the limited partners. He contended that the arbitration clause was invalid due to fraudulent representations made by the general partner which induced him to enter into the partnership agreement.[27]

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18. MO. REV. STAT. §§ 435.350-.470 (1986). Enacted in 1980 and effective for arbitration agreements executed after August 13, 1980. The parties ratification of the amended original agreement in 1983 made the original agreement subject to the Act. *Hefele*, 727 S.W.2d at 475.

19. MO. REV. STAT. § 435.460.

20. *Hefele*, 727 S.W.2d at 477.

21. *Id.*

22. U.A.A. § 1. "A written agreement . . . to submit to arbitration . . . is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for revocation of any contract."

23. Wetzel v. Covenant Oil Corp., 733 P.2d 424 (Okla. Ct. App. 1986).

24. *McKinstry*, 428 Mich. at 187, 405 N.W.2d at 97.

25. 733 P.2d at 424.

26. *Id.*

27. *Id.*

The appellate court ruled that Oklahoma's version of the U.A.A.[28] was silent as to the effect of culpable acts on the validity of an arbitration agreement.[29] In upholding the validity of the agreement, the court adopted the rule of Massachusetts,[30] Arizona,[31] and the United States Supreme Court[32] which recognizes that when attacking a contract, allegations of fraud will be insufficient to defeat arbitration otherwise agreed upon under the U.A.A.[33]

The court noted several factors that were pertinent to its decision. First, the broad language of the arbitration provision provided clear evidence of the intent that arbitration be the chosen method of resolving disputes between the parties.[34] Second, there was no indication that culpable defaults and acts were to preclude arbitration.[35] Finally, the object of the contract was accomplished and the real controversy between the parties did not involve fraud.[36]

3. Rescission

When a contract containing arbitration provisions is abandoned without rescission, the arbitration provisions are valid with respect to disputes arising before abandonment.[37] In *Coughlan Construction Co. v. Town of Rockport*,[38] the parties entered into a construction contract which contained arbitration provisions. A dispute arose after work had commenced, and Coughlan subsequently filed a demand for arbitration. After this demand but prior to the beginning of arbitration proceedings, Coughlan notified Rockport that it was forced to stop work, and the contract was abandoned.[39]

Rockport filed a complaint in superior court requesting a stay of arbitration on the grounds that the parties had abandoned the arbitration agreement when they abandoned the contract. The court ordered the parties to proceed to arbitration of claims made by Coughlan before the contract was abandoned. Arbitration resulted in an award to Coughlan. Rockport filed an unsuccessful complaint in superior court seeking its vacation.[40]

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28. OKLA. STAT. tit. 15, §§ 801-18 (1981).
29. *Wetzel*, 733 P.2d at 426.
30. *See* Quirk v. Data Terminal Sys., Inc., 379 Mass. 762, 400 N.E.2d 858 (1980).
31. *See* Flower World of Am., Inc. v. Wenzel, 122 Ariz. 319, 594 P.2d 1015 (Ariz. Ct. App. 1978).
32. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
33. *Wetzel*, 733 P.2d at 426.
34. *Id.*
35. *Id.*
36. *Id.*
37. Coughlan Constr. Co. v. Town of Rockport, 23 Mass. App. Ct. 994, 505 N.E.2d 203 (1987).
38. *Id.*
39. *Id.* at _____, 505 N.E.2d at 204.
40. *Id.* at _____, 505 N.E.2d at 205.

The appellate court found no indication that Coughlan had agreed to a rescission of the contract because it was forced to stop work. Therefore, the court held that the arbitration provisions were in effect at the time Rockport was ordered to proceed to arbitration.[41] The court placed particular emphasis on the facts that there was no request for contract rescission, the dispute arose prior to abandonment of the contract, and the party seeking arbitration persisted in pursuing arbitration after the contract was abandoned.[42]

4. Revocation

An arbitration agreement may also be invalidated by revocation. The "revocation" exception applies only to cases in which the courts rescind the agreement for reasons such as fraud, duress, or undue influence.[43] An arbitration provision will not fail based on revocation for lack of mutuality of assent if the provision is a contract term formulated for some purpose other than arbitration, and the contract as a whole has received mutual assent.[44] Where public policy favors arbitration provisions in written contracts, such provisions will be enforced even though they appear in adhesion contracts.[45]

These same principles controlled the validity issue in *Hansen v. State Farm Mutual Automobile Insurance Co.*[46] In this case, policyholders brought suit against their insurance carrier under the uninsured motorist coverage of their policy. The policy expressly provided for arbitration of uninsured motorist disputes.[47] When State Farm moved to compel arbitration, the trial court denied the request on the grounds that mutuality of assent to arbitrate was lacking.[48] The court found the policyholders were unaware of the arbitration provision, and arbitration had been imposed on them in an adhesion contract.[49] On appeal, the Supreme Court of Idaho affirmed the trial court's denial of State Farm's motion to compel arbitration on unrelated grounds,[50] but held that the lower court had based its decision on erroneous theory.[51]

The supreme court construed the revocation exception in the Idaho arbitration statute narrowly,[52] holding that an arbitration agreement could be re-

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41. *Id.*
42. *Id.*
43. Hansen v. State Farm Mut. Auto. Ins. Co., 112 Idaho 663, _____, 735 P.2d 974, 981 (1987).
44. *Id.* at _____, 735 P.2d at 980.
45. *Id.* at _____, 735 P.2d at 980-81.
46. *Id.* at 663, 735 P.2d at 974.
47. *Id.* at _____, 735 P.2d at 979.
48. *Id.* at _____, 735 P.2d at 977.
49. *Id.* at _____, 735 P.2d at 980.
50. State Farm had waived its right to enforce the arbitration clause in the contract as the motion to compel was untimely. *Id.* at _____, 735 P.2d at 981.
51. *Id.*
52. IDAHO CODE § 7-901 (1975).

voked only "for reasons such as fraud, duress or undue influence."[53] Since the policyholders had not raised any such issue, the agreement was held to be valid. The court found that the lower court had misapplied the doctrine of mutual assent. The court stated that the question of mutuality goes to the formation of a contract as a whole and held that an arbitration provision will not fail for lack of mutual assent when such provision is a term in a contract formulated for some purpose other than arbitration, and the contract as a whole has received such assent.[54]

The supreme court found the adhesion contract argument to be "nothing more than an argument that arbitration clauses in such contracts should be held void as against public policy."[55] The supreme court found the trial court's adhesion contract rationale to be without merit in light of the fact that the legislature had expressly stated that public policy favors arbitration provisions in written contracts.[56] The court reasoned that the legislature would have expressly exempted adhesion contracts from the provisions of the state arbitration act if it had not intended for such contracts to be enforced.[57]

II. WAIVER

Arbitration and agreements to arbitrate are favored as a means of nonjudicial dispute resolution. The courts will liberally apply the state version of the U.A.A. to promote the policy of favoring arbitration.[58]

If one party initiates litigation, the second party may seek to compel arbitration in an effort to stay litigation. To defeat the right to arbitrate, the litigating party may assert waiver of the right to arbitrate.[59] Waiver is defined as a "voluntary relinquishment of a known right."[60] Some courts conclude the key to waiver is intent.[61] Whether a party's actions illustrate his intent to waive the right to arbitrate is a factual determination for the trial court which will not be disturbed on appeal if it is supported by evidence in the record.[62] Courts are willing to infer this intent when a party's acts are so contrary to the right to arbitration as to bar him from now asserting that right.[63]

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53. *Hansen*, 112 Idaho at _____, 735 P.2d at 979.

54. *Id.* at _____, 735 P.2d at 980.

55. *Id.*

56. *Id.*

57. *Id.*; *see* IDAHO CODE § 7-901.

58. *See* County of Hennepin v. Ada-Bec Sys., 394 N.W.2d 611, 613 (Minn. Ct. App. 1986) (held that Minnesota version of the U.A.A. will be applied liberally).

59. *See Hansen*, 112 Idaho at 663, 735 P.2d at 974.

60. *See County of Hennepin*, 394 N.W.2d at 613 (quoting Har-Mar, Inc. v. Thorsen & Thorshov, Inc., 300 Minn. 149, 156-57, 218 N.W.2d 751, 756 (1974)).

61. *Id.*

62. Norden v. E. F. Hutton & Co., 739 P.2d 914, 915 (Colo. Ct. App. 1987).

63. *Id.* at 915 (completing discovery and confirming in open court the intent to go to trial with knowledge of the right to arbitrate indicates intent to waive).

It is the court's decision whether a party has waived its contractual right to demand arbitration. It is the arbitrator's decision whether a party has waived its right to bring a particular claim or cause of action in the arbitration proceeding.[64] Thus, once a claim is found to be arbitrable, the court may not delve any further into the merits of the dispute, but must leave the merits for the arbitrator.[65]

A. *Right to Compel Arbitration*

1. Failure to Make a Timely Assertion

In *Rosecroft Trotting & Pacing Association v. Electronic Race Patrol, Inc.*,[66] a Maryland court of special appeals concluded that whether a party has waived its right to compel arbitration was an issue for the court, and whether a party has waived his right to bring the substantive claim in question requires factual determinations and is an issue for the arbitrators.[67] The court made it clear that these were two distinct issues.[68]

The defendant in *Rosecroft Trotting* had filed a demand for arbitration of its claims pursuant to the arbitration clause in the contract. Plaintiff sought to enjoin arbitration and objected on the grounds that "the demand for arbitration was not timely made."[69] Plaintiff characterized the waiver or timeliness issue as a question of fact as to when the wrongful act occurred, and whether the specific act in question constituted the wrongful act charged.[70] The court stated that "[t]his issue pertains only to the timeliness of the claim which is the subject of the arbitration and not to the right to arbitrate."[71] The court held that alleged waiver of the substantive claim was an issue for the arbitrators to decide.[72]

In *Falcon Steel Co. v. Weber Engineering Co.*,[73] a Delaware court applied three principles to the issue of waiver. First, any doubts as to arbitrability must be resolved in favor of arbitration.[74] Second, to waive the right to compel

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64. *See* Rosecroft Trotting & Pacing Ass'n v. Elec. Race Patrol, Inc., 69 Md. App. 405, 413, 518 A.2d 137, 141 (1986).

65. *See* Falcon Steel Co. v. Weber Eng'g Co., 517 A.2d 281, 287 (Del. Ch. 1986) (citing City of Meridian v. Algernon Blair, Inc., 721 F.2d 525, 528 (5th Cir. 1983)).

66. 69 Md. App. at 405, 518 A.2d at 137.

67. *Id.* at 413, 518 A.2d at 141.

68. *Id.*

69. *Id.* at 411, 518 A.2d at 140.

70. *Id.* at 412, 518 A.2d at 141.

71. *Id.* at 413, 518 A.2d at 141.

72. *Id.*

73. 517 A.2d at 281.

74. *Id.* at 287.

arbitration, a party must have taken action inconsistent with that right.[75] Third, laches or equitable estoppel will bar arbitration through waiver only when arbitration would be inequitable, such as where the opposing side has lost relevant evidence due to the delay.[76] A fourth principle implied by the court is that a clause which causes waiver will not be read into a contract when it is not required nor logically compelled.[77]

The defendant in *Falcon Steel* was a general contractor who refused to arbitrate with its subcontractor despite a mandatory arbitration clause in their contract.[78] Plaintiff sought to compel arbitration. Defendant responded by claiming, *inter alia*, that the plaintiff had waived the right to compel arbitration by failing to file for arbitration within the time permitted under the contract.[79] The defendant asserted that a clause in the primary contract with the owner which made timely notice a condition precedent to arbitration was implicitly contained in the subcontract, and that the delay rendered his claim against the building's owner invalid (he was suing the owner for the same additional costs for which the subcontractor was suing him).[80] Thus, the defendant argued that the plaintiff's delay in asserting his right to arbitration was prejudicial and had caused them damages.[81] However, the defendant was unable to present any evidence that his claim against the building's owner had indeed been rendered invalid.

The court held that the plaintiff had not waived his right to arbitration since the plaintiff had not actively participated in a lawsuit on the claim now presented for arbitration and had not taken other action inconsistent with the right to arbitrate.[82] Since the defendant presented no evidence of his claim against the owner being invalid due to plaintiff's delay, the court held that such a delay would only constitute a waiver via laches or equitable estoppel where the arbitration remedy would be inequitable, such as where relevant evidence had been lost due to the delay.[83] Furthermore, such inequities were an issue for the arbitrator and not for the court.[84] The court also refused to read the provision of the primary contract into the subcontract providing that timely notice was a condition precedent to arbitration. The court found it was neither an express provision in the subcontract, nor logically compelled by the circumstances.[85] On all these issues the general rule that any doubts as to arbitrability must be resolved in favor of arbitration was persuasive with the

75. *Id.* at 288.
76. *Id.*
77. *See id.* at 285-87.
78. *Id.* at 283.
79. *Id.* at 287.
80. *Id.* at 285, 287.
81. *Id.*
82. *Id.* at 288.
83. *Id.*
84. *Id.* at 287
85. *Id.* at 286-87.

court.[86]

The court in *Hansen v. State Farm Mutual Auto Insurance Co.*[87] utilized principles similar to those followed in *Falcon Steel* to find a waiver of the right to compel arbitration. The court concluded a party can waive his right to force arbitration if he waits too long to assert that right and acts inconsistently with it.[88] The court noted that arbitration provides a quick and inexpensive alternative to litigation and alleviate crowded dockets.[89] Those policies are rendered meaningless when parties proceed with the litigation process before asserting their contractual right to arbitration.[90]

The defendant (State Farm) had engaged in extensive discovery for eleven months, including depositions and medical examinations of the plaintiff, and extensive ongoing settlement negotiations.[91] Only when settlement negotiations finally broke down and it became apparent that plaintiffs would seek "stacking" of the three insurance policies (which would triple plaintiff's potential recovery) did the defendant first seek arbitration under the agreement. The court stated, "in short, when it appeared that things were not going its way, State Farm wanted out of the litigation process."[92] The court held that as a matter of law, the defendant had, by his acts, waived the right to enforce the arbitration clause in the contract.[93]

2. Litigation

The court in *County of Hennepin v. Ada-Bec Systems*,[94] adopted the view that waiver is a "voluntary relinquishment of a known right" so that the key to a successful claim of waiver is a showing of the intent of the party to waive his right to arbitrate.[95] In *County of Hennepin*, the breaching general contractor and its sureties were sued by the hospitals and county.[96] The sureties raised the contract's arbitration clause as a defense, and the plaintiffs motion to strike the arbitration defense was denied.[97] The sureties did not at that time move to compel arbitration or stay the proceedings pending arbitration. Both sides engaged in five years of discovery, with the sureties claiming their discovery was aimed at other remaining parties and claims in the complex suit.[98]

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86. *Id.* at 287-88.
87. 112 Idaho 663, 735 P.2d 974 (1987).
88. *Id.* at _____, 735 P.2d at 981.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. 394 N.W.2d at 611.
95. *Id.* at 613.
96. *Id.* at 612.
97. *Id.*
98. *Id.*

When the plaintiff's filed a notice of readiness for trial, the sureties moved to stay proceedings pending arbitration of the claims pursuant to the arbitration clause of the contract. The trial court held the sureties had waived their arbitration right or defense by waiting over six years to move for arbitration and by participating in discovery in the interim.[99]

The court of appeals reversed the trial court. The court held that the sureties' intent to waive or voluntarily relinquish their arbitration right had not been shown.[100] The court concluded that engaging in discovery did not cause a waiver because discovery was consistent with the flexibility of the arbitration process, and because the complex litigation was ongoing with other parties and other claims in the suit.[101]The intent to retain the right to arbitrate was shown in the assertion of arbitration as a defense in the defendant's answer which the court found to rebut the inference of waiver.[102]

In *Norden v. E.F. Hutton & Co.*,[103] the court stated that a party's right to arbitrate is waived where the party acts inconsistently with that right, resulting in prejudice to the opposing party.[104] A party's intent to waive this right can also be *inferred* from his actions or inaction.[105]

The defendants raised the affirmative defense of an arbitration agreement in their answer.[106] The controlling case law in the state held such agreements to be void.[107] One month after defendant's answer was filed, the state supreme court overruled earlier case law.[108] This decision made the arbitration agreement between plaintiff and defendants valid and enforceable. The defendants continued to pursue litigation by engaging in discovery with full awareness of the enforceability of the arbitration agreement.[109] The defendants filed a motion to compel arbitration only after the trial court ordered them to comply with a discovery request.[110] The trial court denied the motion, ruling the defendant's had "knowingly waived their right to arbitrate."[111]

The Colorado appellate court affirmed the trial court ruling. The court reasoned that the defendants had acted inconsistently with their right to compel arbitration by pursuing a course of litigation when they knew they had an

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99. *Id.*
100. *Id.* at 613.
101. *Id.*
102. *Id.*
103. 739 P.2d 914 (Colo. Ct. App. 1987).
104. *Id.* at 915.
105. *Id.*
106. *Id.* at 914.
107. *Id.* (construing Sandefer v. Reynolds Sec., Inc., 44 Colo. App. 343, 618 P.2d 690 (1980), which held arbitration agreements in securities contracts to be void).
108. *Id.* (construing Sager v. District Court, 698 P.2d 250 (Colo. 1985), which held the state statute void under the supremacy clause, overruling *Sandefer*).
109. *Id.*
110. *Id.*
111. *Id.*

enforceable arbitration agreement.[112] Furthermore, the court found the plaintiff would be prejudiced by compelling arbitration because the defendants had completed discovery while plaintiff had not.[113] The court concluded, "the advantage the defendants gained by judicial discovery is sufficient prejudice to infer waiver of their right to arbitrate."[114]

Case law indicates a party must take action inconsistent with his right to compel arbitration in order to waive that right. The cases analyzed indicate that it takes fairly extreme circumstances to constitute waiver. This is consistent with public policy and legislation favoring enforcement of arbitration agreements.

III. ARBITRABILITY

When parties disagree over what issues the arbitration agreement covers, the court will determine the arbitrability of the disputed issues.[115] In determining arbitrability, courts look to the language of the arbitration clause and the contract terms.[116] Factors which support a finding of arbitrability include: 1) public policy favoring arbitration; 2) state legislative intent favoring arbitration; 3) federal legislation and case law favoring arbitration, and 4) the broad wording of many arbitration clauses allowing for arbitration of most issues.[117]

A. *Scope of the Agreement*

The applicability of Maryland's U.A.A.[118] was addressed in *Board of Education v. Prince George's County Educators' Association.*[119] The issue was whether the Maryland U.A.A. applied to the review of the arbitration award or whether Maryland common law controlled. The award in question involved a collective bargaining agreement between the Board of Education and the teachers. The teachers moved to have an unfavorable award vacated under the Maryland U.A.A.[120] The court of special appeals vacated the award holding

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112. *Id.* at 915.

113. *Id.*

114. *Id.*

115. This is covered under two areas of the U.A.A. U.A.A. § 2 allows a court to decide arbitrability when a party moves to compel or stay arbitration, and U.A.A. § 12(a)(5) allows a court to rule on arbitrability when a motion to vacate an award is made on the grounds that no valid arbitration agreement exists.

116. *See* Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr, 151 Ill. App. 3d 597, 503 N.E.2d 786 (1987); *Rosecroft Trotting*, 69 Md. App. at 405, 518 A.2d at 137.

117. *See Donaldson*, 151 Ill. App. 3d at 601-02, 503 N.E.2d at 789-92.

118. MD. CTS. & JUD. PROC. CODE ANN. § 3-201-34 (1984).

119. 309 Md. 85, 522 A.2d 931 (1987).

120. *Id* at 91, 522 A.2d at 934.

that the Maryland U.A.A. controlled the grounds for review.[121]

The Maryland Court of Appeals concluded the Maryland U.A.A. was inapplicable.[122] The court noted that the state Arbitration Act, by its own terms, applies only to those agreements between employers and employees where the agreement expressly provides that the Act governs.[123] The application of the Maryland U.A.A. was beyond the scope of the arbitration agreement as the collective bargaining agreement did not expressly state that the Act would govern.[124]

The court next addressed the applicability of Maryland Rule E2[125]. This rule provides that once a final arbitration award is issued, the provisions of the Maryland Act regarding court review are applicable even though the Act is not applicable to the arbitration as a whole.[126] The court noted that a broad reading of this rule would make the entire Maryland Act applicable in a court proceeding in an arbitration to which the Act is not applicable.[127] The court rejected this broad interpretation of Maryland Rule E2. The court looked to its previous rulings which narrowly construed Maryland Rule E2, making only the procedural requirements of the Maryland Act applicable to common law arbitration.[128] Thus, the court held that Maryland common law controlled the review of certain arbitration awards.[129]

In *Rosecroft Trotting & Pacing Association v. Electronic Race Patrol, Inc.*,[130] the Maryland court limited itself to the issue of the scope of the arbitration agreement.[131] The case involved a contract dispute over a provision which prohibited the appellant from making any communications which would harm the business reputation of the appellee.[132] Electronic Race submitted the issue for arbitration but Rosecroft declined to arbitrate the matter. The arbitrator determined the claim to be arbitrable.[133] Rosecroft moved to stay arbi-

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121. *Id.* at 92, 522 A.2d at 934.
122. *Id.* at 96, 522 A.2d at 936.
123. *Id.* at 96, 522 A.2d at 936 (citing MD. CTS. & JUD. PROC. CODE ANN. § 3-206(b)).
124. *Id.*
125. *Id.*
126. Maryland Rule E2 reads:
After a final award has been made in writing in an arbitration to which the Maryland Uniform Act is inapplicable, court proceedings may be had to confirm, vacate, modify, correct, or enter judgment on the award. In any such case, the provisions of the Maryland Uniform Arbitration Act concerning such proceedings shall be applicable.
127. *Board of Educ.*, 309 Md. at 96, 522 A.2d at 936.
128. *Id.* at 97, 522 A.2d at 937.
129. *Id.* at 98, 522 A.2d at 937.
130. 69 Md. App. at 405, 518 A.2d at 137.
131. *Id.* at 409, 518 A.2d at 139.
132. *Id.* at 408, 518 A.2d at 138.
133. *Id.*

tration, raising as an issue the applicability of the arbitration clause.[134] The trial court granted Electronic Race's motion for summary judgment.[135]

The court of special appeals affirmed the trial court decision. The court pointed to the broad language of the arbitration clause which provided for arbitration of any dispute "concerning, pertaining, or relating to" the contract.[136] The court stated that under such broad language, "all issues are arbitrable unless expressly and specifically excluded."[137] The court found the covenant not to harm business reputation was a contractual matter subject to arbitration.[138]

In *Bethke v. Polyco, Inc.*,[139] a shareholder's agreement gave Polyco the right to buy Bethke's shares through a procedure which allowed both parties to designate a purchase price over a series of fifteen (15) day time limits.[140] The agreement also specified that if Bethke did not accept Polyco's valuation, an arbitrator would decide whether Bethke's or Polyco's valuation was closest to the fair market value of the stock.[141] After Polyco notified Bethke that it wished to buy his shares and sent him the accountant's report on the valuation, Bethke filed suit alleging faulty accounting and fraud. He sought a temporary injunction as to the fifteen-day time limit because he could not name a value for his shares.[142]

The trial court denied the application for a temporary injunction and ordered that all issues be submitted to arbitration pursuant to the shareholder's agreement.[143] On appeal, Bethke asserted that the scope of the arbitration clause was limited to determining which share valuation was closest to the fair market value.[144] The Texas appellate court upheld the trial court decision. The court ruled that "the question of whether faulty accounting and fraud are within the scope of the arbitration [clause] . . . of the shareholder's agreement is an issue to be determined first by the trial court."[145]

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134. *Id.*

135. *Id.*

136. *Id.* at 409, 518 A.2d at 139. The arbitration clause reads, "Rosecroft and the Patrol agree that *any* dispute or disagreement *concerning, pertaining, or relating* to the performance of the Contract from January 1, 1980, and thereafter shall be submitted to arbitration by an impartial arbitrator selected by the parties." *Id.* (emphasis in original).

137. *Id.* (quoting Gold Coast Mall v. Lamar Corp., 298 Md. 96, 468 A.2d 91 (1983)).

138. *Id.*

139. 730 S.W.2d 431 (Tex. Ct. App. 1987).

140. Id. at 432-33.

141. *Id.* at 433.

142. *Id.*

143. *Id.*

144. *Id.* (the clause read, "the question of which valuation was closest to the fair market value of such stock, would be submitted to arbitration").

145. *Id.* at 433-34.

The Illinois Court of Appeals took up the issue of arbitrability in *Vukusich v. Comprehensive Accounting Corp.*[146] The case involved a franchiser demanding arbitration for a breach of contract with the franchisee.[147] The franchisee filed an additional claim alleging fraud in the inducement on the part of the franchiser. The franchisee then filed suit in circuit court against both the employees and the franchisor alleging false misrepresentations on the part of certain franchiser employees.[148] The trial court found that fraud in the inducement was arbitrable as to the franchisor, but that the arbitration clause could not bind defendants or signatories to the agreements.[149]

The court of appeals upheld the trial court's finding. The court concluded that fraud in the inducement was an arbitrable matter, and as such, was not open to challenge by the franchisee.[150] In so doing, the court rejected the contentions that: (1) Illinois law makes the entire contract void if fraud exists, and (2) provisions of a contract are not separable.[151]

B. *Effect of Res Judicata & Collateral Estoppel*

These two doctrines may be employed to preclude arbitration. In *Bailey v. Metropolitan Property & Liability Insurance Co.*,[152] the plaintiff was injured when an automobile in which he was a passenger collided with a utility pole. Allstate, the automobile insurer, refused to pay the plaintiff any of the $10,000 available under the underinsurance coverage.[153] The plaintiff submitted the matter to the American Arbitration Association and was awarded $7,500 of the $10,000 coverage.[154]

The plaintiff later made claims against Metropolitan Property as the carrier of underinsurance coverage on his and his mother's automobiles.[155] Metropolitan denied liability on two grounds, "(1) that the arbitrator's award precluded the plaintiff from further pursuing the issue of damages and (2) that the plaintiff was also barred by reason of limitations in the defendant's policies."[156] The trial court decided the limitation was valid, and because the

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146. 150 Ill. App. 3d 634, 501 N.E.2d 1332 (1986).

147. *Id.* at 636, 501 N.E.2d at 1333. The arbitration clause read, "[a]ny and all disputes or controversies, whether of law or fact, of any nature whatsoever, arising from or respecting this agreement, shall be decided by arbitration . . . ." *Id.*

148. *Id.* The specific conduct of the defendant was alleged to be in violation of the Franchise Disclosure Act, ILL. REV. STAT. ch. 121½, para. 701-764 (1985).

149. *Id.* at 637, 501 N.E.2d at 1334.

150. *Id.* at 640, 501 N.E.2d at 1335-36.

151. *Id.* at 638, 501 N.E.2d at 1335.

152. 24 Mass. App. Ct. 34, 505 N.E.2d 908 (1987).

153. *Id.* at 35, 505 N.E.2d at 909.

154. *Id.*

155. *Id.*

156. *Id.* at 35, 505 N.E.2d at 909-10. The limitation in both policies read, "[i]f

plaintiff failed to exhaust the underinsurance available from Allstate, he was precluded from pursuing a claim against Metropolitan.[157]

The Massachusetts appellate court decided the case solely on the ground of issue preclusion.[158] The court concluded:

> [a] party not involved in a prior arbitration may use the award in that arbitration to bind his opponent if the party to be bound, or a privy, was before the arbitrator, had a full and fair opportunity to litigate the issue, and the issue was actually decided by the arbitrator or was necessary to his decision.[159]

The court found this case did not fall into an exception to the general rule "that a plaintiff is entitled to one recovery in a personal injury action for all past and reasonably expected future losses and injuries."[160] Nor did the court find any basis for preclusion under the Restatement.[161]

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someone covered under this Part [viz., Bodily Injury Caused by An Uninsured or Underinsured Auto] is using an auto he or she does not own at the time of the accident, the owner's Uninsured or Underinsured Auto insurance [here Allstate] must pay its limits before we pay." *Id.* at 35, 505 N.E.2d at 910 n.1.

157. *Id.* at 35-36, 505 N.E.2d at 910.

158. *Id.* at 36-37, 505 N.E.2d at 910. The court cited the RESTATEMENT (SECOND) OF JUDGMENTS § 84 comment c which provides:

> When arbitration affords opportunity for presentation of evidence and argument substantially similar in form and scope to judicial proceedings, the award should have the same effect on issues necessarily determined as a judgment has. Economies of time and effort are thereby achieved for the prevailing party and for the tribunal in which the issue subsequently arises.

159. *Bailey*, 24 Mass. App. Ct. at 36-37, 505 N.E.2d at 910.

160. *Id.* at 39, 505 N.E.2d at 911 (exception "when a new and unforeseen medical condition arises after the conclusion of the trial").

161. *Id.* at 40, 505 N.E.2d at 912. Reasons to deny an arbitration award preclusive effect are set forth in RESTATEMENT (SECOND) OF JUDGMENTS § 84(2), (3), & (4) as follows:

> (2) An award by arbitration with respect to a claim does not preclude relitigation of the same or a related claim based on the same transaction if a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim.
>
> (3) A determination of an issue in arbitration does not preclude relitigation of that issue if: (a) According preclusive effect to determination of the issue would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious; or (b) The procedure leading to the award lacked the elements of adjudicatory procedure prescribed . . . .
>
> (4) If the terms of an agreement to arbitrate limit the binding effect of the award in another adjudication or arbitration proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation.

The Massachusetts appellate court earlier addressed the issue of whether an arbitration award may be without effect on the grounds of issue preclusion resulting from an prior judicial proceeding in *Microwave Antenna Systems & Technology, Inc. v. Whitney-Pehl Construction Co.*[162] The first lawsuit was filed by the subcontractor against Whitney-Pehl, alleging Whitney-Pehl failed to pay for work performed. On the subcontractor's motion, Microwave, as trustee of funds being held for the benefit of Whitney-Pehl, was brought into the case.[163] Summary judgment was entered for the subcontractor against Whitney-Pehl, and Microwave, as trustee, was ultimately found liable for the full amount owed the subcontractor plus costs and interest.[164]

Microwave, in an attempt to avoid liability, submitted its breach of contract dispute with Whitney-Pehl to arbitration.[165] In arbitration, Whitney-Pehl asserted that the prior judgment had a preclusive effect as to the amount Microwave was ordered to pay the subcontractor. The arbitrator found in Microwave's favor after a hearing on the merits of the breach of contract dispute.[166] When Microwave sought confirmation of the arbitration award in the superior court, the court granted Whitney-Pehl's application to vacate the award which Microwave then appealed.[167]

The appellate court addressed the case in terms of issue preclusion. The court cited the strong public policy in favor of arbitration as an alternative to litigation, and the policy goals favoring issue preclusion as to matters previously litigated by the parties.[168] However, the court looked to Massachusetts statutory law which provides that "a party to any suit involving an arbitrable dispute is entitled to request and ordinarily to receive from the court a stay pending arbitration."[169] The statute indicates that if a party continues with the litigation of an arbitrable dispute, they are deemed to have waived any subsequent arbitration of that dispute.[170] However, in the case at hand, the court found the merits of the breach of contract dispute were never reached in the

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Id. at n.6.

162. 23 Mass. App. Ct. 25, 498 N.E.2d 1059 (1986).

163. *Id.* at 26, 498 N.E.2d at 1060.

164. *Id.* at 27, 498 N.E.2d at 1060-61. Because the court found Microwave to have knowingly and willfully misrepresented a material fact, judgment was entered pursuant to MASS. GEN. L. ch. 246, § 19, *amended by* MASS. GEN. L. ch. 1114, § 266 (1973), which reads, "[i]f a person summoned as trustee . . . he shall be liable to the plaintiff in the trustee process . . . for the full amount due on the judgment recovered therein, with interest, to be paid out of his own goods and estate."

165. *Microwave*, 23 Mass. App. Ct. at 27, 498 N.E.2d at 1061. Microwave asserted it did not owe any sum on Whitney-Pehl's behalf as Whitney-Pehl had breached the construction contract. *Id.* at 26, 498 N.E.2d at 1060.

166. *Id.* at 28, 498 N.E.2d at 1061.

167. *Id.* at 25, 498 N.E.2d at 1060.

168. *Id.*

169. *Id.* at 29, 498 N.E.2d at 1061 (citing MASS. GEN. L. ch. 251, § 2(d)).

170. *Id.*

first lawsuit, so the issues were found to be arbitrable.[171] The appellate court entered a new judgment, confirming the arbitration award.[172]

In *Kirk v. Board of Education*,[173] the Court of Appeals for the Seventh Circuit addressed the question of whether failure to file a counterclaim in a suit to set aside an arbitration award precludes further action on that claim.[174] Plaintiffs Kirk and Stuart, both males, were formerly employed as tenured teachers at high schools operated by the defendant. Due to a reduction in work force, plaintiffs were laid off while some female faculty members with less seniority were retained.[175] The teachers' union filed grievances with the defendant, and the court ultimately ordered the parties to arbitration.[176] The arbitrator reinstated the teachers, and found the dismissals based on economic necessity were void because the parties' contracts required a public hearing on the matter.[177]

The defendant filed an action in circuit court to have the arbitrator's award vacated. The court granted summary judgment for the union and ordered enforcement of the award.[178] The state appellate court affirmed the decision to reinstate the teachers even though the court noted the arbitrators did not have this authority.[179] The court reasoned that because the arbitrators' determination that the terminations were void was binding, the teachers were rehired by "operation of law."[180] The Illinois Supreme Court disagreed and reversed on the rehiring point.[181]

In *Kirk*, while the state litigation was pending, the plaintiffs received their right-to-sue letters from the Equal Employment Opportunity Commission and filed separate sex discrimination suits in federal district court.[182] The defendant moved to dismiss the claims on the ground that res judicata barred the sex discrimination claims because plaintiffs did not counterclaim in the prior suit to vacate the award.[183] The district court dismissed the suit and this

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171. *Id.*

172. *Id.* at 31, 498 N.E.2d at 1063.

173. 811 F.2d 347 (7th Cir. 1987).

174. *Id.* at 351.

175. *Id.* at 349. The reason stated for this order in lay-offs was that they could not supervise female students when the students were in the locker room. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 350.

179. *Id.*

180. *Id.* (citing Bd. of Educ. v. Bremen Dist., 114 Ill. App. 3d 1051, 1058, 449 N.E.2d 960, 966 (1983), *aff'd in part, rev'd in part*, 101 Ill. 2d 115, 461 N.E.2d 406 (1984)).

181. *Bremen*, 101 Ill. 2d at 122, 461 N.E.2d at 409.

182. *Kirk*, 811 F.2d at 350. The suits were filed under Title VII of the Civil Rights Act of 1964 § 706(f)(1), *codified as amended* at 42 U.S.C. § 2000e-5(f)(1) (1982).

183. *Kirk*, 811 F.2d at 350-51.

appeal followed.[184]

The Seventh Circuit considered whether "the plaintiff's failure to file a sex-discrimination count as a counterclaim in the suit initiated by the Board to set aside the arbitrator's award precludes this Title VII action."[185] Based on the doctrine of full faith and credit, the court held that res judicata as applied by the Illinois courts would control.[186] The Illinois rule required identity of cause of action in the two suits which meant the same evidence must sustain both causes of action.[187] The court found the two actions did not involve the same evidence, and concluded the plaintiff's claim was not barred.[188] The court stated, "[w]e reach this conclusion regardless of whether we view the prior action as a review of the merits of the arbitrator's decision or simply an action to confirm or vacate the award, because the evidence necessary to sustain either action would differ radically from that required to support the Title VII claim."[189]

The cases discussing the effect of res judicata and collateral estoppel indicate that courts are willing to find most issues arbitrable, especially under broad arbitration clauses. An exception to this rule is in those uncommon instances where statutory law expressly prohibits or the agreement itself specifically forbids arbitrability. The courts have established a firm role as the final decision maker on the existence of an arbitration clause and the issue of arbitrability. However, the courts leave all other matters for the arbitrator.

IV COMPELLING AND STAYING PROCEEDINGS

The U.A.A. allows for the stay of any court proceeding pending the outcome of arbitration.[190] It also authorizes the court to compel arbitration if it finds an agreement to do so.[191] The application to compel or stay arbitration must be made in a court of competent jurisdiction.[192]

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184. *Id.*

185. *Id.* at 351.

186. *Id.* at 351-52.

187. *Id.* at 352. In Illinois, "for res judicata to apply, there must be an identity of the cause of action in the actions, and a final judgment of the merits in the earlier suit." *Id.*

188. *Id.* at 353.

189. *Id.*

190. U.A.A. § 2.

191. *Id.*

192. *Id.*

A. *Compelling Arbitration*

1. Statutory and Contract Rights

In *Lake Plumbing v. Seabreeze Construction Corp.*,[193] a Florida appellate court compelled arbitration based on the arbitration clause in a contract between a subcontractor and general contractor.[194] The subcontractor brought suit after the contract was terminated, and the general contractor filed a motion to compel arbitration.[195] The court held that where the contract and a Florida statute conferred the right to arbitrate and the right is properly asserted, courts should order arbitration.[196] The court noted that arbitration is especially appropriate in disputes involving issues that are "unique to certain industries and which require specialized knowledge for their resolution."[197]

2. Costs

The fees and expenses of arbitration, except for attorney's fees, are determined and allocated by the arbitrator. In *Kessel v. Dugand*,[198] the appellant appealed the circuit court's order compelling arbitration and directing each party to pay half of the start-up costs of the arbitration.[199] The appellants contended that the circuit court had no authority to direct them to pay half of the costs of instituting the arbitration.[200] The Florida arbitration statute expressly provided that fees and expenses should be "paid as provided in the award."[201] However, the court of appeals concluded this statute did not settle who should pay front money to commence proceedings.[202] The court held that logic required the party pursuing the claim to pay the initial costs subject to a later modification in the award by the arbitrator.[203]

3. Temporary Injunctions

The decision to grant a temporary injunction concerning the issue of arbitration itself or other matters before the court rests in the discretion of the trial court. This decision will not be overturned except on a showing of abuse

193. 493 So. 2d at 1100.
194. *Id.* at 1101 (arbitration clause read, "[a]ll claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, shall be decided by arbitration . . . ").
195. *Id.*
196. *Id.* at 1102; *see also* FLA. STAT. § 682.02 (1985).
197. *Id.*
198. 508 So. 2d 45 (Fla. Dist. Ct. App. 1987).
199. *Id.* at 46.
200. *Id.*
201. FLA. STAT. ANN. § 682.11 (1986).
202. *Kessel*, 508 So. 2d at 46.
203. *Id.*

of discretion.[204]

In *Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co.*,[205] the court considered whether a preliminary injunction could issue before arbitration when the contract required any dispute to be arbitrated.[206] In *Hull*, Hull Municipal Lighting Plant (HMLP) contracted with Massachusetts Municipal Wholesale Electric Company (MMWEC) to buy electricity at a reduced price. The parties entered into a contract which required HMLP to make monthly payments to MMWEC to cover its portion of the debt service on various projects.[207] The contract required all disputes to be submitted to arbitration at the request of either party.[208] Pendency of arbitration was not to affect the obligation of HMLP to make payments on the bonds.[209] HMLP filed suit over MMWEC's investments in four projects involving a nuclear power plant and stopped paying pending settlement of the suit. MMWEC filed for an order compelling arbitration and sought a preliminary injunction to force payment.[210]

In deciding whether to grant the injunction, the court balanced the harm to MMWEC if the injunction was not granted against the harm to HMLP if the injunction was granted, and the likelihood of MMWEC's prevailing on the merits.[211] The court found for MMWEC on both considerations, and issued the preliminary injunction ordering HMLP to continue making the payments.[212]

On appeal, HMLP argued the preliminary injunction was inconsistent with the order compelling arbitration.[213] Since the court has to determine the likelihood of MMWEC's success in order to grant the injunction, the court was invading the province of the arbitrator.[214] The court held that granting a preliminary injunction did not invade the province of the arbitrator.[215] The court reasoned that although its evaluation in the preliminary injunction proceeding may influence the arbitration proceeding, the analysis was based on abbreviated facts and law so that the arbitrator's final judgment could properly differ from the findings in the preliminary injunction hearing.[216]

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204. *See* Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 399 Mass. 640, 506 N.E.2d 140 (1987).
205. *Id.*
206. *Id.* at _____, 506 N.E.2d at 144-45.
207. *Id.* at _____, 506 N.E.2d at 141.
208. *Id.* at _____, 506 N.E.2d at 141 n.3.
209. *Id.* at _____, 506 N.E.2d at 141.
210. *Id.*
211. *Id.* at _____, 506 N.E.2d at 142.
212. *Id.* at _____, 506 N.E.2d at 142-43.
213. *Id.* at _____, 506 N.E.2d at 144.
214. *Id.* at _____, 506 N.E.2d at 145.
215. *Id.*
216. *Id.*

B. *Staying Judicial Proceedings*

1. Third Parties

When considering a motion to stay judicial proceedings, the court may stay the entire proceeding or merely its review of a severable issue.[217] As long as an issue is identical to both proceedings, the court may stay its review of the issue even when the parties in both proceedings are not identical. A stay must be specifically requested or the proceedings will continue.[218]

Courts have also discussed certain prerequisites to *de novo* and appellate review of motions to compel and/or stay arbitration. Illinois courts will grant a motion to stay an arbitration proceeding if the issue of arbitrability itself is in dispute.[219] One Illinois appellate court refused to review the denial of a motion to dismiss on the grounds that it was not an appealable ruling absent an accompanying denial or grant of a motion to compel arbitration.[220]

A Florida statute, using language virtually identical to the U.A.A., permits a stay of those proceedings which involve an issue subject to arbitration if an order for arbitration or an application therefor has been made.[221] The statute also permits staying any particular issue in a proceeding providing the issue is severable, subject to arbitration, and an order or application for arbitration has been either requested or made.[222] Florida courts have interpreted this provision to apply even when the parties are not identical in both the arbitration and the judicial proceedings so long as an identical issue is common to both.[223]

In *425 Florida, Inc. v. George V. Behan Construction*,[224] the Florida District Court of Appeals reviewed a lower court's denial of a motion to stay the trial between a general contractor and an owner of a condominium project pending arbitration of a dispute between the owner and a third party, the architect.[225] The owner alleged collusion between the general contractor and the architect in perpetrating fraud in this dispute.[226] The appellate court reversed the trial court and stayed only the fraud counterclaim pending resolution of

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217. *See* 425 Florida, Inc. v. George V. Behan Constr., 497 So. 2d 1340, 1341 (Fla. Dist. Ct. App. 1986).

218. *See* Sand v. School Serv. Employees Union, 402 N.W.2d 183 (Minn. Ct. App. 1987).

219. *See Donaldson*, 151 Ill. App. 3d at 602, 503 N.E.2d at 790.

220. E. J. De Paoli Co. v. Novus, Inc., 156 Ill. App. 3d 796, 799, 510 N.E.2d 59, 60 (1987).

221. FLA. STAT. ANN. § 682.03(3).

222. *Id.*

223. *425 Florida*, 497 So. 2d at 1341.

224. *Id.* at 1340.

225. *Id.*

226. *Id.* at 1341.

this issue between the architect and the owner through arbitration.[227] The court found the other issues in the dispute to be severable and not arbitrable as they involved both different parties and different contracts than the issue being arbitrated between the owner and the architect.[228]

2. Other Claims

Under the U.A.A., the stay of other proceedings must be included in the court order to compel arbitration.[229] In *Sand v. School Service Employers Union*,[230] the court considered whether a specific stay was required under the Minnesota arbitration statute (which is identical to the U.A.A.).[231] Sand brought a grievance against her employer, the Anoka-Hennepin School District, because of her dismissal.[232] Although the union agreed to process the grievance, it refused to enter into binding arbitration.[233] Sand then brought an action in state court against the union for breach of duty for fair representation.[234] The union interposed a third-party complaint against the school district and moved to compel the school district to arbitrate.[235] This request was granted.[236]

During this time, the proceedings against the union were still pending in district court. The case was ultimately dismissed under Minnesota law because the time period for filing a Note of Issue/Certificate of Readiness or for a continuance had passed.[237] Sand appealed the dismissal based on her interpretation of the Minnesota statute.[238] Sand argued the district court proceedings would have been stayed when the court ordered arbitration with the school district.[239] The court of appeals held this interpretation to be erroneous. The court stated that the wording of the statute requires all stays to be specifically included in any order compelling arbitration.[240] The court found no specific language in the order staying the claim against the union.[241] Nevertheless, the court reversed the dismissal based on other grounds, holding that Sand's inter-

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227. *Id.*
228. *Id.*
229. U.A.A. § 2.
230. *Sand*, 402 N.W.2d at 183.
231. MINN. STAT. ANN. § 572.09 (West 1986).
232. *Sand*, 402 N.W.2d at 184-85.
233. *Id.* at 184.
234. *Id.*
235. *Id.* at 185.
236. *Id.*
237. *Id.*
238. MINN. STAT. ANN. § 572.09.
239. *Sand*, 402 N.W.2d at 185.
240. *Id.* at 185-86.
241. *Id.* at 186.

pretation was reasonable and the defendant had not been unduly prejudiced.[242]

3. Arbitrability

The issue of whether a claim is arbitrable is a determination for the courts. In *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*,[243] the court considered whether a stay of arbitration should be granted where one party asserts the subject of the dispute is not arbitrable.[244] The dispute involved an employee's claim for compensation against his employer. The employee demanded arbitration pursuant to an arbitration clause in the Board of Trade Rules.[245] The defendant, a commodity futures broker at the Board of Trade, contended that the dispute over compensation raised by the plaintiff employee was not within the scope of this arbitration provision.[246] The court of appeals held that Illinois law permits a court to stay an arbitration proceeding on a showing that there is no agreement to arbitrate.[247] The court held that the plain language of this statute indicates the decision of arbitrability is for the trial court as a matter of law.[248]

C. *Staying Arbitration*

A court may stay an arbitration proceeding commenced or threatened on a showing there is no agreement to arbitrate.[249] In *Lambda Construction Co. v. City of Alice*,[250] a preliminary injunction stayed arbitration proceedings until the issues between the parties were tried on the merits. The defendant sought to enjoin arbitration, arguing that delay damages were not contemplated by the contract and therefore not arbitrable.[251] The court granted the injunction pending a hearing to determine arbitrability.[252] The court of appeals upheld this decision. The court based its decision on the trial court's intent to speedily resolve the threshold question of arbitrability, and the injunction being granted solely to that end.[253]

There is an increasing trend by the courts to defer to arbitration where

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242. *Id.* (relief from final judgment based on reasonable defense, reasonable excuse, or no substantial prejudice to the opponent).
243. 151 Ill. App. 3d at 597, 503 N.E.2d at 786.
244. *Id.* at 602, 503 N.E.2d at 790.
245. *Id.* at 599, 503 N.E.2d at 788.
246. *Id.*
247. *Id.* at 600, 503 N.E.2d at 788.
248. *Donaldson*, 151 Ill. App. 3d at 602, 503 N.E.2d at 790.
249. *See* TEX. REV. CIV. STAT. ANN. art. 224-25 (Vernon 1973); *see also* U.A.A. §§ 3-4.
250. 729 S.W.2d 377 (Tex. Ct. App. 1987).
251. *Id.* at 379.
252. *Id.*
253. *Id.* at 381.

appropriate. The courts will not order parties to arbitrate if an injustice would result. Courts are interpreting statutes and making decisions which protect a party's right to arbitrate provided that: (1) the right is clearly enunciated in the agreement between the parties, (2) the agreement governs the dispute before the court, and (3) a party correctly requests a specific remedy.

V. THE ARBITRATION PROCEEDING

The parties may specify in the arbitration agreement the procedures to be followed in the arbitration proceeding.[254] In the absence of any such agreement, the proceedings must adhere to § 5 of the U.A.A. or the applicable state U.A.A. provisions.

In *Renny v. Port Huron Hospital*,[255] the court addressed due process considerations within the arbitration proceeding.[256] The Supreme Court of Michigan held that where an employer and an employee agree in advance that an employer-employee grievance board decision will have final and binding effect, such a decision will, nonetheless, be subject to judicial review when the employee-plaintiff alleges a lack of "elementary fairness" in the grievance proceedings.[257] At the hearing before the grievance board, the plaintiff received no notice of who the opposing witnesses were or what the complaint alleged; was prohibited from presenting any evidence at the hearing; and was denied the opportunity to be present during the proceeding.[258] The court concluded that a grievance process lacking elements of elementary fairness could be successfully challenged on procedural grounds as failing to provide a procedurally fair decision.[259]

VI. CONFIRMATION AND VACATION OF AWARDS

Courts generally confirm arbitration awards unless there are sufficient grounds to vacate the award. The U.A.A. sets out five grounds for vacating an arbitration award.[260] The U.A.A. also sets out the procedure that the peti-

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254. *See* U.A.A. § 5.

255. 427 Mich. 415, 398 N.W.2d 327 (1986).

256. *Id.* at 434, 398 N.W.2d at 337. Although the case did not involve arbitration as such, it did involve a grievance committee board which the court noted "should be granted the same deference as that afforded an independent arbiter." *Id.*

257. *Id.* at 436, 398 N.W.2d at 338.

258. *Id.* at 438, 398 N.W.2d at 339.

259. *Id.*

260. U.A.A. § 12(a) states:

> (a) Upon application of a party, the court shall vacate an award where:
>
> (1) The award was procured by corruption, fraud or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

tioner must follow in order for the court to vacate the award.[261] Generally, the U.A.A. requires the application for vacation to be made within ninety days of delivery of a copy of the award to petitioner.[262] In case of fraud, corruption, or other undue means, the application shall be made within ninety days after such grounds are known or should have been known.[263] In vacating an award, the court may order a rehearing before new arbitrators or the same arbitrators, depending on the grounds for vacation.[264] If the application to vacate is denied and there is no motion to modify or correct, the award will be confirmed.[265]

Under Section 11 of the U.A.A., there is a general policy of minimal judicial interference with arbitration awards. Courts give great weight to the arbitrator's decision.[266] Every reasonable presumption must be indulged to up-

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(3) The arbitrators exceeded their powers;

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

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

261. Section 12(b) states:

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

262. U.A.A. § 12(b); *see also* ME. REV. STAT ANN. tit. 14, § 5938(1)(c) (1964); MINN. STAT. ANN. § 572.19 (West 1987); N.M. STAT. ANN. § 44-7-12(A)(3) (1978); N.C. GEN. STAT. § 1-567.13 (1983); TEX. REV. CIV. STAT. ANN. art. 237 (Vernon 1973); WYO. STAT. § 1-36-114(b) (1977).

263. U.A.A. § 12(b).

264. U.A.A. § 12(c) states:

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

265. U.A.A. § 12(d) states, "[i]f the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award."

266. *See* Maine State Employees Ass'n v. Maine, 517 A.2d 58, 62-63 (Me. 1986).

hold the award.[267] The burden of persuasion utilized by the court to overturn an award varies from "demonstrating an objective basis,"[268] to "[o]nly in a very clear case . . . [of] fraud, misconduct, or gross mistake,"[269] to "clear and convincing evidence."[270] This high burden further supports the policy of giving great deference to arbitration awards in order to discourage litigation.[271]

A party wishing to allege arbitrator misconduct and/or partiality as a basis for vacating an arbitration award must object to the composition of the arbitration panel at the time of the hearing, or his right to object is deemed waived.[272] Assuming no waiver, the party must prove the existence of facts which would establish a "reasonable impression of partiality."[273] The U.A.A. § 12(a)(2) statutory ground of "evident partiality" means "more than a mere appearance of bias."[274]

As previously stated, great judicial deference is given to the arbitrator's final decision,[275] as well as his decision to hear certain expert testimony and issue sanctions.[276] Even when the arbitrator commits an error of law, courts may hold that he has not exceeded his powers, and uphold the decision.[277] If an arbitration panel makes a decision or grants an award that exceeds the arbitration agreement, it can be vacated and remanded for further consideration consistent with the powers conferred on the arbitration panel by statute or the agreement.[278] Courts have agreed that an arbitrator does not have the authority to award punitive damages, as this is a matter left to the courts.[279] However, one court allowed an arbitration panel to "suggest" the amount of punitive damages a proper court should award without finding that the panel exceeded its authority.[280] Further, all grounds for vacating an award must be

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267. *See* Bailey & Williams v. Westfall, 727 S.W.2d 86, 90 (Tex. Ct. App. 1987); Wilson Bldg. Co. v. Thorneburg Hosiery, 85 N.C. App. 684, 355 S.E.2d 815 (N.C. Ct. App. 1987).

268. *See Wilson*, 85 N.C. App. at ____, 355 S.E.2d at 817.

269. *See Bailey & Williams*, 727 S.W.2d at 90.

270. *See* Texas West Oil & Gas Corp. v. Fitzgerald, 726 P.2d 1056, 1062 (Wyo. 1986).

271. *See Wilson*, 85 N.C. App. at ____, 355 S.E.2d at 817.

272. *See* Bernstein Seawell & Kove v. Bosarge, 813 F.2d 726, 732 (5th Cir. 1987).

273. *Id.* at 732.

274. *Id.*

275. *See Maine*, 517 A.2d 58, 62-63 (Me. 1986).

276. *See* Golub v. Spivey, 70 Md. App. 147, 520 A.2d 394 (Md. Ct. App. Spec. 1987).

277. *See Maine*, 517 A.2d at 63 n.10.

278. *See* Law Enforcement Labor Serv. Inc. v. City of Roseville, 393 N.W.2d 670 (Minn. Ct. App. 1986); *Wilson*, 85 N.C. App. at ____, 355 S.E.2d at 818.

279. *See* Stewart v. State Farm Mut. Auto Ins. Co., 104 N.M. 744, 747, 726 P.2d 1374, 1377 (1986).

280. *Id.* at 747, 726 P.2d at 1377.

addressed at the district court level or they are deemed to be waived and cannot be raised on appeal.[281]

A. *Arbitrator Misconduct, Partiality, and Bias*

In *Coughlan Construction Co. v. Town of Rockport*,[282] the arbitrators made an award in favor of a construction company in a dispute over a construction contract with the city. The city filed a complaint to vacate the arbitrator's award because of the possible bias of one of the arbitrators.[283] The arbitrator was an officer of a general contracting corporation and had nominated the attorney for Coughlan as general counsel to the Utility Contractors Association.[284] The trial court found the arbitrator's association with Coughlan's attorney to be a "professional relationship" not sufficient to indicate bias or partiality.[285] The appellate court affirmed the trial judge's findings that the city had not met its burden of proof with respect to the arbitrator and "had not provided the specific and direct evidence of fraud, corruption, and undue influence or partiality . . . necessary to overturn an arbitration ruling."[286]

International Medical Centers, Inc. v. Sabates[287] involved a motion to vacate an arbitration award for arbitrator misconduct. A physician brought a claim against a medical center based on his termination as head of the medical center's eye-care program for failure to maintain liability insurance.[288] The key issue at the arbitration hearing was the legitimacy of the medical center's basis for terminating the physician's employment.[289] After the hearing but before the deliberation, one arbitrator placed a phone call to the physician's insurance carrier to demonstrate the ease with which the hospital could have verified the coverage.[290] The arbitrators found for Sabates on all counts.[291] The trial court held that the arbitrator's action of placing a telephone call did not require the award to be vacated on the basis of arbitrator misconduct.[292] The court reasoned that this action did not prejudice the rights of the hospital as the information gained from the call was already in the record.[293] The court stated that while arbitration panels should not go outside the evidence presented, the challenged conduct must sufficiently prejudice the rights of a

281. *See Texas West*, 726 P.2d at 1061.
282. 23 Mass. App. Ct. at 994, 505 N.E.2d 203.
283. *Id.* at _____, 505 N.E.2d at 205.
284. *Id.* at _____, 505 N.E.2d at 206.
285. *Id.*
286. *Id.* at _____, 505 N.E.2d at 205-06.
287. 498 So. 2d 1292 (Fla. Dist. Ct. App. 1986).
288. *Id.* at 1293.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.* at 1293-94.

party to justify vacating an award.[294]

B. *The Arbitrator's Scope of Authority*

In *Hennepin County Ambulance Drivers Association v. County of Hennepin*,[295] the court of appeals held that the arbitrator's award was properly vacated because the arbitrator exceeded the scope of his authority.[296] A dispute over a new employment contract was arbitrated between the county medical center and a union representing paramedics and ambulance workers.[297] An award was granted in favor of the union which allowed for a three percent increase in pay and ordered the county to reinstate a twelve-hour work shift.[298]

The court concluded that the award exceeded the arbitrator's authority because it ordered the county to reinstate the twelve-hour work shift.[299] The collective bargaining agreement in question was governed by the Charitable Hospitals Act,[300] which the court interpreted as not allowing the arbitrator to determine the normal work shift.[301] In the absence of statutory authority, the court reasoned that such matters are of inherent managerial concern, and the arbitrator had no power to determine them unless the county consented to arbitrate the issue.[302]

In *International Medical Centers, Inc. v. Sabates*,[303] an employer argued that an arbitration award should be vacated because the arbitrators exceeded their authority.[304] The employer contended that the arbitrator's consideration of the employee's claim under the Florida Civil Theft Statute[305] was an abuse

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294. *Id.* at 1294. The statutory basis for the court's decision is FLA. STAT. ANN. § 682.13(1)(b) (1983) which states, "(1) Upon application of a party, the court shall vacate an award when . . . (6) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party."

295. 394 N.W.2d 206 (Minn. Ct. App. 1986).

296. *Id.* at 208.

297. *Id.* at 207.

298. *Id.*

299. *Id.* at 208.

300. MINN. STAT. §§ 179.35-.39 (1986).

301. *County of Hennepin*, 394 N.W.2d at 208; *see* MINN. STAT. § 179.38. The statute did not give arbitrators the authority to settle issues concerning usual hours of work, i.e. 12 hour shift.

302. *County of Hennepin*, 394 N.W.2d at 208.

303. 498 So. 2d at 1292.

304. *Id.* at 1294. The employer's argument was based on FLA. STAT. § 682.13(1)(c) which states, "(1) Upon application of a party, the court shall vacate an award when . . . . (c) The arbitrators or the umpire in the course of his jurisdiction exceeded their powers."

305. FLA. STAT. § 812.035(7) (1983) provides for the recovery of treble damages to a person injured by violation of the statute.

of power.[306] The court held that the employee's claim based on the theft statute was properly the subject of arbitration.[307] The court further stated that the holding was based on the legal principle that review of arbitration awards should be extremely limited.[308]

The New Mexico Supreme Court discussed the issue of awarding punitive damages in *Stewart v. State Farm Mutual Auto Insurance Co.*[309] The insured was covered by State Farm under an uninsured motorist provision of his policy. The policy provided that State Farm would pay to the insured any amount for bodily harm or property damage that the insured would be entitled to receive from any uninsured operator of a motor vehicle.[310] The arbitration panel awarded the insured $3,500 in compensatory damages and suggested $25,000 in punitive damages.[311] Upon petition, the trial court confirmed the entire award.[312]

State Farm appealed and argued that the punitive damage award exceeded the arbitrators' power.[313] The court concluded that the arbitrators did not actually award punitive damages, but merely suggested an amount which a "proper court" could find if they were persuaded punitive damages were warranted.[314] The court found this to be within the authority of the arbitrators, and, noting the advisory nature of the arbitrators' decision, confirmed the entire award.[315]

In *McLeroy v. Waller*,[316] the issue was whether an arbitration panel had exceeded its authority by awarding punitive damages.[317] This case was an appeal from the denial of a petition to set aside an award in favor of a lessee in a wrongful termination of a lease action.[318] The lessee would not have been entitled to punitive damages absent a showing of tortious conduct by the lessor.[319] However, Arkansas law expressly precludes the resolution of tort actions by arbitration.[320] Therefore, the court held that the arbitrators did not have au-

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306. *City of Miami*, 498 So. 2d at 1294.

307. *Int'l Medical Centers*, 498 So. 2d at 1294 (based on a prior appeal decision, *see* Sabates v. Int'l Med. Centers, Inc., 450 So. 2d 514, 518 (Fla. Dist. Ct. App. 1984)).

308. *Id.*

309. 104 N.M. at 744, 726 P.2d at 1374.

310. *Id.* at 745, 726 P.2d at 1375.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 747, 726 P.2d at 1377.

315. *Id.*

316. 21 Ark. App. 292, 731 S.W.2d 789 (1987).

317. *Id.* at 294, 731 S.W.2d at 790.

318. *Id.*

319. *Id.* at 296, 731 S.W.2d at 792.

320. ARK. STAT. ANN. § 34-511 (Supp. 1985) states, "[t]his Act [§§ 34-511, 531-532] shall have no application to personal injury or tort matters . . ."

thority to make an award of punitive damages.[321]

In *Wilson Building Co. v. Thorneburg Hosiery*,[322] the court held that the award of attorney's fees was not a subject for arbitration.[323] The contract called for the owner to pay "reasonable attorneys' fees incurred by the contractor for the collection of any defaulted payment."[324] A statute provided for reasonable attorneys' fees to be fifteen percent of the "outstanding balance" due on the contract.[325] The arbitrators' award included attorney's fees as well as those amounts going toward the "outstanding balance."[326] The appellate court concluded the arbitrators exceeded their authority and remanded the proceedings to the superior court to return the question to the arbitrators solely for a determination of the outstanding balance due on the contract.[327]

C. *Refusal To Hear Evidence Material to the Controversy*

In *McLeroy v. Waller*,[328] the party seeking to vacate an award argued that the arbitration panel improperly refused to postpone the hearing when a subpoenaed witness left before being called to testify.[329] The court of appeals stated that the refusal to postpone the hearing upon sufficient cause, and the refusal to hear evidence material to the controversy so as to substantially prejudice the rights of a party could be grounds for vacating or modifying the award.[330] However, the decisions of the arbitration panel on questions of law and fact are conclusive, and the award of compensatory damages would be confirmed unless sufficient grounds were established to support vacating or modifying the award.[331] The court stated the burden is on the moving party to produce a sufficient record from the arbitration hearing to demonstrate error.[332] The proceedings at the arbitration hearing, including the testimony of witnesses and the discussion between counsel for the parties and the panel, were neither transcribed nor recorded.[333] The appellant failed to meet the required burden of presenting a sufficient record and the arbitrator's decision was confirmed.[334]

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321. *McLeroy*, 21 Ark. App. at 296-97, 731 S.W.2d. at 792.
322. 85 N.C. App. 684, 355 S.E.2d 815 (1987).
323. *Id.* at ____, 355 S.E.2d at 818.
324. *Id.*
325. *Id.*; *see* N.C. GEN. STAT. § 6-21.2(2) (1986).
326. *Wilson*, 85 N.C. App. at ____, 355 S.E.2d at 818. The arbitrators' award included approximately $70,000 in attorney's fees.
327. *Id.* at ____, 355 S.E.2d at 819.
328. 21 Ark. App. at 292, 731 S.W.2d at 789.
329. *Id.* at 294, 731 S.W.2d at 790.
330. *Id.* at 295, 731 S.W.2d at 791.
331. *Id.*; *see also* ARK. STAT. ANN. §§ 16-108-212.
332. *McLeroy*, 21 Ark. App. at 296, 731 S.W.2d at 791.
333. *Id.*
334. *Id.*

In *Golub v. Spivey*,[335] the petitioner sought vacation of an award on the grounds that the arbitrator refused to hear evidence material to the controversy.[336] The arbitrators refused to hear testimony from Golub's expert since Golub failed to meet the set discovery deadline for naming experts.[337] The court affirmed the arbitrator's decision to exclude this expert testimony based on Golub's complete failure to comply with discovery and statutory law giving the arbitration panel authority over discovery issues.[338]

D. *Errors of Fact or Law*

In *Anderson v. Willey*,[339] the Supreme Judicial Court of Maine considered whether a possible procedural irregularity during arbitration constituted a sufficient error of law to justify vacation of the award.[340] The court vacated the award when it concluded the panel erroneously determined the petitioner had standing to sue.[341] The supreme judicial court stated, "in bargaining for an arbitrator's decision, the parties bargain for the arbitrator's interpretation of the law as well [and] a reviewing court is not empowered to overturn an arbitration award merely because it believes that sound legal principles were not applied."[342] The pertinent statute set out only a limited number of factors that a court could consider when reviewing an arbitration award.[343] Since a procedural error of law was not included, the panel's award did not amount to an overextension of the arbitrator's power.[344]

In a case decided a few weeks after *Anderson*, the Supreme Judicial Court of Maine in *Maine State Employees Association v. State*,[345] followed the same line of reasoning regarding errors of law.[346] In this case, an employee's association brought a grievance on behalf of a librarian when her job position was reclassified against her wishes. She had previously petitioned for reclassification to a different job position, and her petition was not processed within the 45-day time limit prescribed by the personnel statute.[347] The arbi-

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335. 70 Md. App. 147, 520 A.2d 394 (1987), *cert. denied*, 310 Md. 2, 526 A.2d. 954 (1987).

336. *Id.* at 160, 520 A.2d at 400.

337. *Id.*, 520 A.2d at 400-01. Golub missed the deadline by over 45 days and did not ultimately name an expert until the opposing party filed a motion in limine to prohibit the hearing of any expert testimony for Golub.

338. *Id.*, 520 A.2d at 401; *see* MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(c).

339. 514 A.2d 807 (Me. 1986).

340. *Id.* at 810.

341. *Id.*

342. *Id.*

343. *See* ME. REV. STAT. ANN. tit. 14, § 5938(1) (1980).

344. *Anderson*, 514 A.2d at 810.

345. 517 A.2d 58 (Me. 1986).

346. *Id.* at 63 n.10.

347. *Id.* at 62; *see* ME. REV STAT. ANN. tit. 5, § 593 (1985).

trator concluded the statute was "external to the Agreement" and returned an award in favor of the state.[348]

The Association petitioned the district court to vacate the award, alleging as grounds that the arbitrator exceeded his powers by rendering an award inconsistent with the statute.[349] Since the arbitration award was based on a collective bargaining agreement, the court stated that in order to find the arbitrator exceeded his power, it must find "no rational construction of the contract that can support the award."[350] The court also stated that "so long as the arbitrator draws his decision from the terms of the collective bargaining agreement, we are reluctant to disturb his conclusions."[351] The court held the arbitrator's interpretation was reasonable and affirmed the award.[352]

In *Texas West Oil & Gas Corp. v. Fitzgerald*,[353] the plaintiff sought to have an arbitrator's award vacated based on a "manifest mistake of the law."[354] The suit involved a breach of contract between a corporation and a contractor who was to construct and deliver a drilling rig. The contractor failed to complete the rig based on improper specifications in the contract.[355] Arbitration resulted in an award to the contractor of the contract price less the cost of completing the rig and the down payment.[356] The corporation filed a motion to vacate the award, arguing that it was a "manifest mistake of law" to award full profit on a contract in which the seller failed to perform.[357]

The Wyoming Supreme Court upheld the arbitration award. The court rejected the contractor's contention that the corporation was precluded from asking for vacation of the award because it did not assert one of the statutorily enumerated grounds for vacating an award.[358] The court stated that the statutory list of grounds was not exclusive, and the court had the power to vacate on a number of other grounds, including a "manifest mistake of law."[359] However, the court did note that the moving party must prove "a manifest mistake of fact or law" in the arbitration award by clear and convincing evidence.[360] The court concluded the award did not grant profit which was not properly

348. *Maine*, 517 A.2d at 62.
349. *Id.*
350. *Id.* at 62-63.
351. *Id.*
352. *Id.* at 64.
353. 726 P.2d 1056 (Wyo. 1986), *reh'g denied*, 749 P.2d 278 (Wyo. 1988).
354. *Texas West*, 726 P.2d at 1060.
355. *Id.* at 1059.
356. *Id.*
357. *Id.* at 1060.
358. *Id.* at 1061-62.
359. *Id.* (construing Riverton Valley Elec. Ass'n. v. Pacific Power & Light Co., 391 P.2d 489, 500 (Wyo. 1964)).
360. *Id.* at 1062 (quoting Northern Supply Co. v. Town of Greybull, 560 P.2d 1172 (Wyo. 1977)).

due under the contract.[361]

In *Bailey & Williams v. Westfall*,[362] Westfall, a withdrawing law partner, was dissatisfied with an arbitration award and sought to have it vacated on the grounds of gross mistake.[363] Westfall argued he was not awarded his share of the firm's accounts receivable.[364] The trial court vacated the arbitration award based on gross mistake.[365]

The appellate court reversed the trial court. The court stated that only in a "very clear case" of gross mistake can an award be set aside.[366] An honest judgment after proper consideration of conflicting claims is not a gross mistake.[367] The court concluded an arbitration proceeding has the same effect as the decision of a court of last resort, and a trial judge may not properly substitute his decision for that of the arbitrator simply because he would have reached a contrary decision.[368] The appellate court found that in the circumstances where error had been alleged, conflicting evidence was presented.[369] The court held the arbitrator's decision to be consistent so that evidence of gross mistake was lacking.[370]

E. *Award Would Not Have Been Granted by the Court*

In *Department of Public Safety v. Public Safety Employees Association*,[371] binding arbitration pursuant to a collective bargaining agreement was ordered. The Association filed a grievance on behalf of a state trooper as a result of his discharge based on felony and misdemeanor charges.[372] The arbitrator rendered an intermediate award, stating that the discharge of the state trooper was untimely as no hearing was granted before the discharge and ordered the discharge reduced to suspension without pay.[373] After the trooper was convicted of the charges in a criminal trial, the arbitrator issued a supplemental award concluding that discharge was then timely and appropriate.[374] A complaint to vacate the arbitration award was filed after the intermediate award had been announced, but before the supplemental award had been ren-

361. *Id.*
362. 727 S.W.2d at 86.
363. *Id.* at 90-91.
364. *Id.*
365. *Id.* at 89.
366. *Id.* at 90.
367. *Id.*
368. *Id.*
369. *Id.* at 91.
370. *Id.* at 92.
371. 732 P.2d 1090 (Alaska 1987).
372. *Id.* at 1092.
373. *Id.*
374. *Id.* at 1092-93.

dered.[375] The trial court vacated the intermediate award based on gross error and the arbitrator's improperly retaining jurisdiction until the criminal proceeding, and held the supplemental award was therefore without effect.[376]

The Supreme Court of Alaska upheld the arbitrator's decision. The court stated that an arbitration award should not be subject to judicial review unless there was gross negligence, fraud, corruption, gross error, or misbehavior on the part of the arbitrator.[377] Strong public policy favoring arbitration and the concern that parties to a dispute would have little incentive to enter into arbitration unless awards are allowed to stand influenced the court's decision to follow a policy of minimal judicial interference with arbitration awards.[378]

The court held that the arbitrator reasonably interpreted the collective bargaining agreement and acted within his authority in continuing his jurisdiction of the arbitration until there was just cause for the discharge.[379] The court further stated that it would be improper for a court to vacate an award merely because it found its own interpretation to be better reasoned than an arbitrator's interpretation, and that an arbitrator's interpretation of a question should not be subjected to plenary review.[380] As long as the arbitrator's interpretation is reasonable in light of the circumstances, and the scope of the award could have been reasonably foreseen, a reviewing court should not interfere with an arbitration award.[381]

F. *Validity of Award*

In *Harris v. Allied American Insurance Co.*,[382] the court held that an insured person was not entitled to confirmation of an arbitration award even though the insurer did not move to vacate, modify, or correct the award within ninety days.[383] The arbitrators decided that the insured had sustained damages, but made no determination as to whether all or any portion of the amount of the damages was due under the uninsured motorist clause of the insurance policy.[384] In the absence of such a determination, the award was held to be void and unenforceable because it was incomplete.[385] The court held the award lacked finality and, thus, could be attacked at any time.[386]

The overriding principle in the judicial decisions regarding confirmation

375. *Id.* at 1093.
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.* at 1093-94.
380. *Id.* at 1093, 1096.
381. *Id.* at 1096-97.
382. 152 Ill. App. 3d 88, 504 N.E.2d 151 (1987).
383. *Id.* at 89, 504 N.E.2d at 152.
384. *Id.*
385. *Id.*
386. *Id.* at 90, 504 N.E.2d at 153.

and vacation of awards is that great deference is to be given to the arbitration proceeding. This allows parties to rely on arbitration awards and promotes finality of dispute resolution without litigation.

VII. Modification Of An Arbitration Award

Attempts to modify or vacate an arbitration award must conform to the applicable provisions of the state U.A.A. Courts are reluctant to disturb such awards unless error is apparent or deviation from the U.A.A. provisions is demonstrated to the court through the presentation of compelling evidence on the record.[387]

The Supreme Court of Wyoming in *Texas West Oil & Gas v. Fitzgerald*,[388] held that an arbitration award may be vacated on grounds other than those specified in Wyoming's U.A.A.[389] In *Texas West*, a corporation brought an action against a contractor alleging breach of contract.[390] The dispute was submitted to arbitration, and a subsequent award favoring the contractor was confirmed "except for the . . . arithmetical error."[391] The Supreme Court of Wyoming affirmed the modified award, holding that the appellant did not clearly and convincingly demonstrate any grounds for vacating the arbitration award.[392]

VIII. Judgments On Awards

Under the U.A.A., after an order confirming, modifying, or correcting an arbitration award is granted, the court "shall" enter a judgment or decree in accordance with its order.[393] This judgment or decree is to be enforced in the same manner as any other judgment or decree.[394]

A. *Judgment on Awards entered by the Court*

Upon a motion to confirm an award by the prevailing party in an arbitration action, the court may either confirm, vacate, modify, or correct the award that was granted.[395] Unless the award is vacated, the court will then enter a

387. *See Texas West*, 726 P.2d at 1056.

388. *Id.*

389. *Id.* at 1061-62. Other than the statutory grounds, the court referred to "behavior beyond the bounds of natural justice, excess of authority, or a manifest mistake of fact or law appearing upon the face of the award." *Id.* at 1062.

390. *Id.*

391. *Id.* at 1059-60; the panels' calculations revealed an award of $467,000, but the award stated $567,000.

392. *Id.* at 1061-62.

393. U.A.A. § 14.

394. *Id.*

395. *Id.* at §§ 11-13.

judgment on the award. The ability of the court to alter, vacate, or modify an award is dependent upon the aggrieved party's action in raising the issue.[396] The court must first determine the correctness of a challenged award before it enters a judgment.

In some instances, a state's arbitration statute may provide the opportunity for the losing party in an arbitration action to litigate the same issue in the court system. In this case, instead of a judgment being entered, a new proceeding is begun. The question then becomes one of whether the award obtained in the arbitration can be used as evidence in the subsequent court proceeding. The courts do allow the award to be used as evidence if it has not been vacated by the court. Such evidence is presumed to be correct.[397]

B. *Prejudgment Interest*

As a general rule, courts are unlikely to approve prejudgment interest in an arbitration award. The court will take into consideration whether such interest was contemplated or awarded by the arbitrators as well as any statutes authorizing such interest.[398]

Post-judgment interest, on the other hand, appears to be available without any prompting on the part of the arbitrators. The interest will be figured from either the time the judgment is entered or from the time when the award was granted by the arbitrators. The court makes this decision based on whether the award was disputed by the aggrieved party.[399]

In *Coughlan Construction Co. v. Town of Rockport*,[400] the prevailing party was seeking both prejudgment interest and post-judgment interest on an award of $271,811 in a dispute which arose out of a contract for sewer construction.[401] The plaintiff sought confirmation of the arbitrator's award. The appeals court of Massachusetts noted that the arbitration panel made no award of interest and mandated that fees and expenses were to be borne equally.[402] The court concluded that prejudgment interest was not available absent a specific award of such interest by the arbitrators.[403]

The court was willing to allow post-judgment interest as the arbitrators did not expressly prohibit it in their award.[404] The problem before the court

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396. *See* Ebitz v. Smith, 525 A.2d 219, 220 (Me. 1987) (failure to raise grounds for vacating the award justified confirming the award).

397. *See Golub*, 70 Md. App. at 159, 520 A.2d at 400.

398. *See Coughlan Constr.*, 23 Mass. App. Ct. at 994, 505 N.E.2d at 203; Lucas v. American Family Mut. Ins. Co., 403 N.W.2d 646 (Minn. 1987).

399. *See Coughlan Constr.*, 23 Mass. App. Ct. at 994, 505 N.E.2d at 203.

400. *Id.*

401. *Id.* at 994, 505 N.E.2d at 206.

402. *Id.*

403. *Id.*

404. *Id.* at 995, 505 N.E.2d at 207.

involved when to begin calculation of the post-judgment interest.[405] The court reasoned that if the defendant was appealing the size of the award, the appropriate date to begin computation would be the date the award became fixed (i.e. when the motion to vacate had been denied and judgment entered against defendant on this motion).[406] In this case, the defendant was arguing against the award on grounds other than the amount of the award. The court held that the proper time to begin computing the interest was the date of the arbitrators' award.[407]

In *Lucas v. American Family Mutual Insurance Co.*,[408] the Supreme Court of Minnesota dealt with the issue of prejudgment interest extensively. The plaintiff in this action was awarded $210,000 by an arbitration panel for personal injuries he sustained in an automobile accident. By agreement, the parties deferred determination of the prejudgment interest issue to the district court.[409] The district court concluded that statutory law did not provide for recovery of prejudgment (arbitration) interest and the decision was upheld on appeal.[410]

The Supreme Court of Minnesota considered whether the prejudgment interest statute of Minnesota[411] authorized prejudgment interest on arbitration awards. The statute allowed such interest from the time of the commencement of the "action" on certain portions of "verdicts" or "reports."[412] In deciding the statute did not allow prejudgment interest, the court concluded that the term "action" as used in this statute meant "judicial proceeding" and did not include an arbitration action.[413] This finding is based on the facts that historically arbitration proceedings have not been considered judicial proceedings, and the Minnesota legislature had the opportunity to specifically allow for prejudgment interest in arbitration actions but failed to enact the legislation.[414] The court rejected the argument that, since the Uniform Commercial Code's definition of "action" would include arbitration proceedings, such a construction would be logical in the instant case.[415] The court reiterated its position that prejudgment interest is not available to arbitration victors under the prejudgment statute of Minnesota in *In re the Arbitration of Wisniewski*.[416]

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405. *Id.*
406. *Id.*
407. *Id.*
408. 403 N.W.2d 646 (Minn. 1987).
409. *Id.* at 647.
410. *Id.*
411. MINN. STAT. § 549.09 (1986).
412. *Id.*
413. *Lucas*, 403 N.W.2d at 650.
414. *Id.* at 650-51.
415. *Id.* at 651. MINN. STAT. § 645.45(2) defines an "action" as "any proceeding in any court of this state."
416. 403 N.W.2d 651 (Minn. 1987).

C. *Attorney's Fees*

The U.A.A. does not expressly provide for the granting of attorney's fees.[417] The courts approach this issue by examining the nature of the dispute and the underlying statutory provisions which would be available in a court proceeding on the involved dispute.[418] Section 14 of the U.A.A. suggests that an arbitration award should be treated in the same or similar manner as an award in a judicial proceeding. A party cannot be expected to forego judicial recourse and agree to settle a dispute by arbitration if they will not be eligible for similar relief in both proceedings. The courts face a difficult situation when a state's arbitration statute expressly allows or disallows attorney's fees and the underlying substantive statute yields the opposite result.[419] In resolving this conflict, the court may view as controlling why the prevailing party is seeking to have a judgment rendered on the award.[420]

The court of appeals for Florida used statutory construction to find that attorney's fees can be recovered in cases where arbitration deals with an issue in which attorney's fees would ordinarily be allowed. In *Consolidated Labor Union Trust v. Clark*,[421] the defendant was compelled by contract to arbitrate a claim for medical expense benefits and prevailed in the arbitration proceeding.[422] The claim was for benefits under the Employee Retirement Income Security Act (ERISA).[423] The arbitration panel awarded the defendant $5,000. The trial court entered judgment on the award and awarded attorney's fees.[424] The sole issue on appeal was the propriety of awarding attorney's fees.[425]

The appellate court first cited the ERISA statute which permits the court to grant in any "action" reasonable attorney's fees and costs to either party.[426] Union Trust argued that an arbitration proceeding is not an "action" within the meaning of the ERISA statute and, therefore, attorney's fees are not permitted.[427] The court held that an arbitration proceeding was an "action" under the statute and that attorney fees are permitted.[428] The court reasoned that the remedial nature of ERISA and the intended purpose of removing obstacles

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417. *See generally* U.A.A. §§ 1-19.

418. *See* Consolidated Labor Union Trust v. Clark, 498 So. 2d 547 (Fla. Dist. Ct. App. 1986).

419. *Id.* at 549-50.

420. *Id.*

421. *Id.* at 547.

422. *Id.*

423. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1974).

424. *Consolidated Labor*, 498 So. 2d at 547.

425. *Id.*

426. 29 U.S.C. § 1132(g)(1) (1982).

427. *Consolidated Labor*, 498 So. 2d at 547.

428. *Id.* at 548.

to enable recovery of benefits due participants justify this conclusion.[429] However, the Florida Arbitration Code[430] expressly excludes the recovery of attorney's fees (a modification of the U.A.A.). Union Trust argued that this was a confirmation action and, thus, should be governed by the Florida Arbitration Statute.[431] The court rejected this argument and concluded, "[s]ince the court is always the appropriate forum to determine whether to award attorney's fees, [citations omitted] all actions to confirm arbitration awards—no matter what the underlying complaint—would be transformed into actions under the arbitration code for which no fees are authorized, a patently absurd result."[432] The court confirmed and entered judgment on the award.

IX. Judicial Review

In an effort to protect private arbitration agreements, the courts have narrowly limited review of an arbitration award. Once an award has been entered, the courts give deference to the finality of that award.[433]

A court's scope of review of an arbitration award is limited to the statutory grounds contained in the jurisdiction's arbitration act.[434] The standard of review used by the court depends on the particular statutory ground for review. Where the basis of review is the arbitrator exceeded his authority, the reviewing court must find objective evidence of impropriety in the record.[435] If the statutory ground for review involves fraud, the reviewing court must find clear and convincing evidence of fraud.[436]

The courts have recognized a valid need to review arbitration awards under certain circumstances. Where there has been a gross mistake of law as applied by the arbitrator, an award is subject to strict review. If the arbitration hearing is found to be procedurally unfair, the reviewing court may vacate the award.[437]

When parties agree to arbitrate, the process should be unimpeded by judicial interference. In *Koranda v. Austin Mutual Insurance Co.*,[438] the appeal originated from a claim for underinsured motorist benefits for injuries sus-

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429. *Id.*
430. *See* Fla. Stat. § 682.11 (1981).
431. *Consolidated Labor*, 498 So. 2d at 550.
432. *Id.*
433. *Recent Developments* 1987, *supra* note 4, at 229.
434. *See* New Shy Clown Casino, Inc. v. Baldwin, 103 Nev. 58, 737 P.2d 524 (1987).
435. *See* G. L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, ____, 355 S.E.2d 815, 818 (1987).
436. *See* Foster v. Turley, 808 F.2d 38, 42 (10th Cir. 1986).
437. *See* Renny v. Port Huron Hospital, 427 Mich. 415, 436, 398 N.W.2d 327, 338 (1986).
438. 397 N.W.2d 357 (Minn. Ct. App. 1986).

tained in an automobile accident.[439] The defendant argued that since the arbitrator's award involved only an "interpretation of law, it was not binding on the trial court if erroneous."[440] In denying the claim, the Minnesota Court of Appeals held that when parties agree to arbitrate and allow the arbitrator to interpret the applicable contract provisions, "the arbitrator's decision is final and will not be set aside even if the reviewing court believes the decision erroneous."[441]

Any attempt to interfere with an award by way of judicial review requires that the reviewing court have subject matter jurisdiction. In *Board of Education v. Compton*,[442] the action was brought to arbitration under the Illinois Educational Labor Relations Act.[443] This Act establishes arbitration as a means for resolving the disputes of educational employees. The Illinois Educational Labor Relations Act, as contrasted with the U.A.A., does not provide for administrative review in the circuit court. The Act only provides for review of Board action in the appellate courts.[444] In order to have subject matter jurisdiction, the court must be authorized in the arbitration act under which the action is brought.[445]

The mere existence of an arbitration agreement does not divest the court of subject matter jurisdiction. *Hendrickson v. Moghissi*[446] involved a malpractice action. The plaintiff had initiated the action in circuit court.[447] The petition in the case had been filed and answered, various sets of interrogatories had been filed, and depositions had been scheduled.[448] The defendant then asserted that the plaintiff had signed an arbitration agreement at the time of her admission to the hospital.[449] The trial court concluded it was without subject matter jurisdiction in light of the arbitration agreement.[450]

The Michigan Court of Appeals disagreed with the trial court's ruling and found that a trial court is not deprived of jurisdiction over a particular claim in lieu of the existence of an agreement to arbitrate, but that subject matter jurisdiction could only be removed by constitution or statute.[451] The court further held that the U.A.A. provides that arbitration agreements are to be enforced by the circuit courts, but the Act does not divest the court of

439. *Id.* at 358.
440. *Id.* at 360.
441. *Id.* at 362.
442. 157 Ill. App. 3d 439, 510 N.E.2d 508 (1987).
443. ILL. REV. STAT. ch. 48, para. §§ 1701-21 (1985).
444. *Compton*, 157 Ill. App. 3d at ____, 510 N.E.2d at 508, 511.
445. *Id.* at ____, 510 N.E.2d at 511.
446. 158 Mich. App. 290, 404 N.W.2d 728 (1987).
447. *Id.* at 293, 404 N.W.2d at 729.
448. *Id.*
449. *Id.*
450. *Id.* at 295, 404 N.W.2d at 730.
451. *Id.* at 295, 404 N.W.2d at 731.

jurisdiction to hear malpractice claims.[452] In *Hendrickson*, the court remanded the case to allow the trial court to decide if the defendant had timely asserted the existence of an arbitration agreement.[453]

A court's scope of review of an arbitration award is limited to the statutory grounds contained in the jurisdiction's arbitration act. In *New Shy Clown Casino, Inc. v. Baldwin*,[454] a Nevada district court modified the arbitrators' award by looking to the lease agreement between the parties. The lease agreement stated that in any dispute submitted to arbitration, the "successful party" shall be entitled to attorney's fees.[455] The dispute which eventually went to arbitration involved the refund of part of a security deposit worth approximately $220,000. The arbitrators awarded over $137,000 of the deposit to the Baldwins and the remaining balance to the casino.[456] The arbitrators specified in the award that each party would be responsible for their attorney's fees.[457] This decision reflected the arbitrators' conclusion that neither party was entirely successful.[458] After contacting the arbitrators and receiving confirmation from them that the lease provision controlled attorney's fees, the district court concluded the Baldwins were the "successful party" and modified the award by granting them attorney's fees.[459]

The Nevada Supreme Court reversed the district court's decision.[460] The court held that the district court's award was not within the scope of review of an arbitrator's award as contained in the state's arbitration act.[461] In the absence of a statutorily granted scope of review, the district court had no jurisdiction to modify the award.[462]

When a court has statutory grounds to review an award, the standard of review used by the court depends on the particular ground for review. If the statutory ground for review of an award involves the arbitrator exceeding his power, the reviewing court must find objective evidence in the record that the arbitrator did exceed his authority in some respect. If the statutory ground for review of an award involves fraud in procuring the award, the reviewing court must find clear and convincing evidence of fraud.

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452. *Id.*
453. *Id.* at 299, 404 N.W.2d at 732.
454. 103 Nev. at 58, 737 P.2d at 524.
455. *Id.* at _____, 737 P.2d at 525.
456. *Id.*
457. *Id.*
458. *Id.*
459. *Id.*
460. *Id.*
461. *Id.* The pertinent sections of the arbitration act adopted by Nevada are identical in wording to the U.A.A. In NEV. REV. STAT. § 38.145 (1969), the statute prescribes when a district court may vacate an award. NEV. REV. STAT. § 38.155 prescribes when a district court shall modify or correct an award.
462. *Baldwin*, 103 Nev. at _____, 757 P.2d 525

In *Foster v. Turley*,[463] the district court overturned the arbitrators' award based on the finding that Turley failed to disclose material facts to the arbitrator.[464] Turley and Foster had entered into an agreement whereby Turley would sell Foster an undivided half interest in unpatented mining claims. The court found that Turley had failed to disclose to Foster or the arbitrators that he had relocated certain mining claims under his name. The district court's decision to overturn the award was apparently based on the conclusion the award had been procured by fraud and was subject to being vacated.[465] Turley appealed this decision.

On appeal, the court stated that the proper standard of review for a court asked to vacate an award for fraud requires clear and convincing evidence establishing fraud.[466] With regard to the relocation of the mining claims, the court of appeals pointed out that the relocations had been filed in the public land records with the appropriate federal agency, and that the relocations were covered by an after-acquired property clause in the contract which protected Foster's interests.[467] In light of these facts and the district court's failure to state whether it found clear and convincing evidence of fraud, the court of appeals remanded the case to be decided under the proper standard.[468]

If the arbitration hearing is found to be procedurally unfair by the reviewing court, the court may vacate the award. In *Renny v. Port Huron Hospital*,[469] a nurse contested her discharge from the hospital as being without just cause. The plaintiff filed the action in the circuit court and submitted the question of "just cause" to the jury for determination.[470] The Michigan Supreme Court found that the arbitration hearing did not comport to standards of "elementary fairness" since the plaintiff was not given proper notice as to what the complaint was or who the witnesses were against her.[471] Furthermore, "elementary fairness" was violated as the plaintiff was not given the opportunity to present witnesses or be present at the hearing.[472] The court concluded a lack of elementary fairness in the hearing procedure entitled the claimant to submit the merits of her claim to a court for judicial review.[473]

The cases dealing with judicial review of arbitration awards indicate a clear attempt by the courts to further the public policy of promoting arbitra-

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463. 808 F.2d at 38.
464. *Id.* at 40.
465. *Id.* at 40, 42. The reported decision does not state that the New Mexico district court vacated the award for fraud. However, the court of appeals frames its decision in these terms and evaluates the district court's decision in these terms.
466. *Id.* at 42.
467. *Id.*
468. *Id.*
469. 427 Mich. at 415, 398 N.W.2d at 327.
470. *Id.* at 417, 398 N.W.2d at 329.
471. *Id.* at 437-38, 398 N.W.2d at 338-39.
472. *Id.*
473. *Id.*

tion. The courts have narrowly limited review of arbitration awards in an effort to promote and protect arbitration.

X. PREEMPTION

Arbitration within the federal context raises complex choice-of-law questions to be answered by a court. Generally, procedural provisions of the state U.A.A. will be applied when arbitration issues involve conflicting federal law. Substantive issues pertaining to arbitration in a federal court will be governed by federal law.

Although *McClellan v. Barrath Construction*[474] involved an action brought pursuant to the Federal Arbitration Act, the Missouri court found the state U.A.A. persuasive in determining the appealability of an order to compel arbitration.[475] The plaintiff's motion to compel arbitration was granted by the trial court and the defendant immediately appealed.[476] The appellate court dismissed the appeal pursuant to § 435.440 of the Missouri U.A.A. because it found that an order compelling arbitration is not a final appealable order as it does not dispose of all parties and issues in the case.[477] The court discussed the interaction between the federal act and state act and stated, "[a]lthough the arbitration ordered here is under the federal rather than the Missouri act, we find § 435.440 persuasive because we believe the appealability of a state court order compelling arbitration should be uniformly determined irrespective of which statute grants the right to arbitrate."[478]

By contrast, in *Webb v. R. Rowland & Co.*,[479] a federal appellate court in Missouri held that the Federal Arbitration Act preempted the application of the Missouri U.A.A. when an arbitration agreement was subject to "interpretation" and "construction."[480] The plaintiffs brought an action against the defendant-brokerage firm under a contract containing a choice-of-law clause directing resolution of disputes under Missouri's version of the U.A.A.[481] However, the court held that since the contract was a "transaction involving commerce", it was subject to the Federal Arbitration Act.[482]

474. 725 S.W.2d 656 (Mo. Ct. App. 1987).
475. *Id.*
476. *Id.* at 657.
477. *Id.* at 658.
478. *Id.*
479. 800 F.2d 803 (8th Cir. 1986).
480. *Id.* at 806.
481. *Id.*
482. *Id.*