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## Recent Developments: The Uniform Arbitration Act

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# RECENT DEVELOPMENTS: THE UNIFORM ARBITRATION ACT<sup>1</sup>

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

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The Uniform Arbitration Act [hereinafter U.A.A.] was proposed by the National Conference of Commissioners on Uniform State Laws in 1955.<sup>2</sup> At present, approximately thirty-five states have adopted arbitration statutes patterned after the U.A.A.<sup>3</sup> The purposes of this annual article are to provide a survey of recent developments in the case law interpreting and applying the various state versions of the U.A.A.; develop and explain the underlying principles and rationales that courts have applied in particular cases; and promote uniformity in the interpretation of the U.A.A. by providing courts and practitioners with a framework for analyzing similar future cases.<sup>4</sup>

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

3. Jurisdictions which have adopted arbitration statutes patterned after the U.A.A. are 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*, 1988 J. DISP. RES. 247 [hereinafter *Recent Developments 1988*]; *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*]. *Recent Developments 1988* collected cases decided between September, 1986 and September, 1987.

## I. VALIDITY OF ARBITRATION AGREEMENTS

The U.A.A. provides that "[a] written agreement to submit any existing 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."<sup>5</sup> Courts and legislatures alike routinely state the policies promoting arbitration. Because most states favor the settlement of disputes through arbitration, there is a tendency for courts to find a valid arbitration agreement.

A. *Application of Contract Principles*

Pursuant to the U.A.A., principles of law and equity are applied by the courts as grounds for the revocation of a contract to arbitrate or a contract with an arbitration clause.<sup>6</sup> This provision of the U.A.A. enables courts to supply principles of contract law to questions of validity.

The requirement that contracts be in writing effects arbitration clauses. Although the U.A.A. requires that an agreement to arbitrate be in writing,<sup>7</sup> an Illinois appellate court in *Landmark Properties, Inc. v. Architects International*,<sup>8</sup> held that a writing was not required. Plaintiff, a development company, entered into an agreement with an architectural firm.<sup>9</sup> The form agreement contained a provision which required arbitration of any disputes.<sup>10</sup> Plaintiff never signed or returned the form.<sup>11</sup> Defendants performed services for plaintiff from October to December of 1983, while plaintiff did not pay for the services.<sup>12</sup> Finally, defendant architect filed a demand for arbitration against the plaintiff.<sup>13</sup> Several months later, plaintiff advised the American

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*Recent Developments* 1987 collected cases decided between September, 1985 and September, 1986. *Recent Developments* 1986 collected cases decided between September, 1984 and September, 1985. *Recent Developments* 1985 collected cases decided between September, 1983 and September, 1984. *Recent Developments* 1984 collected cases decided between September, 1982 and September, 1983. *Recent Developments* 1983 collected cases decided before September, 1982. This article surveys cases decided between September, 1987 and September, 1988.

5. U.A.A. § 1.

6. *Id.*

7. *Id.*

8. 172 Ill. App. 3d 379, 526 N.E.2d 603 (Ill. App. Ct. 1988).

9. *Id.* at \_\_\_, 526 N.E.2d at 604.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at \_\_\_, 526 N.E.2d at 605.

Arbitration Association that they were not bound to arbitrate.<sup>14</sup> The trial court ruled that a contract existed as a result of the parties' conduct, and the contract included a requirement to arbitrate disputes.<sup>15</sup>

The issue on appeal was the existence of an arbitration agreement.<sup>16</sup> The Illinois appellate court followed simple contract law. The plaintiff did not dispute the existence of a contract, but did dispute the existence of an arbitration agreement.<sup>17</sup> The court found that the parties' conduct related specifically to the written contract and not the oral agreement.<sup>18</sup> This is significant as the U.A.A. clearly requires a writing in Section 1, and the court apparently equates conduct related to a written agreement as within this writing requirement.

### B. *Piecemeal Resolution*

Parties who want to avoid arbitration often argue that arbitration will engender piecemeal resolution of the conflict. *Landmark Properties*<sup>19</sup> also addressed the question of piecemeal resolution, but the court did not accept the plaintiff's argument that arbitration would harm them. Plaintiff unsuccessfully attempted to persuade the appellate court that the action should not be arbitrated because other lawsuits were pending against them regarding this same development.<sup>20</sup> Plaintiff also argued that an arbitration agreement should not be enforced when actions are pending involving some of the same facts.<sup>21</sup> The court held that "the policy favoring arbitration will not be ignored simply because multiple parties and claims may be present."<sup>22</sup>

The Florida District Court of Appeals in *Steinberg/W.F.I. Foods, Inc. v. D.C.M. and Associates*,<sup>23</sup> agreed with *Landmark's* analysis. In this case, Steinberg sought to compel arbitration after D.C.M. filed suit pursuant to a lease agreement.<sup>24</sup> The trial court denied Steinberg's motion; the Florida

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14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 603.

20. *Id.*

21. *Id.*

22. *Id.* at \_\_\_, 526 N.E.2d at 607.

23. 522 So.2d 512 (Fla. Dist. Ct. App. 1988).

24. *Id.*

District Court of Appeals reversed and the arbitration agreement was held valid.<sup>25</sup>

The appellate court addressed D.C.M.'s argument that a "piecemeal' and expensive resolution would result" if the Court required a portion of the suit to be arbitrated while the remainder would be tried in court.<sup>26</sup> The appellate court adopted the reasoning of the Third District: "[W]e cannot accept the proposition that a party to a contract calling for arbitration may avoid that undertaking by the simple device of joining as defendants in its lawsuit others with which the party has no such agreement to arbitrate."<sup>27</sup> The court reasoned that to avoid arbitration in this case would "fly in the face of the Florida legislature's intention" as set forth in the Florida Arbitration Code, which is similar to the U.A.A. § 1.<sup>28</sup>

In general, public policy considerations favor the resolution of disputes in arbitration for a variety of reasons. Among these are speed, less expense, and a reduced burden on the judicial system. However, it must be remembered that arbitration is a forum created, controlled, and administered by the written agreement.

## II. WAIVER

A party may waive the right to arbitration by taking actions inconsistent with their contractual rights to arbitration. Inconsistent actions may consist of a failure to exercise rights to compel arbitration under the arbitration agreement; a failure to raise claims; a failure to object to arbitrability; or a failure to assert grounds for vacation of the arbitrator's decision.

### A. *Right to Compel Arbitration*

#### 1. Repudiation of the Arbitration Agreement

A waiver of the right to compel arbitration may be retracted when the waiver is based on a repudiation of the arbitration agreement.<sup>29</sup> In *Gilmore v. Shearson/American Express, Inc.*,<sup>30</sup> the court concluded a party must show that an "amended complaint changed the scope or theory of the previous

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25. *Id.* at 513.

26. *Id.*

27. *Id.* (quoting *Post Tensioned Eng'g Corp. v. Fairways Plaza Assoc.* 412 So.2d 871, 875 (Fla. Dist. Ct. App.), *reh'g denied*, 419 So.2d 1197 (Fla. 1982)).

28. 522 So.2d at 513. Compare U.A.A. § 1 with FLA. STAT. § 682.01 (1988).

29. *Gilmore v. Shearson/American Express, Inc.*, 668 F. Supp. 314 (S.D.N.Y. 1987).

30. *Id.*

asserted claims thus nullifying its earlier waiver in order to revive its right to compel arbitration.<sup>31</sup> In *Gilmore*, the plaintiff charged his stockbroker with milking his securities account thereby causing him \$143,000 in actual damages and \$3,000,000 in punitive damages.<sup>32</sup> The parties had an agreement that any controversy arising out of or relating to the customer's account would be settled by arbitration.<sup>33</sup> The complaint asserted violation of § 10(b) of the Securities Exchange Act of 1934, breach of fiduciary duty, breach of contract, and common law fraud.<sup>34</sup> Later, *Gilmore* amended his complaint to include a RICO violation seeking treble damages.<sup>35</sup> Prior to the RICO claim, Shearson waived its rights to compel arbitration; after the RICO claim, Shearson wanted those rights reinstated.<sup>36</sup>

The district court found that "the addition of the RICO claim certainly add[ed] a new 'theory' to plaintiff's case."<sup>37</sup> Before the amended complaint, Shearson made a "business determination" to forego its right to arbitration of the common law claims since both § 10(b) and the subsequent RICO claims were ruled non-arbitrable.<sup>38</sup> In the interim, the United States Supreme Court ruled that both RICO and § 10(b) claims were arbitrable.<sup>39</sup> The district court said that because the "foundation of that decision (Shearson's) was eroded by plaintiff's successful motion to amend the complaint and by an intervening change in the law," that, "in fairness, Shearson should be able to revive its right to move to compel arbitration of the § 10(b) claims."<sup>40</sup> The court ruled that as to the common law claims, Shearson's original waiver was enforceable because the addition of the RICO claim did not sufficiently "erode" the decision to litigate those claims.<sup>41</sup>

Likewise, in *Peterson v. Shearson/American Express*,<sup>42</sup> the United States Court of Appeals for the Tenth Circuit found that Shearson had not repudiated the arbitration agreement even though they failed to raise

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31. *Id.* at 316.

32. *Id.* at 315.

33. *Id.* at 320.

34. *Id.* at 315.

35. *Id.*

36. *Id.* at 316.

37. *Id.* at 317.

38. *Id.* at 317.

39. *Id.* at 318. The U.S. Supreme Court decided this issue in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987).

40. *Id.* at 318.

41. *Id.* at 319.

42. 849 F.2d 464 (10th Cir. 1988).

arbitration as a defense to a federal claim under § 10(b) of the Securities Exchange Act.<sup>43</sup> The complaint stated five pendant state claims in addition to the federal claim.<sup>44</sup> At the time of filing, claims based on the Securities Act were considered non-arbitrable.<sup>45</sup> Shearson failed to assert arbitration as a defense to any of the claims until just prior to trial and after taking depositions.<sup>46</sup> While the case was awaiting trial, the United States Supreme Court held that § 10(b) claims were arbitrable.<sup>47</sup>

The court in *Peterson* held that waiver of the right to compel arbitration as to the state law claims was enforceable based on the well-settled law that precludes arbitration once substantial preparation for litigation has occurred.<sup>48</sup> However, with regard to the § 10(b) claim, the court concluded that applying the new rule to pending cases was warranted as the new rule overturned a precedent upon which the litigants had relied and the application of it would not create "substantial inequity."<sup>49</sup> The court reasoned that "because Shearson almost certainly could not have obtained an order for arbitration of the Section 10(b)-5 claim prior to *McMahon*, it did not waive its right to arbitrate the claim."<sup>50</sup>

## 2. Participation in Litigation

Recent cases have held that one of the clearest ways to waive the right to arbitration is by participating in certain types of legal proceedings that are inconsistent with the right to arbitrate.<sup>51</sup> However, whether there is or has been litigation between the parties is not alone sufficient to indicate a waiver. The inquiry must proceed deeper to determine the nature of the actions taken by the parties, who initiated the action, and whether there has been conduct demonstrating an intent to waive arbitration.<sup>52</sup>

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43. *Id.* at 466.

44. *Id.* at 465.

45. *Id.* at 466.

46. *Id.* at 468.

47. *See* *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987).

48. *Peterson*, 849 F.2d at 468.

49. *Id.* at 466.

50. *Id.*

51. *Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 533, 536, 491 N.E.2d 1322, 1325 (1986).

52. *Edward Elec. Co. v. Automation, Inc.*, 164 Ill. App. 3d 547, 554-55, 518 N.E.2d 172, 177 (1987).

In *Jackson Trak Group, Inc. v. Mid States Port Authority*,<sup>53</sup> Jackson entered into a contract with Mid States to repair damaged railroad lines. Mid States, being displeased with the quality of the work performed, filed a court action for possession of Jackson's equipment and then seized the equipment.<sup>54</sup> In response, Jackson filed an action for a mandatory injunction and replevin but specifically reserved the right to arbitration.<sup>55</sup> After submitting to arbitration and receiving an unfavorable verdict, Mid States claimed that Jackson had waived its right to arbitration by submitting part of the arbitrable matter to the courts in its request for the injunction and replevin.<sup>56</sup> The Supreme Court of Kansas, after noting that waiver results from the relinquishment of a known right, held that Jackson had not waived its right to arbitration.<sup>57</sup> The court reasoned that nothing Jackson had done could be interpreted to constitute waiver since the court proceedings in which they participated were merely in response to Mid States' court proceedings, and Jackson expressly reserved its right to arbitration.<sup>58</sup>

The same type of issue arose in *Atkins v. Rustic Wood Partners*<sup>59</sup> with a different result. In that case, Atkins, a limited partner, brought an action against the partnership alleging the breach of a fiduciary duty in the sale of property belonging to the partnership.<sup>60</sup> The partners, after taking some legal action, which was merely responsive to the claim filed by Atkins, filed a petition for dissolution of the partnership and distribution of its assets.<sup>61</sup> The Illinois Court of Appeals agreed with Atkins' claim that the partnership had waived its right to arbitration by taking action in court that was inconsistent with the right to arbitration.<sup>62</sup> The court noted that while most of the partnership's court action was merely in response to Atkins' claim, its petition seeking dissolution of the partnership and distribution of its assets evidenced an intent to pursue rights in court and waive arbitration.<sup>63</sup>

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53. 242 Kan. 683, 751 P.2d 122 (1988).

54. *Id.* at \_\_\_, 751 P.2d at 124.

55. *Id.*

56. *Id.* at \_\_\_, 751 P.2d at 129.

57. *Id.*

58. *Id.*

59. 171 Ill. App. 3d. 373, 525 N.E.2d 551 (1988).

60. *Id.* at \_\_\_, 525 N.E.2d at 553.

61. *Id.* at \_\_\_, 525 N.E.2d at 554.

62. *Id.* at \_\_\_, 525 N.E.2d at 556.

63. *Id.*

In *Lawrence v. Comprehensive Business Services Co.*,<sup>64</sup> Comprehensive contracted to provide the use of their trade name to Lawrence as part of a franchise agreement. After discovering that affiliation with Comprehensive might jeopardize the status of Lawrence's certified public accountant's license, Lawrence commenced an action in state court seeking to declare the agreement illegal and unenforceable.<sup>65</sup> Comprehensive moved to stay the proceedings and compel arbitration under the agreement; the district court granted the motion.<sup>66</sup> Lawrence appealed, arguing that Comprehensive had waived its right to arbitration by instituting earlier proceedings against Lawrence in small claims court.<sup>67</sup> The court of appeals, noting that Lawrence was the party that instituted the present action, found there was nothing to evidence Comprehensive's intent to waive arbitration.<sup>68</sup>

One court has held that a failure to take action is evidence of a waiver of the right to arbitrate. In *Detweiler v. J.C. Penney Casualty Insurance Co.*,<sup>69</sup> the court held that a party waived the right to arbitrate by failing to participate in court proceedings.<sup>70</sup> In the case, Detweiler was injured when he shot at his own car as it was being driven away by an uninsured motorist.<sup>71</sup> Detweiler filed a claim under the uninsured motorist clause of the insurance policy which J.C. Penney promptly rejected.<sup>72</sup> Detweiler then brought an action against the third party uninsured motorist to resolve the issue of damages and liability.<sup>73</sup> Throughout the filing, pendency, and resolution of the case, J.C. Penney, although fully apprised as to what was occurring in the case, failed to take any action that would indicate an intent to have the liability and damages issues resolved by arbitration.<sup>74</sup> The court concluded that J.C. Penney's inaction was tantamount to its taking action inconsistent with its right to arbitrate which resulted in a waiver of the right to arbitrate.<sup>75</sup>

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64. 833 F.2d 1159 (5th Cir. 1987).

65. *Id.* at 1160-61.

66. *Id.* at 1161.

67. *Id.* at 1164.

68. *Id.* at 1164-65.

69. 110 Wash. 2d 99, 751 P.2d 282 (1988).

70. *Id.* at 110, 751 P.2d at 288.

71. *Id.* at 101, 751 P.2d at 283.

72. *Id.*

73. *Id.*

74. *Id.* at 112, 751 P.2d at 288.

75. *Id.* at 110, 751 P.2d at 288.

The court in *Kayne v. PaineWebber, Inc.*<sup>76</sup> faced the issue of whether PaineWebber had acted inconsistently with its right to arbitrate. Kayne filed a five-count complaint against PaineWebber concerning securities violations. Counts I and II alleged violations of § 10(b) of the Securities and Exchange Act of 1934. Count III alleged a RICO violation and counts IV and V alleged violations of various state laws regarding securities. PaineWebber did not move to compel arbitration of counts III, IV, and V which were considered arbitrable under the contract between the parties, but instead moved to dismiss all five counts.<sup>77</sup> The court dismissed the § 10(b) claims on the merits leaving PaineWebber to litigate on the remaining claims which were originally arbitrable under the contract.<sup>78</sup> Kayne argued that PaineWebber waived its right to arbitrate by filing and pursuing its motion to dismiss.<sup>79</sup> The court agreed, stating that a party "may not 'forum shop' by first asking a court to examine the merits of his claims and then, if displeased with the result, demand[ing] that the court send them to an arbitrator."<sup>80</sup>

A contradictory result was reached in *Hillman v. Nationwide Fire Insurance Co.*<sup>81</sup> This case involved a claim based on an uninsured motorist policy. Julie Hillman was killed while driving an all terrain vehicle when a truck driven by an uninsured driver struck her vehicle.<sup>82</sup> The court held that Nationwide, plaintiff's insurer, had not waived its right to arbitrate the underlying uninsured motorists claim even though it had acted in bad faith by not disclosing the availability of the arbitration procedure to the Hillmans in four separate pieces of correspondence.<sup>83</sup> Because of Nationwide's bad faith, the Hillmans elected to seek relief through the court system and were represented by counsel who knew that the policy required arbitration.<sup>84</sup>

On appeal, the Hillmans objected to Nationwide's motion to compel arbitration on the basis of Nationwide's bad faith in failing to disclose the availability of arbitration.<sup>85</sup> The court noted that because "a plaintiff cannot claim waiver when the plaintiff initiates court action in violation of the

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76. 684 F. Supp. 978 (N.D. Ill. 1988)

77. *Id.* at 980.

78. *Id.*

79. *Id.*

80. *Id.* at 981.

81. 758 P.2d 1248 (Alaska 1988).

82. *Id.* at 1249.

83. *Id.* at 1253.

84. *Id.*

85. *Id.*

arbitration clause" and that because "none of the litigants herein has clean hands," a presumption in favor of the contractually mandated arbitration would be enforced as long as no demonstrated prejudice was shown.<sup>86</sup> This result contradicts the idea that waiver occurs when the parties begin proceedings inconsistent with the right to arbitrate. However, the court weighed several factors, including bad faith on the part of both parties with the strong policy reasons in favor of arbitration.

### 3. Failure to Make a Timely Assertion

A waiver of the right to compel arbitration does not occur for failure to make a timely assertion of those rights pursuant to a state's statute of limitations unless the parties agree that the statute of limitations applies.<sup>87</sup> In *Cameron v. Griffith*,<sup>88</sup> the parties entered into a contract whereby Cameron was to receive one-third of the proceeds of any subsequent sale by Griffith of company stocks or assets. The agreement provided that any disputes concerning the contract were subject to arbitration.<sup>89</sup> Griffith sold company assets to a third party but failed to distribute any proceeds to Cameron.<sup>90</sup> More than four years later, Cameron filed a demand for arbitration with respect to the proceeds. Griffith objected on the grounds that the statute of limitations had run, leaving the arbitrators no authority to hear the case.<sup>91</sup> The arbitrators rejected this argument and awarded Cameron one-third of the proceeds.<sup>92</sup>

The appellate court upheld the arbitrators' finding that no waiver had occurred. The court read the North Carolina arbitration act as applying only to an "action."<sup>93</sup> The court interpreted the word "action" to refer to a "judicial proceeding" and stated that an arbitration hearing is not a judicial proceeding.<sup>94</sup> Since "the contract itself does not limit the period in which arbitration can be demanded and no statute or court decision of this state of which we are aware does so either," the court held that arbitration is not barred.<sup>95</sup>

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86. *Id.*

87. *Cameron v. Griffin*, 91 N.C. App. 164, 370 S.E.2d 704 (1988).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*, (construing N.C. Gen. Stat. § 1-567.1 -.20 (1983)).

94. *Cameron*, 91 N.C. App. at \_\_\_, 370 S.E.2d at 704.

95. *Id.* at \_\_\_, 370 S.E.2d at 705.

On the other hand, an Illinois court concluded a party loses the right to arbitrate a claim if the request to exercise that right is made "too late" under the Illinois arbitration act.<sup>96</sup> In *Izzo v. AT&T Communications, Inc.*,<sup>97</sup> the court found that a two-year delay by the employer and union in seeking arbitration was not in accordance with the act, which required that disputes be submitted to arbitration "as soon as practicable."<sup>98</sup> The court concluded that "an employee who has been prevented from exhausting his or her contractual remedies by a union's wrongful refusal to process the grievance is free to resort to federal court to pursue his or her claims against both the union and the employer."<sup>99</sup>

### B. *Right to Object to Arbitrability*

A party's action in submitting to an arbitration proceeding on the merits of the claim without raising an objection to the arbitration prior to the proceeding constitutes a waiver of the right to object to arbitrability. In *Cady v. Allstate Insurance Co.*,<sup>100</sup> Anita Cady filed an insurance claim for emotional distress and loss of consortium incurred as a result of witnessing her husband being struck by an automobile. When the insurance company denied her claim, the Cadys filed suit in district court, and the insurance company invoked an arbitration clause in the policy.<sup>101</sup> The Cadys participated in the arbitration proceeding on the merits and raised the claim that the dispute was not subject to arbitration only after the arbitrator had decided the case in favor of the insurance company.<sup>102</sup> The Idaho Court of Appeals held that participation in an arbitration proceeding on the merits is a waiver of the right to raise the issue of arbitrability absent preservation of the objection prior to the arbitration proceeding.<sup>103</sup>

### C. *Right to Assert Grounds for Vacation*

A party to an arbitration proceeding may waive the right to assert grounds for vacation of an award by failing to enter a timely appeal. The

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96. *Izzo v. AT&T Communications, Inc.*, No. 85C8938 (N.D. Ill. Nov. 25, 1987) (LEXIS, Genfed library, Dist file).

97. *Id.* at \_\_.

98. *Id.* at \_\_ (construing ILL. REV. STAT. ch. 10, para. 20 (1985)).

99. *Izzo*, 1987 U.S. Dist. LEXIS at \_\_.

100. 113 Idaho 667, 747 P.2d 76 (Idaho Ct. App. 1987).

101. *Id.* at \_\_, 747 P.2d at 78.

102. *Id.*

103. *Id.*

Supreme Court of Colorado reached this result in *State Farm Mutual Automobile Insurance Co. v. Cabs, Inc.*<sup>104</sup> State Farm brought an action on behalf of one of its policy holders for injuries in an accident involving a cab owned by the defendant.<sup>105</sup> The parties submitted to arbitration where the defendant raised a constitutional challenge to the statute authorizing arbitration.<sup>106</sup> After an unfavorable ruling on its claim and after the time for appeals had elapsed, the defendant sought to vacate the judgment.<sup>107</sup> The supreme court held that the defendant's failure to enter a timely appeal from the arbitrator's judgment constituted a waiver of its right to object to confirmation of the arbitrator's award.<sup>108</sup>

### III. ARBITRABILITY

#### A. *Existence of Agreements*

Prior to the passage of federal and state arbitration acts, the law was biased against arbitration.<sup>109</sup> The common law belief was that contractual agreements to arbitrate future disputes were readily revokable by either party at any time.<sup>110</sup> Today, however, arbitration is a viable and desirable form of dispute resolution, and parties enter into arbitration agreements routinely.<sup>111</sup> Whether a certain claim is arbitrable is determined by the existence of an agreement, the scope of the agreement, and the intent of the parties.<sup>112</sup> When determining the scope of an agreement, the court looks to the specific language of the arbitration clause. Some clauses specifically define the type of claims which will be submitted to arbitration.<sup>113</sup> Conversely, other clauses stating "any controversy shall be subject to

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104. 751 P.2d 61 (Colo. 1988).

105. *Id.* at 62.

106. *Id.* at 63.

107. *Id.*

108. *Id.* at 67.

109. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78 (1985).

110. *Id.*

111. *Id.*

112. *Id.*

113. For example, some collective bargaining agreements provide that the union will represent the employee in a wrongful discharge complaint and will not provide representation in other areas. Additionally, insurance policies may provide for specific claims under a certain dollar amount to be submitted to arbitration.

arbitration" are interpreted broadly.<sup>114</sup> However, even when a clause is broadly interpreted, courts are unwilling to relinquish jurisdiction over certain claims.<sup>115</sup>

### 1. Revocation of Agreements

The issue of revocation of an arbitration agreement was raised in *Hawker v. Northern Michigan Hospital, Inc.*<sup>116</sup> According to an agreement signed by the decedent upon her admission to the hospital, any dispute between the hospital and the patient was to be submitted to arbitration.<sup>117</sup> The duty to arbitrate could be revoked if written notice was sent to the hospital within sixty days of release.<sup>118</sup> Plaintiff claimed a letter was sent to the defendant hospital's administrator revoking arbitration within the sixty day prescribed time limit.<sup>119</sup>

The appellate court affirmed the district court's finding that the letter revoking arbitration was not received within the sixty day period allowed by the agreement.<sup>120</sup> The appellate court further emphasized that the Michigan Uniform Arbitration Act also prescribed a sixty day period for revocation.<sup>121</sup>

### 2. Unsigned Agreements

A signed, written agreement to arbitrate is not necessary to bind the parties to arbitration if the parties treat the agreement as though it was in effect. In *Wetzel v. Sullivan*,<sup>122</sup> plaintiff, a former law firm partner, filed for arbitration pursuant to the terms of an unsigned arbitration agreement when the plaintiff and the defendant could not agree as to the value of plaintiff's

114. See *Frates v. Edward D. Jones*, No. 88-120 (Mont. Aug. 23, 1988) (WESTLAW, MT-CS, State file).

115. *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (Kan. 1988) (Court did not allow the tortious act of wrongful discharge from employment to be submitted to arbitration.).

116. 164 Mich. App. 314, 416 N.W.2d 428 (1987).

117. *Id.* at 317, 416 N.W.2d at 430.

118. *Id.* at 318, 416 N.W.2d at 430.

119. *Id.*

120. *Id.* at 431.

121. *Id.* (construing MICH. COMP. LAWS § 600.5042(3) (1987). This section states, "[t]he agreement to arbitrate [with hospitals and health care facilities] shall provide the person receiving health care or treatment or his legal representative, but not the hospital, may revoke the agreement within 60 days after discharge from the hospital by notifying the hospital in writing.").

122. 745 S.W.2d 78 (Tex. Ct. App. 1988).

stock in the firm and the proper allocation of fees from two contingent fee cases.<sup>123</sup> The defendant had drafted and prepared a shareholders and compensation agreement. The agreements were circulated to each shareholder. The plaintiff signed the agreement; however, the president and six of the shareholders did not sign.<sup>124</sup>

In reversing the lower court's decision denying arbitration, the appellate court noted that arbitration is generally favored by courts and every reasonable presumption will be indulged to uphold arbitration proceedings.<sup>125</sup> The court ruled that the defendant was estopped from denying the existence of the agreement because it had ratified the agreements as a matter of law.<sup>126</sup> Ratification occurs when a party recognizes the validity of a contract by acting under it, or affirmatively acknowledging it.<sup>127</sup> Here, the court found that the defendant had ratified the proposed contract by treating it as though it were in effect throughout the two year negotiation period and by accepting benefits and issuing stock pursuant to the agreement.<sup>128</sup>

Another court also agreed that conduct can bind parties to an arbitration provision contained in an unsigned contract. In *Landmark Properties Inc. v. Architects International*,<sup>129</sup> the evidence indicated that the defendant sent a written contract, which contained an arbitration provision, to the plaintiffs because it felt the services it had been required to perform in the original agreement were not clearly defined. The plaintiffs neither signed nor rejected this contract. However, they did indicate that they would pay the defendant provided all of the services were performed in accordance with these contract terms. During the project, the plaintiffs stopped making payments. Eventually the defendant filed a demand for arbitration pursuant to the contract. The plaintiffs requested a mediation conference and submitted their own claim before the arbitration board before withdrawing and claiming they were not bound to arbitration.<sup>130</sup> The court reasoned that for course of conduct to act as consent to a contract, it must be clear that the conduct relates to the specific contract in question.<sup>131</sup> The court concluded that plaintiff's correspondence to defendant acknowledging the proposed contract, the request for mediation,

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123. *Id.* at 79.

124. *Id.* at 80.

125. *Id.* at 81.

126. *Id.*

127. *Id.*

128. *Id.* at 82.

129. 172 Ill. App. 3d 379, 526 N.E.2d 603 (1988).

130. *Id.*

131. *Id.* at \_\_\_, 526 N.E.2d at 606.

and the submission of a claim to arbitration showed conduct that related specifically to the written contract.<sup>132</sup>

### B. *Scope of the Agreement*

Arbitration clauses are related to contracts and principles of contract interpretation therefore apply.<sup>133</sup> The terms of an arbitration agreement determine which issues will be submitted to arbitration. However, certain issues have been preserved for judicial consideration.

Common law contract interpretation was used in *Kansas Gas & Electric Co. v. Kansas Power & Light Co.*<sup>134</sup> The arbitration clause in question was contained in an ownership agreement for the Jeffrey Energy Center.<sup>135</sup> A separate operating agreement authorized Kansas Power & Light [hereinafter K.P.L.] to act as the agent for the other owners in the operation of the facility.<sup>136</sup> A dispute arose regarding the purchase of coal supplies. K.P.L. sought to compel arbitration.<sup>137</sup> The trial court concluded the arbitration clause in the ownership agreement was not incorporated into the operating agreement because it was not referred to in the first paragraph of the operating agreement.<sup>138</sup> Using standard contract analysis,<sup>139</sup> the court of appeals reversed the district court and found the arbitration clause included in the ownership agreement required arbitration of any controversy arising out of or relating to the operating agreement.<sup>140</sup>

Arbitration agreements which require submission of "any controversy" to arbitration are interpreted as being broad and general in scope. This gives the arbitrator the right to hear and decide nearly every dispute arising between the contractually bound parties. However, some courts are reluctant to allow certain causes of action to be handled through arbitration.

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132. *Id.*

133. *Frates v. Edward D. Jones & Co.*, \_\_\_ Mont. \_\_\_, 760 P.2d 748 (Mont. 1988).

134. 12 Kan. App. 2d 546, 751 P.2d 1 (1988).

135. *Id.* at \_\_\_, 751 P.2d at 147.

136. *Id.*

137. *Id.*

138. *Id.* at \_\_\_, 751 P.2d at 150.

139. The court followed the contract principle that "[u]nless the terms of a contract are ambiguous, its meaning must be determined solely within the 'four corners' of the contract." *Id.* (quoting *Brown v. Lang*, 234 Kan. 610, 675 P.2d 842 (1984)). Furthermore, the court stated, "A contract is ambiguous when the words used to express the meaning and intentions of the parties are insufficient in a sense the contract may be understood to reach two or more possible meanings." *Id.* (quoting *Arkansas Louisiana Gas Co. v. State*, 234 Kan. 797, 675 P.2d 369 (1984)).

140. *Id.*

In *Frates v. Edward D. Jones & Co.*,<sup>141</sup> the Supreme Court of Montana, while acknowledging that both federal and state policy favored arbitration, affirmed a district court's denial of the defendant's motion to compel arbitration and held that the district court had jurisdiction to adjudicate the issue of fraud.<sup>142</sup> The plaintiffs filed an eight count complaint including fraud with regard to an investment made with the defendant in a limited oil and gas partnership.<sup>143</sup> Noting that any ambiguity in the arbitration clause or other aspect of the agreement must be strictly construed against the drafter (defendant), the court found that the contract's arbitration clause was prospective in nature, thus, making its terms inapplicable to the issue of fraud since the contract was entered into after the purchases of the limited partnership.<sup>144</sup>

A similar issue arose in *Coleman v. Safeway Stores, Inc.*,<sup>145</sup> where the court examined whether a contract between employer and employee which provided for arbitration includes the arbitration of torts, or whether the adjudication of a tortious act is best addressed in the judicial arena. The employee in this case claimed she was wrongly discharged.<sup>146</sup> Her union declined to represent her claim; she then filed suit in district court for retaliatory discharge. The district court granted defendant's motion for summary judgment which the court of appeals affirmed.<sup>147</sup>

The Kansas Supreme Court reversed, holding summary judgment was inappropriate since a genuine issue of fact existed.<sup>148</sup> The court further ruled that employees covered by a collective bargaining agreement who have been wrongfully discharged contrary to state public policy can bring an action in tort, regardless of the existence of an arbitration agreement.<sup>149</sup> The court explained that the right to judicial remedies for an employee covered by a collective bargaining agreement is not general in nature, but available only to those who are discharged from employment in conflict with state public policy.<sup>150</sup>

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141. \_\_\_ Mont. at \_\_\_, 760 P.2d at 748.

142. *Id.* at \_\_\_, 760 P.2d at 749.

143. *Id.*

144. *Id.*

145. 242 Kan. 804, 752 P.2d 645 (1988).

146. *Id.* at \_\_\_, 752 P.2d 646.

147. *Id.* at \_\_\_, 752 P.2d at 647.

148. *Id.* at \_\_\_, 752 P.2d at 652.

149. *Id.*

150. *Id.*

In *Elliott v. Inter-Insurance Exchange*,<sup>151</sup> the court concluded the U.A.A. did not control the issues to be arbitrated by the parties.<sup>152</sup> Rather, the arbitration agreement between them dictated the issues to be decided.<sup>153</sup> The arbitration agreement in this case provided that disputes as to the liability or amount of damages were to be arbitrated.<sup>154</sup> In this accident case, the defendant asserted that the other driver was not an uninsured motorist, which was relevant to the issue of coverage.<sup>155</sup> The court stated that whether the scope of the arbitration clause reaches the issues in dispute should be determined as early as possible and "such determination is controlled by judicial guidelines."<sup>156</sup> The court held that under such an agreement, the initial determination of whether the dispute is within the scope of the agreement was to be decided by a court.<sup>157</sup> The court required that it be determined whether the other driver was uninsured before arbitration was conducted.<sup>158</sup>

In *Atkins v. Rustic Woods Partners*,<sup>159</sup> an agreement to arbitrate any dispute between the parties included disputes as to the fiduciary duties between them.<sup>160</sup> In this case, the limited partners sued the partnership and general partners for a breach of fiduciary duty in selling real estate that was a partnership asset.<sup>161</sup> When defendants sought to have the dispute submitted to arbitration pursuant to an arbitration clause in the partnership agreements, the plaintiffs' resisted on the ground that a dispute over fiduciary duties was not within the agreement.<sup>162</sup> The pertinent clause designated "as arbitrable any dispute or disagreement between any of the parties affecting their respective rights in this partnership."<sup>163</sup> The court concluded that this clause required arbitration of the disagreement over fiduciary duties.<sup>164</sup> The court stated that the scope of an arbitration clause

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151. 169 Ill. App. 3d 702, 523 N.E.2d 1086 (1988).

152. *Id.* at \_\_\_, 523 N.E.2d at 1090.

153. *Id.*

154. *Id.* See also *Flood v. Country Mutual Ins. Co.*, 41 Ill. 2d 91, 242 N.E.2d 149 (1968).

155. *Elliot*, 169 Ill. App. 3d at \_\_\_, 523 N.E.2d at 1090.

156. *Id.*

157. *Id.*

158. *Id.*

159. 171 Ill. App. 3d 373, 525 N.E.2d 551 (1988).

160. *Id.* at \_\_\_, 525 N.E.2d at 553.

161. *Id.*

162. *Id.* at \_\_\_, 525 N.E.2d at 555.

163. *Id.*

164. *Id.*

should be determined by examining "both the wording of a particular clause and the terms of the contract."<sup>165</sup>

An agreement to arbitrate is enforceable between parties even if a similar dispute is to be litigated between a party and an outsider.<sup>166</sup> In *Atkins*, plaintiffs brought allegations against an attorney who was not a party that he had breached a fiduciary duty.<sup>167</sup> The court stated that, despite the existence of claims of third parties or multiparty litigation, the agreement to arbitrate was still enforceable.<sup>168</sup> However, the appellate court reversed the order of the circuit court compelling arbitration on the separate ground that defendant had waived its right to arbitration.<sup>169</sup> Plaintiffs' claim for wrongful seizure of property was a claim for breach of contract and could properly be arbitrated as a dispute arising out of or related to the contract.<sup>170</sup>

In *Long v. DeGeer*,<sup>171</sup> a contract provision for arbitration of disputes between a customer and a stockbroker was held to cover a dispute between a customer and an agent of a stockbroker who did not sign the agreement.<sup>172</sup> The customer complained that the agent of the stockbroker mishandled the account.<sup>173</sup> The court found that the provision was broad enough to include any disputes based on fraud and misrepresentation as long as they were rooted in the relationship created by the contract.<sup>174</sup>

In *United States Fidelity & Guaranty Co. v. Woolard*,<sup>175</sup> the court stated that coverage issues relating to an insurance policy are to be decided by the court.<sup>176</sup> The trial court granted an order to compel arbitration, but was reversed on appeal because a determination was not made as to whether the plaintiffs were entitled to recover under the insurance policy.<sup>177</sup> The appellate court stated that since questions existed as to whether the alleged tortfeasor was an uninsured motorist and the plaintiff was an insured under

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165. *Id.* (quoting *J & K Cement Constr., Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 670, 456 N.E.2d 899, 895 (1983)).

166. *Id.* at \_\_\_, 525 N.E.2d at 556.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. 753 P.2d 1327 (Okla. 1988).

172. *Id.*

173. *Id.* at 1328.

174. *Id.* at 1329 (quoting *Berman v. Dean Witter & Co., Inc.*, 44 Cal. App. 3d 999, 119 Cal. Rptr. 130 (Cal. 1975)).

175. 523 So.2d 798 (Fla. Dist. Ct. App. 1988).

176. *Id.*

177. *Id.* at 799.

the policy,<sup>178</sup> the trial court must decide the coverage questions before referring the matter to arbitration.<sup>179</sup>

The court in *Ozite Corp. v. Upholsterers International Union*<sup>180</sup> held that the question of arbitrability of a dispute is for the courts to decide.<sup>181</sup> An employer brought an action against the union to compel arbitration of a dispute over whether the union induced the employer to contribute more to a health and welfare program than other employers.<sup>182</sup> The collective bargaining agreement between the parties mandated that any dispute concerning interpretation, application, or administration be arbitrated.<sup>183</sup> The union argued that no controversy within the meaning of the clause existed because the rate the employer was to pay was provided for in the contract.<sup>184</sup> The employer argued that it had understood during negotiations that its payment to the program would be the same as that of other contributing employers.<sup>185</sup> The court held that the employer was entitled to an order compelling arbitration, and that the arguments of the parties should be presented to the arbitrator and not the court.<sup>186</sup>

The court in *Metropolitan Property & Liability Insurance Co. v. Streets*<sup>187</sup> determined whether a disputed matter was within the scope of an arbitration clause.<sup>188</sup> The dispute was whether an uninsured motorist clause covered an accident involving the insured's son.<sup>189</sup> The policy provided coverage for relatives of the insured if they lived in the same household.<sup>190</sup> It also included relatives who were minors but were temporarily residing elsewhere.<sup>191</sup> The insurance company argued that the son was not a minor in

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178. *Id.*

179. *Id.*

180. 671 F. Supp. 565 (N.D. Ill. 1987).

181. *Id.* at 567 (quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986)).

182. *Id.*

183. *Id.* at 566.

184. *Id.* at 568.

185. *Id.*

186. *Id.*

187. 856 F.2d 526 (3d Cir. 1988), No. 88-1045 (D. Pa. Aug. 31, 1988) (WESTLAW, Allfeds, Dist. file).

188. *Id.* at 526.

189. *Id.* at 527.

190. *Id.*

191. *Id.*

the insured's custody and was not a resident of her household.<sup>192</sup> The parties also disputed the coverage limitations of the policy.<sup>193</sup>

The court held that the dispute over residency and the policy limits was subject to arbitration.<sup>194</sup> The insurance company argued that the arbitration clause covered only disputes over the entitlement to damages from the uninsured driver and the amount of damages.<sup>195</sup> The court stated that the dispute was not about the amount of damages, but rather the coverage of the policy.<sup>196</sup> "Whether or not the estate of Martin Streets can recover such damages, and the amount thereof, are factual issues entirely distinct from the question whether Martin Streets is an insured under the Metropolitan policy."<sup>197</sup>

In *Berryman v. Metropolitan Insurance Co.*,<sup>198</sup> the court held that an arbitration clause is to be read to avoid ambiguities.<sup>199</sup> Defendant argued the clause at issue did not apply to insurance coverage limitations but only to whether a person is entitled to collect damages.<sup>200</sup> The court stated that the arbitration clause was clear in meaning and refused to create ambiguity where none existed.<sup>201</sup>

In *Gelderman v. Mullins*,<sup>202</sup> the court ruled that some contract phrases will be interpreted to meet the public policy favoring arbitration.<sup>203</sup> In this case, plaintiff brought an action against defendant for allegedly misappropriating a computer program developed by a broker which would be used by the broker for business purposes connected with the Chicago Board of Trade (CBOT).<sup>204</sup> Both parties to the action were members of the CBOT.<sup>205</sup> The CBOT required all of its members to arbitrate controversies which

192. *Id.*

193. *Id.*

194. *Id.* at 529.

195. *Id.* at 528.

196. *Id.* at 529.

197. *Id.*

198. No. 88-1895 (E.D. Pa. June 14, 1988) (WESTLAW, Allfeds. Dist file).

199. *Id.* at \_\_\_.

200. *Id.*

201. *Id.*

202. 171 Ill. App. 3d 255, 524 N.E.2d 1212 (1988).

203. *Id.* at \_\_\_, 524 N.E.2d at 1215 (quoting *Dierson v. Joe Klein Builders, Inc.*, 153 Ill. App. 3d 373, 375, 505 N.E.2d 1325, 1327-1328 (1987)). The public policy to be served was judicial economy and resolving disputes out of court.

204. *Id.* at \_\_\_, 524 N.E.2d at 1212-13.

205. *Id.* at \_\_\_, 524 N.E.2d at 1213.

"arise out of Exchange business of such parties."<sup>206</sup> The court gave this language a broad interpretation. The court did not limit business to trading on the Exchange, but ruled that business must be Exchange related.<sup>207</sup> The court concluded the program was Exchange related because it was developed for Exchange use.<sup>208</sup>

One court has construed an arbitration provision narrowly in a limited partnership agreement which limited arbitrable issues to those affecting "general policy" of the company. In *United Cable Television v. Northwest Illinois Cable*,<sup>209</sup> the three disputes involved: 1) amount of profits to be distributed and/or profits to be retained; 2) proper allocation of investment tax credit; 3) maintenance of partnership funds in an account which did not bear interest.<sup>210</sup> The parties did not define "general policy" in the contract so the court had to supply the definition.<sup>211</sup> The court stated that the claim was not arbitrable since the parties intended the provision to apply only to issues arising out of the decision making process as to the course of conduct to be taken by the company with regard to ongoing and future operations.<sup>212</sup> Thus, the arbitration provision was not applicable to disputes over distribution of profits, allocation of investment tax credits, or the holding partnership funds in non-interest bearing accounts.<sup>213</sup>

### C. *Effects of Res Judicata and Collateral Estoppel*

In *City of Bismarck v. Toltz, King, Duvall, Anderson & Associates, Inc.*,<sup>214</sup> the plaintiff sought damages on the same issue it had previously arbitrated with another party to the dispute. The lawsuit filed against a contractor, its surety, and an engineering firm centered around the substandard construction of a sewer system for Bismarck.

First, the city arbitrated its dispute with the contractor.<sup>215</sup> After lengthy arbitration, each party was awarded damages. Pursuant to a stipulation that the contractor and its surety would be dismissed from the lawsuit, the city

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206. *Id.* at \_\_\_, 524 N.E.2d at 1215 (quoting Chicago Board of Trade Rule 600).

207. *Id.*

208. *Id.*

209. 162 Ill. App. 3d 411, 515 N.E.2d 401 (1987).

210. *Id.* at \_\_\_, 515 N.E.2d at 402.

211. *Id.*

212. *Id.* at \_\_\_, 515 N.E.2d at 403.

213. *Id.*

214. 855 F.2d 580 (8th Cir. 1988).

215. *Id.* at 582.

agreed to pay the difference of the two awards to the contractor.<sup>216</sup> Immediately thereafter, the city amended its complaint against the engineering firm to increase the amount of damages and added additional theories of liability.<sup>217</sup>

In affirming the lower court's holding that the city was collaterally estopped from seeking damages from the engineering firm in court after the city had won damages against the contractor in arbitration, the court of appeals outlined a four point test to be used when applying the doctrine of collateral estoppel.<sup>218</sup>

[T]he use of collateral estoppel is appropriate when: 1) the issue is identical to one in a prior adjudication; 2) there was a final judgment on the merits; 3) the estopped party was a party or in privity with a party to the prior adjudication; and 4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.<sup>219</sup>

Under this four prong test, the court found that the city had received adequate remedies and had a full and fair opportunity to litigate the amount of damages in the arbitration hearing.<sup>220</sup>

In *Beckman v. Freeman United Coal Mining Co.*,<sup>221</sup> another court reached a similar result by different means. The issue was whether a union employee was prevented by the doctrine of res judicata from bringing an action in a circuit court for retaliatory discharge. The employee's union had previously filed a grievance on her behalf with an industrial arbitration board which was subsequently denied. The circuit court held that the arbitrator's decision that the employee was discharged for "just cause" precluded her from bringing an action in the circuit court.<sup>222</sup> The court of appeals reversed, finding that the employee did not place the issue of retaliatory discharge before the arbitration board, and therefore, had a right to adjudicate the claim.<sup>223</sup>

216. *Id.*

217. *Id.*

218. *Id.* This test was initially used by the court in *ARKLA v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984).

219. *City of Bismark*, 855 F.2d at 582 (quoting *ARKLA*, 734 F.2d at 356).

220. *Id.* at 583.

221. 123 Ill. 2d 281, 527 N.E.2d 303 (1988).

222. *Id.* at \_\_\_, 527 N.E.2d at 303.

223. *Id.* at \_\_\_, 527 N.E.2d at 305.

The Supreme Court of Illinois reversed the court of appeals and reinstated the judgment of the circuit court.<sup>224</sup> The supreme court, however, did not apply the doctrine of res judicata. Instead, the court reinstated the circuit court decision on the grounds that the plaintiff failed to state a cause of action, thus aligning itself with the industrial arbitration board's finding that the employee was discharged for "just cause."<sup>225</sup>

In *Jackson Trak Group, Inc. v. Mid States Port Authority*<sup>226</sup> the court held that an arbitrator is not collaterally estopped from deciding an issue where an injunction was sought in a prior judicial proceeding in which the court stated it was not ruling on the issue.<sup>227</sup> The defendant argued for collateral estoppel on the issue of liability for seizure of plaintiff's equipment where plaintiff had unsuccessfully sought an injunction.<sup>228</sup> The court stated that the breach of contract issue was not decided in the injunction action, and therefore, the arbitrator was not precluded from addressing that point.<sup>229</sup>

*In re Law Enforcement Labor Services, Inc.*<sup>230</sup> held that absent specific language precluding arbitration on an issue, the agreement between the parties to arbitrate is binding.<sup>231</sup> The defendant argued that the language of the contract gave it the right to make personnel selection decisions.<sup>232</sup> The court held that the specific provisions of the collective bargaining agreement at issue did not preserve for the defendant the right to make such decisions, and that the dispute was subject to arbitration.<sup>233</sup>

Res judicata and collateral estoppel can bar claims that could have originally been heard by an arbitrator. In *Board of Governors v. Education Labor Relations Board*,<sup>234</sup> Northeastern Illinois University filed charges to discharge a teacher, and thereafter, the teacher filed a grievance with the University. The University informed her that her only option was to appeal her discharge through the Merit Board, which she did. However, midway through the hearing, her attorney discovered that she had filed a grievance with the University. When the attorney moved to terminate the hearing so that his client could pursue her option under the University's collective

224. *Id.* at \_\_\_, 527 N.E.2d at 307.

225. *Id.* at \_\_\_, 527 N.E.2d at 305.

226. 242 Kan. 683, 751 P.2d 122 (1988).

227. *Id.* at \_\_\_, 751 P.2d at 129.

228. *Id.*

229. *Id.*

230. 414 N.W.2d 452 (Minn. Ct. App. 1987).

231. *Id.* at 457.

232. *Id.*

233. *Id.*

234. \_\_\_ Ill. App. 3d \_\_\_, 524 N.E.2d 758 (Ill. App. Ct. 1988).

bargaining agreement, the Merit Board refused.<sup>235</sup> The Board also ruled that the dismissal of the teacher was valid. The teacher attempted to submit her claim to arbitration pursuant to an arbitration clause in the collective bargaining agreement. However, the court was not sympathetic and ruled that since the teacher did not appeal the Merit Board's ruling, the Board's judgment became final.<sup>236</sup>

In general, most courts adhere to the strong public policy favoring arbitration either from the policy standpoint of curtailing the rising wave of litigation or to effectuate the intent to have an alternative means of dispute resolution. While courts will not extend the policy favoring arbitration to disputes that clearly were not intended to be covered by an arbitration agreement, this policy seems to have fostered many decisions which compel arbitration where the manifestation of assent to arbitrate was not clear from the parties' agreement. Nothing in the aforementioned cases indicates a reversal of this trend.

#### IV. COMPELLING OR STAYING ARBITRATION

In deciding whether to compel or stay arbitration, a court looks only at whether the dispute is arbitrable; not at the merits of the case.<sup>237</sup> If the dispute is arbitrable, a court must submit the case to arbitration.<sup>238</sup> Arbitration can dispense with many cases and clear court dockets of the ever rising number of claims submitted.<sup>239</sup> However, without a means to compel arbitration when an agreement has been made to arbitrate, this purpose is lost.<sup>240</sup>

In *Landmark Properties, Inc. v. Architects International-Chicago*,<sup>241</sup> the defendant prepared contracts for the plaintiff to sign. The contracts contained an arbitration provision.<sup>242</sup> However, the plaintiff never signed the contracts and denied it was bound by them. Both the trial and appellate courts ordered submission to arbitration.<sup>243</sup> Each court ruled as a matter of law that plaintiff's actions showed the existence of a valid contract which

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235. *Id.* at 759.

236. *Id.* at 770.

237. *See Recent Developments* 1985: 1985 Mo. J. DISP. RES. at 193.

238. *See Sanitary Sewer Auth. v. Dial Assocs. Constr. Group, Inc.*, 367 Pa. Super. 207, 532 A.2d 862, 863 (1987).

239. *See PaineWebber, Inc. v. Farnam*, 843 F.2d 1050, 1052 (7th Cir. 1988).

240. *Id.* at 1053.

241. 172 Ill. App. 3d 379, 526 N.E.2d 603 (1988).

242. *Id.* at \_\_\_, 526 N.E.2d at 604.

243. *Id.* at \_\_\_, 526 N.E. at 603.

included arbitration provisions, even though the document was not signed.<sup>244</sup>

The appellate court concluded that "[w]hen a party denies the existence of an agreement to arbitrate, section 2(b) of the Uniform Arbitration Act (Ill. Rev. Stat. ch. 10, para. 102(b) (1985)), requires that the court, upon application of a party, determine the question of arbitrability as a matter of law."<sup>245</sup> The court further noted that "[i]n such a proceeding the court is not to consider the merits of the issue, but must summarily determine whether an agreement to arbitrate exists. If the court finds that such an agreement exists, it should order arbitration; if not, then it should stay arbitration."<sup>246</sup> The court found that a contract was formed on the basis of plaintiffs' actions, and thus, the arbitration provision should be summarily compelled.<sup>247</sup>

Texas courts appear to share the position taken by the Illinois courts. In *Wetzel v. Sullivan, King & Sabom*,<sup>248</sup> the issue involved the value of a former shareholder's stock in a firm and the allocation of fees in certain contingent fee cases. The plaintiff shareholder filed for arbitration pursuant to an arbitration agreement. The trial court granted injunctive relief to prohibit arbitration of the issues in dispute. The court reasoned that the arbitration agreement did not meet the requirements of Article 224-1 of the Texas General Arbitration Act in that the agreements were not signed by the president and other key members of the firm.<sup>249</sup> Thus, the trial court found no agreement and granted a stay of arbitration.<sup>250</sup>

The appellate court reversed and stated that "[e]ven if a written agreement is not executed and no writing exists that satisfies the Texas General Arbitration Act, a common law right to arbitration is enforceable if an appropriate agreement to submit to arbitration is shown."<sup>251</sup> As in *Landmark*,<sup>252</sup> the *Wetzel* court found there was a valid agreement under common law principles.<sup>253</sup> The court found that the defendant's actions

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244. *Id.* at \_\_\_, 526 N.E.2d at 606.

245. *Id.* at 381, 526 N.E.2d at 605 (quoting *Donaldson v. Lufkin & Jenrette Futures, Inc.*, 151 Ill. App. 3d 597, 503 N.E.2d 786 (1987)).

246. *Id.* (quoting *Gelderman, Inc. v. Mullins*, 171 Ill. App. 3d 255, 524 N.E.2d 1212 (1988)).

247. *Id.* at \_\_\_, 526 N.E.2d at 603.

248. 745 S.W.2d 78 (Tex. Ct. App. 1988).

249. *Id.* at 80 (construing TEX. REV. CIV. STAT. ANN. art. 224-1 (Vernon Supp. 1988)).

250. *Id.* at 78.

251. *Id.* at 81.

252. *Landmark*, 172 Ill. App. 3d at 379, 526 N.E.2d at 603.

253. *Wetzel*, 745 S.W.2d at 78.

revealed the existence of a valid agreement to arbitrate,<sup>254</sup> and additionally held that the defendant would be "estopped from denying the existence of the agreement because it ratified the agreements as a matter of law."<sup>255</sup>

In *Municipality of Anchorage v. Higgins*,<sup>256</sup> the failure to exhaust administrative remedies did not cause the court to compel arbitration. The personnel rules for "classified" employees required employee disputes to be processed through a specific grievance procedure, beginning with an appeal to the agency and then to the mayor, and ending with the employee having the option of submitting the issue to binding arbitration.<sup>257</sup> Higgins, the employee, was reclassified from a "classified" to an "executive" municipal employee<sup>258</sup> by the mayor of Anchorage, but Higgins disputed the reclassification on the grounds that the mayor had failed to comply with the procedural process required for reclassification.<sup>259</sup>

Rather than submitting to the binding arbitration procedures as required by the personnel rules, Higgins filed suit against the municipality because he felt arbitration would not offer him adequate protection since his dispute was against the same individuals responsible for hearing the grievance.<sup>260</sup> The Alaska Municipal Code provided that an employee may dispense with administrative remedies "where the administrative remedy is inadequate or where the pursuit of the administrative remedy would be futile due to the certainty of an adverse decision."<sup>261</sup> The appellate court held that Higgins failed to show that submission of the claim to arbitration would have been "futile". *Higgins* suggests that if an Anchorage municipal employee can prove that submitting his case to arbitration would be "futile", a court cannot compel arbitration. The employee is then able to sue the municipality without following the normal grievance process provided for in the personnel rules.

In *Gelderman, Inc. v Mullins*,<sup>262</sup> the court compelled arbitration even though the controversy was not wholly within the scope of the arbitration agreement. Plaintiff, a member of the Chicago Board of Trade (CBOT), filed suit against a former employee who was a futures commission merchant

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254. *Id.*

255. *Id.*

256. 754 P.2d. 745 (Alaska 1988).

257. *Id.*

258. *Id.* at 746.

259. *Id.* at 747.

260. *Id.* at 746.

261. *Id.* at 747 (quoting *Eidelson v. Archer*, 645 P.2d 171, 181 (Alaska 1982)).

262. 171 Ill. App. 3d 255, 524 N.E.2d 1212 (1988).

and the former employee's employer.<sup>263</sup> Defendants' filed a motion to stay litigation and to compel arbitration based on CBOT Rule 600.<sup>264</sup> At trial, the existence of an arbitration provision was undisputed. However, the trial court denied the motion to stay proceedings and compel arbitration because the "controversy arose from business that was only 90% Exchange-related."<sup>265</sup>

The appellate court reversed the denial of a stay of proceedings and the denial to compel arbitration ruling that the controversy fell within the scope of the arbitration agreement, although not squarely.<sup>266</sup> The court reasoned as follows:

[t]he object of arbitration is to foster the final disposition of disputes in an easier, faster, and more economical manner than by litigation. . . . Moreover, where the issues and relationships are sufficiently interrelated and the result of arbitration may be to eliminate the need for court proceedings, submission of the dispute to arbitration meets the goals of judicial economy and of resolving disputes outside of the judicial forum.<sup>267</sup>

The court concluded that "[t]he fact that approximately 10% of the business [on which the plaintiff based its claim] was outside of the arbitration agreement should not defeat the policy favoring arbitration."<sup>268</sup>

Even if an agreement is shown to exist, unique factual situations may require the court to adopt special standards to arrive at a decision. In *Long v. DeGeer*,<sup>269</sup> a stockbroker was sued by a customer. The stockbroker sought to compel arbitration of the complaint pursuant to an arbitration agreement signed by the plaintiff and the brokerage firm, but not signed by the stockbroker.<sup>270</sup> Plaintiff argued that since the stockbroker was merely a nonsignatory agent that he "should not be given the benefits of the arbitration provisions."<sup>271</sup>

263. *Id.* at \_\_\_, 524 N.E.2d 1213.

264. *Id.* at \_\_\_, 524 N.E.2d at 1214-15. Rule 600 states in part, "[a]ny controversy between parties who are members and which arises out of the Exchange business of such parties shall, at the request of any such party, be submitted to arbitration in accordance with regulations prescribed by the Board." *Id.* (quoting Rule 600).

265. *Id.* at \_\_\_, 524 N.E.2d at 1214.

266. *Id.* at \_\_\_, 524 N.E. at 1216.

267. *Id.* (citing *Dierson v. Joe Klein Builders, Inc.*, 153 Ill. App. 3d 373, 375, 505 N.E.2d 1325, 1327-28 (1987) (and cases cited therein)).

268. *Id.*

269. 753 P.2d 1327 (Okla. 1987), *reh'g denied* 753 P.2d 1327 (Okla. 1988).

270. *Id.* at 1328.

271. *Id.*

The question for the court was whether "the nonsignatory agent handling matters within the scope of the arbitration agreement should be allowed to bring questions concerning those matters into arbitration under the agreement."<sup>272</sup> The court found that this question "has been consistently answered in the affirmative."<sup>273</sup> The court noted that plaintiff many times recognized the stockbroker as an agent of the firm.<sup>274</sup> Given this and the fact that defendant's "actions . . . clearly arose out of the existence of the relationship created by the securities account agreement, the dispute regarding those actions was within the scope of the agreement to arbitrate."<sup>275</sup> In light of a valid agreement to arbitrate and an action falling within this agreement, the court issued an order compelling arbitration.<sup>276</sup>

In *Paine Webber, Inc. v. Farnam*,<sup>277</sup> the appellate court denied Paine Webber's request for a stay of arbitration of customer disputes pending appeal for failing to show undue delay and "irreparable injury."<sup>278</sup> Paine Webber's securities agreements provided for disputes between the company and its stockholders to be settled by arbitration.<sup>279</sup> The district court compelled arbitration of certain customer disputes, but Paine Webber was in the process of appealing the district court's decision.<sup>280</sup>

Although the appellate court acknowledged that preventing a stay of arbitration might result in arbitration ending before resolution of the appeal, "the ordinary incidents of litigating [time, energy, and money] (or arbitrating) a case are not 'irreparable injury.'"<sup>281</sup> The court further noted that "even a strong likelihood of reversal is not enough to get a stay of arbitration pending appeal."<sup>282</sup> The court concluded that the principles of speed and cost-saving afforded by arbitration outweighed plaintiff's contentions.<sup>283</sup>

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272. *Id.* at 1329.

273. *Id.* (including numerous cases cited therein).

274. *Id.*

275. *Id.*

276. *Id.* at 1330.

277. 843 F.2d. 1050 (7th Cir. 1988).

278. *Id.* at 1051.

279. *Id.* at 1052.

280. *Id.* at 1050.

281. *Id.* at 1051 (citing *Graphic Communications Union v. Chicago Tribune Co.*, 779 F.2d. 1315 (7th Cir. 1985)).

282. *Id.* at 1052 (citing *Graphic Communications*, 779 F.2d at 1315).

283. *Id.* at 1053.

Arbitration will not be compelled when the claim set forth does not fall within the arbitration clause. In *Frates v. Edward D. Jones & Co.*,<sup>284</sup> respondent filed various claims against defendant relating to securities transactions which took place before her husband's death. The respondent's broker moved to compel arbitration pursuant to a Full Service Account Customer Loan Agreement and Loan Consent signed by respondent after her husband's death.<sup>285</sup> The court stated that this "clearly refers to future transactions and not those occurring prior to the date of the agreement."<sup>286</sup> The court justified its power to determine this by stating that "arbitration clauses are creatures of contract, and therefore, principles of contract interpretation are applicable."<sup>287</sup> Given that the claims are outside the arbitration clause, the court deemed it correct for the lower court to deny the motion to compel arbitration.<sup>288</sup>

Three cases recently employed a "positive assurance" test in determining whether to compel or stay arbitration. *Izzo v. AT&T Communications, Inc.*<sup>289</sup> concluded that an employee who had been prevented from pursuing all contractual remedies due to the union's resistance to hear the complaint was entitled to have the claims heard in federal court.<sup>290</sup> The court acknowledged that the issues of transfer, promotion, and discharge were arbitrable claims within the collective bargaining agreement and should not normally be released from arbitration "unless it may be said with 'positive assurance' that the arbitration clause"<sup>291</sup> does not cover the asserted dispute. However, the court concluded that the history of collaboration between the company and the unions would jeopardize the employee's rights if the claims were submitted to arbitration.<sup>292</sup> Furthermore, the failure of the union to agree to arbitrate until two years had passed was not in compliance with the Illinois arbitration act which required suits to be submitted to arbitration "as soon as practicable."<sup>293</sup>

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284. 760 P.2d 748 (Mont. 1988).

285. *Id.* at 750. Paragraph 17 of this agreement states in part, "[t]his agreement shall cover all accounts which the undersigned may open or reopen with you. . . ." *Id.*

286. *Id.* at 751.

287. *Id.* at 752.

288. *Id.*

289. *Izzo v. AT&T Communications, Inc.*, No. 85C8938 (D. Ill. Nov. 25, 1987) (LEXIS, Genfed. Dist File).

290. *Id.* at \_\_.

291. *Id.* at \_\_.

292. *Id.* at \_\_.

293. *Id.* at \_\_. (construing ILL. REV. STAT. ch. 10 para. 20 (1985)).

In *Ozite Corp. v. Upholsterers International Union*,<sup>294</sup> the court concluded that an arbitration clause in a contract creates a presumption in favor of arbitrability, and "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."<sup>295</sup> The plaintiff claimed that defendant failed to pay proper contribution rates into a health and welfare program and the parties disputed the collective bargaining agreement itself which mandated that "any controversy concerning the interpretation, application, or administration" of the agreement be submitted to grievance and arbitration proceedings.<sup>296</sup> Although the defendant acknowledged the existence of the agreement, it said that there was no controversy because the issue of contribution rates were specified in the bargaining agreement.<sup>297</sup> However, the court found that Ozite agreed to the rate provision only because it assumed the defendant would be subject to an equal rate, thus, creating a proper controversy for arbitration because the "sole provision in the contract relating to a default in health and welfare program contributions makes reference to arbitration."<sup>298</sup>

*Sanitary Sewer Authority v. Dial Associates Construction Group, Inc.*,<sup>299</sup> is another case which employed the "positive assurance" test in overturning the trial court's grant of a stay of arbitration.<sup>300</sup> A contract between two parties called for the defendant to construct two sewer lines for the plaintiff in exchange for approximately \$670,000.<sup>301</sup> A provision in the contract stated that "[a]ll claims, disputes and other matters in question arising out of, or relating to this Agreement or the breach thereof . . . shall be decided in accordance with the Construction Industry Arbitration Rules."<sup>302</sup> Plaintiff brought an action for breach of the contract and filed for arbitration. The

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294. 671 F. Supp. 565 (N.D. Ill. 1987).

295. *Id.* at 567-68 (quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986)).

296. *Id.* at 566.

297. *Id.* at 568.

298. *Id.*

299. 367 Pa. Super. 207, 532 A.2d. 862 (1987).

300. The court stated, "[i]n accordance with the general policy favoring arbitration of contractual differences, an order enjoining arbitration of a particular grievance should not be granted unless it can be said with positive assurance that the agreement involved is not susceptible of an interpretation that covers the asserted dispute." *Id.* at \_\_\_, 532 A.2d. at 863-64 (quoting *Wolf v. Baltimore*, 250 Pa. Super. 230, 234, 378 A.2d 911, 912 (1977)).

301. *Id.* at \_\_\_, 532 A.2d. at 865.

302. *Id.*

trial court denied arbitration as it concluded the real issue was its jurisdiction once the case had been filed.<sup>303</sup>

The appellate court held that not only was the trial court mistaken in failing to determine whether the dispute involved was covered by the arbitration clause, but also that the jurisdictional issue was irrelevant to the question of whether arbitration should be stayed.<sup>304</sup> The court concluded that, "[t]he parties agreed that all claims arising out of the contract would be subject to arbitration. Clearly, the dispute which is the subject of the arbitration matter, alleging a breach of the contract, is covered by the broad language of the arbitration provision."<sup>305</sup>

Uniform principles to guide the courts in decisions to compel or stay arbitration are essential. However, judicial discretion must also be exercised to promote the policy favoring arbitration. A major factor considered by the court is the language of the clause and the intent of the parties. Therefore, the parties should carefully construct their arbitration agreements to prevent litigating the issue of arbitrability.

## V. CONFIRMATION AND VACATION OF AWARDS

Sections 11 & 12 of the U.A.A. deal with the issue of whether a court should confirm or vacate an existing arbitration award. The importance of these provisions is obvious: they allow an avenue for correctly arbitrated awards to stand while providing a method for vacating awards which are in some respect faulty. These sections provide the necessary pragmatic link from judicial principles of "fairness" and "justice" to the implementation of arbitration awards grounded in sound legal reasoning.

### A. Arbitrator Misconduct, Partiality, and Bias

Section 12(a)(2) of the U.A.A. provides that an award of the arbitrator may be vacated upon showing of partiality or misconduct prejudicing the right of any party. However, showing misconduct which will rise to a level sufficient to set aside or vacate an arbitration award places a heavy burden on the party offering the proof.

A case illustrative of this burden is *Goeller v. Liberty Mutual Insurance Co.*<sup>306</sup> A member of the arbitration panel had written a letter of protest to the arbitration board saying that his vote in the original arbitration was

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303. *Id.* at \_\_\_, 532 A.2d. at 864.

304. *Id.*

305. *Id.* at \_\_\_, 532 A.2d. at 865.

306. 376 Pa. Super. 608, 546 A.2d 690 (1988).

listed incorrectly, and that he thought the other two arbitrators had discussed the case outside of his presence.<sup>307</sup> The appeals court reversed the trial court's vacation of the arbitration award. The court stated that the appellants must show by clear, precise, and indubitable evidence that they were denied a hearing, or that fraud, misconduct, or other irregularity caused the entry of an unjust, inequitable, or unconscionable award.<sup>308</sup> The appellee alleged that when an arbitrator submitted a bill for arbitration during a time that the award was under contest, this was misconduct which the court should vacate.<sup>309</sup> The court concluded that the sending of a bill for a disputed proceeding was not clear and convincing evidence of misconduct sufficient to vacate.<sup>310</sup>

In *Egan & Sons Co. v. Mears Park Development Co.*,<sup>311</sup> the arbitrator had previously been in an attorney-client relationship with a general partner of Mears Park prior to the arbitration proceedings. When the arbitrator determined the award for Mears Park, Egan asked the district court to vacate the award on grounds of evident partiality by the arbitrator.<sup>312</sup> The district court vacated the award. The appellate court cited cases that interpreted Minnesota law to require vacation of an award if there was evidence of dealings that might create the impression of bias and held that a previous attorney-client relationship was sufficient evidence of partiality to vacate the award.<sup>313</sup>

In *Hahn v. A.G. Becker Paribas, Inc.*,<sup>314</sup> the court held that an ex parte communication by the arbitrator with one of the parties raised the presumption that the award was procured by fraud, corruption, or other undue means and thus necessitated vacating the award.<sup>315</sup> The defendant argued that only that portion of the award affected by the ex parte communication should be vacated, but the court held that the arbitrator's actions tainted the whole process and therefore required vacation of the entire award.<sup>316</sup>

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307. *Id.* at \_\_\_, 546 A.2d at 691.

308. *Id.* at \_\_\_, 546 A.2d at 692.

309. *Id.* at \_\_\_, 546 A.2d at 691.

310. *Id.* at \_\_\_, 546 A.2d at 692.

311. 414 N.W.2d 785 (Minn. Ct. App. 1987).

312. *Id.*

313. *Id.* at 786 (quoting *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968)).

314. \_\_\_ Ill. App. 3d \_\_\_, 518 N.E.2d 218,223 (1987).

315. *Id.*

316. *Id.* at 225-26.

In *Howerin Residential Sales Corp. v. Century Realty of Tidewater, Inc.*,<sup>317</sup> the plaintiff filed for arbitration with another realty company over payment of a commission. The arbitrator found in favor of the plaintiff, and the defendant refused to pay citing arbitrator misconduct.<sup>318</sup> The alleged misconduct involved the arbitrator stating to the respondent during the arbitration proceeding that respondents would be "kicked off the Board of Realtors" should they not submit to arbitration.<sup>319</sup> The arbitration award was vacated by the trial court, and on appeal, the issue was the question of the arbitrator's misconduct.<sup>320</sup> The Virginia Supreme Court held that this threat was not misconduct on the part of the arbitrator, since submission to arbitration of any claim between Board of Realtors members was a precondition to being a member.<sup>321</sup> As a result, the court reinstated the arbitration award.<sup>322</sup>

### B. *The Arbitrator's Scope of Authority*

The scope of the arbitrator's authority to decide issues submitted to arbitration is broad.<sup>323</sup> The Superior Court of Pennsylvania has stated that "a dispute is only outside an arbitration clause if it can be said with a positive assurance that the clause never intended to encompass such a situation."<sup>324</sup> The Pennsylvania Commonwealth Court has held that the decision of an arbitrator will not be overturned if it draws its essence from the collective bargaining agreement.<sup>325</sup>

In *Johnson v. American Family Mutual Insurance Co.*,<sup>326</sup> the issue was whether an arbitration panel exceeded its authority by interpreting the Minnesota no-fault insurance statutes.<sup>327</sup> The court held that statutory interpretation of the no-fault insurance statute was properly an area reserved for judicial proceedings, and that an arbitration panel's statutory

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317. 235 Va. 174, 365 S.E.2d 767 (Va. 1988).

318. *Id.* at \_\_\_, 365 S.E.2d at 769.

319. *Id.* at \_\_\_, 365 S.E.2d at 770.

320. *Id.*

321. *Id.*

322. *Id.* at \_\_\_, 365 S.E.2d 771.

323. *See State Farm Mutual Auto. Ins. Co. v. Cabs, Inc.*, 751 P.2d 61 (Colo. 1988) (en banc).

324. *See Hade v. Nationwide Ins. Co.*, 519 Pa. 227, 546 A.2d 615 (1988).

325. *See Wilkes-Barre Area Educ. Assoc. v. Wilkes-Barre Area School Dist.*, 113 Pa 492, 538 A.2d 81 (1988).

326. 426 N.W.2d 419 (Minn. 1988).

327. *Id.*

interpretation clearly exceeded its authority under Minnesota's Uniform Arbitration Act.<sup>328</sup> In vacating the award, the court further held that since the arbitrators exceeded the scope of their authority, the arbitration decision was reviewable de novo.<sup>329</sup>

In another Minnesota case, *Franke v. Farm Bureau Mutual Insurance Co.*,<sup>330</sup> the court was faced with the question of what constitutes arbitrator partiality under Minnesota's Uniform Arbitration Act.<sup>331</sup> Each side was to pick an arbitrator for the panel, and the court was to appoint a neutral arbitrator.<sup>332</sup> The award was appealed based on an alleged relationship between respondent's attorney and respondent's arbitrator which the appellant argued was evident partiality.<sup>333</sup> The court affirmed the arbitration award and held that only the neutral arbitrator could be held accountable for partiality and to hold otherwise would not be in accord with having each side choose their own arbitrator.<sup>334</sup>

In *E.D.S. Construction Co. v. North End Health Center, Inc.*,<sup>335</sup> a contractor did not meet the deadline for finishing construction and a damage claim was submitted to arbitration. The arbitrators awarded liquidated damages to the Health Center in accordance with the contract, and the contractor petitioned the court to vacate the award on the grounds that it was outside the scope of authority of the arbitrator.<sup>336</sup> The contractor argued that the arbitrator's reference in his decision to the liquidated damages clause as a "penalty clause" made the award outside the scope of the arbitrator's authority.<sup>337</sup> The court held that a mere reference in the award creating an ambiguity would not permit the inference that the arbitrator exceeded his authority.<sup>338</sup>

In the case of *Grobert File Co., Inc. v. RTC Systems*,<sup>339</sup> RTC challenged the arbitrator's authority to grant an award that RTC claimed was expressly

328. *Id.* at 421.

329. *Id.* at 419.

330. 421 N.W.2d 406 (Minn. Ct. App. 1988).

331. *Id.*

332. *Id.* at 407.

333. *Id.* at 408.

334. *Id.* at 409-10.

335. 412 N.W.2d 783 (Minn. Ct. App. 1987).

336. *Id.* at 785.

337. *Id.* at 786.

338. *Id.* The court quoted with approval from *Hilltop Constr., Inc. v. Lou Park Apartments*, 324 N.W.2d 236, 239 (Minn. 1982) which states, "[a] mere ambiguity in the opinion accompanying an award which permits an inference that the arbitrators may have exceeded their authority is no reason for refusing to enforce the award."

339. 524 N.E.2d 404 (Mass. App. Ct. 1988).

precluded by the terms of the contract.<sup>340</sup> The court agreed that an arbitrator may not ignore plain language of a contract and award relief that is clearly beyond the marked boundaries of that contract.<sup>341</sup> However, when the language of a contract was subject to interpretation, as in this case, it is clearly within the arbitrator's scope of authority to interpret the language and grant an award within that interpretation.<sup>342</sup>

In *Adler v. Safeco Insurance Co.*,<sup>343</sup> the arbitrators modified an award at Safeco's request by deleting the portion that would require the company to pay prejudgment interest to Adler.<sup>344</sup> On appeal, the court vacated the "reviewed" award and confirmed the original prejudgment interest award.<sup>345</sup> The appeals court noted that the arbitrators are allowed to change an award only if clarification or correction of an obvious miscalculation in figures is necessary.<sup>346</sup> By changing the substance of the award, the arbitrators had exceeded their authority, which gave the district court power to vacate the award.<sup>347</sup> Therefore, the court held that the "reviewed" award was properly vacated and the original award was confirmed.<sup>348</sup>

### C. Refusal to Hear Evidence Material to the Controversy

A court can vacate an arbitration award if the arbitrator refuses to hear evidence material to the controversy.<sup>349</sup> In *Wayne Insulation Co., Inc. v. Hex Corp.*,<sup>350</sup> an action was filed to vacate an arbitration award on grounds that the arbitrators had erroneously refused to hear evidence of a settlement offer made by one of the parties.<sup>351</sup> The court noted that the arbitrators

340. *Id.*

341. *Id.* at 406.

342. *Id.* at 407.

343. 413 N.W.2d 566 (Minn. Ct. App. 1987).

344. *Id.* at 567. The pertinent Minnesota statute has been interpreted by Minnesota courts to mean that arbitrators cannot award prejudgment interest. See *Lucas v. Am. Family Mut. Ins. Co.*, 403 N.W.2d 646 (Minn. 1987) (construing MINN. STAT. § 549.09.1(b)(6) (1986)).

345. *Alder*, 413 N.W.2d at 569.

346. *Id.* at 568 (construing MINN. STAT. § 572.16 (1986)).

347. *Alder*, 413 N.W.2d at 569, Minnesota Statute § 572.19.1(3) provides "Upon application of a party, the court shall vacate an award where: . . . (3) The arbitrators exceeded their powers."

348. *Alder*, 413 N.W.2d at 569.

349. See U.A.A. § 12(a)(4) which provides, "Vacating an award. (a) Upon application of a party, the court shall vacate an award where: (4) The arbitrators refused to . . . hear evidence material to the controversy . . . as to prejudice substantially the rights of a party."

350. 534 A.2d 1279 (D.C. 1987).

351. *Id.*

were not bound by formal rules of evidence but were free to conform to them.<sup>352</sup> The court held that evidence of a settlement offer was not admissible as to liability and therefore was not material.<sup>353</sup> The arbitrators made no error in excluding the evidence, and the award was properly confirmed by the lower court.<sup>354</sup>

In *Wildwoods of Lake Johnson Associates v. L.P. Cox Co.*,<sup>355</sup> the issue was whether the arbitrator's actions rose to the level of a refusal to hear evidence under the North Carolina statute.<sup>356</sup> The court found that the continuous comments and sarcastic remarks by the arbitration panel and panel impatience and unprofessionalism toward the witnesses resulted in some witnesses becoming intimidated and apologetic for testifying.<sup>357</sup> The court held these actions rose to the level of excluding evidence and vacated the arbitration award.<sup>358</sup>

#### D. *Errors of Fact or Law*

It is an established principle of the U.A.A. that an error of fact or law is not grounds for vacation of an arbitration award.<sup>359</sup> In *Gruman v. Hendrickson*,<sup>360</sup> the court was asked to rule on whether the trial court erred in refusing to vacate an arbitration award given the deference afforded arbitrators under Minnesota law.<sup>361</sup> Appellant insurance company claimed that it should have been allowed to intervene as a matter of right when its subrogation right did not mature.<sup>362</sup> The court, in affirming the trial court's decision, concluded that only those grounds statutorily listed were grounds for vacating an arbitration award and not because the court disagrees with the decision on the merits.<sup>363</sup>

352. *Id.* at 1281.

353. *Id.*

354. *Id.*

355. 88 N.C. App. 88, 362 S.E.2d 615 (1987).

356. *Id.* at \_\_\_, 362 S.E.2d at 617. N.C. GEN. STAT. § 1-567.6 (2) (1983) state "Hearing. Unless otherwise provided by the agreement: . . . (2) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing."

357. *Id.* at \_\_\_, 362 S.E.2d at 618.

358. *Id.* at \_\_\_, 362 S.E.2d at 619.

359. See U.A.A. § 12(a)(5).

360. 416 N.W.2d 497 (Minn. Ct. App. 1987).

361. *Id.* at 499. See MINN. STAT. § 572.19 (1986).

362. 416 N.W.2d at 500.

363. *Id.* at 502.

In *Arkansas Department of Parks & Tourism v. Resort Managers, Inc.*,<sup>364</sup> the court considered the issue of whether mistakes of law or fact by an arbitration panel are grounds under Arkansas law for vacating an arbitration award.<sup>365</sup> The general rule set down by the Arkansas law is that a court will not disturb mistakes of law and fact made by the arbitrator.<sup>366</sup> The idea underlying the rule is to discourage a party to an arbitration proceeding from waiting until an award is made, and then complaining about something that could have been questioned or discovered during the arbitration process.<sup>367</sup> The court adhered to the general rule and refused to vacate the arbitration award.<sup>368</sup>

In *Kalish v. Illinois Educational Association*,<sup>369</sup> Kalish and the Association disputed payments under a temporary disability benefit plan and the issue went to arbitration. The award was for the Association, and Kalish filed a motion with the arbitrator to reconsider both the merits and the award.<sup>370</sup> Shortly thereafter, Kalish received a bill from the arbitrator and immediately filed a motion for the district court to stay the award, claiming the arbitrator made errors in law and fact.<sup>371</sup> The district court stayed Kalish's motion and he appealed.<sup>372</sup> On appeal, the court stated that when two parties agree to arbitrate, issues of both fact and law necessary to the arbitrator's decision are within the arbitrator's authority.<sup>373</sup> The court concluded that a mere error of fact or law made by the arbitrator is not sufficient grounds to vacate an award.<sup>374</sup>

The court in *Noriega v. Schnurmacher Holding, Inc.*<sup>375</sup> decided the issue of whether the fact that both the arbitrator and the trial court misapplied a statute requiring a tenant to pay sales tax provided grounds for reversal as a matter of law, notwithstanding absence of statutorily enumerated grounds for vacating an arbitration award.<sup>376</sup> The Florida statute states that

364. 294 Ark. 255, 743 S.W.2d 389 (1988).

365. *Id.* at 256, 743 S.W.2d at 390. See ARK. STAT. ANN. § 16-108-212(a)(5) (1987).

366. 294 Ark. at 260, 743 S.W.2d at 391 (construing ARK. STAT. ANN. § 16-108-212(a) (5)).

367. *Id.* at 261, 743 S.W.2d at 392.

368. *Id.*

369. 166 Ill. App. 3d 406, 519 N.E.2d 1031 (1988).

370. *Id.* at \_\_\_, 519 N.E.2d at 1032.

371. *Id.*

372. *Id.*

373. *Id.* at \_\_\_, 519 N.E.2d at 1033.

374. *Id.* at \_\_\_, 519 N.E.2d at 1032.

375. 528 So. 2d 28 (Fla. Dist. Ct. App. 1988).

376. *Id.* at 30.

errors of law or fact are not grounds for reversible error.<sup>377</sup> However, the court reversed the trial court and vacated the arbitration award, holding that misapplication of a statute constituted grounds for reversal and vacation as a matter of law.<sup>378</sup>

### E. *Validity of an Award*

An analysis commonly used by courts in deciding whether to confirm or vacate an arbitration award is the validity of that award. In *Allen v. McCall*,<sup>379</sup> the only issue presented the trial court was whether lack of notice was a ground for vacation of an arbitration award. The court noted that the arbitration panel never considered the lack of notice claim.<sup>380</sup> The court further held that the issue of whether a party received sufficient notice was one to be resolved in the arbitration proceeding itself, and the fact that the panel never considered the issue made the award invalid and was ground for vacation of the award.<sup>381</sup>

In *Schmidt v. Midwest Family Mutual Insurance Co.*,<sup>382</sup> the issue presented was whether a trial de novo clause in an arbitration agreement could be exercised to prevent confirmation of an award in excess of the state statutory minimum for bodily injuries under Minnesota's financial

377. *Id.* FLA. STAT. § 682.13(1) (a-e) (19) states:

- (1) Upon application of a party, the court shall vacate an award when:
  - (a) the award was procured by corruption, fraud, or other undue means.
  - (b) 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.
  - (c) The arbitrators or the umpire in the course of his jurisdiction exceeded their powers.
  - (d) The arbitrators or the umpire in the course of his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 682.06, as to prejudice substantially the rights of a party.
  - (e) There was no agreement or provision for arbitration subject to this law, unless the matter was determined in proceedings under § 682.03 and unless the party participated in the arbitration hearing without raising the objection.

However, 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 under the statute.

378. *Noriega*, 528 So. 2d at 31.

379. 521 So. 2d 182 (Fla. Dist. Ct. App. 1988).

380. *Id.* at 183.

381. *Id.*

382. 426 N.W.2d 870 (Minn. 1987).

responsibility law.<sup>383</sup> A provision in the arbitration agreement allowed either party the right to a trial de novo only if the arbitrator's award was over the statutory minimum.<sup>384</sup> The insurer sought to exercise its right to the trial de novo while the insured sought confirmation of the arbitrator's award.<sup>385</sup>

The court initially noted that Minnesota has a strong state policy of encouraging and furthering arbitration.<sup>386</sup> The court then cited several reasons for holding that the trial de novo clause was invalid.<sup>387</sup> First, the trial de novo provision thwarts the goals of arbitration of providing a speedy, informal, and inexpensive forum for resolving controversies between contracting parties.<sup>388</sup> Second, the trial de novo provision operates to defeat goals designed to promote judicial economy and respect for the judicial system.<sup>389</sup> Third, the insurance policy possesses some characteristics of an adhesion contract in that the trial de novo provision lacks mutuality of remedy, and was entered into between parties with unequal bargaining power with little or no opportunity for an arms length transaction.<sup>390</sup>

#### F. Collateral Proceedings

A common problem facing arbitration proceedings and the courts which review them is the consequence or effect of contemporaneous judicial or arbitration proceeding. In *Phillips Petroleum Co. v. Arco Alaska, Inc.*,<sup>391</sup> the court held that when an arbitrator is empowered by contract to determine the parties interests, the court shall not actually or constructively vacate or otherwise supersede that award.<sup>392</sup> Arco filed a suit seeking money damages for "lost equity" from Phillips based allegations of wrongful manipulation of the arbitration process.<sup>393</sup> In order to determine the amount of "lost equity" due Arco, the court would have to calculate the "HPV" value, but the contract clearly stated that the arbitration panel would be the only

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383. *Id.* at 871.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* at 874.

388. *Id.*

389. *Id.*

390. *Id.*

391. No. CIV A 7177 (Del. Ch. June 14, 1988) (WESTLAW, States library, Delaware cases file) (1988 W.L. 60380).

392. *Id.* at \_\_.

393. *Id.* at \_\_.

determiners of any disputed "HPV" values.<sup>394</sup> If the court allowed this suit, as a practical matter it would have had the effect of vacating the previous arbitration award. The court refused to disturb the award and concluded that to do so would be contrary to the policy that arbitration should be a final determination.<sup>395</sup>

#### G. Vacation Based on Nonstatutory Grounds

Occasionally, a court will vacate an arbitration award based on grounds outside the arbitration statutes. The most common reason cited by the courts has been on grounds of public policy. However, in *District School Board of St. John's County v. Timoney*,<sup>396</sup> the trial court neither confirmed nor vacated an award. The trial court declared the arbitrators' award a "nullity" as it concluded the award "lent little or no guidance to the court for a judicial ruling," and the award was not based on substantial or competent evidence.<sup>397</sup> The trial court refused to confirm the award and held the petitioner could proceed with a trial on the merits.<sup>398</sup> The court of appeals quashed the order of the trial court.<sup>399</sup> The court concluded that a trial on the merits was not available to the parties as they had agreed to arbitrate.<sup>400</sup> The only proper remedy available to the trial court by statute was to remand the case to the arbitrators for reconsideration.<sup>401</sup>

#### H. Arbitration Panel's Jurisdiction

A person who voluntarily submits an issue to arbitration is precluded from challenging the arbitration panel's jurisdiction to decide the question.<sup>402</sup> In *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*,<sup>403</sup> one of the parties to a dispute insisted on arbitration.<sup>404</sup> When the decision was not as he wanted, he appealed, challenging the authority of the arbitration

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394. *Id.* at \_\_\_\_.

395. *Id.* at \_\_\_\_.

396. 524 So. 2d 1129 (Fla. Dist. Ct. App. 1988).

397. *Id.* at 1130.

398. *Id.*

399. *Id.* at 1131.

400. *Id.*

401. *Id.*

402. *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264 (7th Cir. 1988).

403. *Id.*

404. *Id.* at 268.

panel.<sup>405</sup> The court stated that "the authority of the arbitrators, unlike that of a court, [is] rooted in the parties' consent."<sup>406</sup> This holding was necessary to be consistent with the law of arbitration and its commitment to speedy resolution of disputes.<sup>407</sup>

The underlying premise upon which U.A.A. Sections 11 & 12 is based is that the judiciary must act as a final "referee" in deciding whether an arbitration award is confirmed or vacated. However, these sections also clearly indicate the statutory preference for confirmation rather than vacation of an award. This analysis underscores the legislative desire that the arbitration process be utilized to its fullest extent and that the judiciary should only intervene as a last resort, and then only in limited circumstances. As a result, the courts are supportive of the arbitration process and usually only overturn awards clearly the result of fraud, bias, corruption, failure to hear relevant evidence material to the controversy, or if the award is outside the arbitrator's broad scope of authority. Both the legislative and judicial activity in most jurisdictions indicate that public policy concerns clearly support arbitration as a valuable alternative to judicial resolution of disputes.

## VI. MODIFICATION OR CORRECTION OF AWARDS

Since the purpose of arbitration is to provide a relatively quick and inexpensive way to resolve disputes, arbitrators may modify awards only in special circumstances.<sup>408</sup> Likewise, judicial review of arbitration awards is limited.<sup>409</sup>

U.A.A. Section 9 provides for modification or correction by arbitrators in cases of evident miscalculation or evident mistake in description, imperfection in a matter of form which does not affect the merits, and when necessary to clarify an award.

U.A.A. Section 13 provides for modification or correction by courts in instances of evident miscalculation of figures or evident mistake in description, imperfection in a matter of form which does not affect merits, and an award on a matter not submitted.

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405. *Id.* at 269.

406. *Id.* at 268 (quoting *Ficek v. Southern Pac. Co.*, 338 F.2d 655, 657 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965)).

407. *Id.* at 269.

408. *See Ciampa v. Chubb Group*, 26 Mass. App. Ct. 941, \_\_\_, 525 N.E.2d 1344, 1344 (1988).

409. *See Lorenzini v. Group Health Plan, Inc.*, 753 S.W.2d 106, 107 (Mo. Ct. App. 1988).

Some states allow modification only in the instances set out in the U.A.A. modification provisions.<sup>410</sup> At least one state also allows modification under an instance set out in the U.A.A. vacation provision.<sup>411</sup> In addition, one state has held that an award which is contrary to law may be corrected.<sup>412</sup>

### A. *Modification or Correction by Arbitrators*

#### 1. Evident Miscalculation

U.A.A. Section 9 allows arbitrators to modify or correct an award upon application by a participant where there has been an "evident miscalculation of figures." Under the counterpart provision of the Massachusetts U.A.A.,<sup>413</sup> such an evident miscalculation was held to justify modification in *Ciampa v. Chubb Group*.<sup>414</sup> In this case, a mistake as to present value led to an insufficient award. The court did not define "evident miscalculation," but said "[I]t is 'evident' within the meaning of § 13(a)(1), that the sum of \$18,837, invested at twelve percent per annum, will not support a weekly payment of \$150 per week for 925 weeks."<sup>415</sup>

The court resubmitted the award to the arbitrators for modification, and held that the twenty-day time limit imposed on modification requests by Section 9 applied only to applications by parties, and not to resubmission by a court under Section 13.<sup>416</sup> Furthermore, neither a lower court's suggestion to the parties that they seek reconsideration by the arbitrator nor the previous and unsuccessful attempt by one of the parties to do so limited the court's authority to effect direct resubmission.<sup>417</sup>

#### 2. Clarification

##### a. Jurisdiction Denied

410. See *Ciampa*, 26 Mass. App. Ct. at 941, 525 N.E.2d at 1345 (evident miscalculation); Board of Educ. v. Illinois Educ. Labor Relations Bd., 170 Ill. App. 3d 490, 524 N.E.2d 711 (1988) (clarification).

411. See *Plainfield Community Consol. School Dist. No. 202 v. Lindblad Constr. Co.*, 174 Ill. App. 3d 149, 528 N.E.2d 996 (1988).

412. See *Derry Township Mun. Auth. v. Solomon & Davis, Inc.*, 272 Pa. Super. 213, 539 A.2d 405 (1988).

413. MASS. GEN. L. ch. 251, § 9 (1988).

414. 26 Mass. App. Ct. 941, 525 N.E.2d 1344 (1988).

415. *Id.* at 941, 525 N.E.2d at 1345. The sum required to be invested was \$137,750.00.

416. *Id.* at 942, 525 N.E.2d at 1345.

417. *Id.*

In *Philadelphia Newspapers, Inc. v. The Newspaper Guild*,<sup>418</sup> a dispute arose over the discharge of Robert Lawlor, an editorial page cartoonist. The arbitrator's award ordered that Lawlor be reinstated to his former position or one substantially equivalent and said that the arbitrator would retain jurisdiction for sixty days to resolve any problems which might arise in implementing the award.<sup>419</sup> The newspaper offered Lawlor the position of advertising artist which he accepted.<sup>420</sup> However, twenty-four days after the award, the guild requested a clarifying order as to whether the advertising artist position was adequate.<sup>421</sup> The arbitrator issued an order saying Lawlor must be reinstated to his former position if it still existed.<sup>422</sup> Philadelphia Newspapers filed an application to vacate the clarifying order and preclude enforcement on the theory that the arbitrator lacked authority to clarify the award after it had been rendered.<sup>423</sup>

The court did not apply the Pennsylvania U.A.A.,<sup>424</sup> but relied on common law's *functus officio* doctrine to hold the arbitrator did not have authority to retain jurisdiction or to issue the clarifying award.<sup>425</sup> The court set out policies behind this rule of preventing a "nonjudicial officer, potentially subject to outside communication and unilateral influence, from reexamining a final decision" or from imposing obligations outside the contract.<sup>426</sup> The court concluded that while arbitrators could correct clerical mistakes or obvious errors of arithmetical computation, or adjudicate an issue previously submitted that was not adjudicated, it was inappropriate for an arbitrator to implement or monitor compliance with an award unless all parties consented.<sup>427</sup>

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418. No. 86-6192 (D. Pa. Sept. 28, 1987) (LEXIS, States library, Pennsylvania file).

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.*

424. PA. CONS. STAT. § 7311 (1982).

425. *Philadelphia Newspapers, Inc.*, No. 86-6192 (LEXIS). U.A.A. § 9 and PA. CONS. STAT. § 7311 (1982) give an arbitrator jurisdiction to modify an award upon request of a party or submission by a court for the purpose of clarification. However, the newspaper and guild were parties to a collective bargaining agreement, and the U.A.A. does not apply in cases involving collective bargaining agreements. See Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-188 (1973)).

426. *Id.*

427. *Id.*

## b. Jurisdiction Allowed

In *Board of Education v. Illinois Educational Labor Relations Board*,<sup>428</sup> a dispute arose when the Board of Education moved a teacher from an eight-hour position to a six-hour position.<sup>429</sup> An arbitrator found the Board did not have sufficient reason for the move and ordered the Board to compensate the teacher for lost pay.<sup>430</sup> The teachers' union sought clarification of the award in regard to whether the teacher should be reinstated, and the arbitrator issued an order for reinstatement.<sup>431</sup> The Board misunderstood the order and did not reinstate the teacher.<sup>432</sup> A second union request for clarification resulted not only in reiteration of the reinstatement order, but also additional damages for the teachers due to the delay.<sup>433</sup>

The Board appealed this modified award on the grounds that the arbitrator's jurisdiction had expired before it was issued.<sup>434</sup> Since this dispute was under a collective bargaining agreement, U.A.A. Section 9 (which provides for modification by arbitrators under certain circumstances) did not apply.<sup>435</sup> The court upheld the arbitrator's jurisdiction. The court so held based on the consent of the parties,<sup>436</sup> and the fact that common law *functus officio* doctrine has been weakened by case law and statutes, such as U.A.A. Section 9.<sup>437</sup> The court concluded that "[m]odern theory suggests a power resides in the arbitrator to make such a ruling absent timely objection of a party."<sup>438</sup>

## 3. Mistake of Law

The U.A.A. does not provide for modification of awards which contain mistakes of law, either by arbitrators or by courts. In *Adler v. Safeco Ins. Co.*,<sup>439</sup> the Minnesota Court of Appeals held that the Minnesota arbitration act did not permit modification of an award even though the award violated

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428. 170 Ill. App. 3d 490, 524 N.E.2d 711 (1988).

429. *Id.* at \_\_\_, 524 N.E.2d at 713.

430. *Id.*

431. *Id.* at \_\_\_, 524 N.E.2d at 714.

432. *Id.* at \_\_\_, 524 N.E.2d at 715.

433. *Id.* at \_\_\_, 524 N.E.2d at 714.

434. *Id.* at \_\_\_, 524 N.E.2d at 715.

435. *Id.* at \_\_\_, 524 N.E.2d at 716.

436. *Id.*

437. *Id.* at \_\_\_, 524 N.E.2d at 715.

438. *Id.*

439. 413 N.W.2d 566 (Minn. Ct. App. 1987).

Minnesota law.<sup>440</sup> In *Adler*, an insurer offered \$50,000 in uninsured motorist benefits to Elizabeth Adler, the widow of an insured.<sup>441</sup> Adler rejected the offer, claiming she should receive underinsured benefits as well.<sup>442</sup> The matter was submitted to arbitration and the panel awarded \$5,000 in uninsured benefits and prejudgment interest.<sup>443</sup> The insurer requested modification of the award to eliminate the interest under Minnesota law which denies preaward interest on awards made by arbitrators.<sup>444</sup> The panel modified the award to eliminate the prejudgment interest.<sup>445</sup>

The appellate court held that even though the original interest award was clearly wrong, the arbitration panel lacked the power to modify the award.<sup>446</sup> The court concluded that under Minnesota's arbitration act, arbitrators could modify an award only if there was evident miscalculation or mistake of description, imperfection in a matter of form, or a need for clarification.<sup>447</sup> The court held that the modification in this case did not fit any of the three provisions and thus, must be vacated.<sup>448</sup> The court did note that many errors in arbitration awards escape remedy due to restrictions on arbitrators and limited powers of review of courts.<sup>449</sup>

## B. *Modification or Correction by Courts*

### 1. Award Based on Corruption or Fraud

U.A.A. Section 12(a)(1) provides that an award may be vacated where it was procured by "corruption, fraud or other undue means." However, the U.A.A. does not provide for modification in these instances.

In *Plainfield Community Consolidated School District No. 202 v. Lindblad Construction Co.*,<sup>450</sup> a construction contract erupted into a disagreement, and arbitration resulted in an award for Lindblad.<sup>451</sup> Plainfield asked the court

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440. *Id.* at 568.

441. *Id.* at 567.

442. *Id.*

443. *Id.*

444. *Id.* at 568 (construing MINN. STAT. § 549.09 (1986)).

445. *Id.* at 567.

446. *Id.* at 568.

447. *Id.* (construing MINN. STAT. § 572.20(1)-(3) (1986)).

448. *Id.*

449. *Id.* at 568.

450. 174 Ill. App. 3d 149, 528 N.E.2d 996 (1988).

451. *Id.* at \_\_\_, 528 N.E.2d at 997.

to vacate or modify the award on the grounds that Lindblad's subcontractor, Asbestos Safety, Inc. [hereinafter A.S.I.] had knowingly presented false information to the arbitrator regarding the amount owed by Plainfield, and A.S.I. filed pleadings requesting the court to confirm an arbitration award which A.S.I. knew was "far in excess of the amount to which A.S.I. had any right."<sup>452</sup> The court held that "where an arbitration award is in part improperly procured, only that part will be set aside."<sup>453</sup> The award was reduced from \$34,007.49 to \$10,567.52.<sup>454</sup> Even though the Illinois arbitration act does not provide for modification in an award procured by fraud,<sup>455</sup> the practical effect of the court's partial vacation was to modify the award.

## 2. Arbitrary Awards

In *Hialeah Park, Inc. v. Ocala Breeders' Sales Co.*,<sup>456</sup> an arbitration award was entered which did not correspond with any combination of Ocala's claims, nor with a set-off of Hialeah's claims against Ocala's.<sup>457</sup> Hialeah asked that the award be referred back to the arbitrators or vacated because it was arbitrary in that it bore "no rational relationship to the evidence that the parties presented with respect to damages."<sup>458</sup> However, the Florida U.A.A.<sup>459</sup> does not provide for modification because an award is arbitrary. The court reasoned that there was no legal requirement that an award coincide with the parties' requests or that the arbitrators disclose the "precise mathematical basis" upon which they arrived at the award.<sup>460</sup> The court declined to review the award where it was within the range of evidence, within the scope of submission to arbitration, and where there was no clear showing of arbitrator improprieties under Florida law.<sup>461</sup> The court concluded that it could not review or modify an award which could have been entered on the evidence presented.<sup>462</sup>

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452. *Id.* at \_\_\_, 528 N.E.2d at 999.

453. *Id.*

454. *Id.* at \_\_\_, 528 N.E.2d at 1000.

455. Ill. Rev. Stat. ch. 10, para. 101-23 (1975).

456. 528 So. 2d 1227 (Fla. Dist. Ct. App. 1988).

457. *Id.* at 1227.

458. *Id.*

459. FLA. STAT. §§ 682.01-682.22 (1982).

460. *Id.*

461. *Id.* at 1228 (construing Fla. Stat. § 682.13(1) (1982)).

462. *Id.* at 1227.

### 3. Evidence Admitted

The U.A.A. does not provide for modification of an award due to evidence considered by the arbitrators, but does provide for correction where there has been an evident miscalculation.<sup>463</sup> As the following case demonstrates, it is important to distinguish a mathematical miscalculation from a miscalculation which results from the use of erroneous data.

In *Glen Johnson, Inc. v. Ruzicka*,<sup>464</sup> a party appealed from the trial court's confirmation of an arbitration award on the purported basis that there was "an evident miscalculation of figures."<sup>465</sup> Such a miscalculation would provide grounds for modification under the Florida U.A.A.<sup>466</sup> However, the court found that the motion to vacate the award did not actually involve an evident miscalculation, but rather "was actually based upon the contention that the arbitrator's mathematics had been improperly affected by the consideration of certain evidence."<sup>467</sup> The court held this was not proper grounds for such a motion under Florida law.<sup>468</sup>

#### C. Different Standards in One Statute

The U.A.A. sets forth one standard for modification or correction by arbitrators and one standard for modification or correction by courts.<sup>469</sup> However, a state U.A.A. may have different standards for different situations.<sup>470</sup> The choice of standards may be outcome determinative as demonstrated in *Derry Township Municipal Authority v. Solomon & Davis, Inc.*<sup>471</sup> Derry awarded three sewer system contracts to Solomon. A dispute arose over the quality of the repaving material used by Solomon.<sup>472</sup> Pursuant to an arbitration agreement, the dispute was submitted to arbitration.<sup>473</sup> The arbitrators found in Derry's favor on one contract and in Solomon's favor on another.<sup>474</sup> The first issue faced by the court on

463. See U.A.A. § 13.

464. 517 So. 2d 762 (Fla. Dist. Ct. App. 1987).

465. *Id.* at 763.

466. FLA. STAT. § 682.14 (1988).

467. 517 So. 2d at 763.

468. *Id.* (construing FLA. STAT. § 682.14).

469. See U.A.A. Sections 9 & 13.

470. See 42 PA. CONS. STAT. §§ 7302, 7315, & 7341 (1982).

471. 372 Pa. Super. 213, 539 A.2d 405 (1988).

472. *Id.* at \_\_\_, 539 A.2d at 406.

473. *Id.*

474. *Id.*

Derry's appeal was which standard of review to apply.<sup>475</sup> The Pennsylvania U.A.A. recognizes three different standards under which an award may be modified: (1) the common law standard,<sup>476</sup> (2) the general statutory standard,<sup>477</sup> and (3) the contrary to law standard.<sup>478</sup>

The applicable standard is determined by two factors, one of which is whether the 1927 or 1980 arbitration act applies.<sup>479</sup> Derry argued that Pennsylvania's 1927 act should apply since it was in effect when the agreement was executed.<sup>480</sup> The court held that the 1980 act controlled because it was in effect on the date the dispute arose and the date the matter was submitted to arbitration.<sup>481</sup>

The second issue involved the arbitration agreement in question.<sup>482</sup> Derry argued that the contrary to law standard should apply where the parties showed their intent to have it control by asserting it in their petitions.<sup>483</sup> The court held that the subsequent action of the parties did not override their original intent as expressed in their contract.<sup>484</sup> Therefore, the common law standard applied since the parties had not taken affirmative steps to preserve their right to statutory arbitration.<sup>485</sup> Once it was determined that the narrow common law standard of review applied to the award, Derry could not show reason to modify or vacate.<sup>486</sup> If Derry had persuaded the court to apply the broad contrary to law standard of review, modification or vacation might have been possible.

Although finality of awards is important in encouraging the use of arbitration as a quick and less expensive alternative to litigation,<sup>487</sup> the restrictions on modification result in erroneous awards being upheld.<sup>488</sup> Although awards may be vacated in more instances than they may be

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475. *Id.* at \_\_\_, 539 A.2d at 407.

476. 42 PA. CONS. STAT. § 7341 (1982).

477. 42 PA. CONS. STAT. § 7315(a) (1982). Similar to U.A.A. § 13(a).

478. 42 PA. CONS. STAT. § 7302(d)(2) (1982).

479. 372 Pa. Super. at \_\_\_, 539 A.2d at 408.

480. *Id.* at \_\_\_, 539 A.2d at 407.

481. *Id.* at \_\_\_, 539 A.2d at 408.

482. 42 PA. CONS. STAT. § 7302(a) (1982) which generally provides that an agreement is conclusively assumed to provide for common law arbitration unless it expressly reserves a right to statutory arbitration in writing.

483. 372 Pa. Super. at \_\_\_, 539 A.2d at 409.

484. *Id.*

485. *Id.* at \_\_\_, 539 A.2d at 410.

486. *Id.* at \_\_\_, 539 A.2d at 411.

487. See *Lorenzini*, 753 S.W.2d at 106.

488. See *Adler*, 413 N.W.2d at 568.

modified,<sup>489</sup> this forces parties to start the arbitration process over again. Some states have expanded the instances in which awards may be modified (such as Pennsylvania which allows modification in certain situations where the U.A.A. would allow only vacation)<sup>490</sup> and allow arbitrators to retain jurisdiction so that modification is more easily accomplished.<sup>491</sup> These provisions reflect an attempt to subject awards to greater modification or correction.

## VII. TIMELINESS

Timeliness issues generally surface in one of three different contexts under the U.A.A. First, the issue of the timeliness of a demand for arbitration may arise.<sup>492</sup> Because the U.A.A. does not assist courts in deciding the timeliness of demands for arbitration, courts often leave this question to the arbitrator who in turn must resolve the issue by interpreting the arbitration agreement. Second, questions frequently concern the timeliness of motions to vacate,<sup>493</sup> modify, or correct<sup>494</sup> an arbitration award, or of appeals from an arbitration award.<sup>495</sup> In determining the timeliness of these motions or appeals, courts rigidly adhere to the time limits set forth in the state versions of the U.A.A.<sup>496</sup> Finally, timeliness issues occasionally

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489. See U.A.A. §§ 9, 12, & 13.

490. 42 PA. CONS. STAT. § 7341 (1982).

491. See *Board of Educ.*, 170 Ill. App. 3d 490, 524 N.E.2d 711 (1988).

492. See *In re Cameron & Griffith*, 91 N.C. App. 164, 370 S.E.2d 704 (1988); *Millwrights Local 548 v. Robert J. Puleasa Co.*, 419 N.W.2d 105 (Minn. Ct. App. 1988); *Ozite Corp. v. Upholsterers Int'l Union of North Am.*, 671 F. Supp. 565 (N.D. Ill. 1987); *Frates v. Edward D. Jones & Co.*, \_\_\_ Mont. \_\_\_, 760 P.2d 748 (1988).

493. See *Bell Cold Storage, Inc. v. Over-the-Road City Transfer Union*, 673 F. Supp. 987 (D.Minn. 1987); *State Farm v. Cabs, Inc.*, 751 P.2d 61 (Colo. 1988); *Cady v. Allstate Mutual Auto Ins. Co.*, 747 P.2d 76 (Idaho Ct. App. 1987); *Local 20 v. Baylor Heating & Air Conditioning, Inc.*, 688 F. Supp. 462 (S.D. Ind. 1988).

494. See *Ciampa v. Chubb Group of Ins. Cos.*, 26 Mass. App. Ct. 235, 525 N.E.2d 1345 (1988).

495. See *Seay v. Prudential Ins. Co.*, 375 Pa. Super. 37, 543 A.2d 1166 (1988).

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

affect actions to confirm or enforce arbitration awards.<sup>497</sup> When faced with no statute or court rule controlling the timeliness of actions to confirm or enforce arbitration awards, courts often turn to analogous state or federal statutes.

### A. Demand for Arbitration

Courts commonly rule that the arbitrator determines the timeliness of a demand for arbitration. *In re Cameron and Griffith*<sup>498</sup> held that because neither the contract nor a statute or court decision limited the period in which arbitration could be demanded, the claimant's right to an arbitration hearing was not barred by a statutory limitation period applying only to an "action" or "judicial proceeding."<sup>499</sup> The contract in question made no mention of limiting the period in which arbitration could be demanded. Demand was not made until more than four years after the dispute arose. However, the court compelled arbitration because the parties freely entered into the contract to arbitrate knowing that arbitrators could decide their disputes "according to what was good and equitable."<sup>500</sup>

In *Millwrights Local 548 v. Robert J. Puleasa Co.*,<sup>501</sup> the timeliness issue centered on whether the union had waived arbitration by waiting eight months after a grievance procedure had failed in an employee termination dispute. The trial court denied the union's motion to compel arbitration, holding that arbitration had been waived.<sup>502</sup> The appellate court reversed on the ground that the question of whether arbitration has been waived is strictly procedural and "more properly addressed to the arbitrator as a threshold issue."<sup>503</sup>

The trial court in *Ozite Corporation v. Upholsterers International Union*<sup>504</sup> granted Ozite's motion to compel arbitration on the ground that because section 301 of the Labor Management Relations Act does not specify a limitation period for filing suit, the appropriate period is determined by

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497. See *UMW Dist. 4 v. Cyprus Emerald Resources Corp.*, 681 F. Supp. 271 (W.D. Pa. 1988); *Walkerville Educ. Assoc. v. Walkerville Rural Communities School*, 165 Mich. App. 341, 418 N.W.2d 459 (1987).

498. 91 N.C. App. 164, 370 S.E.2d 704 (1988).

499. *Id.*

500. *Id.* at \_\_\_, 370 S.E.2d at 705.

501. 419 N.W.2d 105 (Minn. Ct. App. 1988).

502. *Id.* at 107.

503. *Id.* at 109.

504. 671 F. Supp. 565 (N.D. Ill. 1987).

state law.<sup>505</sup> The court reasoned that either the five year period for breach of oral contract<sup>506</sup> or the ten year period for breach of written contract<sup>507</sup> controlled this action wherein the union allegedly breached the collective bargaining agreement. This court found that the ninety-day period in the Illinois U.A.A.<sup>508</sup> was inapplicable because that statute pertained to suits to vacate arbitration awards, and no arbitration occurred here.<sup>509</sup> The court further noted that the six month statute of limitations period found in section 10(b) of the National Labor Relations Act (NLRA) had been utilized in an analogous case in at least one court in that district.<sup>510</sup> Arbitration was compelled in this case because the suit was timely under either the applicable state limitation periods or under section 10(b) of the NLRA.<sup>511</sup>

In *Frates v. Edward D. Jones & Co.*,<sup>512</sup> the court affirmed the trial court's denial of a motion to compel arbitration because Frates signed the arbitration agreement after the disputed transactions occurred.<sup>513</sup> The court reasoned that regardless of the federal and state policies favoring arbitration,<sup>514</sup> this arbitration agreement was unenforceable because "grounds existed either in law or equity to revoke the entire contract."<sup>515</sup> By relying on principles of contract interpretation, the court deemed the motion to compel arbitration properly denied via the "prospective nature" of the subsequently signed arbitration agreement.<sup>516</sup>

### B. Motions to Vacate, Modify or Correct, and Appeals

Sections 13(a) and 12(b) of the U.A.A. mandate that in order to have an arbitration award vacated or modified, one must apply to the courts within ninety days after a copy of the award has been delivered to the applicant. Courts rigidly adhere to this limitation in order to promote finality and certainty of awards, to keep arbitration expedient, and to assure

505. *Id.* at 567.

506. ILL. REV. STAT. ch. 110, para. 13-205 (1985).

507. *Id.* at para. 13-206.

508. *Id.* at para. 12(b).

509. *Ozite*, 671 F. Supp. at 567.

510. *Id.*

511. *Id.*

512. \_\_\_ Mont. \_\_\_, 760 P.2d 748 (1988).

513. *Id.* at \_\_\_, 760 P.2d at 752.

514. See 9 U.S.C. § 2 and MONT. CODE ANN. § 27-5-114(1) (1985).

515. *Frates*, \_\_\_ Mont. at \_\_\_, 760 P.2d at 752.

516. *Id.*

the prompt correction of any mistake in the process of arbitration. The limitation is rarely circumvented and then only when these purposes would not be served.

In *Bell Cold Storage, Inc. v. Over-the-Road City Transfer Local 544*,<sup>517</sup> the trial court held that neither party could move to vacate the award until a final arbitration award had been issued.<sup>518</sup> The court reasoned that comity and efficiency were both best served by courts refraining from intervening in a nonfinal arbitration.<sup>519</sup> The parties had agreed to a two-session, bifurcated arbitration. After the first hearing, the employer filed an action to vacate. The action was dismissed and the motion to vacate denied because the arbitration was not yet final.<sup>520</sup>

The Colorado Supreme Court adhered to the ninety-day limitation period under Colorado's U.A.A.<sup>521</sup> in *State Farm v. Cabs, Inc.*<sup>522</sup> The court held that the cab company could have challenged the arbitration statute as unconstitutional in a motion to vacate on the ground that the arbitrators exceeded their powers.<sup>523</sup> Because their challenge was not brought within ninety days after a copy of the award was delivered to them, the cab company's claim was time barred under the U.A.A.<sup>524</sup> The court also held that the cab company could not present this as a substantive defense to confirmation of the award.<sup>525</sup> The court analogized such a failure to a jurisdictional defect in a civil case.<sup>526</sup>

In *Cady v. Allstate Insurance Co.*,<sup>527</sup> the court denied Cady's motion to vacate on the ground that she willingly participated in an arbitration proceeding without preserving the right to challenge the dispute's arbitrability with a timely objection before the hearing on the merits.<sup>528</sup> Cady argued that arbitration should not have been compulsory due to the contract's adhesive nature.<sup>529</sup> Nevertheless, the court concluded that even

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517. 673 F. Supp. 987 (D. Minn. 1987).

518. *Id.*

519. *Id.*

520. *Id.*

521. COLO. REV. STAT. § 13-22-214(2) (1987).

522. 751 P.2d 61 (Colo. 1988).

523. *Id.* at 66.

524. *Id.* at 67.

525. *Id.*

526. *Id.*

527. 113 Idaho 667, 747 P.2d 76 (Idaho Ct. App. 1987).

528. *Id.*

529. *Id.*

where no arbitration agreement exists, a party is estopped from objecting in an untimely manner.<sup>530</sup>

In *Sheet Metal Workers Local Union No.20 v. Baylor Heating and Air Conditioning Inc.*,<sup>531</sup> the court held that Baylor's affirmative defenses to the union's action to confirm the award were barred because Baylor failed to move to vacate the award in a timely manner.<sup>532</sup> Because the Labor Management Relations Act did not provide a time limitation on an action to vacate an arbitration award, the court determined the timeliness of such a challenge as a matter of federal law by referring to the Indiana U.A.A.<sup>533</sup> Due to Baylor's failure to move to vacate the award within ninety days after the mailing of the award to the parties,<sup>534</sup> the court barred Baylor's affirmative defenses in this suit.<sup>535</sup>

The timeliness of a motion to modify or correct an award was the focus in *Ciampa v. Chubb Group of Insurance Companies*.<sup>536</sup> The court held that the twenty-day limit found in section 9 of the Massachusetts U.A.A.<sup>537</sup> applied only to applications for correction or modification and not to "resubmission ordered by [the] court."<sup>538</sup> Hence, section 13(a)(1) of the U.A.A. controlled with its thirty-day limit when it was evident in the original award that a miscalculation of figures had occurred (i.e., the award incorrectly implied that the sum of \$18,837, invested at twelve percent per annum, supported a weekly payment of \$150 per week for 925 weeks).<sup>539</sup> The court suggested resubmission to the arbitrator.<sup>540</sup> Under section 13(a)(1), Ciampa's application was timely.

The focus in *Seay v. Prudential Property & Casualty Insurance Co.*,<sup>541</sup> was on an apparent procedural conflict between two Pennsylvania U.A.A. statutes providing for the commencement of the limitations period granted

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530. *Id.*

531. 688 F. Supp. 462 (S.D. Ind. 1988).

532. *Id.* at 471.

533. *Id.*

534. See IND. CODE ANN. § 34-4-2-12 (Burns 1986).

535. *Baylor*, 688 F. Supp. at 471.

536. 26 Mass. App. Ct. 941, 525 N.E.2d 1344 (1988).

537. See MASS. GEN. LAWS ANN. ch. 251, §§ 9 and 13(a)(1) (West 1988).

538. *Ciampa*, 26 Mass. App. Ct. at 942, 525 N.E.2d at 1344.

539. *Id.*

540. *Id.* at 941, 525 N.E.2d at 1345.

541. 375 Pa. Super. 37, 543 A.2d 1166 (1988).

for appealing an arbitrator's award.<sup>542</sup> Prudential filed a petition to vacate, which was denied. It then appealed that order only to have it quashed because final judgment had not been entered. Seay then filed a petition to confirm which was granted and docketed April 1, 1987. On May 6, 1987, Prudential appealed again, but because more than thirty days had passed since the order confirming the award, the court quashed the appeal.<sup>543</sup> After noting the equivocation found in the statutes (one permits an appeal from an order confirming an award and from final judgment<sup>544</sup> while the other insists that final judgment be entered for orders confirming awards<sup>545</sup>), the court determined that the legislature intended for both sections to be read together and for orders confirming an award to be reduced to judgment before they may be appealed.<sup>546</sup> Thus, Prudential's appeal was timely.

### C. *Actions to Confirm or Enforce*

In *United Mine Workers District 4 v. Cyprus Emerald Resources Corp.*,<sup>547</sup> the court held that the National Labor Relations Act's (NLRA) six month limitation period applied to this action.<sup>548</sup> The court's reasoning was based on the similarities of this action to actions brought under the NLRA.<sup>549</sup> The court further found that such an action accrued at the time the union became or should have become aware that Cyprus was violating or ignoring the arbitrator's decision.<sup>550</sup> The court reasoned that Pennsylvania's U.A.A. provision failed to specify a limitation period for enforcement of actions;<sup>551</sup>

542. *Id.* at \_\_\_, 543 A.2d at 1167, *Cf.* 42 PA. CONS. STAT. ANN. §§ 7320 and 7316 (1980); Section 7320 provides in pertinent part:

"(a) General Rule--an appeal may be taken from:

(3) A court order confirming or denying confirmation of	an award . . . .
(6) A final judgment or decree of a court entered	pursuant to the

provisions of this subchapter."

Section 7316 provides in pertinent part: "Judgment or Decree on Award: Upon the granting of an order of a court confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity with the order. . . ."

543. *Seay*, 375 Pa. Super. at \_\_\_, 543 A.2d at 1168.

544. *Id.*

545. *Id.*

546. *Id.*

547. 681 F. Supp. 271 (W.D. Pa. 1988).

548. *Id.* at 277. *See* 29 U.S.C. § 160 (b) (1973).

549. *Id.*

550. *Id.* at 278.

551. *See* 42 PA. CONS. STAT. ANN. § 7313 (1980).

that Pennsylvania's residual six year statute of limitations was inappropriate because it was too lengthy and not analogous to section 301 of the NLRA; that Pennsylvania's limitation period for contract actions was not sufficiently analogous; and that Pennsylvania's thirty-day limitation periods for requesting vacation, modification, or correction were too short and were wholly distinct actions.<sup>552</sup> Therefore, the court turned to federal law and concluded the six months limitation period under section 10(b) of the NLRA applied.<sup>553</sup> The court held that the Union's complaint was timely filed.<sup>554</sup>

Like the court in *Cyprus*, the court in *Walkerville Education Association v. Walkerville Rural Communities School*<sup>555</sup> had to locate and apply an applicable statute of limitations to an action seeking enforcement of an arbitration award. Because arbitration proceedings are contractual in nature, the Michigan labor dispute statute merely states that arbitration awards arising out of labor disputes "shall be enforceable at law or in equity as the agreement of the parties."<sup>556</sup> The court reasoned that the six month period under the Public Employment Relations Act (PERA)<sup>557</sup> better applied because the one year period under the arbitration court rule<sup>558</sup> applies only to arbitration authorized by the arbitration statute.<sup>559</sup> Collective labor contracts are expressly excepted from the statutory arbitration provisions in Michigan.<sup>560</sup>

The court further held that PERA was not precisely on point because its limitation period applies only to unfair labor practices charges filed with the Michigan Employment Relations Commission (MERC). Nevertheless, in light of the fact that Michigan's U.A.A. does not specify a limitation period for enforcing an arbitration award,<sup>561</sup> and in light of the general contract limitation period of six years being too lengthy, the court adopted the six month period found in PERA.<sup>562</sup> The court based its decision on the fact that federal courts had been adopting a similar period under section

552. *Cyprus*, 681 F. Supp. at 277.

553. *Id.* at 275.

554. *Id.*

555. 165 Mich. App. 341, 418 N.W.2d 459 (1987).

556. *Id.* at 345, 418 N.W.2d at 461 (quoting MICH. COMP. LAWS ANN. § 423.901(4) (West 1978)).

557. See MICH. COMP. LAWS ANN. § 423.216(a) (West 1978).

558. Mich. Stat. Ann. Rule 3.602(1) (Callahan 1985).

559. *Walkerville*, 165 Mich. App. at 344, 418 N.W.2d at 460.

560. Mich. Comp. Laws Ann. § 600.5001(3) (West 1987).

561. See Mich. Comp. Laws Ann. § 423.9d (West 1978).

562. *Walkerville*, 165 Mich. App. at \_\_\_, 418 N.W.2d at 461.

10(b) of the National Labor Relations Act; that using PERA furthers the state's policy in favor of promptly resolving labor disputes in the public sector; and that uniformity of statute of limitations is advanced.<sup>563</sup>

The law regarding issues of timeliness remains consistent. Courts are continuing to defer to the arbitrator on the purely procedural questions of the timeliness of demands for arbitration because of "the desirability of deferring to someone familiar with the practices in the industry and the avoidance of duplication and delay."<sup>564</sup> Moreover, courts are continuing to strictly adhere to the limitation periods required under the state U.A.A.'s regarding vacation and modification or correction. In construing statutory limits on the right to appeal an arbitration award, courts adhere to strict interpretations of the statutes. Finally, courts are reaching out to homological statutes in their attempts to fill voids left by state legislatures in providing for a period within which one may resort to the courts to compel enforcement or confirmation of arbitration awards. A six month period has found favor in at least two courts.<sup>565</sup>

### VIII. JUDGMENTS ON AWARDS

#### A. *Attorney's Fees*

The U.A.A. provides that an arbitrator's expenses and fees, unless otherwise provided for in the agreement, may be assessed in the award. Conversely, if the arbitration agreement is silent as to attorney's fees, they may not be made a part of the arbitration award.<sup>566</sup> The U.A.A. seems clear as to the arbitrator's authority to assess attorney's fees if the agreement so stipulates. Recent cases have addressed the issue of the reviewing court's authority to assess attorney's fees incurred during the arbitration proceeding as a sanction against a party who brings a frivolous suit.

In *Reilly v. Newman*,<sup>567</sup> the Maryland Court of Special Appeals held that the circuit court did not have the authority to order payment of the defendant's attorney's fees that had been incurred during the arbitration

563. *Id.*

564. See *Millwrights Local v. Robert J. Puleasa Co.*, 419 N.W.2d 105, 109 (Minn. Ct. App. 1988) (quoting *Retail Delivery Local 588 v. Servomation, Corp.*, 717 F.2d 475, 477 (9th Cir. 1983)).

565. See *Walkerville*, 165 Mich. App. at \_\_\_, 418 N.W.2d at 461; *Cyrus*, 681 F. Supp at 275.

566. U.A.A. § 10.

567. 74 Md. App. 281, 536 A.2d 1230 (1988), *aff'd in part and rev'd on other grounds*, 314 Md. 364, 550 A.2d 959 (1988).

proceeding as a sanction for maintaining an unjustified action.<sup>568</sup> Reilly filed a malpractice claim against Dr. Newman, alleging that the doctor negligently executed a certificate for involuntary admission to a mental health facility.<sup>569</sup> An award of no liability on the malpractice claim was rendered by the arbitration panel.<sup>570</sup> On appeal, the circuit court awarded the physician costs and attorney's fees.<sup>571</sup> The Maryland Court of Special Appeals held that it was error for the circuit court to have awarded attorney's fees and remanded the case for modification to exclude attorney's fees.<sup>572</sup> The court stated that the arbitration panel had the authority under Maryland law<sup>573</sup> to order attorney's fees against a party who brought a claim in bad faith, but that the circuit court's power is limited to imposing sanctions for fees and costs incurred after the action was filed.<sup>574</sup>

In *Plainfield Community Consolidated School District No. 2 v. Lindblad Construction Co.*,<sup>575</sup> the Illinois Court of Appeals also addressed the issue of whether the trial court could properly award attorney's fees incurred during the arbitration hearing. In *Plainfield*, a dispute arising out of construction work was submitted to arbitration. The arbitrator issued an award against the school district for the full amount requested.<sup>576</sup> Subsequently, the school district discovered that one of the subcontractors had intentionally misrepresented the amount owed and moved the court to modify or vacate the award on this basis.<sup>577</sup> The trial court awarded attorney's fees and costs to both the contractor and the school district from the initiation of arbitration as a result of the subcontractor's misrepresentations before both the

568. *Id.* at 292, 536 A.2d at 1235.

569. *Id.* at \_\_\_, 536 A.2d at 1232.

570. *Id.*

571. *Id.*

572. *Id.* at \_\_\_, 536 A.2d at 1234-35.

573. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-07(a) (Repl. Vol. 1984)(Cum. Supp. 1988) provides:

(a) *Action maintained in bad faith* - If the arbitration panel finds that the conduct of any party in maintaining or defending any action is in bad faith or without substantial justification, the panel may require the offending party, the attorney advising the conduct, or both, to pay to the adverse party the costs of the proceeding and reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it. A determination made under the subsection shall become part of the panel award and subject to judicial review.

574. *Reilly*, 74 Md. App. at 292, 536 A.2d at 1235.

575. 174 Ill. App. 3d 149, 528 N.E.2d 996 (1988).

576. *Id.* at \_\_\_, 528 N.E.2d at 997.

577. *Id.*

arbitrator and the court.<sup>578</sup> The appellate court held that without clear statutory authorization, it could not award fees incurred during arbitration.<sup>579</sup>

The Florida District Court of Appeals followed this holding in *Glen Johnson, Inc. v. L. M. Lowdenshell, Inc.*,<sup>580</sup> by remanding for recomputation an award of attorney's fees made by the circuit court. The circuit court had assessed attorney's fees which were incurred during both the arbitration and enforcement process. The district court remanded the award to the circuit court for recomputation to exclude those attorney's fees arising from the arbitration proceeding.<sup>581</sup> Attorney's fees for arbitration proceedings are expressly excluded by Florida's arbitration code unless provided for in the arbitration agreement.<sup>582</sup> The legislature eliminated such fees from the subject matter jurisdiction of arbitration because "arbitrators are generally businessmen chosen for their expertise in particular subject matter of suit and are not necessarily knowledgeable concerning legal fees."<sup>583</sup>

*Ierna v. Arthur Murray International, Inc.*<sup>584</sup> held that even though the arbitration agreement did not clearly indicate that the parties intended the prevailing party to recover attorney's fees, if the language of the agreement is susceptible to that interpretation, the arbitrator is reasonable in awarding them.<sup>585</sup> In *Ierna*, the appellants argued that the only reason the arbitrators interpreted the language of the agreement to include assessment of attorney's fees was because the lower court in its order granting a motion to confirm the amended award and remanding had instructed them to do so.<sup>586</sup> The court firmly announced that this order did not remand the case to the arbitrators to determine the amount of attorney's fees to be awarded, but remanded it to the arbitrators "for a determination of such costs and expenses to which the defendants may be entitled."<sup>587</sup> Thus, it was the arbitration panel, not the district court, which interpreted the language to include attorney's fees. The court conceded that the language of the arbitration agreement was not clear as to whether the parties intended the prevailing party to recover attorney's fees, but they did agree that it was

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578. *Id.*

579. *Id.*

580. 520 So. 2d 297 (Fla. Dist. Ct. App. 1988).

581. *Id.* at 298.

582. FLA. STAT. § 682.11 (1985).

583. *Id.*

584. 833 F.2d 1472 (11th Cir. 1987).

585. *Id.* at 1477.

586. *Id.*

587. *Id.*

susceptible to that interpretation.<sup>588</sup> They concluded that "[w]hether this language included attorneys' fees was an arbitrable issue, and the arbitrators' interpretation is reasonable."<sup>589</sup>

### B. Prejudgment Interest

The U.A.A. is silent as to when an award of prejudgment interest is appropriate. Generally, a court will not add prejudgment interest to an arbitration award.<sup>590</sup>

In *Adler v. Safeco Insurance Co.*,<sup>591</sup> the court reviewed an arbitration panel's modification of its own award where the panel had erroneously awarded prejudgment interest. The arbitration panel awarded uninsured motorist benefits, prejudgment interest, and costs to the widow of an accident victim. The insurer requested the panel to modify its award to eliminate the prejudgment interest because the Minnesota U.A.A.<sup>592</sup> prohibited such an award based on the facts of the case. The arbitration panel then reversed the interest award.<sup>593</sup>

When the widow sought judicial review, the court held that while the award of prejudgment interest was incorrectly made, Minnesota's arbitration act<sup>594</sup> did not permit the panel to modify its erroneous award. The court further stated that there was no statutory or case law authority which gave the district court jurisdiction to vacate an award because the arbitrators made an error of law.<sup>595</sup>

In *United Services Automobile Association v. Smith*,<sup>596</sup> the court reviewed an appeal from an arbitration panel and awarded prejudgment interest on a settlement offer made by Smith's underinsured driver's liability carrier. The Smiths, who had uninsured motorists coverage with United Services Automobile Association (USAA), were injured in an automobile accident involving an underinsured driver. The driver's liability carrier offered to settle with the Smiths for \$30,000, but USAA refused to give the Smiths permission to settle with the carrier. The claim was arbitrated before a

588. *Id.*

589. *Id.*

590. *See Recent Developments: The Uniform Arbitration Act*, 1987 MO. J. DISP. RES. 221.

591. 413 N.W.2d 566 (Minn. Ct. App. 1987).

592. MINN. STAT. ANN. § 549.09 subd. 1(b) (West 1988).

593. *Alder*, 413 N.W.2d at 567.

594. MINN. STAT. ANN. § 572.16 (West 1988) provides that the basis for an arbitrator to modify an award is limited to mistakes of form, description, or calculation.

595. *Adler*, 413 N.W.2d at 568.

596. 527 So. 2d 281 (Fla. Dist. Ct. App. 1988).

panel which awarded the Smiths a total of \$82,000.<sup>597</sup> The award stated that due to a stipulation of the parties, no ruling as to issues of interest were made.<sup>598</sup> The trial court entered judgment for the Smiths, and the insurer appealed.<sup>599</sup>

The Florida District Court of Appeals held that the trial court erred in awarding prejudgment interest on the \$30,000, even though the insurer had refused to give the insureds permission to accept.<sup>600</sup> The court reasoned that it was not until the arbitration award was made that the Smiths had an enforceable contract.<sup>601</sup> On the same reasoning, the court agreed that the trial court was correct in awarding interest on the sum of \$82,000 from the date of the arbitration award until the date of payment.<sup>602</sup>

#### IX. APPEALS

U.A.A. Section 19 allows an appeal (1) from an order denying an application to compel arbitration, (2) from an order granting an application to stay arbitration, (3) from an order confirming or denying confirmation of an award, (4) from an order modifying or correcting an award, (5) from an order vacating an award without directing a rehearing and (6) from a judgment or decree entered pursuant to the provisions of the U.A.A.<sup>603</sup> The U.A.A. states that the appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.<sup>604</sup>

In *Chem-Ash, Inc. v. Arkansas Power & Light*,<sup>605</sup> the court held that an order by a trial court compelling arbitration was not appealable. Arkansas Power & Light argued that the order was not appealable under the U.A.A. provisions.<sup>606</sup> Chem-Ash argued the court must rely on Rule 2(a) of the Arkansas Rules of Appellate Procedure which it interpreted as indicating that an order compelling arbitration is final and appealable.<sup>607</sup> The court concluded that the order did not in effect determine the action or discontinue it as required for an appealable order under Rule 2(a), but the matter

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597. *Id.* at 282.

598. *Id.*

599. *Id.*

600. *Id.* at 283.

601. *Id.* at 283-84.

602. *Id.* at 283.

603. U.A.A. § 10.

604. *Id.*

605. 296 Ark. 83, 751 S.W.2d 353 (1988).

606. *Id.* at \_\_\_, 751 S.W.2d at 354.

607. *Id.*

had merely been referred to arbitration.<sup>608</sup> Chem-Ash could appeal the arbitration decision, obtain review, and raise any questions concerning the trial court's order on that appeal.<sup>609</sup> The court based this decision on the policy that if it permitted an appeal from every order compelling arbitration, the court would twice review the case and the policy favoring arbitration would be frustrated.<sup>610</sup>

In *Kansas Gas & Electric Co. v. Kansas Power & Light Co.*,<sup>611</sup> the court held an order denying an application to compel arbitration is subject to interlocutory appeal, notwithstanding that such an interlocutory appeal conflicts with Kansas statutory law.<sup>612</sup> Kansas law lists those subjects which are subject to interlocutory appeal, and arbitration appeals are not within that list.<sup>613</sup> However, the Kansas U.A.A. allows for appeal from "orders denying applications granting applications to compel arbitration."<sup>614</sup> The court held that the Kansas U.A.A. took precedence over the Kansas statute and permitted interlocutory appeal.<sup>615</sup>

In *Board of Education v. Compton*,<sup>616</sup> the Illinois Supreme Court was faced with the question of whether the Illinois Educational Labor Relations Act<sup>617</sup> divests the circuit courts of jurisdiction to vacate or enforce arbitration awards in public education.<sup>618</sup> The court held that it was the intention of the legislature to divest the circuit courts of judicial review of this class of arbitration awards.<sup>619</sup> It specifically noted that the absence of any reference in the Act to the Illinois U.A.A.<sup>620</sup> "strongly suggests that the legislature did not intend review of arbitration awards by the circuit courts, even as to 'arbitrability.'"<sup>621</sup> The lack of any provision for review by the

608. *Id.*

609. *Id.*

610. *Id.*

611. 12 Kan. App. 2d 546, 751 P.2d 146 (1988).

612. *Id.* at \_\_\_, 751 P.2d at 149-50.

613. *Id.* at \_\_\_, 751 P.2d at 149 (construing KAN. STAT. ANN. § 5-418 (1986)).

614. KAN. STAT. ANN. § 5-418 (1982).

615. *Kansas Gas*, 12 Kan. App. at \_\_\_, 751 P. 2d at 149.

616. 123 Ill. 2d 216, 526 N.E.2d 149 (1988).

617. ILL. REV. STAT. ch. 48, para. 1701 (1985).

618. *Board of Educ.*, 123 Ill.2d at \_\_\_, 526 N.E.2d at 150.

619. *Id.* at \_\_\_, 526 N.E.2d at 152-53.

620. ILL. REV. STAT. ch. 10, paras. 101-23 (1985).

621. *Board of Educ.*, 123 Ill.2d at \_\_\_, 526 N.E.2d at 152.

courts, absent an unfair labor practice,<sup>622</sup> was said to "jibe[] with the [Illinois Educational Labor Relations] Act's declared goal of minimizing disputes and encouraging arbitration."<sup>623</sup>

## X. JUDICIAL PROCEEDINGS

### A. Jurisdiction

In *Karbowski v. Bradgate Associates, Inc.*,<sup>624</sup> the appellate court held that the district court lacked subject-matter jurisdiction to rule on a motion to vacate the arbitrator's award. Following an arbitration award, the plaintiff filed a motion to vacate in district court which was denied.<sup>625</sup> The Massachusetts' U.A.A. provides that, "upon application of a party, the court shall vacate an award."<sup>626</sup> Since there is nothing in the statute which defines the word "court", the appellate court looked to another section of the statute which specifically refers to the superior court as the forum where "initial application (to vacate) shall be made."<sup>627</sup>

In *Board of Education v. Illinois Educational Labor Relations Board*,<sup>628</sup> a teacher alleged that the school board engaged in unfair labor practices by refusing to abide by an arbitration award handed down by the Illinois Educational Labor Relations Board (IELRB). The school board challenged the jurisdiction of the IELRB in that the complaint was not timely filed.<sup>629</sup> The court ruled that the IELRB has jurisdiction to render an arbitration award in response to a labor grievance under the U.A.A.<sup>630</sup>

### B. Standing

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622. Unfair labor practice was defined as the refusal to "comply with a binding arbitration award." *Id.* Thus, there would be judicial review if the losing party at arbitration refuses to comply.

623. *Id.* at \_\_\_, 526 N.E.2d at 154.

624. 25 Mass. App. Ct. 526, 520 N.E.2d 504 (1988).

625. *Id.* at \_\_\_, 520 N.E.2d at 505.

626. MASS. GEN. L. ch. 251, § 12(a) (1972).

627. *Karbowski*, 25 Mass. App. at \_\_\_, 520 N.E.2d at 506 (construing MASS. GEN. L. ch. 251, § 17 (1960)).

628. 170 Ill. App. 3d 490, 524 N.E.2d 711 (1988).

629. *Id.* at \_\_\_, 524 N.E.2d at 716.

630. ILL. REV. STAT. ch. 10, paras. 101-23 (1983).

In *Svoboda v. Department of Mental Health & Developmental Disabilities*<sup>631</sup>, the court held that discharged employees had standing to challenge an arbitrator's award issued after the union challenged the discharge, regardless of whether discharged employees alleged and proved that the union did not adequately represent them in arbitration proceedings.<sup>632</sup> According to company rules, an individual employee is allowed to bring a grievance on his own without the aid of his union.<sup>633</sup> In this case, plaintiffs brought an action under the Illinois U.A.A.<sup>634</sup> to vacate a labor arbitrator's decision to uphold the discharge of the plaintiffs from their employment positions with defendant.<sup>635</sup> The Illinois Public Relations Act,<sup>636</sup> which governed the case and was subject to the Illinois U.A.A., limits actions seeking to vacate an arbitrator's award to "parties" to a collective bargaining agreement.<sup>637</sup> The *Svoboda* court found that "parties" includes not only unions and employers, but also individual employees, and thus, individual employees have standing to bring an action to vacate an arbitrator's award.<sup>638</sup> The *Svoboda* court further held that although the collective bargaining agreement provided that "the decision and award of arbitration shall be final and binding," the Illinois Public Labor Relations Act (which is subject to the Illinois U.A.A.) does not preclude plaintiffs' standing to petition to vacate an arbitration award.<sup>639</sup>

#### XI. JUDICIAL REVIEW

Upon appeal of an arbitration award, a court must establish the scope of review.<sup>640</sup> In doing so, the court may not always look first to the individual state's U.A.A. for this standard. Rather, the court will look to the source of the arbitration and determine whether the U.A.A. standard is applicable.

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631. 162 Ill. App. 3d 366, 515 N.E.2d 446 (1987).

632. *Id.* at 369, 515 N.E.2d at 449.

633. *Id.* at 369, 515 N.E.2d at 448 (construing ILL. REV. STAT. ch. 48, para. 1616 (1985)).

634. ILL. REV. STAT. ch. 10, paras. 101-23 (1961).

635. *Svoboda*, 162 Ill. App. 3d at 366-67, 515 N.E.2d at 446.

636. ILL. REV. STAT. ch. 48, paras. 1601-27 (1984).

637. *Id.* at para. 1616.

638. *Svoboda*, 162 Ill. App. 3d at 367, 515 N.E.2d at 447 (construing ILL. REV. STAT. ch. 48, para. 1606(b) (1985)).

639. *Id.* at 372, 515 N.E.2d at 450 (construing ILL. REV. STAT. ch. 48, paras. 1608 & 1616 (1985)).

640. See *Jackson Trak Group, Inc. v. Mid States Port Authority*, 242 Kan. 683, 751 P.2d 122, 127 (1988).

Under some circumstances, courts have rejected the argument that they should abandon their common law standard of review in favor of the standard of review offered in their state's U.A.A.<sup>641</sup> This is particularly true when arbitration of a matter is mandated by statute, or application of the U.A.A. is not expressly provided for in the agreement.<sup>642</sup> It is also important to note that courts will apply a different standard of review in considering an interlocutory appeal.<sup>643</sup>

In *Carbondale v. Fraternal Order of Police Lodge 63*,<sup>644</sup> the court held that in arbitration awards under Act 111,<sup>645</sup> judicial review "is available only by narrow certiorari where the only questions that can be considered are questions of jurisdiction, the regularity of the proceedings before the arbitrator, excess in the exercise of powers, and constitutional issues."<sup>646</sup> Since the arbitrator's award was drawn from the "essence" of the agreement of the parties, it was not to be disturbed.<sup>647</sup> The court noted further that the scope of review set out in the Pennsylvania U.A.A.<sup>648</sup> did not apply to Act 111 cases.<sup>649</sup>

The commonwealth court in *Carbondale* cited approvingly another Act 111 case which the Pennsylvania Supreme Court had decided earlier that same year. That case, *In re Upper Providence Police Delaware County Lodge #27*,<sup>650</sup> also recognized the narrow certiorari by which there can be judicial review of limited issues.<sup>651</sup> The court further held that the Pennsylvania U.A.A. and its procedures would apply only to collective bargaining agreements where it was "consistent with any statute regulating labor and management relations."<sup>652</sup> It then concluded that the standard of review set

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641. See *Carbondale v. Fraternal Order of Police Lodge 63*, 109 Pa. Commw. 325, 531 A.2d 76 (1987); *In re Upper Providence Police Delaware County Lodge #27 Fraternal Order of Police*, 514 Pa. 501, 526 A.2d 315 (1987).

642. See International Ass'n of Firefighters, Local 1619 v. Prince George's County, 74 Md. App. 438, 538 A.2d 329 (1988).

643. See *Wetzel v. Sullivan*, 745 S.W.2d 78 (Tex. Ct. App. 1988).

644. 109 Pa. Commw. 325, 531 A.2d 76 (1987).

645. Act of June 24, 1968, P.L. 237, as amended, 43 PA. CONS. STAT. §§ 217.1-10. to 217.10. This act authorizes collective bargaining by municipal police and fire fighters.

646. *Carbondale*, 109 Pa. Commw. at 326, 531 A.2d at 77.

647. *Id.* at 326, 531 A.2d at 77.

648. 42 PA. CONS. STAT. §§ 7301 to 7320 (1980).

649. *Carbondale*, 109 Pa. Commw. at \_\_\_, 531 A.2d at 78.

650. 514 Pa. 501, 526 A.2d 315 (1987).

651. *Id.* at \_\_\_, 526 A.2d at 371.

652. *Id.* at \_\_\_, 526 A.2d at 318 (citing 42 PA. CONS. STAT. § 7302(b) (1980)).

by the U.A.A. was inconsistent with the standard of review previously established by Act 111 cases.<sup>653</sup>

In *International Association of Firefighters, Local 1619 v. Prince George's County*,<sup>654</sup> an order to vacate an arbitration award was sought on the basis that the arbitrators made errors of law and fact and thereby exceeded their authority in fashioning a disciplinary proceeding less severe than that determined by the county fire department.<sup>655</sup> The trial court vacated, and the union appealed. The Court of Special Appeals held that absent a provision in the collective bargaining agreement expressly providing for the application of the Maryland U.A.A.,<sup>656</sup> "the common law principles governing review of arbitration awards control. . . ."<sup>657</sup> Thus, the court applied the Maryland common law rule that an award should be vacated only if it was procured by fraud, misconduct, bias, prejudice, corruption, lack of good faith by the arbitrator, a mistake so gross as to imply bad faith or lack of honest judgment, and where the award is against clear public policy, but not on the basis of "mere errors of law or fact."<sup>658</sup>

The court further concluded that the authority of the arbitrators to fashion a remedy was broad, and, absent provisions to the contrary in the agreement, the court should defer to the judgment of the arbitrators.<sup>659</sup> Based on this standard, the court reversed the trial court's ruling and directed it to confirm the arbitrators' award.<sup>660</sup>

While the previously cited cases set out when courts are unwilling to look to their state's U.A.A. for the standard of review, courts will look to the U.A.A. for the standard of review in cases which the parties have freely entered into an agreement providing for arbitration. In these cases, the courts are willing to give the parties what they bargained for.<sup>661</sup> Most states' arbitration acts provide that an arbitrator's decision is presumed valid unless one of the express provisions for vacating an award can be proven<sup>662</sup> or

653. *Id.* at \_\_\_, 526 A.2d at 319-20.

654. 74 Md. App. 438, 538 A.2d 329 (1988).

655. *Id.* at 443, 538 A.2d at 331.

656. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201-24 (1984 Repl. Vol.).

657. 74 Md. App. at 444, 538 A.2d at 331. *See*, MD. CTS. & JUD. PROC. CODE ANN. § 3-206(b).

658. *Firefighters*, 74 Md. App. at 445, 538 A.2d at 332.

659. *Id.* at 446-49, 538 A.2d at 333-34.

660. *Id.* at 450, 538 A.2d at 335.

661. *See* Cameron v. Griffith, 91 N.C. App. 164, 370 S.E.2d 704 (1988).

662. *See* Jackson Trak Group, Inc. v. Mid States Port Authority, 242 Kan. 683, 751 P.2d 122, 127 (1988). *See also*, Cady v. Allstate Ins. Co., 113 Idaho 667, 747 P.2d 76 (Idaho Ct. App. 1987) (review of arbitrators decision limited to IDAHO CODE § 7-912 (1986)).

unless the arbitrator exceeded his power.<sup>663</sup> This is true even if the award is not one which a court of law or equity would or could have given.<sup>664</sup> In an effort not to dilute the purpose of arbitration, these courts follow the explicit language of their respective U.A.A.'s.

In *In re Cameron and Griffith*,<sup>665</sup> the parties entered into a contract for the sale of 1,680 shares of stock of National Storage Company. In addition to the initial purchase price, the contract provided that if the buyer sold the company stock or assets, the seller would receive one-third of the proceeds.<sup>666</sup> The contract also provided that all disputes would be settled by arbitration.<sup>667</sup> Four years later, buyer sold the majority of the company to a third party and failed to turn over any of the proceeds to the seller. Following arbitration the claimant was awarded \$66,323.<sup>668</sup> The award was confirmed by the trial court and the respondent appealed, claiming the statute of limitations had run, divesting the arbitrator of authority to hear the claim.<sup>669</sup> The court determined that even if the arbitrator was mistaken as to the statute of limitations, it was a hazard the parties had assumed when they agreed to arbitrate and was not reviewable.<sup>670</sup> Where the contract to arbitrate was freely entered into, "an arbitrator's mistake, either as to law or fact, is 'the misfortune of the party.'"<sup>671</sup>

Similarly, the court in *Jackson Trak Group v. Mid States Port Authority*<sup>672</sup> bound the parties to the arbitrators' decision. Jackson sought confirmation of an arbitrator's award in his favor for work he had performed and for improper seizure of equipment. Mid States contended that the arbitrators exceeded their powers and moved to vacate the award relating to the equipment seizure.<sup>673</sup> The district court found for Jackson. On appeal, the court held that "[g]enerally where the parties have agreed to be bound to a submission to arbitration, errors of law and fact, or an erroneous decision of matters submitted to the judgment of the arbitrators are insufficient to

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663. See *Jackson Trak*, 242 Kan. at \_\_\_, 751 P.2d at 130.

664. See *Wilkes-Barre Area Educ. Assoc. v. Wilkes-Barre Area School Dist.*, 113 Pa. Commw. 492, 538 A.2d 81 (1988).

665. 91 N.C. App. at 164, 370 S.E.2d at 704.

666. *Id.*

667. *Id.*

668. *Id.*

669. *Id.* at \_\_\_, 370 S.E.2d at 705.

670. *Id.*

671. *Id.*

672. *Jackson Trak*, 242 Kan. at \_\_\_, 751 P.2d at 122.

673. *Id.*

invalidate an award fairly made.<sup>674</sup> The court further held an award is presumptively valid unless one of the specific grounds in the state arbitration act can be proved.<sup>675</sup> "[I]t is not the function of the court to hear the case de novo and consider the evidence presented to the arbitrators."<sup>676</sup>

In *Cady v. Allstate Insurance Co.*,<sup>677</sup> the court also declined to grant a trial de novo. Following an automobile accident in which her husband had been seriously injured, Anita Cady's claim for damages was denied by an arbitration board.<sup>678</sup> Anita moved for a trial de novo, and a declaration that the arbitrator's decision was null and void.<sup>679</sup> The court held that judicial review of an arbitrator's award was much more limited than that for a trial, and that the review was limited to the state's U.A.A.<sup>680</sup> It concluded that to grant a trial de novo would defeat the purpose of the U.A.A.<sup>681</sup>

Other courts have not been willing to expand the scope of review even when there is a mistake as to law or fact. In determining the scope of review, the court in *Lorenzini v. Group Health Plan, Inc.*<sup>682</sup> turned to the express language of the U.A.A.<sup>683</sup> and held that it was irrelevant whether the arbitrator's interpretation of the contract was wrong because an arbitrator's erroneous interpretation of the law does not violate his power and authority.<sup>684</sup>

In *Wilkes-Barre Area Educational Association v. Wilkes-Barre Area School District*,<sup>685</sup> the court on appeal stated that the scope of review of the arbitrator's decision was limited and would "not be overturned if it draws its essence" from the agreement between the parties.<sup>686</sup> This essence test simply means that "[i]f the subject matter of the dispute is encompassed within the terms of the agreement, 'the validity of the arbitrator's interpretation is not a matter of concern to the court.'"<sup>687</sup> The court further held that

674. *Id.* at \_\_\_, 751 P.2d at 127.

675. KAN. STAT. ANN. § 5-412.

676. *Jackson Trak*, 242 Kan. at \_\_\_, 751 P.2d at 127.

677. 113 Idaho 667, 747 P.2d 76 (Idaho Ct. App. 1987).

678. *Id.* at \_\_\_, 747 P.2d at 77.

679. *Id.* at \_\_\_, 747 P.2d at 78.

680. IDAHO CODE § 7-912 (1986).

681. *Cady*, 113 Idaho at \_\_\_, 747 P.2d at 79.

682. 753 S.W.2d 106 (Mo. Ct. App. 1988).

683. MO. REV. STAT. § 435.405.1 (1986).

684. *Lorenzini*, 753 S.W.2d at 108.

685. 113 Pa. Commw. 492, 538 A.2d 81 (1988).

686. *Id.* at \_\_\_, 538 A.2d at 83. The litigants were parties to a collective bargaining agreement.

687. *Id.* (Emphasis in the original).

the agreement would be examined taking into account its language, context, and other indicia of the parties' intention.<sup>688</sup> Moreover, it found that even though the relief granted by the arbitrator "could not or would not be granted" by a law or equity court, this was an insufficient ground for vacation or for refusing confirmation.<sup>689</sup> The court additionally found that judicial interference is not justified or warranted merely because the arbitrator erroneously resolved the question presented to him.<sup>690</sup>

Not all jurisdictions have been willing to sit by while mistakes as to law go unchallenged.<sup>691</sup> In *Winters v. Erie Insurance Group*,<sup>692</sup> the insured sought review of an arbitrator's decision that an insurer was not required to pay a disputed uninsured motorist claim.<sup>693</sup> The decision was confirmed at the trial level, but was reversed on appeal based on the arbitrator's misinterpretation of law.<sup>694</sup> The court said the proper scope of review was provided in the state arbitration act<sup>695</sup> which states that an arbitrator's award may be modified or corrected where "the award is contrary to law and is such that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict."<sup>696</sup> The court stated that the arbitrator's interpretation of the insurance policy was contrary not only to legal principles, but also to common sense and therefore, reversed the decision of the trial court.<sup>697</sup> The insurer argued for a different standard of review but was unpersuasive.<sup>698</sup>

When a states arbitration statute, which is dissimilar to the U.A.A., is repealed and replaced with a U.A.A. provision, the standard of review a court uses in reviewing the arbitrator's actions is usually determined by the date the dispute arose.<sup>699</sup>

688. *Id.* at \_\_\_, 538 A.2d at 83-84.

689. *Id.* at \_\_\_, 538 A.2d at 84. See, Pennsylvania U.A.A. at 42 PA. CONS. STAT. § 7314(a)(2) (1986).

690. *Wilkes-Barre*, 113 Pa. Commw. at \_\_\_, 538 A.2d at 84.

691. See *Winters v. Erie Ins. Group*, 367 Pa. Super. 253, 532 A.2d 885 (1987).

692. *Id.*

693. *Id.*

694. *Id.* at \_\_\_, 532 A.2d at 887.

695. 42 PA. CONS. STAT. § 7302(d)(2) (1986).

696. *Winters*, 367 Pa. Super. at \_\_\_, 532 A.2d at 886.

697. *Id.* at \_\_\_, 532 A.2d at 887.

698. *Id.* at \_\_\_, 532 A.2d at 886. The insurer argued that 42 PA. CONS. STAT. §§ 7314 & 7315 (1986) (which are patterned after U.A.A. §§ 12 & 13) should apply. The court said that the insurer waived its right to argue for this standard of review on appeal because it argued at trial for the "contrary to law" standard which the court applied here. *Id.*

699. See *Derry Township Mun. Authority v. Solomon & Davis, Inc.*, 372 Pa. Super. 213, 539 A.2d 405 (1988).

In *Derry Township Municipal Authority v. Solomon & Davis, Inc.*,<sup>700</sup> a dispute arose concerning certain descriptions for repaving materials contained in a series of contracts entered into by the parties.<sup>701</sup> The contracts were entered into before the state adopted the U.A.A. statute.<sup>702</sup> The dispute arose, and an arbitration hearing was held on the issue, after the adoption and the effective date of the U.A.A. statute.<sup>703</sup> Derry Township sought to vacate, modify, or correct the arbitration award which had been in favor of Solomon & Davis, Inc.<sup>704</sup>

The question posed to the court was which standard of review should be used in reviewing the arbitrator's decision.<sup>705</sup> Under the previous arbitration act, the standard of review to be used by the courts in reviewing an arbitrator's actions was similar to the standard for a judgment notwithstanding the verdict.<sup>706</sup> Under the newly adopted act, an award will be disturbed only in narrowly drawn circumstances, and therefore, if used, the petitioning party will not be as likely to obtain relief as one might have under the old act.<sup>707</sup> Also, under the common law rules for arbitration in Pennsylvania, an award will only be disturbed where "it is clearly shown that a party was denied a hearing or that fraud, misconduct, or corruption or other irregularity caused the rendition of an unjust, inequitable, or unconscionable award."<sup>708</sup>

The court concluded that the new act should govern the dispute since it arose and was arbitrated after the effective date for the new act.<sup>709</sup> The court then looked to the act to determine whether the arbitration will be governed by statutory or common law rules.<sup>710</sup> The new act states that an agreement to arbitrate is presumed to be governed by common law rules unless the agreement expressly provides for statutory arbitration.<sup>711</sup> Thus, the court concluded that since the arbitration provision in the contract did not expressly provide for statutory arbitration, common law arbitration rules

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700. *Id.*

701. *Id.* at \_\_\_, 539 A.2d at 406.

702. *Id.* at \_\_\_, 539 A.2d at 408.

703. *Id.*

704. *Id.* at \_\_\_, 539 A.2d at 406.

705. *Id.* at \_\_\_, 539 A.2d at 406-07.

706. *Id.* at \_\_\_, 539 A.2d at 407.

707. *Id.*

708. *Id.* at \_\_\_, 539 A.2d at 408.

709. *Id.*

710. *Id.* (construing 42 PA. CONST. STAT. ANN. § 7302(a) (Purdon 1986)).

711. *Id.* at \_\_\_, 539 A.2d at 409 (construing 41 PA. CONST. STAT. ANN. § 7302(a) (Purdon 1986)).

will apply.<sup>712</sup> The court applied the narrow common law standard of review and upheld the arbitrator's award as there was no evidence presented alleging that Derry was denied a hearing, or that fraud or misconduct occurred on the part of the arbitrators.<sup>713</sup>

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712. *Id.* at \_\_\_, 539 A.2d at 410.

713. *Id.* at \_\_\_, 539 A.2d at 411.

