

1990

## Recent Developments: The Uniform Arbitration Act

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### Recommended Citation

Gregory K. Barnes, Cynthia R. Bradley-Bishop, Michele Carroll, and Richard W. Fischer, *Recent Developments: The Uniform Arbitration Act*, 1990 J. Disp. Resol. (1990)  
Available at: <https://scholarship.law.missouri.edu/jdr/vol1990/iss2/12>

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

## I. INTRODUCTION

Arbitration as a forum for dispute resolution has been a part of the American common law heritage for at least the past one hundred fifty years. However, until recently, state law was almost uniformly biased against arbitration.<sup>2</sup> The theory at common law was that either party to an agreement to arbitrate future disputes could void the agreement at any time.<sup>3</sup> This legal environment rendered the institution of arbitration impotent in any situation in which one of the parties decided that their interests would be better served if the dispute was resolved in a more traditional court setting.

As a response to the weak condition of state arbitration law, the Uniform Arbitration Act (hereinafter "U.A.A.") was proposed by the National Conference of Commissioners on Uniform State Laws in 1955.<sup>4</sup> At present, approximately thirty-four states and the District of Columbia have adopted arbitration statutes patterned after the U.A.A.<sup>5</sup> The cumulative effect of the proposal of the U.A.A., its subsequent enactment by two-thirds of the state legislatures, and the passage of the similar Federal Arbitration Act (hereinafter "F.A.A.") signaled the evolution of arbitration law in this country toward the favored status that the arbitration process now enjoys.

In 1984, contemporaneously with the creation of the Center for the Study of Dispute Resolution at the University of Missouri-Columbia, the first issue of the *Missouri Journal of Dispute Resolution* was published. This first publication contained an article entitled *Recent Developments: The Uniform Arbitration Act*. Since that time, every subsequent issue of this publication has included a detailed update of that original article which monitored the evolution of arbitration law among U.A.A. jurisdictions.

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.; to develop and explain the underlying principles and rationales that

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1. This project was written and prepared by *Journal of Dispute Resolution* Members and Candidates under the direction of Associate Editor in Chief Joseph E. Maxwell and Note and Comment Editor Robert K. Angstead.

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

3. *Id.* at 79.

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

5. 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.

courts have applied in particular cases; and to promote uniformity in the interpretation of the U.A.A. by providing courts and practitioners with a framework for analyzing similar cases.<sup>6</sup>

## II. VALIDITY OF ARBITRATION AGREEMENTS

The U.A.A. provides that a written agreement to submit to arbitration "is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of a contract."<sup>7</sup> While most states try to promote the settlement of disputes through arbitration, the courts have found arbitration agreements to be invalid for various reasons.

### A. Piecemeal Resolution

One argument that parties often use to avoid arbitration is that it will result in piecemeal resolution of the dispute.<sup>8</sup> In *Joba Construction v. Monroe County Drain Commissioner*,<sup>9</sup> Joba had a contract containing an arbitration agreement with Monroe County to construct a water pollution control facility.<sup>10</sup> Monroe County Drain Commission became dissatisfied with Joba's work and issued a stop order.<sup>11</sup> Joba filed for arbitration pursuant to the contract and, in addition, sued the commissioner in circuit court requesting the same relief as requested in the arbitration claim.<sup>12</sup> The commissioner and the county filed a counterclaim against Joba, alleging abuse of process.<sup>13</sup> The county also sued the surety on a

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6. See *Recent Developments: The Uniform Arbitration Act*, 1989 J. DISP. RESOL. 237 (hereinafter *Recent Developments 1989*); *Recent Developments: The Uniform Arbitration Act*, 1988 J. DISP. RESOL. 247 (hereinafter *Recent Developments 1988*); *Recent Developments: The Uniform Arbitration Act*, 1987 MO. J. DISP. RESOL. 177 (hereinafter *Recent Developments 1987*); *Recent Developments: The Uniform Arbitration Act*, 1986 MO. J. DISP. RESOL. 169 (hereinafter *Recent Developments 1986*); *Recent Developments: The Uniform Arbitration Act*, 1985 MO. J. DISP. RESOL. 173 (hereinafter *Recent Developments 1985*); *Recent Developments: The Uniform Arbitration Act*, 1984 MO. J. DISP. RESOL. 207 (hereinafter *Recent Developments 1984*); *Recent Developments: The Uniform Arbitration Act*, 48 MO. L. REV. 137 (1983) (hereinafter *Recent Developments 1983*). *Recent Developments 1989* collected cases decided between September 1987, and September 1988. *Recent Developments 1988* collected cases decided between September 1986, and September 1987. *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 these previous cases and cases decided between September 1988, and September, 1989.

7. U.A.A. § 1.

8. See *Baldwin Co. v. Weyland Mach. Shop Inc.*, 685 S.W.2d 537 (Ark. Ct. App. 1985).

9. 150 Mich. App. 173, 388 N.W.2d 251 (1986).

10. *Id.* at \_\_\_, 388 N.W.2d at 252.

11. *Id.*

12. *Id.*

13. *Id.*

performance bond, and the surety filed a third party complaint against Joba seeking indemnification.<sup>14</sup> The action on the performance bond was consolidated with Joba's suit, and Monroe county was added as a defendant in Joba's action.<sup>15</sup> The court stated the abuse of process claim and the action on the performance bond were not subject to arbitration because this would result in repetition of evidence and presentations to the arbitrator and the court, which is inconsistent with arbitration's objective of providing inexpensive and expeditious disposition of disputes.<sup>16</sup> Therefore, the court held that the principle of judicial economy prohibited arbitration.<sup>17</sup>

In contrast, the court in *Steinberg/W.F.I. Foods Inc. v. D.C.M. and Associates*,<sup>18</sup> rejected the piecemeal argument and held that the conflict was suitable for arbitration.<sup>19</sup> The court held that to allow parties to avoid arbitration by joining as defendants in its lawsuit parties which are not bound by the arbitration agreement would be inconsistent with the intent of the arbitration act.<sup>20</sup>

### B. Application of Contract Principles

The U.A.A. provides that an arbitration agreement is valid unless grounds exist at law or in equity for revocation of a contract.<sup>21</sup> As a result, courts apply contract principles to determine the validity of an arbitration agreement.

#### 1. The Writing Requirement

The U.A.A. requires that an arbitration agreement be in writing.<sup>22</sup> The Missouri version of the U.A.A. requires any contract containing an arbitration clause to give notice of the clause to the parties in ten-point capital letters.<sup>23</sup> In *Hefele v. Catanzaro*,<sup>24</sup> the court ruled an arbitration clause was unenforceable

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14. *Id.*

15. *Id.* at \_\_\_, 388 N.W.2d at 253.

16. *Id.* at \_\_\_, 388 N.W.2d at 254.

17. *Id.*

18. 522 So. 2d 512 (Fla. Dist. Ct. App. 1988).

19. *Id.* at 513. See also *Forest City Dillon, Inc. v. Superior Court for Pima*, 138 Ariz. 410, 675 P.2d 297 (Ariz. Ct. App. 1984); *Steinberg v. Prudential-Bache Sec.*, No. 8173 Slip Op. (Del. 1985); *Landmark Properties, Inc. v. Architects Int'l*, 172 Ill. App. 3d 379, 526 N.E.2d 603 (1988); *J & K Cement Constr. Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 456 N.E.2d 889 (1983).

20. *Steinberg*, 522 So. 2d at 513.

21. U.A.A. § 1.

22. *Id.*

23. MO. REV. STAT. § 435.460 (1986).

24. 727 S.W.2d 475 (Mo. Ct. App. 1987).

because the parties had failed to include the required notice.<sup>25</sup> The court, while recognizing the harshness of this rule, noted the legislative concern that entry into such agreements be voluntary.<sup>26</sup>

The courts have upheld arbitration agreements that were not in writing in rare instances.<sup>27</sup> In *Landmark Properties Inc. v. Architects International*,<sup>28</sup> an Illinois appellate court was faced with this matter. In *Landmark*, the plaintiff entered into an agreement with an architectural firm.<sup>29</sup> Included in the agreement was a provision requiring arbitration of any dispute.<sup>30</sup> The defendant performed the services for the plaintiff, although the plaintiff never signed the agreement.<sup>31</sup> The plaintiff did not pay for the services, and the defendant filed a demand for arbitration.<sup>32</sup> Although the plaintiff did not dispute the existence of an oral agreement, it argued it was not bound by the arbitration clause in the written agreement.<sup>33</sup> On appeal the Illinois court ruled that the parties' conduct related to the written contract and not the oral agreement; therefore, the dispute was to be settled by an arbitrator.<sup>34</sup> While the U.A.A. clearly requires a writing in Section 1, this court apparently equates conduct related to a written agreement as within the writing requirement.

## 2. Fraudulent Inducement

Parties commonly use theories of fraud and misrepresentation to argue that arbitration agreements are invalid.<sup>35</sup> However, while both contract law and the

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25. *Id.* at 477. See also *Lake Plumbing v. Seabreeze Constr. Corp.*, 493 So. 2d 1100 (Fla. Dist. Ct. App. 1986) (if there is no issue as to making of agreement which contains an arbitration clause it is an error for trial court to deny party the right to arbitrate and require the dispute to be litigated in court); *Wigod v. Chicago Mercantile Exch.*, 141 Ill. App. 3d 129, 490 N.E.2d 39 (1986) (bylaws may constitute a sufficient writing to satisfy Illinois Arbitration Act); *McKinstry v. Valley Obstetrics-Gynecology Clinic, P.C.*, 428 Mich. 167, 405 N.W.2d 88 (1987) (statutory presumption of validity accrues once evidence of agreement is satisfactorily established); *Cf. Saltner v. Farmer*, 653 P.2d 413 (Colo. Ct. App. 1982); *Zac Smith & Co. v. Moonspinner Condominium Ass'n*, 472 So. 2d 1324 (Fla. Dist. Ct. App. 1985) (arbitration clause of contract was binding on third party beneficiary); *Board of County Comm'rs v. Cam Constr. Co.*, 300 Md. 643, 480 A.2d 795 (1984) (general contractor was allowed to bring subcontractor's claims under arbitration clause); *Computer Corp. of Am. v. Zarecor*, 16 Mass. App. Ct. 456, 452 N.E.2d 267 (1983); *Cooke County Bd. of Highway Comm'rs v. Newport Utils. Bd.*, 690 S.W.2d 231 (Tenn. 1985) (indemnification clause prevails over arbitration clause).

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

27. See *Hot Springs County School Dist. v. Strube Constr. Co.*, 715 P.2d 540 (Wyo. 1986).

28. 172 Ill. App. 3d 379, 526 N.E.2d 603 (1988).

29. *Id.* at 380, 526 N.E.2d at 604.

30. *Id.*

31. *Id.*

32. *Id.* at 381, 526 N.E.2d at 605.

33. *Id.* at 382, 526 N.E.2d at 605.

34. *Id.* at 384, 526 N.E.2d at 606.

35. See *Himmelstein v. Valenti Dev. Corp.*, 103 Ill. App. 3d 911, 431 N.E.2d 1299 (Ill. App. Ct. 1982); *Paramore v. Inter-Regional Fin. Group Leasing Co.*, 68 N.C. App. 659, 316 S.E.2d 90 (N.C. Ct. App. 1984).

U.A.A. provide that fraud and misrepresentation serve to invalidate an agreement, fraudulent inducement to enter into a contract does not necessarily invalidate an arbitration clause within that contract.<sup>36</sup>

In the case of *Michael-Curry Cos. Inc. v. Knutson Shareholders Liquidating Trust*,<sup>37</sup> the defendant, Knutson, claimed fraud in the inducement, and therefore, that no valid arbitration agreement existed.<sup>38</sup> The Minnesota Supreme Court ruled, however, that the issue of fraud in the inducement was an issue for the arbitrator.<sup>39</sup> The court stated that, when an arbitration agreement specifically shows that the parties intend to arbitrate fraud in the inducement, or the arbitration clause was sufficiently broad to comprehend the issue, then fraud in the inducement must go to the arbitrator.<sup>40</sup> The court felt that by sending cases such as this to arbitration it was promoting the policy of the Minnesota U.A.A., which favors arbitration.<sup>41</sup>

### 3. Rescission

Rescission of a contract is another method parties have used to attack arbitration agreements.<sup>42</sup> In *Coughlan Construction Co. v. Town of Rockport*,<sup>43</sup> the parties entered into a construction contract which contained an arbitration provision.<sup>44</sup> A dispute arose after work had begun and Coughlan, the contractor, filed a demand for arbitration.<sup>45</sup> After this demand, but prior to the beginning of arbitration proceedings, Coughlan notified Rockport that it was forced to stop work, and the contract was abandoned.<sup>46</sup> Rockport filed a complaint in superior court requesting a stay of arbitration on the ground that the parties had abandoned the arbitration agreement when they abandoned the contract.<sup>47</sup> The court ordered the parties to proceed to arbitration of claims Coughlan made before the contract

36. See *Grane v. Grane*, 143 Ill. App. 3d 979, 493 N.E.2d 1112 (Ill. Ct. App. 1986); *Wetzel v. Covenent Oil Corp.*, 733 P.2d 424 (Okla. Ct. App. 1986).

37. 449 N.W.2d 139 (Minn. 1989).

38. *Id.* at 140.

39. *Id.* at 142.

40. *Id.* at 141.

41. *Id.* at 142.

42. See *Willis Flooring, Inc. v. Howard S. Lease Constr. Co.*, 656 P.2d 1184 (Alaska 1983) (contract was attacked because of lack of mutuality); *U.S. Insulation Inc. v. Hilro Constr. Co.*, 146 Ariz. 250, 705 P.2d 490 (Ariz. Ct. App. 1985); *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908 (Del. Super. Ct. 1989); *Hansen v. State Farm Mut. Auto. Ins. Co.*, 112 Idaho 663, 735 P.2d 974 (Idaho 1987) (arbitration agreement attacked on grounds of lack of mutual assent); *Fraternal Order of Police v. Washington Park*, 123 Ill. App. 3d 26, 462 N.E.2d 855 (1984); *McCrary Eng'g Corp. v. Upland*, 472 N.E.2d 1305 (Ind. Ct. App. 1985); *Wamego v. L. R. Foy Constr. Co.*, 9 Kan. App. 2d 168, 675 P.2d 912 (1984).

43. 23 Mass. App. Ct. 994, 505 N.E.2d 203 (1987).

44. *Id.* at \_\_\_, 505 N.E.2d at 204.

45. *Id.*

46. *Id.*

47. *Id.* at \_\_\_, 505 N.E.2d at 205.

was abandoned.<sup>48</sup> Coughlan won in arbitration and Rockport tried unsuccessfully to have the award vacated.<sup>49</sup>

The appellate court found no indication that Coughlan had agreed to a rescission of the contract because it was forced to stop work.<sup>50</sup> Therefore, the court held that the arbitration provisions were in effect at the time Rockport was ordered to proceed to arbitration.<sup>51</sup> The court placed particular emphasis on the facts that there was no request for contract rescission, the dispute arose prior to abandonment of the contract, and the party seeking arbitration persisted in pursuing arbitration after the contract was abandoned.<sup>52</sup>

### C. Statutory Construction

Generally, state courts have chosen to construe arbitration statutes broadly to promote a policy of enforcing arbitration agreements.<sup>53</sup> However, in *National Education Association v. United School District*,<sup>54</sup> a Kansas court ignored this principle. The plaintiff, a teacher, sought confirmation of an arbitration award relating to his contract with the school district.<sup>55</sup> The court held that the Kansas version of the U.A.A. did not apply to the plaintiff's employment contract because the statute was "plain and unambiguous" in its exclusion of all employment contracts, regardless of whether the employer was in the private or public sector.<sup>56</sup>

### D. Time Limits on Raising the Invalidity Defense

Another consideration affecting the validity of an arbitration agreement is whether there are any time limitations placed on raising the invalidity defense. This issue arose in *Arrow Overall Supply Co. v. Peloquin Enters.*,<sup>57</sup> where the plaintiff sought to have the arbitrator's award confirmed in a judicial proceeding. The defendant did not appear at the prior arbitration proceeding, although he received notice of the proceeding and eventually of the plaintiff's award.<sup>58</sup> The

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. See *Howard County Bd. of Educ. v. Howard County Educ. Ass'n.*, 61 Md. App. 631, 487 A.2d 1220 (Md. Ct. Spec. App. 1985), *cert. granted*, 306 Md. 47, 506 A.2d 1190 (1986); *Wilson v. McGrow, Pridgen & Co.*, 298 Md. 66, 467 A.2d 1025 (Md. 1983); *Forest Hills v. Weber Inc.*, 691 S.W.2d 361, (Mo. Ct. App. 1985); *State ex rel. Tri-City Constr. Co. v. Marsh*, 668 S.W.2d 148 (Mo. Ct. App. 1984).

54. 7 Kan. App. 2d 529, 644 P.2d 1006 (Kan. App. Ct. 1982).

55. *Id.* at \_\_\_, 644 P.2d at 1007.

56. *Id.* at \_\_\_, 644 P.2d at 1009.

57. 414 Mich. 95, 323 N.E.2d 1 (1982).

58. *Id.* at 101, 323 N.E.2d at 3.

defendant challenged the validity of the agreement for the first time at the confirmation proceedings.<sup>59</sup> The Michigan Supreme Court held that the defense was timely; however, the court added that a party who participates in the arbitration proceeding cannot challenge the validity of the agreement at the confirmation hearing.<sup>60</sup> The court felt that if a party chooses not to participate in the arbitration process he or she should not be required to seek an injunction to stay the arbitration proceeding in order to preserve the invalidity defense.<sup>61</sup> The receipt of a notice letter imposes no duty on one not bound by an arbitration agreement.<sup>62</sup> As long as the party does not participate, the defense may be timely raised in the later confirmation proceedings.

### E. *Statutory Causes of Action Favoring Litigation*

Some arbitration agreements may be unenforceable due to a state policy favoring litigation of certain statutory causes of action.<sup>63</sup> In *Blow v. Shaughnessy*,<sup>64</sup> the North Carolina Court of Appeals determined that securities trading litigation should not be stayed pending arbitration even though there was an arbitration clause in the securities agreement between the parties.<sup>65</sup> A factor in the court's ruling was a pending Securities and Exchange Commission regulation stating that any securities broker who entered into an agreement binding the customer to arbitration involving disputes arising under federal securities laws had committed a fraudulent, manipulative, or deceptive act.<sup>66</sup> The court stated that although North Carolina law approves of arbitration as a manner of settling disputes,<sup>67</sup> it was compelled to recognize the federal law and underlying policy as relevant.<sup>68</sup>

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59. *Id.*

60. *Id.*

61. *Id.* at 100, 323 N.E.2d at 3.

62. *Id.*

63. See *Sabates v. Int'l Medical Centers, Inc.*, 450 So. 2d 514 (Fla. Dist. Ct. App. 1984); *Hannen v. Original Gunitite Aquatech Pools, Inc.*, 385 Mass. 813, 434 N.E.2d 611 (Mass. 1982); *Cf. Obstetrics and Gynecologists v. Pepper*, 101 Nev. 105, 693 P.2d 1259 (Nev. 1985) (arbitration agreement found invalid because one of parties was member of protected class).

64. 68 N.C. App. 1, 313 S.E.2d 868 (1984).

65. *Id.* at 22, 313 S.E.2d at 874.

66. *Id.* at 15, 313 S.E.2d at 876.

67. N.C. GEN. STAT. § 1.567.20 (1983).

68. *Blow*, 68 N.C. App. at \_\_\_, 313 S.E.2d at 876. The court indicated that the securities act was promulgated to protect the rights of investors and that federal policy forbids a waiver of any of these rights.

### F. *Role of Federal Arbitration Act*

An agreement which is unenforceable under state law may be revived under the F.A.A.<sup>69</sup> In *Old Dominion Insurance Co. v. Dependable Reinsurance Co.*,<sup>70</sup> the court compelled arbitration despite the fact that the arbitration clause was unenforceable under the Florida Arbitration Act.<sup>71</sup> The arbitration clause was unenforceable because a "retrocession contract" between the parties contained a provision allowing for removal of the arbitration to Bermuda.<sup>72</sup> However, the court found the arbitration was enforceable under the F.A.A., which provides for arbitration where the contractual relations between the two parties involve interstate commerce.<sup>73</sup> The court also demonstrated the effect of this presumption favoring arbitration in its treatment of a clause elsewhere in the contract providing for service of suit. The court held that doubts concerning provisions apparently incompatible with the arbitration clause should be resolved in favor of arbitration.<sup>74</sup>

## III. WAIVER

### A. *Right to Compel Arbitration*

#### 1. Repudiation of the Underlying Agreement

In *City of Wamego v. L. R. Foy Construction Co.*,<sup>75</sup> the Kansas Court of Appeals held that repudiation of a contract containing an arbitration provision acts as a waiver of the right to arbitrate.<sup>76</sup> Wamego sued Foy for breach of contract after Foy denied that a contract existed between the two parties.<sup>77</sup> Foy moved to stay the suit and compel arbitration.<sup>78</sup> The court held that the arbitration provision could not be held a separate agreement absent evidence of an independent meeting of the minds regarding arbitration.<sup>79</sup> The court noted that Foy did not limit its repudiation of the contract and held that the repudiation constituted conduct "inconsistent with a continued right to compel arbitration."<sup>80</sup>

69. See *Preziose v. Lumbermen's Mut. Cas. Co.*, No. 897-298 (Vt. Oct. 13, 1989) (LEXIS, Genfed library, Dist file).

70. 472 So. 2d 1365 (Fla. Ct. App. 1985).

71. *Id.* at 1367.

72. *Id.*

73. *Id.*

74. *Id.* at 1368.

75. 9 Kan. App. 2d 168, 675 P.2d 912 (1984).

76. *Id.* at 172, 675 P.2d at 916.

77. *Id.* at 171, 675 P.2d at 915.

78. *Id.* at 169, 675 P.2d at 913.

79. *Id.* at 172, 675 P.2d at 916.

80. *Id.* at 173, 675 P.2d at 917.

However, in *U.S. Insulation, Inc. v. Hilro Construction Co.*,<sup>81</sup> the Arizona Supreme Court held that Hilro did not waive its right to compel arbitration when it repudiated other obligations under the contract.<sup>82</sup> In *U.S. Insulation*, Hilro gave U.S. Insulation (USI) written notice that it considered the contract to be "no longer in effect."<sup>83</sup> USI filed suit and Hilro moved to stay proceedings and to compel arbitration pursuant to the contract. USI claimed that Hilro waived its right to compel arbitration when it repudiated the contract. The court held that while repudiation of the arbitration clause itself, or a claim that the contract was void *ab initio*, would waive the right to arbitrate, repudiation of any other obligation under the contract would not.<sup>84</sup>

In *Gilmore v. Shearson/American Express, Inc.*,<sup>85</sup> a New York federal district court stated that a waiver of the right to compel arbitration may be retracted when the waiver is based on a repudiation of the arbitration agreement.<sup>86</sup> The court concluded that a party must show an "amended complaint changed the scope or theory of the previous claims to nullify the earlier waiver and to revive the right to compel arbitration."<sup>87</sup> Gilmore's complaint alleged a violation of Section 10(b) of the Securities Exchange Act of 1934, breach of fiduciary duty, breach of contract, and common law fraud.<sup>88</sup> Gilmore later amended his complaint to include a RICO violation.<sup>89</sup> Prior to the RICO claim Shearson waived its right to compel arbitration; after the RICO claim Shearson wanted those rights reinstated.<sup>90</sup>

The district court found that "the addition of the RICO claim certainly add[ed] a new 'theory' to the plaintiff's case."<sup>91</sup> Before amending the complaint Shearson made a business determination to forego its right to arbitration of the common law claims because the Section 10(b) claim was ruled non-arbitrable.<sup>92</sup> In the interim the United States Supreme Court ruled that both RICO and Section 10(b) claims were arbitrable.<sup>93</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 law," then, "in fairness, Shearson should be able to revive its right to move to compel arbitration of the

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81. 146 Ariz. 250, 705 P.2d 490 (Ariz. Ct. App. 1985).

82. *Id.*

83. *Id.* at 258, 705 P.2d at 498.

84. *Id.*

85. 668 F. Supp. 314 (S.D.N.Y. 1987).

86. *Id.* See also *Peterson v. Shearson/American Express*, 849 F.2d 464 (10th Cir. 1988).

87. *Gilmore*, 668 F. Supp. at 316.

88. *Id.* at 315.

89. *Id.*

90. *Id.*

91. *Id.* at 317.

92. *Id.* at 318.

93. *Id.* at 316. The Supreme Court decided this issue in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987).

§10(b) claims."<sup>94</sup> The court ruled on the common law claim that Shearson's original waiver was enforceable because the addition of the RICO claim did not sufficiently "erode" the decision to litigate those claims.<sup>95</sup>

## 2. Failure to Make a Timely Assertion

In *Falcon Steel Co. v. Weber Engineering Co.*,<sup>96</sup> the Delaware Court of Chancery applied three principles to the issue of waiver. First, any doubts as to arbitrability must be resolved in favor of arbitration.<sup>97</sup> Second, to waive the right to compel arbitration, a party must have taken action inconsistent with that right.<sup>98</sup> Third, laches or equitable estoppel will bar arbitration through waiver only when arbitration would not be equitable, such as where the opposing side has lost relevant evidence due to the delay.<sup>99</sup> The court held that where the defendant could not produce evidence that the plaintiff's delay had caused the defendant to lose its claim against the plaintiff, no waiver had occurred.<sup>100</sup>

*Stauffer Construction Co. v. Board of Education*<sup>101</sup> involved a contract for the renovation of a school. The Maryland Court of Special Appeals held that Stauffer could waive its right to compel arbitration by waiting too long to file its demand. The court also recognized the possibility that a party could waive its right to arbitration by filing a lawsuit against the opposing party.<sup>102</sup>

In *U.S. Insulation v. Hilro Construction Co.*,<sup>103</sup> the Arizona Court of Appeals held that a party which had no obligation to seek arbitration could not be held to have waived the right to compel arbitration due to delay.<sup>104</sup> Similarly, in *Kostakos v. KSN Joint Venture No. 1*,<sup>105</sup> the Illinois Appellate Court held that when both plaintiff and defendant have been dilatory, and the delay did not prejudice the plaintiff, defendant's delay did not result in a waiver of the right to compel arbitration.<sup>106</sup>

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94. *Gilmore*, 668 F. Supp. at 318.

95. *Id.* at 319.

96. 517 A.2d 281 (Del. Ch. 1986).

97. *Id.* at 287.

98. *Id.* at 288.

99. *Id.*

100. *Id.*

101. 54 Md. App. 658, 460 A.2d 609 (Md. Ct. Spec. App. 1983).

102. *Id.* But see *D.E. Wright Elec. v. Henry Ross Const.*, 183 Ill. App. 3d 46, 538 N.E.2d 1182 (Ill. App. Ct. 1989).

103. 146 Ariz. 250, 705 P.2d 490 (Ariz. App. Ct. 1985).

104. *Id.* See also *Gold Coast Mall v. Larmar Corp.*, 298 Md. 96, 468 A.2d 91 (1983); *Cameron v. Griffith*, 91 N.C. App. 164, 370 S.E.2d 704 (1988).

105. 142 Ill. App. 3d 533, 491 N.E.2d 1322 (1986).

106. *Id.* at 536, 491 N.E.2d at 1325.

### 3. Participation in Litigation

In *D.E. Wright Electric v. Henry Ross Construction*,<sup>107</sup> the Illinois Appellate Court stated that "while it has been held that submitting arbitrable issues to a court of law, as by filing a counterclaim, may result in the waiver of the right to arbitration, the filing of a counterclaim and answer does not automatically result in waiver of arbitration rights."<sup>108</sup> In holding that the defendant did not waive its right to compel arbitration, the court noted that the defendant had asserted its right to arbitration early in the proceeding but was denied.<sup>109</sup>

In *TDE v. Israel*,<sup>110</sup> another Illinois appellate court stated that "waiver of a contractual right to arbitration occurs when a party's conduct is so inconsistent with the arbitration clause as to demonstrate an abandonment of that right."<sup>111</sup> In *Preferred Financial Corp. v. Quality Homes, Inc.*,<sup>112</sup> the Minnesota Court of Appeals reached that result where there had been a trial on the merits.<sup>113</sup> The court held that an issuer of bonds waived its right to compel arbitration by failing to move to compel arbitration until after a trial on the merits.<sup>114</sup> The court stated that the bond issuer displayed no intent to seek arbitration by instead choosing to rely on a summary judgment motion.<sup>115</sup>

Similarly, in *Capital Mortgage Co. v. Coopers & Lybrand*,<sup>116</sup> the Michigan Court of Appeals found a waiver of the right to compel arbitration where summary judgment was granted against a party who then sought to compel arbitration.<sup>117</sup>

In *Servomation Corp. v. Henry Construction Co.*,<sup>118</sup> the North Carolina Court of Appeals found a waiver of the right to compel arbitration where the defendant served numerous interrogatories (which the plaintiff answered) and filed a motion for summary judgment, alternatively requesting an order to compel

107. 183 Ill. App. 3d 46, 538 N.E.2d 1182 (Ill. App. Ct. 1989).

108. *Id.* at 53, 538 N.E.2d at 1187.

109. *Id.* at 53-54, 538 N.E.2d at 1187-88.

110. 185 Ill. App. 3d 1059, 541 N.E.2d 1281 (Ill. App. Ct. 1989).

111. *Id.* at \_\_\_, 541 N.E.2d at 1286. See also *Post Tensioned Eng'g Corp. v. Fairway Plaza Assocs.*, 412 So. 2d 871, 874 (Fla. Dist. Ct. App. 1982), *petition denied*, 419 So. 2d 1197 (Fla. 1982), *appeal filed*, 429 So. 2d 1212 (Fla. Dist. Ct. App. 1983).

112. 439 N.W.2d 741 (Minn. Ct. App. 1989).

113. *Id.*

114. *Id.* at 744. See also *Hanslin Builders, Inc. v. Britt Dev. Corp.*, 15 Mass. App. Ct. 319, 445 N.E.2d 188 (1983), *cert. denied*, 388 Mass. 1105, 448 N.E.2d 766; *Rustad v. Rustad*, 68 N.C. App. 58, 314 S.E.2d 275 (1984), *cert. denied*, 311 N.C. 763, 321 S.E.2d 145. But see *Forest City Dillon, Inc. v. Superior Court for Pima*, 138 Ariz. 410, 675 P.2d 297 (Ariz. Ct. App. 1984).

115. *Preferred Financial*, 439 N.W.2d at 744. See also *Kayne v. Payne Webber, Inc.*, 684 F. Supp. 978 (N.D. Ill. 1988).

116. 142 Mich. App. 531, 369 N.W.2d 922 (1985).

117. *Id.*

118. 70 N.C. App. 309, 318 S.E.2d 904 (1984), *aff'd after remand*, 74 N.C. App. 603, 328 S.E.2d 842 (1985), *rev'd*, 316 N.C. 543, 342 S.E.2d 853 (1986).

arbitration.<sup>119</sup> The court reasoned that public policy favored waiver where extensive discovery resulted in "manifest detriment" to the opposing party.<sup>120</sup>

However, in *Servomation Corp. v. Hickory Construction Co.*,<sup>121</sup> the North Carolina Supreme Court held that the mere filing of a complaint does not result in waiver, absent evidence of prejudice to the opposing party.<sup>122</sup> The court stated that evidence of prejudice could include being forced to bear the expense of a long trial, losing helpful evidence, taking steps in litigation to the party's detriment, or making available to the opponent the use of judicial discovery procedures not available in arbitration.<sup>123</sup> Similarly, in *County of Clark v. Blanchard Construction Co.*,<sup>124</sup> the Nevada Supreme Court held that participation in litigation constitutes waiver only if it prejudices the other party.<sup>125</sup>

Some courts have focused on the expenditure of judicial resources to determine whether waiver has occurred. In *Home Gas Corp. v. Walter's of Hadley*,<sup>126</sup> the Supreme Court of Massachusetts held that the defendant's failure to demand arbitration before allowing the parties and the court to expend "a great deal of time, expense, and resources on trying the case" resulted in a waiver of the defendant's right to later compel arbitration.<sup>127</sup>

Other decisions have emphasized the parties' intent. In *District Moving & Storage Co. v. Gardiner & Gardiner*,<sup>128</sup> a Maryland appellate court held that "waiver of the right to arbitrate cannot be inferred in the absence of a clear expression of intent."<sup>129</sup> Thus, where the defendant's actions consisted of (1) filing demurrers to plaintiff's declaration, amended declaration, and second declaration; (2) submitting memoranda in support of its demurrer to the first

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119. *Id.*

120. *Id.* at 312, 318 S.E.2d at 906. See also *Norden v. E. F. Hutton & Co.*, 739 P.2d 914 (Colo. Ct. App. 1987); *Hansen v. State Farm Mut. Auto. Ins. Co.*, 112 Idaho 663, 735 P.2d 974 (Idaho 1987); *Joba Construction v. Monroe County Drain Comm'r.*, 150 Mich. App. 173, 388 N.W.2d 251 (1986). But see *County of Hennepin v. Ada-Bec Sys.*, 394 N.W.2d 611 (Minn. Ct. App. 1986) (participation was consistent with the flexibility of the arbitration process); *Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 533, 491 N.E.2d 1322 (1986) (waiver is to be determined by the issues submitted to litigation, not by the number of papers filed in court).

121. 316 N.C. 543, 342 S.E.2d 853 (1986).

122. *Id.* See also *Burd, Inc. v. Stoneville Furniture Co.*, 134 Ill. App. 3d 149, 479 N.E.2d 962 (1985); *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984); *Sentry Eng'g and Const., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 338 S.E.2d 631 (1985).

123. *Servomation*, 316 N.C. 544, 342 S.E.2d at 854.

124. 98 Nev. 488, 653 P.2d 1217 (1982).

125. *Id.* at 491, 653 P.2d at 1220. See also *Hillman v. Nationwide Mut. Fire Ins. Co.*, 758 P.2d 1248 (Alaska 1988).

126. 403 Mass. 772, 532 N.E.2d 681 (1989).

127. *Id.* at 777, 532 N.E.2d at 684. Cf. *Atlas v. 7101 Partnership*, 109 Ill. App. 3d 236, 440 N.E.2d 381 (1982) (court relied on the limited use of judicial resources to conclude there was no waiver).

128. 63 Md. App. 96, 492 A.2d 319 (1985), *aff'd*, 306 Md. 286, 508 A.2d 487 (1986).

129. *Id.* at 105, 492 A.2d at 324. See also *Jackson Trak Group, Inc. v. Mid States Port Auth.*, 242 Kan. 683, 751 P.2d 122 (1988); *Lawrence v. Comprehensive Bus. Serv. Co.*, 833 F.2d 1159 (5th Cir. 1987); *Riverfront Properties, Ltd. v. Max Factor III*, 460 So. 2d 948 (Fla. Dist. Ct. App. 1984).

amended petition accompanied by an assertion that plaintiff should be bound by arbitration clauses in the disputed contracts; (3) maintaining a consistent position in all subsequent pleadings; and (4) no final judgment on the merits occurred, then the defendant had not waived the right to compel arbitration because such acts did not evidence a clear expression of intent to do so.<sup>130</sup>

In *Atkins v. Rustic Woods Partners*,<sup>131</sup> the Illinois Appellate Court held that, while most of the defendant's court action was in response to the plaintiff's claims, some of its actions, such as seeking dissolution of the partnership with the plaintiff and distribution of the partnership assets, evidenced an intent to pursue rights in court and waive the right to compel arbitration.<sup>132</sup>

### B. Right to Raise Claims

Claims may be deemed to be waived when a party fails to properly assert them.<sup>133</sup> In *Hedlund v. Citizen's Security Mutual Insurance Co. of Red Wing*,<sup>134</sup> the Minnesota Court of Appeals held that a party could not be awarded costs or prejudgment interest because the arbitrators had not awarded them, and because they were requested only upon application for confirmation of the award.<sup>135</sup> The court stated that failure to move for modification or correction of the award resulted in a waiver of the claim for costs and prejudgment interest.<sup>136</sup>

In *Wanschura v. Western National Mutual Insurance Co.*,<sup>137</sup> the Minnesota Court of Appeals denied prejudgment interest to the plaintiff who failed to ask that it be included in the arbitration award.<sup>138</sup> Plaintiff asked for prejudgment interest in his motion to confirm the arbitration award but the court held that it could not award the interest upon a motion to confirm.<sup>139</sup>

Failure to give timely written notice of a claim has been held to waive the right to assert that claim.<sup>140</sup> In *Byron's Construction Co. v. North Dakota State Highway Department*,<sup>141</sup> the North Dakota Supreme Court held that the state's arbitration statute required Byron to give timely written notice of its claim for

130. *District Moving*, 63 Md. App. at 105, 492 A.2d at 324. See also *Charles J. Frank, Inc. v. Association of Jewish Charities*, 294 Md. 443, 450 A.2d 1304 (1982). But see *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wash. 2d 99, 751 P.2d 282 (1988) (failure to take action in court was evidence of a waiver of the right to arbitrate).

131. 171 Ill. App. 3d 373, 525 N.E.2d 551 (1988).

132. *Id.*

133. *Hedlund v. Citizen's Sec. Mut. Ins. Co. of Red Wing*, 377 N.W.2d 460 (Minn. Ct. App. 1985). See also *Rosecroft Trotting & Pacing Assoc. v. Electronic Race Patrol*, 69 Md. App. 405, 518 A.2d 137 (1986).

134. *Hedlund*, 377 N.W.2d 460.

135. *Id.* at 464.

136. *Id.*

137. 389 N.W.2d 927 (Minn. Ct. App. 1986).

138. *Id.* at 928.

139. *Id.*

140. *Byron's Const. Co. v. North Dakota State Highway Dep't*, 448 N.W.2d 630 (N.D. 1989).

141. *Id.*

additional compensation for construction work for the state.<sup>142</sup> The court further held that Byron failed to give such notice and thus waived its right to assert the claim in arbitration.<sup>143</sup>

### C. Right to Object to Arbitrability

A party can waive its right to object to arbitrability by submitting to an arbitration proceeding on the merits of a claim without raising an objection to the arbitration prior to the proceeding.<sup>144</sup> In *In Re Marriage of Gavend*,<sup>145</sup> the Supreme Court of Colorado held that a husband in a marriage dissolution case waived his right to object to the arbitration by agreeing in writing to participate in the process and by failing to object until after the arbitrator had delivered a tentative award.<sup>146</sup>

### D. Right to Assert Grounds for Vacation

A party may waive the right to assert grounds for vacation of an arbitration award by failing to comply with the time requirements of the arbitration statute or by failing to enter a timely appeal.<sup>147</sup> In *State Farm Mutual Automobile Insurance Co. v. Cabs, Inc.*,<sup>148</sup> State Farm sued on behalf of its policy holder for injuries sustained in an accident with defendant's cab.<sup>149</sup> The defendant sought to vacate the arbitrator's ruling after the time for filing appeals under the arbitration statute had elapsed.<sup>150</sup> The Colorado 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 the confirmation of the arbitrator's award.<sup>151</sup>

Similarly, in *Walter A. Brown, Inc. v. Moylan*,<sup>152</sup> an apartment owner received an arbitration award against the managing agent of one of her apartments and filed for confirmation of the award. The agent's answer sought vacation of the award. However, the agent filed the answer 107 days after the delivery of the

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142. *Id.* at 634.

143. *Id.*

144. *Marriage of Gavend*, 781 P.2d 161 (Colo. Ct. App. 1989); *see also* *Cady v. Allstate Ins. Co.*, 113 Idaho 667, 747 P.2d 76 (Idaho Ct. App. 1987); *Hot Springs County School Dist. v. Strube Constr. Co.*, 715 P.2d 540 (Wyo. 1986); *Jaffe v. Nocera*, 493 A.2d 1003 (D.C. Ct. App. 1985).

145. *Gavend*, 781 P.2d at 161.

146. *Id.* at 162.

147. *State Farm Mut. Auto. Ins. Co. v. Cabs, Inc.*, 751 P.2d 61 (Colo. 1988). *See also* *Littlejohn v. Keystone Ins. Co.*, 353 Pa. Super. 63, 509 A.2d 334 (1986); *Melton v. Lyon*, 108 N.M. 420, 773 P.2d 732 (1989).

148. *State Farm Mut. Auto. Ins. Co.*, 751 P.2d 61.

149. *Id.* at 62.

150. *Id.* at 63.

151. *Id.* at 67.

152. 509 A.2d 98 (D.C. 1986).

award rather than within the maximum 90 days.<sup>153</sup> The District of Columbia Court of Appeals held that the failure to make a timely answer waived the agent's right to assert grounds for vacation of the award.<sup>154</sup>

#### IV. ARBITRABILITY

Prior to the passage by Congress of the F.A.A. and the passage by many state legislatures of the U.A.A., both federal and state law were biased against arbitration.<sup>155</sup> The theory at common law was that either party to an agreement to arbitrate future disputes could void the agreement at any time.<sup>156</sup> However, with the passage of the U.A.A. and F.A.A., and the accompanying legislative history favoring the arbitral process, arbitration, has become commonplace as an alternative to the traditional civil trial.<sup>157</sup>

When considering the arbitrability of a given controversy, courts tend to ask one or more of the following questions: (1) Does a valid agreement to arbitrate exist?; (2) What did the parties intend as to the scope of the arbitration agreement?; (3) What is the effect of previously adjudicated claims and issues?; (4) Is the court or the arbitration panel the proper forum for determining the arbitrability of the conflict?; (5) Are all or only some of the issues arising out of the conflict subject to arbitration?; and (6) If all the claims arising out of the dispute are not subject to arbitration, which claims are severable? The way various courts have answered these questions is the subject of the following section.

##### A. Existence of Agreements

A typical problem courts encounter when determining the question of the arbitrability of a dispute is whether a valid arbitration agreement exists. This question can be better discussed when the sub-issues are broken down into the following categories: revocation of agreements, unsigned agreements, and incorporation by reference situations.

##### 1. Revocation of Agreements

The issue of revocation of an arbitration agreement was raised in *Hawker v. North Michigan Hospital, Inc.*<sup>158</sup> At issue was an agreement a patient signed upon her admission to the hospital.<sup>159</sup> According to the agreement, the patient

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153. D.C. CODE ANN. § 16-4311(b) (1981).

154. *Brown*, 509 A.2d at 100.

155. Meyerowitz, *supra* note 2, at 79.

156. *Id.*

157. *Id.*

158. 164 Mich. App. 314, 416 N.W.2d 428 (1987).

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

and the hospital were to submit any dispute between them to arbitration.<sup>160</sup> The agreement specified that the duty to arbitrate could be revoked if written notice was sent to the hospital within sixty days of release.<sup>161</sup> The plaintiff contended that she sent such a letter revoking arbitration to the hospital within the prescribed sixty day limit.<sup>162</sup> The appellate court affirmed the validity of the agreement, but also upheld the district court's finding that the letter revoking the agreement was not received within sixty days, thereby invalidating the attempted revocation.<sup>163</sup>

## 2. Unsigned Agreements

A signed, written agreement to arbitrate is not necessary to bind the parties to arbitration if a party's conduct treats an agreement to arbitrate as if it was in effect. In *Wetzel v. Sullivan*,<sup>164</sup> a dispute arose out of a former law partner's stock valuation upon the termination of his interest in the law firm.<sup>165</sup> The defendant had drafted and prepared a shareholder's and compensation agreement which contained an arbitration clause.<sup>166</sup> The plaintiff signed the agreement; however, the president and six of the shareholders did not.<sup>167</sup> When the plaintiff attempted to submit the dispute to arbitration, the defendants countered that no valid arbitration agreement existed.<sup>168</sup>

In reversing the lower court's decision denying arbitration, the appellate court noted that courts generally favor arbitration and will indulge every reasonable presumption to uphold arbitration proceedings.<sup>169</sup> The court ruled that the defendant was estopped from denying the existence of the agreement because it had ratified the agreement as a matter of law by treating it as though it was in effect throughout the two-year negotiation period and by accepting benefits and issuing stock pursuant to the agreement.<sup>170</sup>

Another court agreed that conduct can bind parties to an arbitration provision contained in an unsigned contract. In *Landmark Properties, Inc. v. Architects International*,<sup>171</sup> the defendant sent a written contract containing an arbitration agreement to the plaintiffs. The plaintiffs, while neither signing nor rejecting the contract, indicated that they would pay the defendant, provided that all services

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160. *Id.*

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

162. *Id.*

163. *Id.* at 431, 416 N.W.2d at 431.

164. 745 S.W.2d 78 (Tex. Ct. App. 1988).

165. *Id.* at 79.

166. *Id.*

167. *Id.* at 80.

168. *Id.*

169. *Id.* at 81.

170. *Id.* at 82.

171. 172 Ill. App. 3d 379, 526 N.E.2d 603 (1988).

were performed in accordance with the contract.<sup>172</sup> While the project was proceeding, the plaintiffs stopped making payments and eventually the defendant filed a demand for arbitration.<sup>173</sup> The plaintiffs requested a mediation conference and submitted their claim before the arbitration board but later withdrew, claiming they were not bound to arbitrate.<sup>174</sup> The court held that a valid agreement to arbitrate existed. It noted that the plaintiffs' correspondence to the defendant acknowledging the proposed contract, request for a mediation conference, and original submission of the claim to arbitration showed conduct related specifically to the written contract.<sup>175</sup>

In certain instances, however, courts have refused to find the existence of a valid, unsigned agreement to arbitrate. In *Coswell & Wehrle v. Nicholson*,<sup>176</sup> plaintiffs attempted to compel arbitration, asserting that a valid and binding agreement to arbitrate existed.<sup>177</sup> The court found that although the plaintiffs proposed a written agreement, defendants never signed the agreement or ratified it by its conduct.<sup>178</sup> Therefore, since private arbitration is wholly a creature of contract, it was improper to arbitrate absent a valid agreement or some ratifying conduct by the defendant.<sup>179</sup>

### 3. Incorporation by Reference

An additional question that courts have adjudicated is whether an arbitral clause may be incorporated by reference into a contract. In *Jim Carlson Construction, Inc. v. Bailey*,<sup>180</sup> the defendants appealed the trial court's denial of their application to compel arbitration regarding a contract dispute with the plaintiff.<sup>181</sup> A blank form was used, and in the area designated for other documents to be incorporated by reference into the contract, several suggested documents were listed in a parenthetical.<sup>182</sup> One such document contained an arbitration clause but the area beneath the parenthetical was left blank.<sup>183</sup> The court ruled that since without any of the suggested documents listed in the parenthetical there would be no contract, all suggested documents listed must therefore be incorporated by reference; hence, the dispute was arbitrable.<sup>184</sup>

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172. *Id.* at 380, 526 N.E.2d at 604.

173. *Id.* at 381, 526 N.E.2d at 605.

174. *Id.*

175. *Id.* at 381, 526 N.E.2d at 606.

176. 780 P.2d 37 (Colo. Ct. App. 1989).

177. *Id.* at 38.

178. *Id.*

179. *Id.*

180. 769 S.W.2d 480 (Mo. Ct. App. 1989).

181. *Id.*

182. *Id.* at 481.

183. *Id.*

184. *Id.*

In *Sentry Engineering and Construction, Inc. v. Mariner's Cay Development Corp.*,<sup>185</sup> the owner and contractor concurrently executed documents covering construction costs (cost document) and profits and costs over construction (profit document). The cost document contained an arbitration clause and incorporated the profit document through an agreement modification provision.<sup>186</sup> The profit document incorporated the cost document by reference.<sup>187</sup> The court found the two documents had been executed for the single purpose of providing compensation for construction and, therefore, comprised a single contract.<sup>188</sup> The court ruled that the arbitration provision in the cost document applied to the contract as a whole and not merely to the portion of the contract evidenced by the cost document.<sup>189</sup>

#### 4. Agreement to Arbitrate Under Implied Contract Theory

In *Shaffer v. Pennsylvania Liquor Control Board*,<sup>190</sup> an employee filed a petition with the Pennsylvania Board of Claims, seeking reimbursement for travel expenses. The employee based his claim on a theory of implied contract.<sup>191</sup> The court ruled that this dispute was not arbitrable due to the fact that no express agreement can exist under an implied contract theory.<sup>192</sup> Similarly, in *Johnson v. Travelers*,<sup>193</sup> the court refused to compel arbitration where the plaintiff sought relief under an implied contract theory after he was struck and injured by an uninsured motorist.<sup>194</sup> Plaintiff used an implied contract theory to argue that, pursuant to Pennsylvania law, all insurance contracts must provide for binding arbitration to resolve disputes regarding uninsured motorist benefits.<sup>195</sup> Plaintiff further argued that he was entitled to arbitration despite the fact that there was no express arbitration agreement.<sup>196</sup> The court refused to order arbitration in the absence of an express agreement between the parties.<sup>197</sup>

### B. Scope of Agreements

Since arbitration clauses are contractual in nature, principles of contract determination must logically apply. The terms or scope of an arbitration

185. 287 S.C. 346, 338 S.E.2d 631 (1985).

186. *Id.* at \_\_\_, 338 S.E.2d at 632-33.

187. *Id.* at \_\_\_, 338 S.E.2d at 633.

188. *Id.*

189. *Id.* at \_\_\_, 338 S.E.2d at 633-34.

190. 92 Pa. Commw. 374, 500 A.2d 917 (1985).

191. *Id.* at \_\_\_, 500 A.2d at 919.

192. *Id.* at \_\_\_, 500 A.2d at 921.

193. 348 Pa. Super. 278, 502 A.2d 206 (1985).

194. *Id.* at \_\_\_, 502 A.2d at 209.

195. *Id.* at \_\_\_, 502 A.2d at 208.

196. *Id.*

197. *Id.* at \_\_\_, 502 A.2d at 209.

agreement determine which disputes will be submitted to arbitration. In *United Cable Television Corp. v. Northwest Illinois Cable Corp.*,<sup>198</sup> the defendant brought an action to stay all arbitration proceedings that the plaintiff had initiated.<sup>199</sup> The trial court held that two out of the three issues involved in the dispute were not arbitrable because they were not matters of "general policy affecting business" of the partnership within the meaning of the arbitration agreement.<sup>200</sup> The Illinois Supreme Court held that partnership decisions as to distribution of profits, allocation of tax credits, and depositing of funds were not within the scope of the arbitration clause and denied arbitration as to those issues.<sup>201</sup>

Other courts have encountered other issues regarding the scope of arbitration agreements. In *Michael-Curry Cos., Inc. v. Knutson Shareholders Liquidating Trust*,<sup>202</sup> the issue was whether an arbitration clause was sufficiently broad to establish whether the parties intended the issue of fraudulent inducement to be arbitrated.<sup>203</sup> The court looked to the language of the arbitration clause which read in part, "[a]ny controversy or claim arising out of, or relating to . . . the making . . . thereof, shall be settled by arbitration . . ." <sup>204</sup> The court ruled that the claim arose out of the formation or making of the contract and remanded for arbitration.<sup>205</sup>

Similarly, in *Ram Electronics Corp. v. Westley*,<sup>206</sup> plaintiff sued defendant stockholder for injunctive relief under an agreement containing an arbitration clause in connection with the sale of corporate assets. Defendant counterclaimed for replevin of certain items plaintiff detained.<sup>207</sup> The trial court denied plaintiff's motion to compel arbitration as to the replevin claim.<sup>208</sup> On appeal, the appellate court ruled that the replevin action was arbitrable because the defendant stockholder had signed the agreement in his individual capacity.<sup>209</sup>

### C. Effect of Res Judicata and Collateral Estoppel

In *Paine Webber, Inc. v. Farnam*,<sup>210</sup> the defendants, against whom the plaintiff brokerage firm had brought a civil action in state court, counterclaimed against plaintiff in federal district court and moved to stay state court proceedings

198. 128 Ill. 2d 301, 538 N.E.2d 547 (1989).

199. *Id.* at 304-05, 538 N.E.2d at 548.

200. *Id.*

201. *Id.* at 311-12, 538 N.E.2d at 552-53.

202. 449 N.W.2d 139 (Minn. 1989).

203. *Id.*

204. *Id.* at 141.

205. *Id.*

206. 534 So. 2d 936 (Fla. Dist. Ct. App. 1988).

207. *Id.* at 936-37.

208. *Id.* at 937.

209. *Id.*

210. 870 F.2d 1286 (7th Cir. 1989).

pending arbitration.<sup>211</sup> Meanwhile, an Illinois state court issued a stay order pending arbitration of the defendant's claims.<sup>212</sup> The federal district court judge concluded that the plaintiff was precluded from relitigating arbitrability in federal court.<sup>213</sup> However, the Seventh Circuit reversed, holding that the state court order staying the plaintiff's suit against the defendants pending arbitration of the defendant's claims would not be given preclusive effect in federal court pursuant to the law of the case doctrine.<sup>214</sup>

In *Metropolitan Airports Commission v. Metropolitan Airports Police Federation*,<sup>215</sup> the trial court overturned an arbitrator's award on the grounds that he exceeded his authority. The court of appeals denied discretionary review and dismissed the appeal.<sup>216</sup> The Minnesota Supreme Court, in granting discretionary review, held that regardless of whether a trial court's judgment was appealable, both the Supreme Court and the court of appeals had the authority to grant discretionary review as a matter of independent determination.<sup>217</sup>

In *Jackson Trak Group, Inc. v. Mid States Port Authority*,<sup>218</sup> the court ruled 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>219</sup> The defense argued for applying collateral estoppel on the issue of liability for seizure of the plaintiff's equipment where the plaintiff had unsuccessfully sought an injunction.<sup>220</sup> The court ruled 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>221</sup>

Finally, the Minnesota Court of Appeals in *In re Law Enforcement Labor Service, Inc.*,<sup>222</sup> held that absent specific language precluding arbitration on an issue, the agreement between the parties to arbitrate is binding.<sup>223</sup> The defendant argued that the language of the contract gave it the right to make choices in regard to personnel selection.<sup>224</sup> The court disagreed, holding that the specific provisions of the collective bargaining agreement at issue did not preserve the right of the defendant to make such personnel choices and that the dispute was arbitrable.<sup>225</sup>

211. *Id.* at 1287.

212. *Id.*

213. *Id.*

214. *Id.* at 1290.

215. 443 N.W.2d 519 (Minn. 1989).

216. *Id.* at 522.

217. *Id.* at 524.

218. 242 Kan. 683, 751 P.2d 122 (1988).

219. *Id.* at 692, 751 P.2d at 129.

220. *Id.* at 690, 751 P.2d at 129.

221. *Id.* at 692, 751 P.2d at 129.

222. 414 N.W.2d 452 (Minn. Ct. App. 1987).

223. *Id.* at 457.

224. *Id.*

225. *Id.*

#### D. *Proper Forum for Determining Arbitrability*

The question of whether an issue is arbitrable is one at law, and a court must make its own determination on the issue. In *Anderson v. Elliot*,<sup>226</sup> the court was faced with a dispute arising out of a fee arbitration between an attorney and his client. After the arbitration award was handed down the attorney sought to overturn the award on the basis that the bar rules requiring that the attorney submit to fee arbitration unconstitutionally denied his right to a trial by jury.<sup>227</sup> The Supreme Judicial Court of Maine held that the attorney failed to preserve any constitutional objection to the fee arbitration by acquiescing to the client's choice of forum and failing to object to the arbitration panel until he learned the award was adverse to him.<sup>228</sup>

In *Poire v. Kaplan*,<sup>229</sup> a suit between two joint venturers, the defendant filed a motion to dismiss the case on the grounds that the exclusive remedy available to the plaintiff was arbitration. The court ordered arbitration, and an award was rendered for the plaintiff.<sup>230</sup> The defendant then claimed that the issues in her motion to dismiss were not arbitrable.<sup>231</sup> The court of appeals rejected the defendant's argument, finding that the trial court had questioned the parties prior to arbitration and concluded that the entire dispute was subject to arbitration.<sup>232</sup>

In *McCary Engineering Corp. v. Town of Upland*,<sup>233</sup> plaintiff employed defendant engineering corporation to prepare applications for federal grants. Unknowingly, the plaintiff town board's president signed contracts for additional services, which had been inserted into a stack of forms requiring his signature.<sup>234</sup> Plaintiff attempted to terminate the contract because the board president had no authority to bind the town.<sup>235</sup> In response, the defendant engineering corporation sought a demand for arbitration, which the trial court denied.<sup>236</sup> On appeal, the court held that because the town questioned the authority of the board president, it disputed the validity of the contract and its arbitration clause.<sup>237</sup> The court ruled that the trial court had jurisdiction to determine arbitrability and affirmed the stay of arbitration.<sup>238</sup>

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226. 555 A.2d 1042 (Me. 1989).

227. *Id.* at 1043.

228. *Id.* at 1045.

229. 491 A.2d 529 (D.C. 1985).

230. *Id.* at 530.

231. *Id.*

232. *Id.* at 533.

233. 472 N.E.2d 1305 (Ind. Ct. App. 1985).

234. *Id.* at 1306.

235. *Id.*

236. *Id.*

237. *Id.* at 1307.

238. *Id.* at 1308.

In *Detroit Automobile Inter-Insurance Exchange v. Maurizio*,<sup>239</sup> the court noted that in determining the question of arbitrability, trial courts are to avoid ruling on the substantive provisions of the contract.<sup>240</sup> The court refused to rule on an anti-stacking provision in an insurance contract because to do so would encroach on the merits of the case.<sup>241</sup>

### E. Arbitrability of Specific Claims

In *Board of Education of Warren Township High School District 121 v. Warren Township High School Federation of Teachers, Local 504*,<sup>242</sup> plaintiff school board brought an action seeking a declaratory judgment as to the arbitrability of a teacher's grievance and a preliminary injunction to prevent the defendant union from arbitrating the grievance.<sup>243</sup> The trial court preliminarily enjoined arbitration, and appeal was taken.<sup>244</sup> The Illinois Supreme Court reversed, holding that under Illinois law trial courts do not retain power to enjoin arbitration in the context of public education labor disputes.<sup>245</sup>

Conversely, under Pennsylvania law a trial court had jurisdiction in the context of public education labor disputes to make a preliminary determination of whether a particular issue was arbitrable under the terms of a collective-bargaining agreement.<sup>246</sup> In *Middle Bucks Area Vocational Technical School Education Association v. Executive Council of Middle Bucks Area Vocational Technical School*,<sup>247</sup> the plaintiff executive council requested a stay of arbitration arising out of a teacher's dismissal on the grounds that there was no agreement to arbitrate.<sup>248</sup> The trial court stayed arbitration and the appellate court affirmed, ruling that the trial court had exercised proper jurisdiction.

In *Hall v. Metropolitan Life Insurance Co.*,<sup>249</sup> a Florida appellate court affirmed a trial court order compelling arbitration. The court rejected the plaintiff policyholder's contention that the claim was not arbitrable in that it violated provisions of a Florida law guaranteeing an insured the right of access to the courts.<sup>250</sup> The court explained that the statute the plaintiff relied upon was

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239. 129 Mich. App. 166, 341 N.W.2d 262 (1983).

240. *Id.* at 176, 341 N.W.2d at 267.

241. *Id.* at 176-77, 341 N.W.2d at 268.

242. 128 Ill. 2d 155, 538 N.E.2d 524 (1989).

243. *Id.* at 159, 538 N.E.2d at 526.

244. *Id.*

245. *Id.* at 164, 538 N.E.2d at 528.

246. *Middle Bucks Area Vocational Technical School Educ. Ass'n v. Executive Council of Middle Bucks Area Vocational Technical School*, 122 Pa. Commw. 595, 552 A.2d 763 (1989).

247. *Id.*

248. *Id.* at \_\_\_, 552 A.2d at 764.

249. 454 So. 2d 711 (Fla. Dist. Ct. App. 1984).

250. *Id.* at 713.

applicable with disability policies rather than life insurance policies like that held by the plaintiff.<sup>251</sup>

### F. Severability of Claims

The issue of severability arises when a claim submitted is not arbitrable. The question is whether the arbitrable issue(s) can be heard separately by the arbitrator or must be heard by a court. In *Himmelstein v. Valenti Dev. Corp.*,<sup>252</sup> the court ruled that a pre-contract tortious misrepresentation claim was not arbitrable. It severed that claim from the others that were remanded to the trial court for decision.<sup>253</sup>

In *City of Hot Springs v. Gunderson's, Inc.*,<sup>254</sup> the plaintiff city sued an architectural firm and a contractor for negligence and breach of contract in the design and construction of a golf course. The contractor's contract contained an arbitration clause, but the architect's contract did not.<sup>255</sup> The South Dakota Supreme Court held that the trial court's denial of the contractor's motion to compel arbitration was improper.<sup>256</sup> It ruled that a court must consider the propriety of severing claims before denying arbitration on the ground that multiple suits might result in different forums.<sup>257</sup>

In *Lynch v. Three Ponds Co.*,<sup>258</sup> part of an arbitral award was held to be void because it contained an issue that was not subject to arbitration. The court held that the part of the award that dealt with matters covered by the arbitration agreement was severable from the void portion and could not be set aside absent a showing of other grounds for vacation of the award.<sup>259</sup>

## V. COMPELLING ARBITRATION AND STAYING LEGAL PROCEEDINGS

### A. Compelling Arbitration

Section 2 of the U.A.A. permits proceedings to compel or stay arbitration.<sup>260</sup> Under the U.A.A. a party may compel arbitration by showing both an

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251. *Id.*

252. 103 Ill. App. 3d 911, 431 N.E.2d 1299 (1982).

253. *Id.* at 914-15, 431 N.E.2d at 1302.

254. 322 N.W.2d 8 (S.D. 1982).

255. *Id.* at 9.

256. *Id.* at 11.

257. *Id.*

258. 656 P.2d 51 (Colo. Ct. App. 1982).

259. *Id.* at 53-54.

260. See U.A.A. §§ 2(a), (b).

agreement to arbitrate and the opposing party's refusal to arbitrate.<sup>261</sup> Because arbitration is a contractual remedy the contract determines the limitations, conditions and restrictions on arbitration.<sup>262</sup>

When a petition to compel arbitration is filed, the court's role is to make a threshold determination of whether an agreement to arbitrate exists between the parties and whether such agreement includes arbitration of the specific point in dispute.<sup>263</sup> The court will compel arbitration if it finds a valid agreement which covers the dispute. Courts should not make substantive decisions on the merits of the dispute.<sup>264</sup>

The issue of statutory requirements in a proceeding to compel arbitration was addressed in *Proper v. Don Conolly Construction Co., Inc.*<sup>265</sup> Appellant asserted that section 682.03(1), Florida Statute (1987), requires a trial court to conduct a full evidentiary hearing to determine whether there was an agreement to arbitrate before granting or denying a motion for an order compelling arbitration.<sup>266</sup> Section 682.03(1) states that a trial court, upon finding that a substantial issue is raised as to the making of an agreement or provision concerning arbitration, shall "summarily hear and determine the issue and according to its determination, shall grant or deny the application."<sup>267</sup> The appellate court held that the trial court properly complied with the statutory requirements by summarily hearing the issue and making a determination based on the contract itself.<sup>268</sup>

In *TDE LTD. v. Israel*,<sup>269</sup> the owner-defendants appealed a circuit court order denying their motion to dismiss plaintiff's lawsuit or, alternatively, to stay litigation proceedings and to compel arbitration.<sup>270</sup> The court reversed the circuit court's order denying defendant's motion to compel arbitration. The court relied on Section 2(a) of the U.A.A., which enumerates the events which trigger the parties' obligation to arbitrate, namely: an agreement to arbitrate and a refusal by

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261. U.A.A. § 2 provides:

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

*Id.*

262. *E.g.*, *Christmas v. Cimarron Realty Co.*, 98 N.M. 330, 332, 648 P.2d 788, 790 (1982); *Knut Co. v. Knutson Constr. Co.*, 433 N.W.2d 149 (Minn. Ct. App. 1988).

263. *E.g.*, *Knutson Constr. Co.*, 433 N.W.2d 149; *TDE LTD. v. Israel*, 185 Ill. App. 3d 1059, 541 N.E.2d 1281 (Ill. App. Ct. 1989).

264. *Proper v. Don Conolly Constr. Co.*, 546 So. 2d 758 (Fla. Dist. Ct. App. 1989).

265. *Id.*

266. *Id.* at 759.

267. *Id.*

268. *Id.* at 759-60.

269. *TDE LTD.*, 185 Ill. App. 3d 1059, 541 N.E.2d 1281.

270. *Id.* at \_\_\_\_, 541 N.E.2d at 1282.

the party opposing arbitration to do so.<sup>271</sup> These factors were present in this case; therefore, compelling arbitration and staying the litigation was proper.

In *Anderson v. Dean Witter Reynolds, Inc.*,<sup>272</sup> the district court denied a motion to compel arbitration because the cause of action involved a federal civil rights claim of sex discrimination. On appeal, the court affirmed the trial court's conclusion that, as a matter of law, neither the F.A.A. nor the Minnesota Uniform Arbitration Act require arbitration of sex discrimination claims brought under the Minnesota Human Rights Act.<sup>273</sup> The court relied heavily on several cases,<sup>274</sup> one of which stated that:

Congress has articulated an intent through the text and legislative history of Title VII to preclude waiver of judicial remedies for violation of both federal Title VII rights and parallel state statutory rights, thereby exempting state statutes from the provisions of the Federal Arbitration Act. We emphasize that we reach this holding based upon the legislative history and congressional intent manifested by Congress in passing Title VII.<sup>275</sup>

### B. *Staying Legal Proceedings*

Any legal proceeding involving an arbitrable issue shall be stayed when an order to compel arbitration has issued or when an application for such an order has been made.<sup>276</sup> Therefore, an order compelling arbitration will generally be accompanied by an order to stay legal proceedings pending the outcome of the arbitration. If the legal proceeding includes issues unrelated to the arbitration, these issues may be severed, with the stay applying only to the arbitrable issues.<sup>277</sup>

Courts generally encourage enforcement of executory arbitration agreements,<sup>278</sup> providing for expeditious, inexpensive dispute resolution without

271. *Id.* at \_\_\_, 541 N.E.2d at 1287.

272. *Anderson v. Dean Witter Reynolds, Inc.*, 449 N.W.2d 468 (Minn. Ct. App. 1989).

273. *Id.* at 470.

274. See *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 143 (1989); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

275. *Anderson*, 449 N.W.2d at 469.

276. U.A.A. § 2(d) states:

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

*Id.*

277. *Id.*

278. *E.g.*, *Kurland Steel v. Carle Found. Hosp.*, 185 Ill. App. 3d 624, 541 N.E.2d 862 (1989); *J & K Cement Constr. Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 456 N.E.2d 889 (1983); *Charles J. Frank, Inc. v. Ass'n of Jewish Charities*, 294 Md. 443, \_\_\_ 450 A.2d 1304, 1312 (1982).

judicial involvement.<sup>279</sup> Litigation may be stayed even though the parties have not executed an agreement to arbitrate when the need for litigation may be obviated by the results of other, related arbitration.<sup>280</sup>

The policy favoring enforcement of arbitration agreements outweighed the policies favoring joinder in *Kurland Steel v. Carle Foundation Hospital*.<sup>281</sup> A dispute arose between the general contractor (English Brothers) and the owner (Carle Foundation Hospital). Their contract contained an arbitration clause. English Brothers and Kurland Steel had entered into subcontract which contained an indemnification clause in favor of English Brothers but did not include an agreement to arbitrate.

Kurland filed a motion for declaratory judgment. It asked the court to issue a preliminary injunction staying the arbitration between English Brothers and the Carle Foundation Hospital pending court resolution of the rights and obligations of all parties involved.<sup>282</sup> The hospital filed a motion to dismiss. The motion was granted, and the subcontractor filed an interlocutory appeal. On appeal the court held that the trial court had properly dismissed the subcontractor's complaint since the subcontractor failed to allege the contract between the hospital and the general contractor lacked an agreement to arbitrate.<sup>283</sup>

The court rejected the arguments that the arbitration between the hospital and the general contractor would hinder judicial economy or promote inconsistent results.<sup>284</sup> The court states that arbitration will serve to define the issues and make more manageable the dispute of the parties outside the arbitration agreement, and that joinder of multiple parties frequently fails to save time and money.<sup>285</sup> The court concludes that judicial economy is an inadequate reason for ignoring the existence of the arbitration agreement.<sup>286</sup>

The policy favoring enforcement of arbitration agreements also prevailed in *Kidder Electric v. U.S. Fidelity & Guaranty*.<sup>287</sup> When a controversy arose between the subcontractor and the general contractor, the subcontractor instituted an arbitration proceeding as provided for in an agreement between the two parties. Thereafter, to toll the statute of limitations, the subcontractor filed its action against the surety on the payment bond.<sup>288</sup> In its complaint the subcontractor

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

280. *E.g.*, *Forest City Dillon, Inc. v. Superior Court for Pima*, 138 Ariz. 410, 675 P.2d 297 (Ariz. Ct. App. 1984); *Post Tensioned Eng'g Corp. v. Fairways Plaza Assocs.*, 429 So. 2d 1212 (Fla. Dist. Ct. App. 1983); *Kurland Steel*, 185 Ill. App. 3d 624, 541 N.E.2d 862.

281. *Kurland Steel*, 185 Ill. App. 3d 624, 541 N.E.2d 862.

282. *Id.* at \_\_\_, 541 N.E.2d at 862.

283. *Id.*

284. *Id.* at \_\_\_, 541 N.E.2d at 865.

285. *Id.*

286. *Id.*

287. 530 So. 2d 475 (Fla. Dist. Ct. App. 1988).

288. *Id.* at 476.

moved to stay the bond action against the surety until conclusion of the pending arbitration proceeding.<sup>289</sup>

The general contractor, as intervenor in the bond action, and the surety company jointly moved to stay the arbitration proceeding until the conclusion of the bond litigation.<sup>290</sup> The trial court granted the general contractor's and surety's motion to stay the arbitration proceedings.

The subcontractor appealed and the appellate court reversed the trial court. The appellate court stated that regardless of who prevails in the arbitration, the arbitration determination will eliminate the issue in the bond litigation. Therefore, in order to effectuate the arbitration provision in the contract between the contractor and the subcontractor, to permit the subcontractor to toll the statute of limitations on its cause of action on the bond, and to avoid unnecessary litigation, the arbitration proceeding should be permitted to proceed, and the bond litigation should be stayed.<sup>291</sup> While the surety never agreed to arbitrate any claim against it on its bond, nevertheless, the surety's principal (the contractor) agreed with the subcontractor to arbitrate what was essentially the same claim.<sup>292</sup>

### C. Costs

The fees and expenses of arbitration, except for attorney's fees, are determined and allocated by the arbitrator.<sup>293</sup> In *Leaf v. State Farm Mutual Automobile Insurance Co.*,<sup>294</sup> the insured appealed a circuit court order granting her petition to compel arbitration but striking her claim for attorney fees. The district court reversed the circuit court's denial of attorney fees. The court held that State Farm's failure to respond to Leaf's letter advising it of her selection of an arbitrator could be deemed to have "wrongfully caused Leaf to resort to litigation to resolve a conflict which was reasonably within State Farm's power to resolve."<sup>295</sup>

## VI. THE ARBITRATION PROCEEDING

Parties may specify in their arbitration agreement the procedures to be used in their arbitration hearing.<sup>296</sup> In the absence of any such agreement, the proceedings must adhere to Section 5 of the U.A.A. or the applicable state U.A.A. provisions.

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289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 477.

293. *Cf. Kessel v. Dugand*, 508 So. 2d 45 (Fla. Dist. Ct. App. 1987).

294. *Leaf v. State Farm Mut. Auto. Ins. Co.*, 544 So. 2d 1049 (Fla. Dist. Ct. App. 1989).

295. *Id.* at 1050.

296. *See* U.A.A. § 5.

In *Byron's Construction v. State Highway Department*,<sup>297</sup> Byron's, the contractor, appealed from a district court judgment affirming an arbitration panel's decision. The panel had denied all of Byron's claims against the North Dakota State Highway Department.<sup>298</sup> The arbitrators had bifurcated the proceedings to first consider the notice issue. Following an evidentiary hearing the arbitrators determined that Byron's failed to give the Highway Department timely written notice of its intent to claim additional compensation.<sup>299</sup>

On appeal Byron's asserted that the relevant facts on the merits were so intertwined with the notice issue that the arbitrators could not properly decide the notice issue without first receiving evidence on the merits or substance of Byron's claims.<sup>300</sup> The court concluded that the arbitrators did not err in bifurcating the hearing and did not prejudice or compromise Byron's right to introduce relevant evidence since the arbitrators did not preclude Byron's from introducing whatever evidence it thought necessary for the arbitrators to consider in deciding the notice issue.<sup>301</sup>

## VII. CONFIRMATION AND VACATION OF AWARDS

Courts give great deference to arbitration awards; thus, arbitration awards are generally confirmed unless a party can show that one of the statutory grounds for vacation outlined in Section 12 of the U.A.A. has been met. The purpose for affording courts a limited role in the arbitration process is to preserve the integrity of alternative dispute resolution. If courts were allowed to review arbitral decisions de novo there would be no purpose in seeking arbitration, and the process would be undermined.

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

Section 12(a)(2) of the U.A.A. provides that an arbitrator's award may be vacated upon a showing of partiality or misconduct prejudicing the right of any party.<sup>302</sup>

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297. *Byron's Const. Co. v. North Dakota State Highway Dep't*, 448 N.W.2d 630 (N.D. 1989).

298. *Id.* at 631.

299. *Id.*

300. *Id.* at 632.

301. *Id.*

302. See also *Hooten Const. Co. v. Borsberry Const. Co.*, 108 N.M. 192, 769 P.2d 726 (N.M. 1989); *Goeller v. Liberty Mut. Ins. Co.*, 376 Pa. Super. 608, 546 A.2d 690 (1988); *Coughlan Const. Co. v. Town of Rockport*, 23 Mass. App. Ct. 994, 505 N.E.2d 203 (1987); *Wyndham v. Haines*, 305 Md. 269, 503 A.2d 719 (1986); *Turner v. Nicholson Properties*, 80 N.C. App. 208, 341 S.E.2d 42 (1986); *Safeco Ins. Co. v. Stariha*, 346 N.W.2d 663 (Minn. Ct. App. 1984); *Bernstein v. Grammercy Mills, Inc.*, 16 Mass. App. Ct. 403, 452 N.E.2d 231 (1983); *Renwin v. Piper, Jaffray & Hopwood, Inc.*, 107 Ill. App. 3d 799, 438 N.E.2d 509 (1982); *Foley Co. v. Grindsted Products, Inc.* 233 Kan. 339, 662 P.2d 1254 (1983).

*Melton v. Lyon*<sup>303</sup> stands for the proposition that, before an award may be set aside because the arbitrator was impartial or biased, "the evidence of bias or interest of an arbitrator must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative."<sup>304</sup> In *Melton*, the court ruled that there was not sufficient evidence of bias where the arbitrator failed to disclose that he was previously employed by business competitors of the appellants, since he had no ongoing relationship with the competitor.<sup>305</sup>

In *Hartman v. Cooper*,<sup>306</sup> the court overturned the arbitrator's award and held that the appearance of possible bias was sufficient to require the vacation of the award.<sup>307</sup>

A party seeking to have an award vacated for arbitrator misconduct must not only show misconduct but also that the party has in fact incurred prejudice as a result of the misconduct.<sup>308</sup>

In *Fort Wayne Community Schools v. Fort Wayne Education Association*,<sup>309</sup> the party seeking to have the award vacated alleged that the arbitrator had slept during the testimony of one of its expert witnesses.<sup>310</sup> Noting that several other experts had testified on the same topic and that the arbitrator's decision contained material substantially similar to that contained in the expert's affidavit, the court found that the party had failed to show it had been prejudiced.<sup>311</sup>

In *L & H Airco v. Rapistan Corp.*,<sup>312</sup> the court held that vacation of an award is the proper remedy when an arbitrator fails to disclose a current or prior relationship with a party to the proceeding.<sup>313</sup> In this case, the court held that the arbitrator is immune from civil liability, although the arbitrator is not insulated from criminal sanctions for fraud or corruption or from sanctions imposed by the arbitrator's governing body.<sup>314</sup>

303. 108 N.M. 420, 773 P.2d 732 (N.M. 1989).

304. *Id.* at \_\_\_\_, 773 P.2d at 734.

305. *Id.* at \_\_\_\_, 773 P.2d at 734-35.

306. 59 Md. App. 154, 474 A.2d 959 (1984), *cert. denied*, 301 Md. 41, 481 A.2d 801.

307. *Id.* at 168, 474 A.2d at 967. *See also* Calabrese v. State Farm Mut. Auto Ins., 187 Ill. App. 3d 349, 543 N.E.2d 215 (1989); Egan & Sons Co. v. Mears Park Dev. Co., 164 Ill. App. 3d 660, 414 N.W.2d 785 (Minn. Ct. App. 1987); Hahn v. A.G. Becker Paribas, Inc., 518 N.E.2d 218 (1987).

308. *Fort Wayne Community Schools v. Fort Wayne Educ. Ass'n*, 490 N.E.2d 337 (Ind. Ct. App. 1986); *See also* Int'l Medical Centers v. Sabates, 498 So. 2d 1292 (Fla. Dist. Ct. App. 1986); AFSCME Council 65 v. Aitkin County, 357 N.W.2d 432 (Minn. Ct. App. 1984); Beebout v. St. Paul Fire and Marine Ins. Co., 365 N.W.2d 271 (Minn. Ct. App. 1985); Metro. Dade County v. Molloy 456 So. 2d 1280 (Fla. Dist. Ct. App. 1984) (*per curiam*); State v. Davidson & Jones Constr. Co., 72 N.C. App. 149, 323 S.E.2d 466 (1984).

309. *Fort Wayne Community Schools*, 490 N.E.2d 337.

310. *Id.* at 339.

311. *Id.* at 340.

312. 446 N.W.2d 372 (Minn. 1989).

313. *Id.* at 377.

314. *Id.* at 377-78.

B. *The Arbitrator's Scope of Authority*

An award may be vacated if the arbitrator exceeds his authority.<sup>315</sup> An arbitrator's powers are generally defined in the arbitration agreement. "Great deference is given to an arbitrator's decision, an arbitrator's power is confined to interpretation and application of the agreement and he does not have the power to dispense his own brand of industrial justice."<sup>316</sup>

In *Local 964 v. County of Lawrence*,<sup>317</sup> the court held that the arbitrator exceeded her scope of authority when the award "could not in any way be rationally derived from the agreement."<sup>318</sup> The court acknowledged its limited role in reviewing arbitration awards and held that "an arbitrator's decision may not be disturbed so long as it draws its essence from the collective bargaining agreement."<sup>319</sup> Under the essence test, the court must determine whether an arbitrator's interpretation can in "any rational way be derived from the collective bargaining agreement, viewed in light of its language, its context and other indicia of the parties' intention."<sup>320</sup> In *Local 964*, the court held that because the arbitrator's decision could not be rationally derived from the agreement, the arbitrator exceeded her scope of authority in reaching the decision.<sup>321</sup>

In *Schnurmacher Holding, Inc. v. Noriega*,<sup>322</sup> the court held that an arbitrator exceeds his authority when he "goes beyond the authority granted by the parties or the operative documents and decides an issue not pertinent to the

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315. U.A.A. § 12(a)(3). See *Kilianek v. Kim*, 192 Ill. App. 3d 139, 548 N.E.2d 598 (1989); *Jontig v. Bay Metro. Transp. Auth.*, 178 Mich. App. 499, 444 N.W.2d 178 (1989); *Metro. Airports Comm'n v. Metro. Airports Police Fed'n*, 443 N.W.2d 519 (Minn. 1989); *Snyder v. Berliner Const. Co., Inc.*, 79 Md. App. 29, 555 A.2d 523 (1989); *Safeco Ins. Co. v. Goldenberg*, 435 N.W.2d 616 (Minn. Ct. App. 1989); *Container Technology v. J. Gadsden Pty., Ltd.*, 781 P.2d 119 (Colo. App. 1989) (arbitrator did not exceed the scope of his authority; an unfavorable interpretation of a contract is not a basis to set aside an award); *E.D.S. Constr. Co. v. North End Health Center, Inc.*, 412 N.W.2d 783 (Minn. Ct. App. 1987); *Grobert File Co., Inc. v. RTC Sys.*, 524 N.E.2d 404 (Mass. Ct. App. 1988); *Hennepin County Ambulance Drivers Ass'n v. County of Hennepin*, 394 N.W.2d 206 (Minn. Ct. App. 1986); *South Conejos School Dist. v. Martinez*, 709 P.2d 594 (Colo. Ct. App. 1985); *Prince George County Educator's Ass'n v. Board of Educ.*, 61 Md. App. 249, 486 A.2d 228 (1985), cert. granted, 492 A.2d 616; *Duluth Police Union v. Duluth*, 360 N.W.2d 367 (Minn. Ct. App. 1985); *Plymouth-Carver Regional School Dist. v. David M. Crawley Assoc's Inc.*, 17 Mass. App. Ct. 901, 455 N.E. 2d 990 (1983); *AFSCME District Council 96 v. Indep. School Dist. No. 381, Two Harbors*, 351 N.W.2d 33 (Minn. Ct. App. 1984); *Iowa City Community School Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139 (Iowa 1983); *Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, 665 P.2d 1046 (Idaho 1983); *Foley Co. v. Grindsted Products, Inc.* 233 Kan. 339, 662 P.2d 1254 (1983); *AFSCME v. Dept. of Corrections*, 192 Ill. App. 3d 108, 548 N.E.2d 592 (Ill. App. 1989); *Maine State Employees Ass'n v. State*, 517 A.2d 58 (Me. 1986).

316. *Laborers Int'l Union of North Am., Local Union No. 964 v. County of Lawrence*, 128 Pa. Commw. 216, 563 A.2d 224 (1989).

317. *Id.* at 224.

318. *Id.* at 227.

319. *Id.* at 226.

320. *Id.*

321. *Id.* at 227.

322. 542 So. 2d 1327 (Fla. 1989).

resolution of the issue submitted to arbitration."<sup>323</sup> In *Schnurmacher*, since the arbitrator decided the issue submitted to him there was no merit to the contention that he exceeded his authority.<sup>324</sup>

*David Co. v. Jim W. Miller Construction, Inc.*<sup>325</sup> is a case which exemplifies the "general trend of courts, in the absence of limiting language in the contract itself, to accord judicial deference and afford flexibility to arbitrators to fashion awards comporting with the circumstances out of which the disputes arose."<sup>326</sup> Thus, in this case, the court confirmed an arbitration award which was equitable in nature. The panel required the contractor, whom the building owner alleged to have constructed buildings with numerous building defects, to purchase the land from the owner. The court affirmed that it was proper to require the responsible party to remedy the gross construction deficiency and bear the risk of potential future warranty liabilities.<sup>327</sup>

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

A court may vacate an arbitration award where the arbitrator refuses to hear evidence that is material to the controversy when that refusal results in substantial prejudice to the rights of a party.<sup>328</sup>

In *AFL-CIO v. Department of Corrections*,<sup>329</sup> the circuit court vacated an award on the ground that the arbitrator's refusal to hear material evidence by applying the exclusionary rule outside the realm of criminal law violated public

323. *Id.* at 1329. See also *Snyder*, 79 Md. App. at \_\_\_, 555 A.2d at 528 (arbitrator exceeded scope of authority by issuing award which was "beyond purview of the submission" which defined the arbitrator's jurisdiction); *Hetrick v. Weimer*, 67 Md. App. 522, 508 A.2d 522 (1986); *Fryer v. Nat'l Union Fire Ins. Co.*, 365 N.W.2d 249 (Minn. 1985); *City of Worcester v. Granger Bros., Inc.*, 19 Mass. App. 379, 474 N.E.2d 1151 (1985); *McDonald v. Hardee County School Bd.*, 448 So. 2d 593 (Fla. Dist. Ct. App. 1984), *review denied*, 456 So. 2d 1181 (Fla. 1984).

324. *Schnurmacher Holding*, 542 So. 2d at 1329.

325. 444 N.W.2d 836 (Minn. 1989).

326. *Id.* at 841. See also *Hooten Const. Co. v. Borsberry Const. Co.*, 108 N.M. 192, 769 P.2d 726 (N.M. 1989); *Stewart v. State Farm Mut. Auto Ins. Co.*, 104 N.M. 744, 726 P.2d 1374 (1986); *State Farm Fire & Cas. Co. v. Wise*, 150 Ariz. 16, 721 P.2d 674 (1986); *Missouri Mining, Inc. v. St. Joseph Light & Power Co.*, 703 S.W.2d 94 (Mo. Ct. App. 1985); *Moseley v. Brewer*, 139 Ariz. 540, 679 P.2d 563 (Ariz. Ct. App. 1984). *Contra* *City of DeKalb v. Local 1236*, 182 Ill. App. 3d 367, 538 N.E.2d 867 (1989) (although courts allow flexibility and deference to arbitrators to fashion awards, an award may not stand if it is contrary to public policy); *Aamot v. Eneboe*, 352 N.W.2d 647 (S.D. 1984) (court did not allow arbiter flexibility).

327. *David Co.*, 444 N.W.2d at 842.

328. U.A.A. § 12(a)(4). See *Wayne Insulation Co., Inc. v. Hex Corp.*, 534 A.2d 1279 (D.C. 1987); *Wildwoods of Lake Johnson Assocs. v. L.P. Cox Co.*, 88 N.C. App. 88, 362 S.E.2d 615 (1987); *McLeroy v. Waller*, 21 Ark. App. 292, 731 S.W.2d 789 (1987); *Golub v. Spivey*, 70 Md. App. 147, 520 A.2d 394 (1987), *cert. denied*, 310 Md. 2, 526 A.2d 954; *Farm Constr. Serv., Inc. v. Robinson*, 21 Mass App. 955, 487 N.E.2d 873 (1986).

329. 192 Ill. App. 3d 108, 548 N.E.2d 592 (1989).

policy.<sup>330</sup> The circuit court then remanded the case, stating that on remand the arbitrator must consider evidence he previously excluded.<sup>331</sup>

#### D. No Arbitration Agreement

If no arbitration agreement exists arbitrators have no authority to resolve disputes. Consequently, a court can vacate an award upon a showing that an arbitrator made an award in the absence of an arbitration agreement.<sup>332</sup>

In *Wigod v. Chicago Mercantile Exchange*,<sup>333</sup> the court held that persons not parties to a valid arbitration agreement cannot be compelled to submit to arbitration.<sup>334</sup> In this case, the court vacated the award, even though the plaintiff had agreed to abide by the Chicago Mercantile Exchange's arbitration rules, because the court found that the arbitration rules were not made compulsory under the express terms of the rules.<sup>335</sup>

In *Hot Springs County School District v. Strube Construction Co.*,<sup>336</sup> the court held that the parties' participation in the arbitration process amounted to a waiver of their right to dispute the existence of an arbitration agreement.<sup>337</sup>

#### E. Errors of Fact or Law

A mere error of fact or law made by the arbitrator is not sufficient grounds to vacate an award.<sup>338</sup> The appellate court in *Jontig v. Bay Metropolitan*

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330. *Id.* at \_\_\_, 548 N.E.2d at 594.

331. *Id.*

332. U.A.A. § 12(a)(5). *See also* *Marino v. Tagarès*, 395 Mass. 397, 480 N.E.2d 286 (1985).

333. 141 Ill. App. 3d 129, 490 N.E.2d 39 (1986).

334. *Id.* at 132, 490 N.E.2d at 41.

335. *Id.*

336. 715 P.2d 540 (Wyo. 1986).

337. *Id.* at 546. *See also* *Helmrichs v. Bank of Minneapolis & Trust Co.*, 349 N.W.2d 326 (Minn. Ct. App. 1984).

338. The U.A.A. does not provide for vacation on these grounds and courts generally follow this proposition holding that only those grounds statutorily listed in the U.A.A. are grounds for vacating an arbitration award. *See* *Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327 (Fla. 1989); *Hooten Const. Co. v. Borsberry Const. Co.*, 108 N.M. 192, 193, 769 P.2d 726, 727 (N.M. 1989) (court refused to vacate award where decision was based on such relevant evidence as a reasonable mind might accept as adequate to support the decision); *Gruman v. Hendrickson*, 416 N.W.2d 497 (Minn. Ct. App. 1987); *Arkansas Dep't of Parks and Tourism v. Resort Managers, Inc.*, 294 Ark. 255, 743 S.W.2d 389 (1988); *Kalish v. Illinois Educ. Ass'n*, 166 Ill. App. 3d 406, 519 N.E.2d 1031 (1988); *Anderson v. Willey*, 514 A.2d 807 (Me. 1986); *School Comm. of Quincy v. Quincy Educ. Ass'n*, 22 Mass. App. 914, 491 N.E.2d 672 (1986); *Wicomico County Educ. Ass'n v. Board of Educ.*, 59 Md. App. 564, 477 A.2d 279 (Md. Ct. Spec. App. 1984); *Massachusetts Bay Transp. Auth. v. Boston Carmen's Union, Div. 589*, 17 Mass. App. 104, 455 N.E.2d 1231 (1983), *appeal denied*, 390 Mass. 1106, 459 N.E.2d 824 (1984); *Cabus v. Dairyland Ins. Co.*, 656 P.2d 54 (Colo. Ct. App. 1982); *Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, 665 P.2d 1046 (Idaho 1983); *Foley Co. v. Grindsted Products, Inc.* 233 Kan. 339, 662 P.2d 1254 (1983).

*Transportation Authority*<sup>339</sup> held that the circuit court correctly vacated the award where it appeared, on the face of the award, that the arbitrator made an error of law so substantial that the award would have been different but for the error.<sup>340</sup>

In *Patrick v. Cherokee Insurance Co.*,<sup>341</sup> the court held that an award may be vacated as contrary to law when, had it been a jury verdict, the court could have entered a judgment notwithstanding the verdict.<sup>342</sup>

#### F. Award Would Not Have Been Granted by a Court

The fact that an award could not or would not have been granted by a court is not a ground for vacating or refusing to confirm the award.<sup>343</sup> In *Department of Public Safety v. Public Safety Employees Association*,<sup>344</sup> the trial court vacated the arbitrator's award on the ground that the award was based on gross error.<sup>345</sup> The Supreme Court of Alaska upheld the arbitrator's decision, recognizing the strong public policy favoring arbitration. The court also acknowledged that disputants would have little incentive to enter into arbitration if courts were allowed to vacate an award merely because they found their own interpretation to be better reasoned than the arbitrator's.<sup>346</sup> As long as the arbitrator's interpretation is reasonable in light of the circumstances and the scope of the award could have been reasonably foreseen, a reviewing court should not interfere with an arbitration award.<sup>347</sup>

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339. 178 Mich. App. 499, 444 N.W.2d 178 (1989).

340. *Id.* at 502-04, 444 N.W.2d at 180-81. See also *Azpell v. Old Republic Ins. Co.*, 382 Pa. Super. 255, 555 A.2d 168 (1989); *Texas West Oil & Gas Corp. v. Fitzgerald*, 726 P.2d 1056, 1061-62 (Wyo. 1986), *reh'g denied*, 749 P.2d 278 (Wyo. 1988) (statutory list of grounds is not exclusive and court may vacate for manifest mistake of law); *Bailey & Williams v. Westfall*, 727 S.W.2d 86 (Tex. Ct. App. 1987); *Prince George County Educator's Ass'n v. Board of Educ.*, 61 Md. App. 249, 486 A.2d 228 (1985), *cert. granted*, 492 A.2d 616; (arbitrator had exceeded his authority by making a clearly erroneous finding of fact; thus, the court vacated the award); *City of Worcester v. Granger Bros., Inc.*, 19 Mass. App. 379, 474 N.E.2d 1151 (1985); *Western Waterproofing Co. v. Lindenwood Colleges*, 662 S.W.2d 288 (Mo. Ct. App. 1983); *Taunton Mun. Light Plant v. Paul L. Gerringer & Assocs.*, 560 F. Supp. 1249 (D. Mass. 1983), *aff'd mem.*, 725 F.2d 664 (1st Cir. 1983); *Detroit Auto. Inter-Ins. Exch. v. Gavin*, 416 Mich. 407, 331 N.W.2d 418 (1982).

341. 354 Pa. Super. 427, 512 A.2d 24 (1986).

342. *Id.* at 429, 512 A.2d at 25 (citing Pennsylvania Arbitration Act).

343. U.A.A. § 12 (a). See *Minnesota State Patrol Troopers Ass'n v. State Dep't of Pub. Safety*, 437 N.W.2d 670 (Minn. Ct. App. 1989); *Bingham County Comm'n.*, 105 Idaho 36, 665 P.2d 1046; *David Co. v. Miller Constr., Inc.*, 428 N.W.2d 590 (Minn. 1988).

344. 732 P.2d 1090 (Alaska 1987).

345. *Id.* at 1093.

346. *Id.* at 1093-96.

347. *Id.* at 1096-97. See also *Prudential-Bache Sec. v. Schuman*, 483 So. 2d 888 (Fla. Dist. Ct. App. 1986).

### G. Validity of Award

Invalid awards are generally void and unenforceable and as such are generally subject to vacation.<sup>348</sup> When a party attacks the validity of an arbitral award, it bears the burden of sustaining the attack.<sup>349</sup>

In *Schmidt v. Midwest Family Mutual Insurance Co.*,<sup>350</sup> the court held that the arbitration award was valid and should be confirmed notwithstanding the insurer's claim of a right to trial de novo pursuant to a clause in the arbitration agreement which provided for a trial de novo if the award exceeded the statutory minimum.<sup>351</sup> The Supreme Court of Minnesota held the de novo clause invalid, noting that there are strong policy reasons for upholding arbitration awards. The court opined that the trial de novo provision thwarted the goals of arbitration of providing a speedy, informal, and inexpensive forum for resolving controversies between contracting parties.<sup>352</sup>

### H. Binding Effect of an Award

As a general rule, an arbitrator's decision is final and binding upon the parties.<sup>353</sup> Section 14 of the U.A.A. makes arbitration awards binding by giving courts limited authority to vacate the awards and by allowing a court order confirming an award to be enforced just like any other judicial judgment or decree.<sup>354</sup> An award must be binding because no one will arbitrate unless courts accord proper respect to an arbitrator's decision.

In *Mayor of Baltimore v. Ohio Casualty Insurance Co.*,<sup>355</sup> the court held that, for arbitration awards to be binding, there must have been notice of arbitration and a hearing at which evidence was received.<sup>356</sup> In this case the court found that no binding arbitration had taken place because there was no evidence of arbitration in the record.<sup>357</sup>

348. See *Harris v. Allied Am. Ins. Co.*, 152 Ill. App. 3d 88, 504 N.E.2d 151 (1987); *Allen v. McCall*, 521 So. 2d 182 (Fla. Dist. Ct. App. 1988).

349. *Container Technology v. J. Gadsden Pty., Ltd.*, 781 P.2d 119 (Colo. App. 1989).

350. 426 N.W.2d 870 (Minn. 1988).

351. *Id.* at 874.

352. *Id.* at 871, 874.

353. See *Melton v. Lyon*, 108 N.M. 420, 773 P.2d 732 (N.M. 1989); *Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327 (Fla. 1989); *Huntington Woods v. Ajax, Inc.*, 177 Mich. App. 351, 441 N.W.2d 99 (1989); *Eisen v. State Dep't of Pub. Welfare*, 352 N.W.2d 731 (Minn. 1984); *Foley Co. v. Grindsted Products, Inc.* 233 Kan. 339, 662 P.2d 1254 (1983); *Taunton Mun. Light Plant v. Paul L. Geringer & Assocs.*, 560 F. Supp. 1249 (D. Mass. 1983), *aff'd mem.*, 725 F.2d 664 (1st Cir. 1983); *Western Cas. & Sur. Co. v. Grudley*, 362 N.W.2d 100 (S.D. 1985).

354. U.A.A. § 14.

355. 50 Md. App. 455, 438 A.2d 933 (1982).

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

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

In *City of Lenexa v. Fairley Construction Co.*,<sup>358</sup> the court held that an "agreement to arbitrate did not have to specifically provide that parties agreed to be bound by arbitrator's decision, as arbitration is, by definition, binding."<sup>359</sup>

### I. Collateral Proceedings

In *Bertling v. Roadway Express, Inc.*,<sup>360</sup> the court held that the failure to utilize the statutory procedure for attacking the validity of an arbitration award precludes consideration of an attack on the validity of the award in a collateral proceeding.<sup>361</sup> In this case, after Bertling was discharged from Roadway, he filed a grievance. The arbitration panel upheld the discharge, stating that Bertling was discharged for just cause. Bertling then filed suit in court against Roadway for retaliatory discharge.<sup>362</sup> Since the issues were substantially the same, the court found that Bertling's failure to challenge the arbitration award under the statutory procedure precluded him from challenging the award by means of the retaliatory discharge proceeding.<sup>363</sup>

In *State v. Thomas Construction Co.*,<sup>364</sup> the court held that an award confirmed by a court has the same *res judicata* effect as any judgment.<sup>365</sup> The court noted that the parties are only precluded as to matters that were actually heard and covered by an award.<sup>366</sup>

### J. Vacation Based on Nonstatutory Grounds

Although courts generally hold that an arbitration award can be vacated only upon the grounds stated in the U.A.A.,<sup>367</sup> occasionally, a court will vacate an

358. 245 Kan. 316, 777 P.2d 851 (1989).

359. *Id.* at \_\_\_, 777 P.2d at 851. See also *Schmidt v. Midwest Family Mut. Ins. Co.*, 426 N.W.2d 870 (Minn. 1988) (arbitrator's decision was binding; trial de novo clause invalid because it violated public policy favoring arbitration); *Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, 665 P.2d 1046 (Idaho 1983).

360. 121 Ill. App. 3d 60, 459 N.E.2d 265 (1984).

361. *Id.* at 64, 459 N.E.2d at 267-68.

362. *Id.* at 61-62, 459 N.E.2d at 265-66.

363. *Id.* at 64-65, 459 N.E.2d at 267-68. See also *Phillips Petroleum Co. v. Arco Alaska, Inc.*, (Westlaw, States Library, Delaware cases file) (1988 W.L. 60380) (When an arbitrator is empowered by contract to determine the parties' interests, the court shall not actually or constructively vacate or otherwise supersede the award. If the court allowed this suit, as a practical matter it would have had the effect of vacating the previous arbitration award; therefore, 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).

364. 8 Kan. App. 2d 283, 655 P.2d 471 (1982).

365. *Id.* at 288, 655 P.2d at 471.

366. *Id.* at 289, 655 P.2d at 475.

367. U.A.A. § 12. See *Harris v. Haught*, 435 So. 2d 926 (Fla. Ct. App. 1983); *Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327 (Fla. 1989); *Container Technology v. J. Gadsden Pty., Ltd.*, 781 P.2d 119 (Colo. App. 1989).

award based on nonstatutory grounds. The most common reason cited by the court has been on grounds of public policy.<sup>368</sup>

### K. Need for Stating Reasons for Awards

The U.A.A. does not require arbitrators to give reasons for their awards,<sup>369</sup> and courts generally do not require arbitrators to justify their decisions.<sup>370</sup> Rarely is an arbitrator's award vacated for failure to specify or give reasons for the award.

## VIII. MODIFICATION OF ARBITRATION AWARDS

The focus of U.A.A. Section 9<sup>371</sup> is the modification, clarification, or correction of an arbitration award by the arbitrator. This provision allows the award to be corrected if application by a party is made within twenty days after delivery of the award. Modification may be made upon the grounds of miscalculation or mistake under Section 13,<sup>372</sup> or in order to clarify the award. The

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368. See *AFSCME v. Dept. of Corrections*, 192 Ill. App. 3d 108, 548 N.E.2d 592 (1989). Some courts reason that an award that violates public policy exceeds the authority of the arbitrator, finding statutory grounds for vacating an award that violates public policy. See *Konicki v. Oak Brook Racquet Club*, 110 Ill. App. 3d 217, 441 N.E.2d 1333 (1982). Other courts do not need a statutory ground and will vacate an award simply because it violates public policy. See *Caputo v. Allstate Ins. Co.*, 344 Pa. Super. 1, 495 A.2d 959 (1985) (court did not find arbitration award reviewable on specific statutory grounds but allowed review based on an alleged violation of public policy). See also *City of DeKalb v. Local 1236*, 182 Ill. App. 3d 367, 538 N.E.2d 867 (1989).

369. U.A.A. § 12.

370. See *Hilltop Const., Inc. v. Lou Apartments*, 324 N.W.2d 236 (Minn. 1982) (although a trial court has the authority to order an arbitrator to clarify or explain his reasoning process, the exercise of that power is purely discretionary); *Board of Educ., Unified School District No. 215 v. L.R. Foley Constr. Co.*, 237 Kan. 1, 697 P.2d 456 (1985).

371. U.A.A. § 9 states:

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

*Id.*

372. U.A.A. § 13 provides:

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

- (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
- (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
- (3) The award is imperfect in a matter of form, not affecting the merits of the

purpose of Section 9 is to allow arbitrators to correct mistakes or clarify awards without judicial action on the part of either party. This promotes speedy dispute resolution, a major goal of arbitration.<sup>373</sup>

Section 13 concerning modification or correction by the courts has been strictly applied in confirming awards. In *Minnesota Licensed Practical Nurses Association v. Bemidji Clinic*,<sup>374</sup> the court held that when an arbitration award does not specifically state that an individual is entitled to a specific type of relief, a suit brought to obtain such relief is a modification, not an enforcement, of the award.<sup>375</sup> The court refused the request for modification, stating that the award merely established a procedure for handling employee lay-offs, and did not specifically state that the plaintiff must be offered full-time work.<sup>376</sup>

### A. Miscalculation of Figures

U.A.A. Section 13(a)(1) allows the court to modify or correct the arbitration award when an evident miscalculation or mistake occurs.<sup>377</sup> In *Althoff, Inc. v. IFG Leasing Co.*,<sup>378</sup> the court modified an award to increase the amount paid to a lessor. The arbitrator had erroneously credited an item twice to the lessee in determining the amount awarded. The court expressed its reluctance to disturb the award, but held that this was a situation where the U.A.A. required modification due to an "evident miscalculation of figures."<sup>379</sup>

Absent such a readily ascertainable mistake, courts are generally reluctant to disturb the arbitrator's award. A party seeking to modify an unsatisfactory award in the case of *In re Marriage of Gavend*<sup>380</sup> was denied relief due to the absence of "mathematical errors [in the award] that would be patently clear to a reviewing court."<sup>381</sup> The court stated that the applicant for modification was actually seeking review of the award's merits, which was not permitted by the Colorado statute.<sup>382</sup>

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controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

*Id.*

373. See *Red Carpet Armory Realty Co. v. Golden W. Realty*, 644 P.2d 93, 94 (Colo. Ct. App. 1982); *Saville Int'l Inc. v. Galanti Group, Inc.*, 107 Ill. App. 3d 799, 802, 438 N.E.2d 509, 512 (1982).

374. 352 N.W.2d 65 (Minn. Ct. App. 1984).

375. *Id.* at 67.

376. *Id.* at 68.

377. U.A.A. § 13 (a)(1).

378. 704 P.2d 1302 (Wyo. 1985).

379. *Id.* at 1305.

380. 781 P.2d 161 (Colo. Ct. App. 1989).

381. *Id.* at 162.

382. *Id.* See COLO. REV. STAT. §§ 13-22-214 -215 (1987).

However, at least one court has modified an arbitration award due to an error in the method of its calculation, rather than due to a mistaken mathematical result. In *Presnell v. Allstate Insurance Co.*,<sup>383</sup> the court modified an arbitration award to reflect receipt of insurance proceeds. The court reduced the award by the amount of the settlement the party had received from the defendant's insurer in the auto accident.<sup>384</sup>

### B. Award Upon a Matter Not Submitted

U.A.A. Section 13(a)(2) allows the court to modify or correct an award when the arbitrators have awarded upon a matter not submitted to them.<sup>385</sup> In *Champion International Corp. v. United Paperworkers International Union*,<sup>386</sup> the union filed a seniority grievance and a scheduling grievance against the company. Although the union withdrew the seniority grievance prior to the arbitration proceeding, the arbitrator ruled in favor of the union on this matter.<sup>387</sup> On appeal, the court held that since the arbitrator had clearly ruled on a matter not submitted, modification of the award was required.<sup>388</sup> In *Bernard v. Kuhn*,<sup>389</sup> the parties entered into a compensation stipulation prior to arbitration which provided that the losing party would pay the arbitrator's fees. The arbitrator, however, ordered both parties to share the fees, as well as other arbitration costs. The court held that modification of the award was proper because the issue of arbitration fees was never submitted to the arbitrator.<sup>390</sup>

### C. Award in Conflict with a Statute

A court can modify an arbitration award that conflicts with a state statute.<sup>391</sup> In *Selected Risks Insurance v. Thompson*,<sup>392</sup> the trial court modified an arbitration award that reduced an injured claimant's insurance benefits by the amount of worker's compensation benefits he had received. The supreme court held that this reduction was in clear opposition to the Pennsylvania Motor Vehicle Financial Responsibility Law,<sup>393</sup> which provides that insurance benefits are not subject to reduction because of worker's compensation received.<sup>394</sup> Stating that the

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383. 434 N.W.2d 267 (Minn. Ct. App. 1989).

384. *Id.* at 269.

385. U.A.A. § 13(a)(2).

386. 779 F.2d 328 (6th Cir. 1985).

387. *Id.* at 330-31.

388. *Id.*

389. 65 Md. App. 557, 501 A.2d 480 (1985).

390. *Id.* at 565-66, 501 A.2d at 484.

391. *Upper Bucks County Area Vocational-Technical School Joint Comm'n v. Upper Bucks County Vocational Technical School Educ. Ass'n*, 91 Pa. Commw. 463, 497 A.2d 943 (1985).

392. 520 Pa. 130, 552 A.2d 1382 (1989).

393. PA. STAT. ANN. tit. 75 § 1735 (Purdon supp. 1990).

394. *Selected Risks Ins.*, 520 Pa. at 142, 552 A.2d at 1388.

statutory language was a persuasive statement as to legislative policy in dealing with set-offs, the court modified the award to include the amounts withheld.<sup>395</sup>

#### D. Procedural Issues

A party may be estopped from enforcing a trial de novo provision in an arbitration agreement where the party previously attempted to modify the award. In *Pierce v. Midwest Family Mutual Insurance Co.*,<sup>396</sup> Pierce attempted to claim benefits under the underinsured motorist provision of his automobile insurance policy. Pursuant to an agreement in the insurance policy, the matter was submitted to arbitration. After receiving a favorable arbitration award, Pierce moved to have the trial court confirm the award. Midwest moved to have the trial court modify the award. The trial court confirmed the arbitration award and denied Midwest's motion to modify. Midwest then moved for a trial de novo and vacation of the trial court's judgment. The trial court denied both motions. The appeals court affirmed the trial court on the ground that Midwest was estopped from using the trial de novo provision of the policy because it had earlier moved to modify the award. The appellate court stated that enforcement of the provision would allow Midwest three opportunities to gain a favorable result: arbitration, motion to modify or vacate, and trial de novo.<sup>397</sup> To allow such a result would hinder what the court referred to as the ultimate purpose of arbitration: "the voluntary, speedy, informal and relatively inexpensive resolution of disputes."<sup>398</sup>

### IX. TIMELINESS

The U.A.A. provides time limitations for motions to vacate,<sup>399</sup> modify,<sup>400</sup> and correct<sup>401</sup> an award. If a party to the arbitration fails to challenge the arbitrator's award within the prescribed statutory period, that party may have waived its right to object to the award at a later time.<sup>402</sup> Jurisdictions that have adopted the U.A.A. have interpreted these time limits as the point where the court is obligated to confirm the award if no challenge has been made.<sup>403</sup> The courts

395. *Id.* at 142-43, 552 A.2d at 1388.

396. 390 N.W.2d 358 (Minn. Ct. App. 1986).

397. *Id.* at 362.

398. *Id.* at 362-63.

399. *Id.* § 12(b).

400. U.A.A. § 13(a).

401. *Id.*

402. *Walter A. Brown, Inc. v. Moylan*, 509 A.2d 98 (D.C. 1986); *Sentry Eng'g and Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 338 S.E.2d 631 (1985).

403. *Dunlap v. State Farm Ins. Co.*, 377 Pa. Super. 165, 546 A.2d 1209 (1988); *Beriker v. Permagrain Products, Inc.*, 347 Pa. Super. 102, 500 A.2d 178 (1985). In Pennsylvania, a party may move the court to confirm an award after expiration of thirty days from the date the award was entered. The court "shall enter an order confirming the award . . ." PA. CONS. STAT. § 7342(b) (1980). The court in *Beriker* interpreted the statute as obligating the court to confirm if the award is not challenged

strictly apply the time limitations set in their state's version of the U.A.A.<sup>404</sup> to assure efficiency,<sup>405</sup> promote finality,<sup>406</sup> and require parties to promptly initiate challenges to awards.<sup>407</sup>

### A. Motions To Vacate

The U.A.A. requires that an application to vacate an award be made within ninety days after delivery of a copy of the award to the applicant.<sup>408</sup> The ninety day limitation on filing motions to vacate is common to most jurisdictions;<sup>409</sup> however a few states have set more stringent time limitations.<sup>410</sup>

In *Orr v. Orr*,<sup>411</sup> the appellant moved to vacate an award claiming there were procedural defects in the award. The court denied the motion as untimely and held that failure to comply with the statutory time limit will result in an absolute bar, even when the party seeking vacation has a valid reason under the

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within thirty days. 347 Pa. Super at 104, 500 A.2d at 179. See also § 11 of the U.A.A. which states that "[u]pon application of a party, the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13."

404. See *Great Am. Ins. Co. v. LeMieux*, 439 N.W.2d 733, 734 (Minn. Ct. App. 1989) ("Arbitration awards may be set aside only in limited circumstances and then only if a motion to vacate is brought within 90 days of receipt on the award.") (quoting MINN. STAT. § 572.19(2)(1989)); *Russell H. Lankton Constr. Co. v. LaHood*, 143 Ill. App. 3d 806, 493 N.E.2d 714 (1986); *Minnesota Licensed Practical Nurses Ass'n v. Bemidji Clinic*, 352 N.W.2d 65 (Minn. Ct. App. 1984); *Best Coin-Op, Inc. v. Clementi*, 120 Ill. App. 3d 892, 458 N.E.2d 1057 (1983).

405. *Bell Cold Storage, Inc. v. Over-the-Road City Transfer Union*, 673 F. Supp. 987, 991 (D. Minn. 1987).

406. *Great Am. Ins.*, 439 N.W.2d at 734-35.

407. *Haskell v. Forest Land & Timber Co.*, 408 So. 2d 811, 812 (Fla. Dist. Ct. App. 1982).

408. U.A.A. § 12(b).

409. *State Farm Mutual Automobile Insurance Co. v. Cabs, Inc.*, 751 P.2d 61 (Colo. 1988); *Walter A. Brown, Inc. v. Moylan*, 509 A.2d 98 (D.C. 1986); *Sentry Eng'g and Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 338 S.E.2d 631 (1985). See also ME. REV. STATE ANN. tit. 14, § 5938(2) (1964); MINN. STAT. ANN § 572.19(2) (West 1987); N.M. STAT. ANN. § 44-7-12(B) (1978); N.C. GEN. STAT. § 1-567.13(b) (1983); TEX. REV. CIV. STAT. ANN. art. 237(B) (Vernon 1973); WYO. STAT. § 1-36-114(b) (1977).

410. The time limit for filing a motion to vacate in Massachusetts is thirty days. MASS. GEN. LAWS ANN. ch. 251, § 12(b) (West 1984); Pennsylvania also has a thirty day time limit for filing motions to vacate. PA. CONS. STAT. § 7342(b) (1980); MICH. COMP. LAW ANN. § 769.9(2) (West 1967) requires that a motion to vacate an award must be made within twenty days.

411. 108 Idaho 874, 702 P.2d 912 (Idaho Ct. App. 1985).

state's arbitration statute to vacate.<sup>412</sup> Other courts also have held that procedural defects must be raised within the statutory time period.<sup>413</sup>

The ninety day limitation period clearly applies when there is a valid and enforceable arbitration clause.<sup>414</sup> However, the courts have held that even when the parties submit to arbitration without an arbitration agreement, the parties' remedy for obtaining review is by moving to vacate the award within the statutory time limitations.<sup>415</sup>

The court in *Jaffe v. Nocera*<sup>416</sup> would not allow a motion to vacate an award because the motion was filed more than ten months after the award was issued. The defendant argued that the statutory time limit would be tolled when he filed a timely motion for the arbitrator to reconsider the award. The court stated that tolling might be appropriate where the arbitrators must correct their own errors before reaching a final judgment, to prevent simultaneous consideration of the issue by the court on a motion to vacate and by the arbitrator.<sup>417</sup> However, the court found that none of these situations arose in this case and no useful purpose would be served by tolling the statute.<sup>418</sup>

In *Bernstein v. Grammercy Mills, Inc.*,<sup>419</sup> the Massachusetts Court of Appeals held that the statutory period for filing a motion to vacate was not tolled by seeking vacation of the award as a counterclaim to a party's motion to

412. *Id.* at 876, 702 P.2d at 914. *See also* *Burt v. Duval County School Bd.*, 481 So. 2d 55 (Fla. Dist. Ct. App. 1985) (board waived its right to object to the arbitrator's jurisdiction by not objecting within ninety days of the arbitrator's award); *Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, 665 P.2d 1046 (Idaho 1983).

413. *See* *Local 589, Amalgamated Transit Union v. Massachusetts Bay Trans. Auth.*, 397 Mass. 426, 491 N.E.2d 1053 (1986). In so holding, this court refused to follow the decision in *Painters Local No. 257 v. Johnson Indus. Painting Contractors*, 16 Mass. App. Ct. 67, 448 N.E.2d 1307 (1983), which held that a motion to vacate on jurisdictional grounds was not subject to the time period limitation. In ruling as it did, the *Amalgamated* court stated that since the legislature did not establish an exception to the statutory time limits, this court was not going to create one. 397 Mass. at 431, 491 N.E.2d at 1056.

414. *Great Am. Ins. Co. v. LeMieux*, 439 N.W.2d 733, 734 (Minn. Ct. App. 1989).

415. *Cady v. Allstate Ins. Co.*, 113 Idaho 667, 672, 747 P.2d 76, 81 (Idaho Ct. App. 1987); *Poire v. Kaplan*, 491 A.2d 529, 534 (D.C. 1985).

416. 493 A.2d 1003 (D.C. Ct. App. 1985).

417. *Id.* at 1012.

418. *Id.* The court in *Tung v. W.T. Cabe & Co.*, 492 A.2d 267 (D.C. Cir. 1985), similarly denied an application to vacate an award because it was not filed within ninety days of receipt of the award. The defendant argued that the statutory period for filing such motions was tolled when he filed an application for reconsideration of the award. The court held that the guidelines did not contain a procedure for reconsideration of an award and the statutory period was not tolled; *see also* *Best Coin-Op, Inc. v. Clementi*, 120 Ill. App. 3d 892, 458 N.E.2d 1057 (1983) (ninety day statutory period for filing motion to vacate not tolled by filing a motion for confirmation or by giving responding party time to file a response to the motion for confirmation).

419. 16 Mass. App. Ct. 403, 452 N.E.2d 231 (1983).

confirm.<sup>420</sup> Plaintiff and defendant submitted to arbitration a dispute over a sales commission defendant claimed plaintiff owed. The arbitrator found in favor of plaintiff, but the defendant refused to comply with the award. Plaintiff filed a petition for confirmation and enforcement and defendant counterclaimed to vacate the award. Plaintiff argued that defendant's counterclaim was untimely because it was raised more than thirty days after entry of the award. The defendant argued that his claim was not barred because it was subject to the time limitations under the statute for compulsory counterclaims.<sup>421</sup> The court held that even if the defendant's claim was a compulsory counterclaim the state's arbitration act would control and defendant's claim was untimely.<sup>422</sup>

Although some courts have held that there should be no judicial exceptions to these statutory time limitations,<sup>423</sup> there are a few exceptions where courts do not require a motion to vacate to be filed within ninety days of receipt of the award. The U.A.A. states that if a party bases its motion to vacate on grounds of corruption or fraud, the party seeking to vacate has ninety days from the time such grounds are known or should have been known.<sup>424</sup> Also, if the underlying arbitration proceeding was invalid, at least one court has allowed a party to file a motion to vacate outside the statutory period.<sup>425</sup>

The court in *Austin v. Stovall*<sup>426</sup> held that if an entire award is being attacked based on a void arbitration proceeding, the motion to vacate need not be made within the statutory time limits.<sup>427</sup> Austin and Stovall submitted to arbitration their dispute over money owed under a subcontract on a construction project. Stovall did not like the choice of arbitrator and chose another. Austin refused to participate and the arbitrator entered an award in Stovall's favor. The district court held that the arbitration proceeding was void due to the incorrect method of choosing an arbitrator. Austin's failure to timely move to vacate the award did not preclude him from attacking the award.<sup>428</sup>

However, in *Detroit Automobile Inter-Insurance Exchange v. Gavin*,<sup>429</sup> the Michigan Supreme Court held that a court in its discretion may allow a party to

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420. *But see* I.U.B.A.C. Local Union # 31 v. Anastasi Bros., Corp., 600 F. Supp. 92 (S.D. Fla. 1984), where the court permitted defendant to move to vacate an award as a counterclaim even though not within the statutory time limits, because defendant's claim was based on his allegation that the contract was illegal. The court reasoned that the validity of the contract must be determined before either the contract or the arbitration award could be enforced.

421. MASS. GEN. LAWS ANN. ch. 260, § 36 (West Supp. 1984).

422. *See Bernstein*, 16 Mass. App. Ct. at \_\_\_, 452 N.E.2d at 235 (section 36 of Mass. arbitration act is intended to "flush out objection to awards with dispatch").

423. *Amalgamated*, 397 Mass. at 430, 491 N.E.2d at 1056; *Bingham County Comm'n*, 105 Idaho at \_\_\_, 665 P.2d at 1049; *Haskell*, 408 So. 2d at 812.

424. U.A.A. § 12(b).

425. *Austin v. Stovall*, 475 So. 2d 1014, 1015 (Fla. Dist. Ct. App. 1985).

426. *Id.*

427. *Id.* at 1015.

428. *Id.*

429. 416 Mich. 407, 331 N.W.2d 418 (1982).

file an untimely motion to vacate if the party can show excusable neglect.<sup>430</sup> In this case, the motion was filed three days after the statutory time period had expired. The court held that since the delay was only three days and the defendant was not prejudiced thereby, the circuit court did not abuse its discretion by accepting the late motion.

### B. *Motions To Modify or Correct*

The U.A.A. provides that motions to modify or correct an award be made within ninety days after delivery of a copy of the award.<sup>431</sup> The court in *Russell H. Lankton Construction Co. v. LaHood*,<sup>432</sup> stated in dicta that characterizing a complaint as an application for modification will invoke the ninety day statutory limitations of the state's arbitration act.<sup>433</sup> The plaintiff won an arbitration award which required the defendant to pay the award within fifteen days of issuance of a Final Certificate of Payment from an Architect. Defendant was not required to pay until the certificate was issued. The plaintiff filed for judgment on the award over a year later. The court dismissed the complaint characterizing it as an untimely motion to modify.<sup>434</sup>

In *Quirk v. Data Terminal Systems*,<sup>435</sup> the plaintiff sought to file a motion to correct and affirm an award which contained a clerical error. The plaintiff relied on the Massachusetts Rules of Civil Procedure which state that the judge may correct clerical errors in arbitration awards notwithstanding the time limitations established in the states arbitration act.<sup>436</sup> The court held the motion was untimely because the statutory time limit had expired and further stated that since the procedural rule and the statutory time limit were in conflict, the statutory time limit was more specific and would control.<sup>437</sup>

There are a few states which have variations of U.A.A. Section 13(a). Massachusetts requires that applications for correction or modification be made within twenty days,<sup>438</sup> while Pennsylvania requires that all challenges to an arbitrator's decision be made within thirty days.<sup>439</sup>

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

431. U.A.A. § 13(a).

432. 143 Ill. App. 3d 806, 493 N.E.2d 714 (1986).

433. *Id.* at 807, 493 N.E.2d at 716.

434. *Id.*

435. 394 Mass. 334, 475 N.E.2d 1208 (1985).

436. *Id.* at 339-40, 475 N.E.2d at 1211-12.

437. *Id.*

438. MASS. GEN. LAWS ANN. ch. 251, § 9 (West 1988). See *Ciampi v. Chubb Group of Ins. Cos.*, 26 Mass. App. Ct. 941, 525 N.E.2d 1344 (1988).

439. PA. CONS. STAT. § 7342(b) (1980). See, e.g., *Beriker v. Permagrain Products, Inc.*, 347 Pa. Super. 102, 104, 500 A.2d 178, 179 (1985).

### C. Motions Demanding Arbitration

The U.A.A. does not provide a time limitation on filing demands for arbitration. The answer to the question of whether a demand for arbitration is timely depends on an interpretation of the arbitration agreement. Thus, the general consensus among courts today is to leave this decision to the arbitrator.<sup>440</sup>

The court in *Roseville Community School District v. Roseville Federation of Teachers*<sup>441</sup> held that the determination of timeliness is left to the discretion of the arbitrator, and the court will not reverse the arbitrator's determination. In this case the issue of timeliness depended on whether the dispute was deemed to be continuing or temporary in nature. The arbitrator found the grievance to be continuing and declared that the demand for arbitration was timely. Upon motion to vacate the award for error in the arbitrator's determination, the court refused to review the arbitrator's finding, holding that the determination was procedural and could be made only by the arbitrator.<sup>442</sup>

In *In re Cameron and Griffith*,<sup>443</sup> demand for arbitration was made more than four years after the dispute arose. Neither the contract in question nor a statute or court decision of the jurisdiction limited the period within which the parties could demand arbitration. The court compelled arbitration, stating that the parties had freely entered into the contract to arbitrate knowing that their dispute could be settled by arbitrators "according to what was good and equitable."<sup>444</sup>

However, some courts have held that a party may waive its right to compel arbitration if the party takes action inconsistent with that right.<sup>445</sup> The court in *Hansen v. State Farm Mutual Automobile Insurance Co.*<sup>446</sup> found that the defendant had waived its right to enforce the arbitration clause in the insurance contract because it had instituted litigation proceedings and engaged in extensive discovery for eleven months; it was not until it appeared that the suit was not proceeding in its favor that the defendant sought to compel arbitration.<sup>447</sup> The court stated that arbitration provides a quick and inexpensive litigation alternative,

440. *Cameron v. 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); *County of Durham v. Richards & Assocs.*, 742 F.2d 911 (4th Cir. 1984); *Roseville Community School Dist. v. Roseville Fed'n of Teachers*, 137 Mich. App. 118, 357 N.W.2d 829 (1984).

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

442. *Id.* at 124-25, 357 N.W.2d at 833. See also *County of Durham*, 742 F.2d at 815 (party sought to use timeliness as a defense to an action to compel arbitration, and although from the facts it appeared that the demand was untimely, the court nevertheless compelled arbitration holding that the determination of whether an action to compel arbitration was timely was reserved to the arbitrator).

443. 91 N.C. App. 164, 370 S.E.2d 704 (1988).

444. *Id.* at 165, 370 S.E.2d at 705.

445. *Falcon Steel Co. v. Weber Eng'g Co.*, 517 A.2d 281, 288 (Del. Ch. 1986); *Hansen v. State Farm Mut. Auto. Ins. Co.*, 112 Idaho 663, 735 P.2d 974 (Idaho 1987).

446. *Hansen*, 112 Idaho 663, 735 P. 2d 974.

447. *Id.* at 665, 735 P.2d at 981.

and those policies are thwarted when a party seeks to litigate before asserting its right to arbitration.<sup>448</sup>

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

The U.A.A. does not provide for a specific time period within which to seek confirmation or enforcement of arbitral awards.<sup>449</sup> Most state statutes similarly do not provide a time limitation for these actions. Thus, the courts look to analogous statutes to determine whether actions to confirm or enforce an award are timely. Two courts have adopted a six month limitation period.<sup>450</sup>

In *United Mine Workers District 4 v. Cyprus Emerald Resources Corp.*,<sup>451</sup> the union sought to enforce the arbitrator's award against Cyprus. The court, after recognizing that Pennsylvania's version of the U.A.A. does not specify a time limitation period for enforcement of actions, held that the National Labor Relations Act's (NLRA) six month statute of limitations<sup>452</sup> applied.<sup>453</sup> The court found that no state statute was sufficiently analogous and turned to federal law, concluding that this action was similar to actions brought under the NLRA.<sup>454</sup>

Similarly, the court in *Walkerville Education Association v. Walkerville Rural Communities School*<sup>455</sup> had to locate an applicable statutory time limitation to apply to actions seeking enforcement of an arbitration award. The Michigan court adopted the six month period found in the Public Employment Relations Act (PERA).<sup>456</sup> Although actions filed under PERA are not exactly analogous to actions to enforce an award, the court held that this statute was the best of any other statute it could have chosen, and that in using the six month period set out in PERA the court would be furthering the state's policy favoring the prompt resolution of labor disputes.<sup>457</sup>

#### E. *Appeals*

The U.A.A. does not provide any time limitations for filing an appeal.<sup>458</sup> U.A.A. Section 19(b) merely says that "[t]he appeal shall be taken in the manner

448. *Id.*

449. U.A.A. § 11 only states that "[u]pon application of a party, the Court shall confirm an award . . . ."

450. See *United Mine Workers Dist. 4 v. Cyprus Emerald Resources Corp.*, 681 F. Supp. 271 (W.D. Pa. 1988); *Walkerville Educ. Ass'n v. Walkerville Rural Communities School*, 165 Mich. App. 341, 418 N.W.2d 459 (1987).

451. *United Mine Workers*, 681 F. Supp. 271.

452. As found in § 10(b) of the NLRA.

453. *United Mine Workers*, 681 F. Supp. at 277.

454. *Id.* at 275-77.

455. *Walkerville*, 165 Mich. App. 341, 418 N.W.2d 459.

456. *Id.* at 345, 418 N.W.2d at 461.

457. *Id.*

458. See U.A.A. § 19.

and to the same extent as from orders or judgments in a civil action." Therefore, any statutory time limitations will have to be incorporated into each state's own version of the U.A.A.. At least two jurisdictions have enacted statutory time periods within which a party must appeal an arbitrator's award.<sup>459</sup>

In *Farmer v. Polen*,<sup>460</sup> the plaintiff received an arbitration award against the defendant and sought to have the award confirmed. The defendant filed a counterclaim for breach of contract. When the trial court denied the counterclaim, the defendant filed an amended answer to the petition seeking to rescind the contract. The trial court denied confirmation, but the appellate court reversed, holding that the defendant, by failing to challenge the validity of either the arbitration agreement or the subsequent arbitration proceedings within the ninety day statutory time limit, was deemed to have ratified and confirmed the contract.<sup>461</sup>

However, the Florida Supreme Court has held that this ninety day statutory period on filing appeals from arbitration awards applies only to issues that were submitted to the arbitration panel.<sup>462</sup> The defendant in *Meade v. Lumbermens Mutual*<sup>463</sup> was an insurance carrier who sought to appeal the award because it exceeded the policy limits. The trial court denied the appeal because the insurance carrier had filed it outside the ninety day statutory time period. The appellate court reversed, stating that the insurance company's defense had not been presented to the arbitration panel, and therefore, the ninety day statutory period did not apply.<sup>464</sup>

In *Lough v. Spring*,<sup>465</sup> the court held that the appeal filed by appellants for a trial de novo twenty-nine days after the dissolution of the court order staying the appeal period was untimely. In Pennsylvania, a party to a compulsory arbitration may appeal the arbitrator's award by seeking a trial de novo in the court of common pleas,<sup>466</sup> however, the appeal must be taken within thirty days after entry of the award.<sup>467</sup> The superior court held that the court of common pleas did not have the power to stay the appeal period while the court was considering a motion to strike, and the stay entered by the court of common pleas had no effect on the time for filing the appeal.<sup>468</sup>

459. Florida requires that appeals be filed within ninety days. See *Farmer v. Polen*, 423 So. 2d 1035 (Fla. Dist. Ct. App. 1982); *Meade v. Lumbermens Mut. Cas. Co.*, 423 So. 2d 908 (Fla. 1982). Pennsylvania requires appeals to be filed within thirty days. See, e.g., *Lough v. Spring*, 383 Pa. Super. 85, 556 A.2d 441 (1989).

460. 423 So. 2d 1035.

461. *Id.* at 1037.

462. See *Meade*, 423 So. 2d at 910.

463. 423 So. 2d 908 (Fla. 1982).

464. *Id.* at 909.

465. 383 Pa. Super. 85, 556 A.2d 441 (1989).

466. 42 PA. CONS. STAT. ANN. § 7361(d) (Purdon 1980).

467. *Lough*, 556 A.2d at 442 (citing PA. R. CIV. P. 1308(a)). See also *Hall v. Reeb*, 555 A.2d 926 (Pa. Super. 1989).

468. *Lough*, 556 A.2d at 444-45.

In *Seay v. Prudential Property & Casualty Insurance Co.*,<sup>469</sup> a procedural conflict arose between two Pennsylvania U.A.A. statutes concerning the commencement of the limitations period for appealing an arbitrator's award.<sup>470</sup> Prudential appealed an order denying its petition to vacate the arbitrator's award. The court quashed the order because final judgment had not been entered. When Seay's petition to confirm the arbitrator's award was granted, Prudential appealed again. The court quashed this appeal because it was filed more than thirty days after the order confirming the award. In recognizing the equivocation in the statutes (one permits an appeal from an order confirming an award and from final judgment<sup>471</sup> while the other requires final judgment to be entered for orders confirming awards),<sup>472</sup> the court determined that these two statutes should be read together and held that an order confirming an award must be reduced to judgment before it may be appealed.<sup>473</sup> Thus, Prudential's appeal was timely since it was filed within thirty days from final judgment of the order.<sup>474</sup>

#### F. Federal Causes of Action

Two federal appellate circuits have held that the ninety day limitation period is inapplicable to collective bargaining agreements: the Tenth Circuit in *Barnett v. United Airlines*,<sup>475</sup> and the Eleventh Circuit in *Hand v. International Chemical Workers Union*.<sup>476</sup> These two cases relied on the Supreme Court's decision in *DelCostello v. International Brotherhood of Teamsters*<sup>477</sup> in applying the statute of limitations found in the National Labor Relations Act (NLRA), rather than the corresponding statutory time limitations provided in the state's arbitration act.

In *DelCostello*, the Court applied the six month limitations period found in Section 10(b) of the NLRA to a Section 301 dispute. The court claimed that important federal policies were at stake, and the NLRA was more analogous to the Section 301 dispute than the applicable forum's arbitration act.

However, in a series of later decisions, the courts have applied the statutory limitations found in the U.A.A. to disputes involving Section 301 of the National Labor Management Relations Act (NLMRA).<sup>478</sup> These subsequent decisions distinguished *DelCostello* and narrowed the holding's application to its facts.<sup>479</sup>

469. 375 Pa. Super. 37, 543 A.2d 1166 (1988).

470. 42 PA. CONS. STAT. ANN. §§ 7316 -7320 (Purdon 1980).

471. *Id.* § 7320(a).

472. *Id.* § 7316.

473. *Seay*, 375 Pa. Super. 37, 543 A.2d 1166.

474. *Id.* at 41, 543 A.2d at 1168.

475. 738 F.2d 358 (10th Cir. 1984).

476. 712 F.2d 1350 (11th Cir. 1983).

477. 462 U.S. 151 (1983).

478. 29 U.S.C. §§ 141 -97 (1982). *See, e.g.,* *Gencorp, Inc. v. Local 850, United Rubber*, 622 F. Supp. 216 (W.D.N.C. 1985); *Plumber's Pension Fund, Local 130 v. Domas*, 778 F.2d 1266 (7th Cir. 1985).

479. *Delcostello*, 462 U.S. 151.

The court in *Plumber's Pension Fund, Local 130, U.A. v. Domas*<sup>480</sup> resolved the dispute by applying the statutory limitations contained in Illinois' arbitration act.<sup>481</sup> The court relied on the language used in *DelCostello* to distinguish the decision. The Supreme Court in *DelCostello* expressly stated that the case "should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere."<sup>482</sup>

The federal district court in *Gencorp, Inc. v. Local 850, United Rubber*<sup>483</sup> held that U.A.A. Section 12(b) applies to disputes involving Section 301 of the NLMRA. Gencorp sought to vacate the arbitration award in federal court on the ground that the arbitrator failed to consider certain evidence Gencorp had offered. The court, noting that no federal statute of limitations applies to Section 301, stated that "the timeliness of such a suit is to be governed by the most closely analogous statute of limitations under state law."<sup>484</sup> The court held that since the U.A.A.<sup>485</sup> provides for vacating an award on the grounds that the arbitrator failed to hear evidence material to the dispute, the U.A.A. would be the most analogous statute to apply in this case.<sup>486</sup>

## X. JUDGMENTS ON AWARDS

### A. Judgment on Award Entered by a Court

Section 14 of the U.A.A. provides that once a court enters a judgment or decree confirming, modifying, or correcting an award, this judgment shall be enforced in the same manner as any other court order.<sup>487</sup> Therefore, res judicata applies to judgments entered on arbitration awards<sup>488</sup> and to an arbitrator's final

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480. *Plumber's Pension*, 778 F.2d 1266.

481. *Cf. Ozite Corp. v. Upholsterers Int'l Union*, 671 F. Supp. 565 (N.D. Ill. 1987) (ninety day period in Illinois U.A.A. inapplicable; plaintiff filed a motion to compel; court stated that U.A.A. pertained to suits to vacate awards and no arbitration had occurred here yet).

482. *DelCostello*, 462 U.S. at 166. See also *Sheet Metal Workers Local Union No. 20 v. Baylor Heating and Air Conditioning Inc.*, 688 F. Supp. 462 (S.D. Ind. 1988), *aff'd*, 877 F.2d 547 (7th Cir. 1989) (court borrowed ninety day statutory time limit from Indiana's U.A.A. to determine timeliness of an action under NLMRA).

483. *Gencorp.*, 622 F. Supp. 216.

484. *Id.* at 218.

485. U.A.A. § 12(a)(4).

486. *Gencorp*, 622 F. Supp. at 217.

487. U.A.A. § 14 states:

Upon the granting of an order confirming, modifying, or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court.

*Id.*

488. *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985), *reh'g denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

award.<sup>489</sup> Furthermore, when a claim is properly adjudicated in arbitration, the pursuit of the same issue on a different theory is barred.<sup>490</sup> The application of res judicata and collateral estoppel to arbitrator's decisions emphasizes the finality of the arbitration process. Since a major purpose of arbitration is to avoid litigation, if dissatisfied parties were allowed to successfully appeal or relitigate the confirmation of the award, this goal would be defeated.

However, in *Sieberlich v. Burlington Northern Railroad*,<sup>491</sup> the court vacated an arbitration award although the party seeking vacation had not appealed the arbitrator's decision within the 20-day period dictated by local court rules. Stating that the Minnesota statute<sup>492</sup> regarding vacation of judgments governs over a local court rule, the appellate court confirmed the lower court's vacation of the award. Burlington Northern's attorney stated that he believed the arbitration was non-binding; therefore, he failed to realize he had only 20 days to appeal the award. The court held that this constituted "excusable neglect" under the state statute concerning vacation of judgments and allowed the untimely trial de novo request.<sup>493</sup>

### B. Prejudgment Interest

Although courts are generally unlikely to approve prejudgment interest in an arbitration award,<sup>494</sup> the Supreme Court of New Mexico held in *Hooten Construction Co. v. Borsberry Construction Co.*<sup>495</sup> that the trial court did not abuse its discretion in awarding prejudgment interest.<sup>496</sup> Borsberry had argued that prejudgment interest was not allowable because no contract provision authorized it, and two settlement offers had been made before the arbitration.<sup>497</sup> The court rejected these arguments, stating that the New Mexico arbitration statute<sup>498</sup> specifically allowed the court to award interest after considering several factors, including, but not limited to, whether or not settlement offers had been tendered.<sup>499</sup> Furthermore, when the contract does not preclude interest, as in the

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

490. *Save Charleston Found. v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (S.C. Ct. App. 1985).

491. 447 N.W.2d 896 (Minn. Ct. App. 1989).

492. MINN. R. CIV. P. 60.02 (1988).

493. *Sieberlich*, 447 N.W.2d at 898.

494. *See Coughlan Constr. Co. v. Town of Rockport*, 23 Mass. App. Ct. 994, 505 N.E.2d 203 (1987); *Arbitration of Wisniewski*, 403 N.W.2d 651 (Minn. 1987); *Lucas v. Am. Family Mut. Ins. Co.*, 403 N.W.2d 646 (Minn. 1987); *Wanschura v. Western Nat'l Mut. Ins. Co.*, 389 N.W.2d 927 (Minn. Ct. App. 1986); *Hedlund v. Citizen's Sec. Mut. Ins. Co. of Red Wing*, 377 N.W.2d 460 (Minn. Ct. App. 1985).

495. 108 N.M. 192, 769 P.2d 726 (N.M. 1986).

496. *Id.* at \_\_\_, 769 P.2d at 730.

497. *Id.*

498. N.M. STAT. ANN. § 56-8-4(B) (1986).

499. *Id.*

instant case, the award of prejudgment interest remains within the court's discretion.<sup>500</sup>

### C. Attorney Fees

Section 10 of the U.A.A. specifically excludes attorney fees from the list of expenses an arbitrator may award in the absence of a provision in the agreement to arbitrate.<sup>501</sup> Therefore, the court in *Bingham County Commission v. Interstate Electric Co.*<sup>502</sup> held that the plain meaning of Section 10 precludes the award of attorney fees in an arbitration award without the parties' consent.<sup>503</sup> However, some courts have allowed recovery of attorney fees under U.A.A. Section 14 when such expenses are incurred in proceedings to confirm, modify or correct an award.<sup>504</sup> Attorney fees incurred prior to and during arbitration are not recoverable.<sup>505</sup> Arbitrators are not authorized to award attorney fees because they do not have the expertise necessary to determine the appropriate compensation, but a court may award attorney fees to the successful party in arbitration.<sup>506</sup> A court's awarding attorney fees is appropriate when the party becomes entitled to judgment in its favor.<sup>507</sup>

In *Leaf v. State Farm Mutual Automobile Insurance Co.*,<sup>508</sup> the court held that when action to compel arbitration of insurance claims is reasonably necessary to pursue the claim rather than to resort to litigation, award of attorney fees is justified.<sup>509</sup> The insured in *Leaf* had advised State Farm of her decision to arbitrate a disputed claim rather than to litigate. When State Farm failed to respond the court held that this constituted "reasonable necessity" on the insured's part to resort to litigation to pursue her claim.<sup>510</sup> Therefore, since it was within

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500. *Id.*

501. U.A.A. § 10 reads: "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." *Id.*

502. 105 Idaho 36, 665 P.2d 1046 (Idaho 1983).

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

504. *County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 653 P.2d 1217 (1982). *But see Heyman v. Vonelli*, 413 So. 2d 1254 (Fla. Dist. Ct. App. 1982) (recoverable expenses limited to court costs).

505. *Bingham County*, 105 Idaho 36, 665 P.2d 1046; see also *St. Paul Fire and Marine Ins. Co. v. Sample*, 533 So. 2d 1196 (Fla. Dist. Ct. App.). *But see L.H. Airco v. Rapistan Corp.*, 446 N.W.2d 376 (1989) (court stated an exception to the rule that a party cannot recover attorney fees from prior arbitration proceedings when prior litigation expenses were occasioned by wrongful conduct of a non-party, and a subsequent action to recover attorney fees is maintained).

506. *Zac Smith & Co. v. Moonspinner Condominium Ass'n*, 472 So. 2d 1324 (Fla. Dist. Ct. App. 1985).

507. *State Farm Mut. Auto. Ins. Co. v. Stack*, 543 So. 2d 782 (Fla. Dist. Ct. App. 1989).

508. 544 So. 2d 1049 (Fla. Dist. Ct. App. 1989).

509. *Id.* at 1050.

510. *Id.*

the company's power to resolve the conflict and they failed to do so, Leaf was entitled to a reasonable attorney fee award.<sup>511</sup>

When a contractual arbitration clause expressly contains a provision authorizing recovery of attorney fees, this language must be strictly construed.<sup>512</sup> The court in *B & H Construction Co. v. Tallahassee Community College*<sup>513</sup> held that recovery of these contractual fees are not part of damages, which are subject to the mitigation principle, but rather are ancillary to damages.<sup>514</sup> The appellate court further stated that the trial court has discretion to deny the contractual attorney fees if the party seeking reimbursement is unsuccessful on the merits of the claim.<sup>515</sup>

Another approach courts have taken is to examine the nature of the dispute and the underlying statutory provisions which would be available in a court proceeding on the particular dispute.<sup>516</sup> This is in keeping with Section 14 of the U.A.A., which suggests that an arbitration award should be treated in an identical manner as a judicial decree.<sup>517</sup> A party cannot be expected to forego judicial recourse and agree to arbitrate a dispute if it will not be eligible for similar relief, including an award of attorney fees, in both proceedings. In *Consolidated Labor Union Trust v. Clark*,<sup>518</sup> the court allowed recovery of attorney fees when the issue arbitrated was a claim for benefits under the Employee Retirement Income Security Act (ERISA).<sup>519</sup> Although the award of fees under ERISA conflicted with the Florida Arbitration Code,<sup>520</sup> which expressly excluded recovery of attorney fees, the court concluded that the nature of the underlying complaint governed. Therefore, the award of attorney fees pursuant to ERISA was affirmed.

However, an excessive award of attorney fees may be stricken on appeal. In *St. Paul Fire and Marine Insurance Co. v. Sample*,<sup>521</sup> the trial court awarded fees of \$30,000 to the insured's attorney, although the total award to the insured was only \$19,230.77.<sup>522</sup> Since the parties had previously entered into a 40%

511. *Id.*

512. *B & H Constr. Co. v. Tallahassee Community College*, 542 So. 2d 382 (Fla. Dist. Ct. App. 1989).

513. *Id.*

514. *Id.* at 389; *see also* *Geisler v. Motorists Mut. Ins. Co.*, 556 A.2d 391, 398 (1989) (attorney fees awarded as part of a settlement did not constitute an award for bodily damages, which required set-off from policy limits.)

515. *B & H Constr.*, 542 So. 2d at 387.

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

517. U.A.A. § 14.

518. 498 So. 2d 547 (Fla. Dist. Ct. App. 1986).

519. 29 U.S.C. §§ 1001-1461 (1974).

520. FLA. STAT. § 682.11 (1981).

521. 533 So. 2d 1196.

522. *Id.* at 1197.

contingent fee arrangement, the trial court erred in allowing \$30,000 for attorney fees.<sup>523</sup>

## XI. APPEALS

Section 19 of the U.A.A. denotes those orders upon which an appeal may be taken. Many jurisdictions have enacted statutes that have appeals provisions identical or similar to Section 19 of the U.A.A.. The courts within these states generally construe this list of appeals to be exclusive, and any order not listed is not appealable.<sup>524</sup> For those states who do not view this list of appealable orders as exhaustive, the appealability of an order is determined based on its similarity to an injunction or on whether the particular order is deemed final.<sup>525</sup>

### A. Orders Compelling Arbitration

The U.A.A. does not expressly allow an appeal from an order compelling arbitration.<sup>526</sup> Most jurisdictions that have adopted the U.A.A. also hold that no right to appeal exists from an order compelling arbitration.<sup>527</sup> Two reasons given for not allowing these orders to be appealed are the policy of encouraging arbitration and the promotion of uniformity in the laws of those states which adopt the U.A.A..

The Arkansas Supreme Court recently decided *Chem-Ash, Inc. v. Arkansas Power & Light*.<sup>528</sup> Chem-Ash argued that the order was appealable under Rule 2(a) of the Arkansas Rules of Appellate Procedure.<sup>529</sup> The court held that an order compelling arbitration did not fit within the rule and, therefore, was not appealable.<sup>530</sup> In arriving at its conclusion, the court stated that if it was to allow an appeal from every order compelling arbitration, it would be frustrating the policy favoring arbitration.<sup>531</sup>

523. *Id.*

524. J.M. Huber v. Main-Erbauer, Inc., 493 A.2d 1048 (Me. 1985); St. Francis Xavier Hosp. v. Ruscon/Abco, 285 S.C. 584, 330 S.E.2d 548 (1985); Gardner v. Prudential Ins. Co., 332 Pa. Super. 358, 481 A.2d 654 (1984); Old Rochester Regional Teachers' Club v. Old Rochester Regional School Dist., 18 Mass. App. Ct. 117, 463 N.E.2d 581 (1984); Hodes v. Comprehensive Health Assocs., 9 Kan. App. 2d 36, 670 P.2d 76 (1983).

525. *E.g.*, Grane v. Grane, 130 Ill. App. 3d 332, 337-38, 473 N.E.2d 1366, 1370 (Ill. Ct. App. 1985).

526. See U.A.A. § 19(a).

527. Eckblad v. Farm Bureau Ins. Co., 371 N.W.2d 78 (Minn. Ct. App. 1985); Burgie v. League Gen. Ins. Co., 355 N.W.2d 466 (Minn. Ct. App. 1984); Gardner, 332 Pa. Super. 358, 481 A.2d 654; Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983).

528. 296 Ark. 83, 751 S.W.2d 353 (1988).

529. *Id.* at 84, 751 S.W.2d at 354.

530. *Id.*

531. *Id.*

The North Carolina Court of Appeals in *Bluffs, Inc. v. Wysocki*<sup>532</sup> held that an order compelling arbitration was not appealable. The court could find no basis outside the U.A.A. for allowing the appeal and dismissed the appeal.<sup>533</sup>

There are a few jurisdictions that have either not adopted Section 19 or that have found ways to allow an appeal from an order compelling arbitration.<sup>534</sup> In *Evansville-Vanderburgh School Corp. v. Evansville Teachers Association*,<sup>535</sup> the Indiana Court of Appeals held an order compelling arbitration to be appealable.<sup>536</sup> The policy reason stated behind its decision was that if the court withheld the right to appeal these orders, it would be counter-productive to compel parties to proceed with useless arbitration proceedings.<sup>537</sup>

### B. Orders Staying Arbitration Proceedings

Section 19 of the U.A.A. allows an appeal from an order granting an application to stay arbitration.<sup>538</sup> Those jurisdictions that have adopted the U.A.A. also allow such an appeal.<sup>539</sup> Although the case did not involve an arbitration agreement, the court in *Anthony Plumbing v. Attorney General*<sup>540</sup> mentioned in dicta that an appeal may be taken from an order granting a petition to stay arbitration.<sup>541</sup>

532. 68 N.C. App. 284, 286, 314 S.E.2d 291, 293 (1984).

533. *Id.*

534. *Evansville-Vanderburgh School Corp. v. Evansville Teachers Ass'n*, 494 N.E.2d 321 (Ind. App. 1986); *Board of Educ. v. Indian Prairie Educ. Ass'n*, 13 Ill. App. 3d 1040, 487 N.E.2d 1149 (1985); *County of Durham v. Richards & Assocs.*, 742 F.2d 911 (4th Cir. 1984).

535. *Evansville-Vanderburgh*, 494 N.E.2d 321.

536. *Id.* at 323.

537. *Id.* at 325 (citing IND. R. APP. P. 4(B)(6)).

538. Provided that the order is made under Section § 2(b) of the U.A.A., which states:

On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

*Id.*

539. *J.M. Huber*, 493 A.2d 1048; *Manalili v. Commercial Mowing & Grading*, 442 So. 2d 411 (Fla. Dist. Ct. App. 1983); *J & K Cement Constr. Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 456 N.E.2d 889 (1983).

540. 298 Md. 11, 467 A.2d 504 (1983).

541. Maryland's arbitration statute does not list any other arbitration order or judgments as specifically appealable. See MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to -234 (1980).

### C. Orders Denying the Compulsion of Arbitration

Ordinarily, an interlocutory order is not appealable because it is not a final order. However, the U.A.A. specifically allows a party to appeal an order denying the compulsion of arbitration.<sup>542</sup>

Most states which have adopted Section 19 of the U.A.A. also allow an appeal to be taken from an order denying the compulsion of arbitration.<sup>543</sup> The Kansas Court of Appeals in *Kansas Gas & Electric Co. v. Kansas Power & Light Co.*<sup>544</sup> held that even though an order denying an application to compel arbitration would be an unappealable interlocutory order under Kansas statutory law,<sup>545</sup> such an order is subject to interlocutory appeal.<sup>546</sup> The court in this case held that the Kansas U.A.A. overrides the conflicting Kansas statute.<sup>547</sup>

Although Illinois has not enacted Section 19 of the U.A.A., the courts have found a way to allow appeal of orders denying compulsion. In *J & K Cement Construction v. Montalbano Builders, Inc.*<sup>548</sup> and *Notaro v. Nor-Evan Corp.*,<sup>549</sup> the Illinois courts analogized the denial of a motion to compel arbitration to the denial of an injunction.<sup>550</sup> The court in *J & K Cement* held that the policy of the U.A.A. favors arbitration, and this policy would be frustrated if the courts were not allowed to enforce arbitration agreements.<sup>551</sup>

There are limited situations where courts have been unwilling to allow appeals from orders denying the compulsion of arbitration. In *NCR Corp. v. Mr. Penguin Tuxedo Rental, Inc.*,<sup>552</sup> the court held that an arbitration agreement was not binding on the parties; therefore, the provisions for interlocutory appeals did not apply.<sup>553</sup> The court then dismissed the appeal stating that it could find no justification outside the U.A.A. for allowing the appeal.<sup>554</sup>

542. U.A.A. § 19(a)(1).

543. *U.S. Insulation v. Hilro Constr. Co.*, 146 Ariz. 250, 705 P.2d 490 (Ariz. App. Ct. 1985); *Servomation Corp. v. Hickory Constr. Co.*, 70 N.C. App. 309, 318 S.E.2d 904 (1984), *aff'd after remand*, 74 N.C. App. 603, 328 S.E.2d 842 (1985), *rev'd*, 316 N.C. 543, 342 S.E.2d 853 (1986); *Blow v. Shaugnessy*, 68 N.C. App. 1, 313 S.E.2d 868 (1984); *Manalili v. Commercial Mowing & Grading*, 442 So. 2d 411 (Fla. Dist. Ct. App. 1983); *Vic Potamkin Chevrolet, Inc. v. Bloom*, 386 So. 2d 286 (Fla. Dist. Ct. App. 1980); *Sabates v. Int'l Medical Centers, Inc.*, 450 So. 2d 514 (Fla. Dist. Ct. App. 1984); *Gardner v. Prudential Ins. Co.*, 332 Pa. Super. 358, 481 A.2d 654 (1984).

544. 12 Kan. App. 2d 546, 751 P.2d 146 (1988).

545. KAN. STAT. ANN. § 5-418 (1986).

546. *Kansas Gas & Elec.*, 12 Kan. App. 2d at \_\_\_, 751 P.2d at 149-50.

547. *Id.*

548. 119 Ill. App. 3d 663, 456 N.E.2d 889 (1983).

549. 98 Ill. App. 2d 268, 456 N.E.2d 93 (1983).

550. An appeal may be taken from an interlocutory order granting, modifying, refusing, dissolving, or refusing to dissolve an injunction under ILL. R. CIV. P. 307(a)(1).

551. *J & K Cement*, 119 Ill. App. 3d at 681, 456 N.E.2d at 902.

552. 663 S.W.2d 107 (Tex. Ct. App. 1984).

553. *Id.* at 108.

554. *Id.*

### D. Orders Denying a Stay of Arbitration

Jurisdictions that have adopted the U.A.A. have not allowed appeals to be taken from orders denying a stay of arbitration.<sup>555</sup> The court in *J.M. Huber Corp. v. Main-Erbauer, Inc.*,<sup>556</sup> denied an appeal from a denial of a stay of arbitration because there was no provision for such an appeal in the Maine arbitration statute.<sup>557</sup> The court stated that the limitations imposed by Section 19 of the U.A.A. and the corresponding Maine statute<sup>558</sup> encouraged the use of arbitration and avoided delays caused by unnecessary interlocutory appeals.<sup>559</sup> A Kansas court adopted a similar philosophy in *Hodes Comprehensive Health Associates*<sup>560</sup> by stating that "the fact the legislature saw fit to specify in one code section the different orders and judgments from which appeals may be taken clearly indicates . . . an intention to restrict the appeals in such proceedings to the orders and judgments therein specified."<sup>561</sup>

Those jurisdictions that have not adopted Section 19 of the U.A.A. are more likely to allow an appeal on the ground that the denial of a right to appeal in such a situation denies a party the right to a full opportunity to challenge the existence of a valid arbitration agreement.<sup>562</sup> The Illinois court decided the cases of *Grane v. Grane*<sup>563</sup> and *Clark v. Country Mutual Insurance Co.*<sup>564</sup> in the same year. Each case held that an order denying a stay of arbitration was appealable. Illinois has not adopted Section 19 and, therefore, has no statutory list of appealable orders. Illinois allows an appeal of an arbitration award as it would an appeal in any civil case. The court in *Grane* held that the order denying a stay of arbitration was similar to an order granting or denying an injunction and appealable under Illinois Supreme Court Rule 307(a)(1) and 28 U.S.C. Section 1292(a)(1). The court in *Clark*, also holding that the order was injunctive in nature, relied on Illinois case law allowing such appeals.<sup>565</sup>

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555. *J.M. Huber*, 493 A.2d 1048; *St. Frances Xavier Hosp.*, 285 S.C. Ct. App. 584, 330 S.E.2d 548; *Hodes*, 9 Kan. App. 2d 36, 670 P.2d 76.

556. 493 A.2d 1048 (Me. 1985).

557. The pertinent Maine statute is identical to U.A.A. § 19.

558. ME. REV. STAT. ANN. tit. 14 § 5945(1)(B) (1964).

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

560. 9 Kan. App. 2d 36, 670 P.2d 76 (Kan. Ct. App. 1983).

561. *Id.* at \_\_\_, 670 P.2d at 78.

562. *See, e.g., Grane v. Grane*, 130 Ill. App. 3d 332, 339, 473 N.E.2d 1366, 1370-71 (1985).

563. 130 Ill. App. 3d 332, 473 N.E.2d 1366.

564. 131 Ill. App. 3d 633, 476 N.E.2d 4 (1985).

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

### E. Appeals From an Award

Section 19 of the U.A.A. also allows an appeal to be taken from (1) an order confirming or denying confirmation of an award;<sup>566</sup> (2) an order modifying or correcting an award;<sup>567</sup> (3) an order vacating an award without directing a rehearing;<sup>568</sup> and (4) a judgment or decree entered pursuant to the provisions of this act.<sup>569</sup>

The court in *Rural Water District No. 6 Butler County v. Ziegler Corp.*<sup>570</sup> granted the District's motion to confirm the arbitration award. Ziegler appealed this order but the appellate court affirmed the trial court's confirmation, holding that even though the right to appeal is statutorily given, the scope of review of an award is severely limited.<sup>571</sup>

In *Metropolitan Airports Commission v. Airports Police Federation*,<sup>572</sup> the arbitrator interpreted a collective bargaining agreement between the Metropolitan Airports Commission and the Metropolitan Airports Police Federation and found that the assignment of work, which was the subject of their dispute, was not covered by the agreement. Therefore, the grievance was not arbitrable. Finding the arbitrator had exceeded his powers, the district court vacated the arbitrator's award and remanded the matter for rehearing by another arbitrator. The Minnesota Supreme Court held that an order which vacated an award, but also ordered a rehearing, was not appealable because it did not fall within Minnesota's arbitration act.<sup>573</sup> However, the court continued to hold that regardless of whether the judgment was appealable under the state's arbitration act, the Minnesota Court of Appeals and the Minnesota Supreme Court have the authority to accept the appeal if the "interests of justice so warrant."<sup>574</sup>

In *Western Waterproofing Co. v. Lindenwood Colleges*<sup>575</sup> the Missouri Court of Appeals held that an order denying a petition to vacate an arbitration award is not an appealable order.<sup>576</sup> However, the court read the appeal from the denial of the motion to vacate as a premature appeal from the order confirming

566. U.A.A. § 19(a)(3).

567. *Id.* § 19(a)(4).

568. *Id.* § 19(a)(5).

569. *Id.* § 19(a)(6).

570. 9 Kan. App. 2d 305, 677 P.2d 573 (1984).

571. *Id.* at \_\_\_, 677 P.2d at 578. See also *Caputo v. Allstate Ins. Co.*, 344 Pa. Super. 1, 495 A.2d 959 (1985).

572. 443 N.W.2d 519 (Minn. 1989).

573. MINN. STAT. § 572.26.1(5) (1990).

574. *Metro. Airports Comm'n*, 443 N.W.2d at 523.

575. 662 S.W.2d 288 (Mo. Ct. App. 1983).

576. *Id.* at 289. See also *Dunlap v. State Farm Ins. Co.*, 377 Pa. Super. 165, 546 A.2d 1209 (1988) (no right to appeal from denial of motion to vacate exists under Pennsylvania's arbitration act; however, court is obligated to confirm award if there are no motions to modify or correct, and it is the order confirming the award that can be appealed).

the award, which is appealable in Missouri.<sup>577</sup> Since, in the area of arbitration, it is difficult to determine when a judgment is final, the court allowed the appeal. The court reasoned that under Rule 81.05(b) of the Missouri Rules of Court, when an a notice of appeal has been filed prematurely, such notice will be considered to have been filed immediately after the judgment becomes final.<sup>578</sup> Here the court treated the appeal as a good faith effort to appeal the confirmation of the award.<sup>579</sup>

### F. Procedure

Appeals permitted under the U.A.A. must be taken in the same manner as appeals from civil actions.<sup>580</sup> In *Haegle v. Pennsylvania General Inc. Co.*,<sup>581</sup> the trial court denied defendant's motion to vacate or modify the award. The plaintiff argued that since defendant did not file any objections to the judge's order, the defendant had not preserved any issues for appeal. The defendant argued, and the court agreed, that the proceeding before the court on the motion to vacate or modify was similar to a hearing on a petition and not a bench trial, and was therefore exempt from the rule requiring any objections to be filed within ten days. Basing its decision on Pennsylvania's U.A.A.,<sup>582</sup> the court held that an appeal from a court's order concerning an arbitral award shall be by petition and must follow the same procedure as an appeal from a hearing in a civil action.<sup>583</sup>

The case of *McGonigle v. Currence*<sup>584</sup> established the rule that a party's appearance at the arbitration hearing is not a requirement in perfecting an appeal. McGonigle appealed from an order dismissing a de novo appeal from an arbitrator's award. The trial court dismissed the de novo appeal for failure to appear at the arbitration hearing. The superior court reversed, stating that Section 7361(d) grants any party the right to appeal for a trial de novo in the court, provided they comply with all the necessary steps in perfecting the appeal, and appearance at the arbitration hearing is not such a step.<sup>585</sup>

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577. *Western Waterproofing*, 662 S.W.2d at 289 (construing MO. REV. STAT. § 435.440 (Supp. 1986)). See *Burgie v. League Gen. Ins. Co.*, 355 N.W.2d 466, 468-69 (Minn. Ct. App. 1984) (trial court's denial of motion to vacate acted as confirmation of award and was, therefore, immediately appealable); *Cyclone Roofing Co. v. David M. LaFave Co.*, 67 N.C. App. 278, 312 N.C. 224, 321 S.E.2d 872 (1984) (court allowed interlocutory appeal from confirmation of award even though other issues remained to be adjudicated, holding that by allowing an immediate appeal, court could avoid risk of inconsistent holdings).

578. *Western Waterproofing*, 662 S.W.2d at 289.

579. *Id.*

580. U.A.A. § 19(b).

581. 330 Pa. Super. 481, 479 A.2d 1005 (1984).

582. 42 PA. CONS. STAT. § 7317 (1980).

583. *Haelele*, 330 Pa. Super. at 490, 479 A.2d at 1009.

584. 387 Pa. Super 511, 564 A.2d 508 (1989).

585. *Id.* at 517, 564 A.2d at 511.

## XII. JUDICIAL PROCEEDINGS

## A. Jurisdiction

While arbitration is a non-judicial proceeding, the U.A.A. authorizes limited judicial involvement to facilitate its goals. Jurisdiction lies with the courts of competent jurisdiction in the state.<sup>586</sup> Generally, courts are permitted to determine whether a valid arbitration agreement exists<sup>587</sup> and to enforce<sup>588</sup> an agreement by compelling arbitration or, where appropriate, by staying arbitration or judicial proceedings.<sup>589</sup>

Once the award is made, the court may confirm,<sup>590</sup> correct, modify,<sup>591</sup> or vacate<sup>592</sup> the award. When it has granted an order confirming, correcting or modifying an award, the court enters judgment in conformity therewith.<sup>593</sup>

In proceedings to confirm, modify or vacate awards, courts rule upon a variety of issues raised by the parties. Courts generally rule on the arbitrability of the claim, although that responsibility may, in limited instances, be shifted to a state administrative agency or board.<sup>594</sup> The issue of waiver of the right to compel arbitration is to be determined by a court, not an arbitrator,<sup>595</sup> as is the res judicata effect of a prior arbitration award.<sup>596</sup> In Pennsylvania, a court may rule upon constitutional attacks upon an arbitrator's award.<sup>597</sup> A court may also have the power under a state's arbitration act to review an arbitration award rendered pursuant to a state law which prohibits review.<sup>598</sup>

An agreement to arbitrate confers jurisdiction upon the courts to enforce the agreement and to enter judgment. In *Bingham County Commission v. Interstate Electric Co.*,<sup>599</sup> the Idaho Supreme Court held that the arbitrator's award was not itself the judgment of a competent tribunal and that it became enforceable only when the court entered judgment thereon.

586. U.A.A. § 17.

587. *Id.* § 2(a).

588. *Id.* § 17.

589. *Id.* § 2.

590. *Id.* § 11.

591. *Id.* § 13.

592. *Id.* § 12.

593. *Id.* § 14.

594. *Board of Educ. for Dorchester County v. Hubbard*, 305 Md. 774, 506 A.2d 625 (1986); *Guaranty Nat. Ins. Co. v. Valdez*, 107 N.M. 764, 764 P.2d 1322 (N.M. 1988).

595. *Joba Constr. Co. v. Monroe County Drain Comm'r*, 150 Mich. App. 173, 388 N.W.2d 251 (1986).

596. *Monmouth Publ. Schools, Dist. No. 38 v. Pullen*, 141 Ill. App. 3d 60, 489 N.E.2d 1100 (1985); *L.R. Foy Constr. Co. v. Pro. Mechanical Constr.*, 13 Kan. App. 2d 188, 766 P.2d 196 (1988).

597. *Pennsylvania Social Servs. Union v. Commonwealth of Pa. Bd. of Probation & Parole*, 96 Pa. Commw. 461, 508 A.2d 360 (1986).

598. *Appeal of Upper Providence Police Lodge*, 93 Pa. Commw. 272, 502 A.2d 263 (1985).

599. 108 Idaho 181, 697 P.2d 1195 (Idaho Ct. App. 1983).

The arbitration agreement itself is the source of the court's jurisdiction to enforce it. Thus, in *Clark v. Country Mutual Insurance Co.*,<sup>600</sup> it was held that a court which issued an order compelling arbitration retained jurisdiction to later enforce, vacate, or modify the award.

Of course, the agreement confers jurisdiction only if there is a valid consent to arbitrate on the part of a party to an agreement. Thus, in *Gaslin, Inc. v. L.G.C. Exports, Inc.*,<sup>601</sup> the court held that it was the job of the courts, not arbitrators, to decide whether the arbitrator has jurisdiction over the parties and the subject matter to be arbitrated, as well as whether there was an agreement to arbitrate in the first place.<sup>602</sup>

Similarly, a state statute may provide a court with subject matter jurisdiction only if the agreement is subject to the state's code and provides for arbitration in that state. Thus, in the case of *Griffith v. ITT World Communications, Inc.*,<sup>603</sup> the court ruled that a Florida court had no jurisdiction to modify an arbitration award when the arbitration took place in New York.<sup>604</sup> The case resulted from a motion to modify filed in a Florida state court, but the action was removed to federal court; the federal court held its jurisdiction was derivative, and since the state court lacked jurisdiction, it, too, lacked jurisdiction.<sup>605</sup>

In *Adams v. Nelson*,<sup>606</sup> the North Carolina Supreme Court held the trial court was not ousted of its jurisdiction because the defendants failed to apply to the court by proper motion for arbitration.<sup>607</sup> Similarly, in *Hendrickson v. Moghissi*,<sup>608</sup> the Michigan Court of Appeals held that a trial court is not ousted of jurisdiction by the existence of an agreement to arbitrate; subject matter jurisdiction could only be removed by constitution or statute.<sup>609</sup> Thus, although circuit courts are empowered under the U.A.A. to enforce arbitration agreements, they are not divested of jurisdiction to hear, *inter alia*, malpractice claims.<sup>610</sup> The court remanded the case to the trial court to determine whether the defendant had timely asserted the existence of an arbitration agreement.<sup>611</sup>

In *Big Beaver Falls Area School District v. Big Beaver Falls Area Education Association*,<sup>612</sup> it was held that a court does not necessarily lose jurisdiction to review an arbitrator's award when proper service is not made within the statutory

600. 131 Ill. App. 3d 633, 476 N.E.2d 4 (1985).

601. 334 Pa. Super. 132, 482 A.2d 1117 (1984).

602. *Id.*

603. 611 F. Supp. 1567 (S.D. Fla. 1985).

604. *Id.* at 1568.

605. *Id.*

606. 313 N.C. 442, 329 S.E.2d 322 (1985).

607. *Id.* at 446, 329 S.E.2d at 324.

608. 158 Mich. App. 290, 404 N.W.2d 728 (1987).

609. *Id.* at 295-96, 404 N.W.2d at 730-31.

610. *Id.* at 296, 404 N.W.2d at 731.

611. *Id.* at 299, 404 N.W.2d at 732.

612. 89 Pa. Commw. 176, 492 A.2d 87 (1985).

period.<sup>613</sup> The school district initially made service by mail rather than deputized service as required by the statute.<sup>614</sup> However, before the thirty day statute<sup>615</sup> had run, the school board petitioned for review as provided for in the Pennsylvania Rules of Civil Procedure.<sup>616</sup> The appellate court reversed the trial court's dismissal for lack of jurisdiction, holding that a reissuance of the petition was proper where there was no sign that the party seeking review was trying to stall.<sup>617</sup>

Ordinarily, the U.A.A. does not allow appeals of orders denying motions to stay arbitration.<sup>618</sup> However, the Illinois version of the U.A.A. grants appellate courts jurisdiction to entertain such appeals.<sup>619</sup>

In *Paine, Webber, Jackson, and Curtis, Inc. v. Bennett*,<sup>620</sup> an appeal from an order denying a motion to compel arbitration was dismissed for lack of jurisdiction. The appellate court held that because the complaint upon which the appeal was based had been dismissed with leave to amend, it was not a final order and thus not appealable.<sup>621</sup>

However, in *Ripple v. Packard*,<sup>622</sup> an appellate court in the same state (Florida) ruled that such courts have jurisdiction to review otherwise non-appealable interlocutory orders when those orders depart from the requirements of law.<sup>623</sup> The trial court in that case had granted a motion to vacate an arbitrator's award without ordering a rehearing before the arbitrator.<sup>624</sup>

Although arbitrability of individual claims is normally a determination for a court, in limited instances this responsibility may be shifted to a state administrative agency or board.<sup>625</sup> In *Board of Education for Dorchester Co. v. Hubbard*,<sup>626</sup> an appellate court in Maryland ruled that the State Board of Education, rather than the circuit court, had primary jurisdiction over determining the arbitrability of claims concerning teaching certificate classification and class size.<sup>627</sup> In *Hubbard*, two disputes were involved. The first involved a group of Dorchester County teachers who objected to reductions in their teaching certificate classifications. The second involved a grievance filed by a group of Garrett County teachers who objected to their school board's failure to hire enough

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613. *Id.*

614. *Id.* at \_\_, 422 A.2d at 88.

615. 42 PA. CONS. STAT. ANN. § 7314(b) (1982).

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

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

618. U.A.A. § 19.

619. *Grane v. Grane*, 130 Ill. App. 3d 332, 335-39, 473 N.E.2d 1366, 1368-71 (1985).

620. 469 So. 2d 881 (Fla. Dist. Ct. App. 1985).

621. *Id.*

622. 471 So. 2d 1293 (Fla. Dist. Ct. App. 1985).

623. *Id.* at 1294.

624. *Id.*

625. *Board of Educ. for Dorchester County v. Hubbard*, 305 Md. 774, 506 A.2d 625 (1986).

626. *Id.*

627. *Id.* at 792, 506 A.2d at 634.

teachers to accommodate class size. Both groups of teachers sought arbitration. The Dorchester County School Board sought to stay arbitration, and the Garrett County School Board sought to vacate an arbitration award on the ground that the issues involved were not arbitrable. Both circuit courts found that the issues were arbitrable and ruled in favor of the respective teachers.<sup>628</sup> On appeal, the cases were consolidated, and the appellate court raised sua sponte the issue of whether the courts should defer to the State Board of Education.<sup>629</sup> Although the court held that the circuit courts were authorized to entertain the actions,<sup>630</sup> it ultimately found that the State Board of Education had primary jurisdiction.<sup>631</sup> The court justified judicial deference by recognizing that the Board's "paramount role . . . in interpreting the public education laws sets it apart from most administrative agencies."<sup>632</sup>

In *Karbowski v. Bradgate Associates*,<sup>633</sup> the appellate court held that the district court lacked subject matter jurisdiction to vacate an arbitration award. Noting that the Massachusetts U.A.A. did not define "court", the appellate court looked to another section of the statute<sup>634</sup> which specified that the proper jurisdiction to file the initial application to vacate was the superior court.<sup>635</sup>

In *Board of Education v. Illinois Education Labor Relations Board*,<sup>636</sup> the court ruled that the Illinois Educational Labor Relations Board has jurisdiction to render an arbitration award in response to a labor grievance under the U.A.A..<sup>637</sup> In *Massachusetts Bay Transit Authority v. Boston Carmen's Union, Division 589*,<sup>638</sup> the court noted that courts may have jurisdiction to decide disputes when arbitration would be contrary to public policy.<sup>639</sup> However, in that case, it found no such conflict.<sup>640</sup>

In *Rustad v. Rustad*,<sup>641</sup> the court held that once it acquired jurisdiction over a divorce case, no subsequent agreement to arbitrate disputes involved in the divorce could divest it of jurisdiction.<sup>642</sup>

628. *Id.* at 781-85, 506 A.2d at 628-30.

629. *Id.* at 785-87, 506 A.2d at 630-31.

630. *Id.* at 787, 506 A.2d at 631.

631. *Id.*

632. *Id.* at 791, 506 A.2d at 633. Note that while the court vested primary jurisdiction in the Board rather than itself, a body independent from the arbitration proceeding was given the power to determine arbitrability.

633. 25 Mass. App. Ct. 526, 520 N.E.2d 504 (1988).

634. MASS. GEN. L. ch. 251, § 17 (1960).

635. *Karbowski*, 25 Mass. App. Ct. at \_\_\_, 520 N.E.2d at 506.

636. 170 Ill. App. 3d 490, 524 N.E.2d 711 (1988), *appeal denied*, 122 Ill. 2d 569, 530 N.E.2d 239.

637. ILL. REV. STAT. ch. 10, ¶¶ 101-23 (1983).

638. 17 Mass. App. Ct. 104, 455 N.E.2d 1231 (1983).

639. *Id.* at \_\_\_, 455 N.E.2d at 1234.

640. *Id.* at \_\_\_, 455 N.E.2d at 1235.

641. 68 N.C. App. 58, 314 S.E.2d 275 (1984).

642. *Id.* at 60-62, 314 S.E.2d at 277-78.

### B. Standing

In *Svoboda v. Department of Mental Health & Developmental Disabilities*,<sup>643</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 the employees alleged or proved that the union did not adequately represent them in arbitration proceedings.<sup>644</sup> In that case, company rules allowed an individual employee to bring a grievance on his own without the aid of his union.<sup>645</sup> The court held that the word "parties" in the Illinois Public Relations Act,<sup>646</sup> which limited actions seeking to vacate an arbitrator's award to "parties" to a collective bargaining agreement,<sup>647</sup> included not only unions and employers, but individual employees.<sup>648</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 Relations Act (which is subject to the Illinois U.A.A.) does not preclude standing to petition to vacate an arbitration award.<sup>649</sup>

In *Eisen v. Minnesota*,<sup>650</sup> the court held that since the U.A.A. does not define the word "party", it should look to the collective bargaining agreement for a definition. In that case, only the union was deemed to be a party; thus, the complaint was dismissed since the complainant (an aggrieved employee) was not a party with standing to challenge the arbitrator's decision.

### C. Procedural Matters

Challenges to an arbitrator's jurisdiction must be made within the statutory period,<sup>651</sup> as must challenges to the award itself.<sup>652</sup> Timeliness is considered a jurisdictional matter.<sup>653</sup> In Massachusetts, the initial application to vacate an award must be filed with the superior court, not the district court or any other court.<sup>654</sup>

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643. 162 Ill. App. 3d 366, 515 N.E.2d 446 (1987).

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

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

646. ILL. REV. STAT. ch. 48, ¶¶ 1601-27 (1984).

647. *Id.*, ¶ 1616.

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

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

650. 352 N.W.2d 731 (Minn. 1984).

651. *Burt v. Duval County School Bd.*, 481 So. 2d 55 (Fla. Dist. Ct. App. 1985). *See also supra* Section IX., Timeliness.

652. *Beriker v. Permagrain Products, Inc.*, 347 Pa. Super. 102, 104, 500 A.2d 178, 179 (1985). *See also supra* Section IX., Timeliness.

653. *Lough v. Spring*, 383 Pa. Super. 85, 91-92, 556 A.2d 441, 444 (1989).

654. *See Karbowski v. Bradgate Assocs.*, 25 Mass. App. Ct. 526, 520 N.E.2d 504 (1988); *supra* notes 48-50 and accompanying text.

## D. Venue

Arbitrations which are not subject to the state's code or which take place outside that state may not be challengeable in that state's court.<sup>655</sup>

## XIII. JUDICIAL REVIEW

Because arbitration is an alternative dispute resolution technique favored by the courts<sup>656</sup> and chosen by the parties for its informal, expeditious, and inexpensive character,<sup>657</sup> the courts have exercised judicial restraint<sup>658</sup> in reviewing arbitration proceedings. Courts, recognizing that the parties have chosen by mutual agreement both the forum and the issues to be arbitrated,<sup>659</sup> are reluctant to interfere. Because the parties have expressly chosen arbitration over judicial proceedings, legislatures and the courts accord great deference to the finality of its results<sup>660</sup> and encourage enforcement of arbitration decisions.<sup>661</sup>

Since the advantages of arbitration exist only when the courts view arbitration as the end rather than the beginning of litigation,<sup>662</sup> the preeminent value is finality. The courts manifest this value by imposing strict procedural requirements<sup>663</sup> and a heightened standard of review on challenges to arbitration.<sup>664</sup> Thus, there is a "presumption of validity" accorded to arbitration decisions.<sup>665</sup> It should be noted, however, that while this strict review standard applies to the

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

656. See, e.g., *Snyder v. Berliner Const. Co., Inc.*, 79 Md. App. 29, 33, 555 A.2d 523, 525 (1989) (noting that under the Maryland U.A.A., "[S]uits to compel arbitration and suits to stay court action pending arbitration are now to be viewed as 'favored' actions." (quoting *Bel Pre Medical Center, Inc. v. Frederick Contractors, Inc.*, 21 Md. App. 307, 320 A.2d 558 (1974), *rev'd on other grounds*, 274 Md. 307, 334 A.2d 526 (1975)).

657. *Schmidt v. Midwest Family Mut. Ins. Co.*, 426 N.W.2d 870, 873 (Minn. 1988).

658. *Helmrichs v. Bank of Minneapolis & Trust Co.*, 349 N.W.2d 326, 327 (Minn. Ct. App. 1984).

659. *Schmidt*, 426 N.W.2d at 873.

660. *Melton v. Lyon*, 108 N.M. 420, 773 P.2d 732 (N.M. 1989) (finality cannot be upset except under exceptional circumstances—possible bias of arbitration who formerly worked for competitor of a party insufficient under facts of case).

661. *Barclay Townhouse Ass'n v. Messersmith*, 67 Md. App. 493, 508 A.2d 507 (1986); *Snyder*, 79 Md. App. at 35, 555 A.2d at 525.

662. *Bd. of Educ. of Prince George's County v. Prince George's County Educators' Ass'n, Inc.*, 309 Md. 85, 98, 522 A.2d 931, 932 (1987).

663. *Lough v. Spring*, 383 Pa. Super. 85, 556 A.2d 441 (1989) (failure to comply with strict procedural requirements). *But see McGonigle v. Currence*, 387 Pa. Super. 511, 564 A.2d 508 (1989) (failure to appear at arbitration hearing not held to constitute waiver of right to appeal de novo from award).

664. *Barclay*, 67 Md. App. at 496, 508 A.2d at 509.

665. *Matter of Wyoming Game and Fish Comm'n*, 773 P.2d 941 (Wyo. 1989).

trial court's review of the arbitrator, it does not apply to the appellate court's review of the trial court.<sup>666</sup>

The scope of review of the arbitration is normally limited to express statutory grounds defined in the U.A.A.<sup>667</sup> In some instances and jurisdictions, however, the scope may be determined by another source. For example, the document which served as the source of the arbitration,<sup>668</sup> another statute,<sup>669</sup> or the common law<sup>670</sup> may be the preferred source.

In Pennsylvania (and Maryland), there is a statutory presumption that use of the U.A.A. in establishing the scope of review is not intended unless explicitly included in the arbitration agreement.<sup>671</sup> Non-U.A.A. arbitrations in Pennsylvania (e.g., those governed by "Act 111" involving public employees,<sup>672</sup> the common law,<sup>673</sup> or a collective bargaining agreement) are subject to review under a "narrow certiorari" standard which does not include errors of law or fact.<sup>674</sup> However, arbitrations provided for in agreements prior to enactment of the Pennsylvania U.A.A. (i.e., under the Pennsylvania Arbitration Act of 1927)<sup>675</sup> are subject to a "contrary to law" standard that is the equivalent of a holding that the ruling, if it was a jury verdict, would justify a judge's entry of a judgment notwithstanding the verdict.<sup>676</sup>

Maryland also possesses a statutory presumption that use of the U.A.A. is not intended unless explicitly included in the agreement.<sup>677</sup> However, under

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666. See, e.g., *Michael-Curry Cos. v. Knutson Shareholders Liquidating Trust*, 449 N.W.2d 139 (Minn. 1989).

667. See *Jackson Trak Group v. Mid States Port Auth.*, 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 arbitrator's decision limited to IDAHO CODE § 7-912 (1986)). See also *Boulder City v. General Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985).

668. See *Jackson Trak Group*, 242 Kan. at 694, 751 P.2d at 127.

669. E.g., statutes governing public employees such as Pennsylvania's "Act 111". *City of Philadelphia v. Fraternal Order of Police, Lodge No. 5*, 565 A.2d 1232 (Pa. Commw. 1989).

670. *Int'l Ass'n of Firefighters, Local 1619 v. Prince George's County*, 74 Md. App. 438, 538 A.2d 329 (1988) (common law is used unless the collective bargaining agreement specifies U.A.A.).

671. *Popskyj v. Keystone Ins. Co.*, \_\_\_ Pa. Super. \_\_\_, 565 A.2d 1184 (1989); *Int'l Ass'n of Firefighters*, 64 Md. App. at \_\_\_, 538 A.2d at 331. See MD. CTS. & JUD. PROC. CODE ANN. § 3-206(b) (1984 Repl. Vol.).

672. *Fraternal Order of Police*, 565 A.2d at 1234 (discussing 43 PA. CONS. STAT. §§217.1 through 217.10 (1982) ("Act 111")).

673. Pennsylvania and Maryland create a presumption that the common law shall govern the issue unless the agreement expressly provides for statutory review. See *Derry Township Mun. Auth. v. Solomon & Davis, Inc.*, 372 Pa. Super. 213, 539 A.2d 405 (1988); *Messersmith, Inc. v. Barclay Townhouse Assocs.*, 313 Md. 652, 659 n.2, 547 A.2d 1048, 1051 n.2 (Md. Ct. App. 1988); *Int'l Ass'n of Firefighters*, 538 A.2d at 331.

674. See, e.g., *Fraternal Order of Police*, 565 A.2d at 1234. This Pennsylvania standard has been handed down by its Supreme Court.

675. See 42 PA. CONS. STAT. ANN. § § 7301-7362, 7302(d)(2)(1982); *Geisler*, 556 A.2d at 392-93.

676. *Geisler v. Motorists Mut. Ins. Co.*, 556 A.2d 391, 393 (Pa. Super. 1989) (citing historical note to § 7302(d)(2)); *Winters v. Erie Ins. Group*, 367 Pa. Super. 253, 532 A.2d 885 (1987).

677. See *Messersmith*, 547 A.2d at 1051 n.2. See also *Int'l Ass'n of Firefighters*, 538 A.2d at 331; MD. CTS. & JUD. PROC. CODE ANN. § 3-206(b) (1984 Repl. Vol.).

Maryland common law, "an award is subject to being vacated for a 'palpable mistake of law or fact . . . apparent on the face of the award' or for a 'mistake so gross as to work manifest injustice.'"<sup>678</sup>

Generally, then, the presumption of validity can only be overcome by a showing that an express provision for vacating an award under the U.A.A. is present<sup>679</sup> or that the arbitrator exceeded her power.<sup>680</sup> Mistakes of law or fact are not grounds to second-guess the arbitrator;<sup>681</sup> review of such questions is not de novo,<sup>682</sup> and problems are the "misfortune of the party"<sup>683</sup> which elected the arbitration forum.<sup>684</sup> Nor may a party collaterally attack an arbitrator's decision if it ignores the arbitration act and does not file a motion to vacate.<sup>685</sup>

In the absence of a statutorily-based scope of review, the Nevada Supreme Court ruled in *New Shy Clown Casino, Inc. v. Baldwin*<sup>686</sup> that the district court was without power to rule that one party to an arbitration was the "successful party" and thus entitled to attorney's fees, when the arbitrator had ordered fees

678. *Id.* (quoting *Prince George's County Educators' Ass'n, Inc.*, 309 Md. at 105, 522 A.2d at 940).

679. The following grounds, from the Kansas U.A.A. are typical:

- 1) The award was procured by corruption, fraud or other undue means;
- 2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
- 3) The arbitrators exceeded their powers;
- 4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of K.S.A. 5-405 [U.A.A. hearing provision], as to prejudice substantially the rights of a party; or
- 5) There was no arbitration agreement and the issue was not adversely determined in proceedings under K.S.A. 5-402 [U.A.A. Proceedings to compel or stay arbitration] and the party did not participate in the arbitration hearing without raising the objection; But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

KAN. STAT. ANN., 5-412(a)(1987).

680. *See, e.g.*, ILL. REV. STAT. 1985, ch. 10, ¶ 112(a)(3) (1989). *Kilianek v. Kim*, 192 Ill. App. 3d 139, 548 N.E.2d 598 (1989).

681. *In re Marriage of Gavend*, 781 P.2d 161 (Colo. Ct. App. 1989).

682. *Jackson Trak Group*, 751 P.2d at 127; *Cady*, 747 P.2d at 79 (trial de novo would defeat purpose of U.A.A.); *Lorenzini v. Group Health Plan, Inc.*, 753 S.W.2d 106, 108 (Mo. Ct. App. 1988) (arbitrator's erroneous interpretation of contract does not violate his power or authority under MO. REV. STAT. § 435.405.1 (1986)).

683. *Cameron and Griffith*, 91 N.C. App. 164, 165, 370 S.E.2d 704, 705 (1988) (improper interpretation of statute of limitations).

684. *Id.*

685. *Prudential Property & Cas. Ins. v. McDaniel*, 342 Pa. Super. 557, 493 A.2d 731 (1985) (party moved instead for declaratory judgment).

686. 737 P.2d 525 (Nev. 1987).

split notwithstanding provision in the statute providing that fees were to be awarded to the "successful party" in arbitration proceedings.<sup>687</sup>

There are exceptions to the rule that even mistakes of law are not grounds for a challenge. Pennsylvania's version of the U.A.A. provides that an arbitrator's holding may be reversed if it is contrary to law.<sup>688</sup> (This explains the disproportionate number of cases reported from Pennsylvania!)

The Michigan Supreme Court held in *Renny v. Port Huron Hospital*<sup>689</sup> that a court may find, as a matter of law, that an arbitration proceeding<sup>690</sup> "did not comport with elementary [procedural] fairness"<sup>691</sup> and thus send the issue of whether an employee was fired for just cause<sup>692</sup> to a jury.<sup>693</sup>

687. Parties seeking refund of a security deposit were awarded \$137,000 of the approximately \$220,000 they sought. The arbitrator then ordered each party to be responsible for their own attorney's fees, concluding that neither party was completely successful. *Id.* at 525. The district court had found the plaintiff to be the "successful party" and awarded it attorney's fees.

688. See Pa. U.A.A. of 1980, 42 PA. CONS. STAT. § 7302(d)(2)(1982):

Where this paragraph is applicable a court in reviewing an arbitration award pursuant to this subchapter shall notwithstanding any other provision of this subchapter, modify or correct the award 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.

*Id.* (quoted in *Popsky*, 565 A.2d at 1186).

689. 427 Mich. \_\_\_, 398 N.W.2d 327 (Mich. 1986).

690. The proceeding involved was unilaterally established by the employer and consisted of a joint employer-employee grievance board which the court distinguished from arbitration. *Id.* at \_\_\_, 398 N.W.2d at 336-38. "However, this Court recently agreed with the United States Supreme Court that a decision of a joint employer-employee grievance committee should be granted the same deference as that afforded an independent arbiter." *Id.* at 337 (citing *Fulgham v. United Parcel Service*, 424 Mich. 89, 378 N.W.2d 472 (1985)).

691. The court found the following essential elements necessary to fair adjudication in administrative and arbitration proceedings:

- 1) Adequate notice to persons who are to be bound by the adjudication;
- 2) The right to present evidence and arguments and the fair opportunity to rebut evidence and argument by the opposing argument;
- 3) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status;
- 4) A rule specifying the point in the proceeding when a final decision is rendered; and
- 5) Other procedural elements as may be necessary to ensure a means to determine the matter in question. These will be determined by the complexity of the matter in question, the urgency with which the matter must be resolved and the opportunity of the parties to obtain evidence and formulate legal contentions.

*Renny*, 427 Mich. at \_\_\_, 398 N.W.2d at 338 (citing RESTATEMENT (SECOND) JUDGMENTS, §§ 83(2) and 84(3)(b)).

The court found that the plaintiff received inadequate notice of the charges and witnesses against her, as well as of the specific procedures used in both her grievance and subsequent court case. It also found she was denied the opportunity to present evidence and witnesses and the right to be present during the hearing. *Id.* at \_\_\_, 398 N.W.2d at 338-39.

692. The court found that the existence of the grievance procedure implied that a "just cause" contract was involved, contrary to the employer's assertion that power was reserved to terminate an employee "at will." *Id.* at \_\_\_, 398 N.W.2d at 336.

Some courts in Maryland have held that a construction of the underlying contract that is "completely irrational"<sup>694</sup> is beyond the scope of the arbitrator's powers and constitutes grounds for judicial reversal.<sup>695</sup>

Even when statutory grounds are alleged for judicial intervention, they are usually construed strictly. Timeliness requirements are strictly enforced.<sup>696</sup> Complaints must be detailed and convincing. Thus, the Minnesota Supreme Court held in *Michael-Curry v. Knutson*<sup>697</sup> that accusations of fraud must be stated with particularity.<sup>698</sup> The court in *Foster v. Turley*<sup>699</sup> required "clear and convincing evidence" of fraud before intervening.<sup>700</sup>

On the question of whether the arbitrator has exceeded her powers, the courts have applied varying tests. One court required "objective evidence of impropriety in the record" and concluded that the test was not met.<sup>701</sup> Other courts have looked for "clear and convincing evidence."<sup>702</sup>

In general, however, it is not enough that the arbitrator's decision is not what a court of law or equity would have done.<sup>703</sup> This is true even on issues as sensitive as the statute of limitations<sup>704</sup> or the exclusion of evidence.<sup>705</sup>

693. The court noted that had the proceeding been procedurally fair, it would have been subject to only limited judicial review—i.e., to the statutory grounds for vacating an award, citing M.C.R. 3-602(J). *Renny*, 427 Mich. at \_\_\_, 398 N.W.2d at 335-37. The court finds the basis for the "procedurally unfair" rule in federal labor law, citing *Breish v. Ring Screw Works*, 248 N.W.2d 526 (Mich. 1976), but says explicitly the same applies to arbitration proceedings. *Renny*, 427 Mich. at \_\_\_, 398 N.W.2d at 338.

694. *Snyder v. Berliner Const. Co., Inc.*, 79 Md. App. 29, 36, 555 A.2d 523, 526 (1989).

695. *Id.*; *O-S Corp. v. Kroll*, 348 A.2d 830 (Md. App. 1975). For a case in which the standard was met on a question of fact, see *Bd. of Educ. of Prince George's County v. Prince George's County Educators' Ass'n, Inc.*, 309 Md. 85, 522 A.2d 93 (1987). *Snyder*, 79 Md. at 38 n.2, 555 A.2d at 527 n.2, notes however, that because Maryland's high court has not reached the issue, it is not clear that this is good law in Maryland. In fact, the doctrine was called into question in *Messersmith, Inc. v. Barclay Townhouse Assocs.*, 313 Md. 652, 660 n.2, 547 A.2d 1048, 1051 n.2 (Md. Ct. App. 1988). The *Snyder* holding rested on other grounds as well, i.e., the arbitrator exceeding his power and a possible mistake of law regarding jurisdiction. *Snyder*, 79 Md. App. at 29, 555 A.2d at 523.

696. *Orr v. Orr*, 108 Idaho 874, 876, 702 P.2d 912, 914 Idaho 1985). See also *supra*, Section IX., Timeliness.

697. 449 N.W.2d 139 (1989).

698. *Id.* at 142.

699. 808 F.2d 38 (10th Cir. 1986).

700. *Id.* at 42. *Foster* involved a failure to disclose material facts to the arbitrator.

701. See *G.L. Wilson Bldg. Co. v. Throneburg Hosiery Co.*, 85 N.C. App. 684, \_\_\_, 355 S.E.2d 815, 818 (1987).

702. *Burd, Inc. v. Stoneville Furniture Co.*, 134 Ill. App. 3d 149, \_\_\_, 479 N.E.2d 962, 965 (1985) (standard not met).

703. See, e.g., *Koranda v. Austin Mut. Ins. Co.*, 397 N.W.2d 357 (Minn. Ct. App. 1986).

704. *Cameron and Griffith*, 91 N.C. App. 164, 165, 370 S.E.2d 704, 705 (1988).

705. *Fairbanks Mun. Util. Sys. v. Lees*, 705 P.2d 457 (Alaska 1986) (courts should interfere only when exclusion amounts to complete omission of critical evidence). But see *Renny*, 427 Mich. 415, 398 N.W.2d 327 (exclusion of witnesses or evidence may be grounds for claim of elementary unfairness justifying reversal of arbitration result).

There are, however, issues which the courts will review de novo. These include issues relating to jurisdiction, including the existence of the agreement,<sup>706</sup> the arbitrability of an issue,<sup>707</sup> and the arbitrator's jurisdiction.<sup>708</sup> The issue is sometimes couched in terms of "subject matter jurisdiction."<sup>709</sup>

The court in *Lanci v. Metropolitan Insurance Co.*<sup>710</sup> held that an issue that would be unreviewable after the dispute went to arbitration was appealable under the collateral order doctrine prior to arbitration since the right involved was too important to be denied review and would be irreparably lost if review was postponed.<sup>711</sup>

Thus, jurisdictional questions can be the hook that courts hang their hat on when review is deemed appropriate. For example, in *Snyder*,<sup>712</sup> the Maryland Court of Appeals held that an arbitrator's refusal to consider all claims before him constituted exceeding his jurisdiction.<sup>713</sup> Other courts, however, hold that even a generalized statement in the decision that all claims have been considered and rejected is sufficient to withstand review.<sup>714</sup>

Another such "hook" for judicial review is a conflict between the decision of the arbitrator and public policy.<sup>715</sup> Thus, in *Schmidt v. Midwest Family Insurance Co.*,<sup>716</sup> the Minnesota Supreme Court voided a term in an insurance policy which specified that the insurer was entitled to a trial de novo if an arbitration award exceeded a specified limit. The court held that the provision was contrary to the public policy of the state, which favored arbitration.<sup>717</sup>

In *Azpell v. Old Republic Insurance Co.*,<sup>718</sup> a Pennsylvania court held that an arbitration award which provided for a recovery in addition to worker's

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706. *Snyder*, 79 Md. App. 29, 555 A.2d 523; *Kilianek v. Kim*, 192 Ill. App. 3d 139, 548 N.E.2d 598 (1989).

707. *Guaranty Nat'l Ins. Co. v. Valdez*, 107 N.M. 764, 764 P.2d 1322 (N.M. 1988).

708. *Snyder*, 79 Md. App. at 40, 555 A.2d at 528.

709. *Board of Educ. v. Compton*, 157 Ill. App. 3d 439, \_\_\_, 510 N.E.2d 508, 511 (1987).

710. 388 Pa. Super. 1, 564 A.2d 972 (1989).

711. The case involved a trial court's factual determination of a question of whether a settlement agreement was based on mutual mistake. If appeal was quashed, the case would have proceeded to an uninsured motorist arbitration hearing. The court held that mutual mistake entitled *Lanci* to void the settlement agreement. *Id.* at 972-75.

712. *Snyder*, 79 Md. App. at 29, 555 A.2d 523.

713. *Id.* at 37; 555 A.2d at 527.

714. *L.R. Foy Constr. Co. v. Pro. Mechanical Contr.*, 13 Kan. App. 2d 188, 196, 766 P.2d 196, 202-03 (1988).

715. *Schmidt v. Midwest Family Mut. Ins. Co.*, 426 N.W.2d 870 (Minn. 1988) (trial de novo term in insurance policy contrary to public policy favoring arbitration); *Azpell v. Old Republic Ins. Co.*, 382 Pa. Super. 255, 555 A.2d 168 (1989) (arbitration award contrary to public policy limiting recovery to worker's compensation); *City of DeKalb v. Local 1236*, 182 Ill. App. 3d 367, 538 N.E.2d 867 (1989) (award was contrary to public policy favoring uniformity of pension benefits for disabled firefighters).

716. *Schmidt*, 426 N.W.2d 870.

717. *Id.* at 874-75.

718. *Azpell*, 382 Pa. Super. 255, 555 A.2d 168.

compensation ran contrary to public policy that worker's compensation be the exclusive means of recovery in such cases.<sup>719</sup>

In *City of DeKalb v. International Association of Firefighters, Local 1236*,<sup>720</sup> an arbitration award which would have created pension benefits greater than those of other disabled firefighters in Illinois was voided as contrary to public policy, which favored uniform pension benefits for all disabled public firefighters.<sup>721</sup>

Other cases successfully challenging arbitration awards as contrary to public policy include those involving uninsured motorist coverage.<sup>722</sup>

However, in *Amalgamated Transit Union Local 1300 v. Mass Transit Administration*,<sup>723</sup> a Maryland appeals court overturned a lower court ruling setting aside an arbitrator's reinstatement of a bus driver dismissed for having alcohol on his breath. The court found the arbitrator's finding that the driver was not intoxicated took it out of the realm of Maryland's public policy regarding driving while intoxicated.

Finally, courts are more willing to vacate a decision if it involves attorney-client arbitration because of their inherent power to regulate the bar and the administration of justice.<sup>724</sup>

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719. *Id.* at \_\_\_, 555 A.2d at 172-73. It should be noted, however, that Pennsylvania has an atypical "contrary to law" standard of review in their version of the U.A.A..

720. 182 Ill. App. 3d 367, 538 N.E.2d 867 (1989).

721. *Id.* at 372, 538 N.E.2d at 870-73. The court notes that courts may review public policy issues de novo even when they have been submitted to the arbitrator. *Id.* at 376, 538 N.E.2d at 873.

722. This rule was established by *Davis v. Gov't Employees Ins. Co.*, 500 Pa. 84, 454 A.2d 973 (1982). Note again, however, Pennsylvania's atypical "contrary to law" standard of review.

723. *Amalgamated Transit Union v. Mass Transit Admin.*, 305 Md. 380, 504 A.2d 1136 (Md. 1986).

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

