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RECENT DEVELOPMENTS: THE UNIFORM ARBITRATION ACT¹

I. INTRODUCTION

Since 1983, this annual Article² has been prepared to provide a survey of recent developments in the case law interpreting and applying the various state versions of the Uniform Arbitration Act³. The purpose is to promote uniformity in the interpretation of the U.A.A. by developing and explaining the underlying principles and rationales courts have applied in recent cases.⁴

II. VALIDITY OF ARBITRATION AGREEMENTS

A. Validity

Courts strive to promote arbitration as evidenced by *Southland Corp. v. Keating*,⁵ in which the Supreme Court voiced a preference for arbitration. Indicative of this country's preference for arbitration, the UAA firmly provides that "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁶ This

1. This project was written and prepared by *Journal of Dispute Resolution* Candidates under the direction of Associate Editor in Chief Robert M. Bain and Note and Comment Editor Cynthia Bradley-Bishop.

2. See *Recent Developments: The Uniform Arbitration Act*, 1990 J. DISP. RESOL. 471; *Recent Developments: The Uniform Arbitration Act*, 1989 J. DISP. RESOL. 237; *Recent Developments: The Uniform Arbitration Act*, 1988 J. DISP. RESOL. 247; *Recent Developments: The Uniform Arbitration Act*, 1987 MO. J. DISP. RESOL. 177; *Recent Developments: The Uniform Arbitration Act*, 1986 MO. J. DISP. RESOL. 169; *Recent Developments: The Uniform Arbitration Act*, 1985 MO. J. DISP. RESOL. 173; *Recent Developments: The Uniform Arbitration Act*, 1984 MO. J. DISP. RESOL. 207; *Recent Developments: The Uniform Arbitration Act*, 48 MO. L. REV. 137 (1983).

3. UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 4 (1978) [hereinafter U.A.A.]. Jurisdictions which have adopted arbitration statutes patterned after the U.A.A. are Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and Wyoming.

4. This Article surveys cases decided between September, 1989 and September, 1990.

5. 465 U.S. 1 (1984).

6. U.A.A. § 1.

provision grants substantial deference to the validity of arbitration agreements.⁷ Accordingly, courts applying this language tend to find arbitration agreements valid.

The common law requirement that contracts be supported by consideration guided the Arizona Court of Appeals to find an arbitration provision invalid.⁸ The court in *Stevens/Leinwebber/Sullens, Inc. v. Holm Development & Management, Inc.*,⁹ decided whether the validity of an arbitration provision is to be separately decided when there is no attack on the underlying contract.¹⁰

This case concerned a construction contract with an addendum to the contract which included an arbitration clause.¹¹ The appellee maintained that the arbitration provision is invalid because the addendum was not supported by consideration.¹² Appellant argued that the arbitration clause should be construed within the entire contract's context.¹³ When the whole contract is supported by adequate consideration, this consideration is sufficient to support the arbitration provision in the addendum.¹⁴ However, the court ruled that appellant could not "borrow" consideration from the principle contract to support the arbitration clause in the addendum.¹⁵

The court reasoned that under the separability doctrine, where an arbitration clause is considered an independent and separate document apart from the principle contract, the arbitration provision lacking independent consideration is void.¹⁶ The court explained that consideration was lacking because the appellant did not do anything in consideration of the rights granted to it in the addendum.¹⁷ In short, the court invoked the basic contract principle that lack of consideration may invalidate an arbitration agreement.

In *DiGiammatteo v. Olney*,¹⁸ a Texas court applied additional contract principles. The court applied the contract principle of privity to determine the existence of a valid and enforceable arbitration provision.¹⁹ In this case, the Texas Court of Appeals decided whether the trial court lacked jurisdiction to confirm an arbitration award between appellee and appellant on the grounds that the appellant was not a party to the contract authorizing the arbitration.²⁰

7. *Id.*

8. *Stevens/Leinwebber/Sullens, Inc. v. Holm Dev. and Management, Inc.*, 165 Ariz. 25, 30, 795 P.2d 1308, 1313 (1990).

9. 165 Ariz. 25, 795 P.2d 1308.

10. *Id.* at 25, 795 P.2d at 1309.

11. *Id.* at 26, 795 P.2d at 1309.

12. *Id.*

13. *Id.*

14. *Id.* at 25, 795 P.2d at 1308.

15. *Id.* at 30, 795 P.2d at 1313.

16. *Id.*

17. *Id.*

18. 794 S.W.2d 103 (Tex. Ct. App. 1990).

19. *Id.* at 104.

20. *Id.*

The critical facts in this case are that DiGiammatteo, on behalf of the corporation DiGiammatteo & Associates, contracted with Olney to consult on an architecture project.²¹ The court reasoned that Olney, the party trying to enforce the contract, must prove that privity existed between himself and DiGiammatteo in their individual capacities.²² Because Olney failed to produce any evidence that DiGiammatteo did not sign in his representative capacity, and because DiGiammatteo introduced a copy of the contract indicating that DiGiammatteo signed in his representative capacity, the court ruled that the trial court erred when it confirmed the arbitration award.²³ The Texas Court of Appeals reversed the trial court's judgment and remanded the cause for further proceedings.²⁴

Because this country favors arbitration, arbitration clauses tend to be found valid. However, as the noted cases have shown, a court will not hesitate to declare an arbitration agreement invalid by using the same grounds used to invalidate a contract.

B. Arbitrability

The question of arbitrability, whether a claim is to be arbitrated or decided by a court, is clearly important to both parties to an agreement.²⁵ When confronted with this question, courts generally hold that if there is a valid arbitration agreement between the parties, their disputes or claims are arbitrable.²⁶ Of course parties may keep certain claims out of arbitration, but unless the language of the arbitration clause is clear as to what is excluded,²⁷ courts often find that disputes are within the scope of the clause and are thus arbitrable.²⁸ Such holdings are aligned with the pervasive policy favoring arbitration²⁹ which leads courts to construe arbitration clauses as broadly as possible³⁰ while remaining true to the intent of the parties.³¹

21. *Id.* at 103.

22. *Id.* at 104.

23. *Id.* at 105.

24. *Id.*

25. See *infra* notes 32-136 and accompanying text.

26. *Cell v. Moore & Scheley Secs.*, 449 N.W.2d 144, 147-48 (Minn. 1989).

27. *American Fed'n of Gov't Employees, Local 3721 v. District of Columbia*, 563 A.2d 361, 362 (D.C. 1989).

28. *Cell*, 449 N.W.2d at 148.

29. *Phillips v. Parker*, 794 P.2d 716, 718 (Nev. 1990).

30. *Local 3721*, 563 A.2d at 362.

31. *Michael-Curry Cos. v. Knutson Shareholders Liquidating Trust*, 449 N.W.2d 139, 141 (Minn. 1989).

1. Existence of Agreements

In *Beard v. Mount Carroll Mutual Fire Insurance*³² the court demonstrated how completely it follows the broad policy favoring arbitration.³³ The plaintiff in *Beard* sued her insurance company for recovery under her insurance policy covering the destruction of her rental house and its furnishings.³⁴ The insurance policy contained an appraisal clause which required disinterested appraisers to determine the value of the property in case of a disagreement between the parties.³⁵ This clause was to act as a condition precedent to filing suit.³⁶ The court analogized the appraisal clause to an enforceable arbitration clause³⁷ and thus held it valid as "an agreement to submit a future controversy to an out of court settlement."³⁸

Waiver on the part of the parties also leads to the enforceability of arbitration clauses. In *Joder Building Corp. v. Lewis*,³⁹ the court held that the defendants' participation in the arbitration proceeding was sufficient to waive their right to object to the enforceability of the arbitration clause under the Vermont U.A.A.⁴⁰ Plaintiff, a construction contractor, entered into agreement with defendants, homeowners, to work at defendants' home.⁴¹ When a dispute later arose, the parties looked to a signed agreement concerning arbitration.⁴² The agreement did not contain the acknowledgement language as required by Vermont's version of the U.A.A.,⁴³ but defendants participated in arbitration until the arbitrators refused to give them a postponement; then they simply did not appear.⁴⁴

32. 203 Ill. App. 3d 724, 561 N.E.2d 116 (1990).

33. See *id.* at 727-31, 561 N.E.2d at 117-20.

34. *Id.* at 726, 561 N.E.2d at 117.

35. *Id.*

36. *Id.* at 726-27, 561 N.E.2d at 117.

37. *Id.* at 727-28, 561 N.E.2d at 118.

38. *Id.* at 728, 561 N.E.2d at 118.

39. 153 Vt. 115, 569 A.2d 471 (1989).

40. *Id.* at 120-22, 569 A.2d at 474.

41. *Id.* at 117, 569 A.2d at 471-72.

42. *Id.*

43. *Id.* at 119, 569 A.2d at 472-73. Vermont's version of the U.A.A. provides:

Required provision. No agreement to arbitrate is enforceable unless accompanied by or containing a written acknowledgement of arbitration signed by each of the parties or their representatives. When contained in the same document as the agreement to arbitrate, that acknowledgement shall be displayed prominently. The acknowledgement shall provide substantially as follows:

"ACKNOWLEDGEMENT OF ARBITRATION.

I understand that (this agreement/my agreement with ___ of ___) contains an agreement to arbitrate. After signing (this/that) document, I understand that I will not be able to bring a lawsuit concerning any dispute that may arise which is covered by the arbitration agreement, unless it involves a question of constitutional or civil rights. Instead, I agree to submit any such dispute to an impartial arbitrator."

Vt. STAT. ANN. tit. 12, § 5652(b) (1990).

44. *Joder*, 153 Vt. at 120, 569 A.2d at 472.

Defendants first argued that the required acknowledgement was missing from their arbitration agreement when they filed a motion with the court to dismiss the confirmation of the award.⁴⁵

The court in *Joder* found that the language of the clause did not substantially embody the required acknowledgement nor was it prominently displayed as required by the statute.⁴⁶ However, the court determined that the clause was binding on the parties⁴⁷ because a later section of the statute shows that a certain amount of participation in an arbitration proceeding waives a party's right to challenge the lack of an acknowledgement.⁴⁸

Since defendants stopped participating only when they were dissatisfied with the arbitrators, they now may not attack the clause's noncompliance with the statute simply because they were unhappy with the award.⁴⁹ The court concluded that it would be improper to reward defendants' behavior in this matter and thus held that defendants' participation in this arbitration prevented them from alleging defects in the agreement.⁵⁰

The court in *Graham v. State Farm Mutual Automobile Insurance*⁵¹ held that even in the absence of statutory language endorsing a certain type of arbitration clause, such a clause was not against public policy.⁵² The *Graham* court found that since such clauses are part of an enforceable contract they bind the parties to arbitrate, waiving their right to a jury trial.⁵³

In *Graham*, plaintiffs, whose car was insured by State Farm Mutual Automobile Insurance, were in a car wreck caused by an unknown motorist.⁵⁴ After the accident, the parties disagreed as to the amount defendant, the insurance company, owed the plaintiffs.⁵⁵ Plaintiffs then filed suit, but the trial court granted defendant's summary judgment since the insurance policy required arbitration.⁵⁶ Plaintiffs did not even see the policy until after their first payment and were not made aware of the arbitration clause by the defendants.⁵⁷

The court stated that the public policy of Delaware favors arbitration.⁵⁸ It also noted that to avoid enforcement of the clause the plaintiffs must show either that the clause has been revoked or that some other provision of law supersedes

45. *Id.* at 120, 569 A.2d at 472-73.

46. *Id.* at 119, 569 A.2d at 473.

47. *Id.* at 119-20, 569 A.2d at 473-74.

48. *Id.* at 120, 569 A.2d at 473.

49. *Id.*

50. *Id.* at 122, 569 A.2d at 474.

51. 565 A.2d 908 (Del. 1989).

52. *Id.* at 911.

53. *Id.* at 913.

54. *Id.* at 910.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 911.

the Delaware version of the U.A.A.⁵⁹ The court rejected plaintiffs' argument that absence of specific statutory language endorsing the inclusion of arbitration clauses in insurance policies means such inclusion is against public policy.⁶⁰ On the contrary, the court determined that this type of arbitration clause was fair to both parties.⁶¹

The *Graham* court also held that although an insurance contract is a contract of adhesion, inclusion of an arbitration clause waives the plaintiff's constitutional right to a jury trial unless the contract is unconscionable and thus unenforceable.⁶² The court determined that this contract was not unconscionable since both parties had equal input in selecting the arbitrators, the result bound both parties, and it adhered to the public policy of the state by resolving disputes through arbitration.⁶³

2. Scope of the Agreement

The determination of which issues an arbitration clause encompasses is an area in which the courts clearly show a preference for arbitrability. Unless the intent of the parties as reflected in the language of the clause, clearly excludes an issue, courts generally find that issue arbitrable.⁶⁴

As discussed earlier, when the *Beard* court decided to treat the appraisal clause in the insurance policy similar to an arbitration agreement, it included in its analysis the general policy favoring arbitration.⁶⁵ In this case the plaintiff's loss entailed a total destruction of her property.⁶⁶ Since the terms of the agreement were clear and there was nothing in them to suggest that the parties meant to exclude disputes concerning total destruction of property from arbitration, the court found against favoring arbitration.⁶⁷ Although total destruction would make appraisal of the property more difficult, the court concluded that appraisal was still possible since information as to the property's value could come from other sources.⁶⁸ Thus the court held that the appraisal clause did apply to this issue and remanded the case with an order for the trial court to compel appraisal.⁶⁹

The court in *Phillips v. Parker*⁷⁰ displayed its favoritism toward arbitration in finding that although plaintiffs' causes did not directly stem from the parties'

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 912-13.

63. *Id.*

64. See *infra* notes 65-133 and accompanying text.

65. *Beard*, 203 Ill. App. 3d at 727-29, 561 N.E.2d at 118-19.

66. *Id.* at 728-29, 561 N.E.2d at 118-19.

67. *Id.*

68. *Id.* at 729, 561 N.E.2d at 119.

69. *Id.* at 730-31, 561 N.E.2d at 119-20.

70. 794 P.2d 716 (Nev. 1990).

contract, they did relate to the agreement and were therefore within the scope of the agreement's arbitration clause.⁷¹ The parties in *Phillips* contracted to start a mail service business.⁷² Their contract included an arbitration clause that provided for arbitration of any controversy "relating to" the agreement.⁷³

The defendant later removed plaintiff from the corporation's board of directors, and when plaintiff sued, defendant Phillips moved to compel arbitration.⁷⁴ In an attempt to avoid arbitration, plaintiff promptly amended his complaint to omit any reference to the agreement.⁷⁵ The court stated that there is a "strong public policy" in favor of contractual arbitration agreements in Nevada which plaintiff's amended pleading cannot evade since it is based on rights the agreement allegedly conferred on him.⁷⁶ The court concluded that those rights relate to the agreement and therefore fall within the scope of the arbitration clause.⁷⁷

Similarly in *A.E. Staley Manufacturing v. Robertson*,⁷⁸ the Illinois appellate court broadly applied a generic arbitration agreement in one contract to issues arising under another related agreement concerning the same subject matter.⁷⁹ In *A.E. Staley*, defendant and plaintiff entered a "Management Retention Agreement"⁸⁰ whereby defendant, an executive working for the plaintiff corporation, received retirement benefits for remaining with the corporation through a takeover.⁸¹ The parties later entered a second supplemental agreement which gave defendant additional retirement benefits.⁸² The original agreement contained a broad arbitration clause, while the supplement said nothing about arbitration.⁸³ After defendant's termination from the corporation, he received what he alleged was partial payment of the retirement benefits due to him under the supplement.⁸⁴ Defendant sought to arbitrate the dispute under the clause found in the original contract.⁸⁵

Since it did not specify which issues were to be arbitrated, the appellate court stated that the clause was a generic arbitration clause.⁸⁶ The court held that the dispute must arise out of the subject matter of the contract to be within the scope

71. *Id.* at 718.

72. *Id.* at 717.

73. *Id.*

74. *Id.*

75. *Id.* at 718.

76. *Id.*

77. *Id.*

78. 588 N.E.2d 434 (Ill. App. Ct. 1990).

79. *Id.* at 437-38.

80. *Id.* at 435.

81. *Id.* at 436.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 436-37.

of that contract's generic clause.⁸⁷ The court further held that since the subject matter of the original contract and the supplement was the same, such as the amount of the defendant's benefits upon retirement or termination, arbitration was proper.⁸⁸ Rejecting the plaintiff's narrow characterization of the subject matter of the agreements, the court held that the dispute was within the scope of the arbitration clause in the original contract.⁸⁹

In *American Federation of Government Employees, Local 3721 v. District of Columbia*,⁹⁰ the court determined that specific contractual rights of the defendant were expressly excluded from the parties' agreement to arbitrate since there was no other way to interpret the clause's language.⁹¹ Plaintiff, the American Federation of Government Employees, Local 3721, sought to arbitrate a labor dispute between one of its members and the District of Columbia Fire Department.⁹² Plaintiff claimed the defendant wrongfully terminated its member.⁹³ The trial court found that the issue of wrongful termination was not within the scope of the arbitration clause since the agreement to arbitrate excluded this particular issue.⁹⁴ Following a policy favoring arbitration, the court stated that if the clause was "susceptible of an interpretation" embracing this issue, the issue was arbitrable.⁹⁵ The court then found that the clause specifically excluded management rights, which included the right to discharge issues from arbitration.⁹⁶ Therefore the court held that the clause in question was not susceptible to an interpretation that included this issue within its scope.⁹⁷

Whether a flaw in the underlying contract invalidates an arbitration clause within the contract, or whether the existence of the flaw is itself an issue for arbitration is an important question facing courts interpreting the Uniform Arbitration Act. In *Mewbourne Oil Co. v. Blackburn*,⁹⁸ the Texas Court of Appeals held that an allegation of a party's repudiation of a contract was within the scope of that contract's arbitration clause.⁹⁹ The parties in *Mewbourne* entered into many agreements, all containing arbitration clauses, for which Mewbourne was to sell gas to defendant Transwestern Pipeline Company.¹⁰⁰ Plaintiff Mewbourne later sued the defendant claiming it had breached and

87. *Id.* at 437.

88. *Id.*

89. *Id.* at 437-38.

90. 563 A.2d 361.

91. *Id.* at 364.

92. *Id.* at 362.

93. *Id.*

94. *Id.*

95. *Id.* at 362-63.

96. *Id.* at 363.

97. *Id.*

98. 793 S.W.2d 735 (Tex. Ct. App. 1990).

99. *Id.* at 737.

100. *Id.* at 736.

repudiated the contracts.¹⁰¹ The court stated that since the agreement to arbitrate was in writing, the dispute concerning the performance of the underlying contracts is a question for the arbitrators and does not affect the validity of the arbitration clause.¹⁰²

In *Michael-Curry Cos. v. Knutson Shareholders Liquidating Trust*,¹⁰³ the Minnesota Supreme Court faced a similar situation. The court held that a claim that the underlying contract was fraudulently induced was within the scope of the arbitration agreement.¹⁰⁴ The Knutson Shareholders trust contracted to sell stock to the Michael-Curry companies.¹⁰⁵ That contract contained an arbitration clause.¹⁰⁶ Later, an amendment to the contract was executed which guaranteed Michael-Curry a certain profit.¹⁰⁷ When that profit was not realized, Michael-Curry demanded reimbursement under the amendment.¹⁰⁸ The trust then alleged that Michael-Curry was guilty of fraud in the inducement of the amendment, and therefore refused to submit to arbitration.¹⁰⁹

The court stated that it must determine whether the issue of fraud in the inducement was within the scope of the parties' arbitration agreement by discerning the parties' intent from the language of the clause.¹¹⁰ The court noted that the clause's language, must either specifically include fraud in the inducement or be broad enough to comprehend its inclusion.¹¹¹ Although the court found no specific reference to this issue, it found that the clause was broad enough to require arbitration of a claim of fraud in the inducement.¹¹² The clause stated that it covered issues relating to "the making" of the contract which the court found included circumstances surrounding the contract's formation, such as fraud in the inducement.¹¹³ The court rejected the trust's contention that specificity of the scope of issues to be arbitrated is always required, stating that such a rule would be impractical and would defeat the policy favoring arbitration.¹¹⁴ The court concluded by expressing its concern that allegations of fraud in the inducement in the underlying contract are often made to avoid arbitration by

101. *Id.*

102. *Id.* at 737.

103. 449 N.W.2d 139.

104. *Id.* at 142.

105. *Id.* at 140.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 141.

111. *Id.*

112. *Id.* at 142.

113. *Id.*

114. *Id.*

rendering the contract's arbitration clause invalid.¹¹⁵ The court emphasized that requests to stay arbitration for this reason should be stated with particularity.¹¹⁶

In *Smith v. Logan*,¹¹⁷ the Arizona Court of Appeals held a claim of fraud in the inducement of a contract to be within the scope of the contract's arbitration clause, since the language of the clause itself was very broad.¹¹⁸ The parties contracted for plaintiff Smith to buy a business from Logan.¹¹⁹ The contract contained an arbitration clause, but the trial court refused to compel arbitration of Smith's claim of fraud in the inducement.¹²⁰ The appellate court reversed finding that the language of the agreement was broad enough to show the parties' intent to have such issues arbitrated.¹²¹ In addition, the claim was not fraudulent inducement of the arbitration agreement itself, but of the entire contract.¹²² The court concluded that the clause's language stating that "disputes relating to any of the representations"¹²³ will be arbitrated, included Smith's claim of fraud, especially since this interpretation was consistent with the other provisions of the contract.¹²⁴

Finally in *Cell v. Moore & Schley Securities Corp.*¹²⁵ the Supreme Court of Minnesota applied New York law to determine that the issue of fraud in the inducement was within the scope of the contract's arbitration clause.¹²⁶ The plaintiff, Cell, sued his stockbrokers alleging they fraudulently induced him to enter a "Customer's and Margin Agreement."¹²⁷ That agreement contained an arbitration clause.¹²⁸ After finding that New York law governed the agreement, the court noted that in that state an arbitration clause is separable from the underlying contract.¹²⁹ Thus, even if the contract was induced by fraud the arbitration agreement would still be valid.¹³⁰ Since the plaintiff did not allege fraud in the inducement of the arbitration clause, the court found the clause valid.¹³¹ The court determined that the language of the clause itself was broad and therefore required the arbitration of all disputes reasonably related to the

115. *Id.*

116. *Id.*

117. 166 Ariz. 1, 799 P.2d 1378 (Ct. App. 1990).

118. *Id.* at 2-3, 799 P.2d at 1379-80.

119. *Id.* at 2, 799 P.2d at 1379.

120. *Id.* at 1, 799 P.2d at 1378.

121. *Id.* at 3, 799 P.2d at 1380.

122. *Id.* at 2-3, 799 P.2d at 1379-80.

123. *Id.* at 2, 799 P.2d at 1379.

124. *Id.* at 2-3, 799 P.2d at 1379-80.

125. 449 N.W.2d 144.

126. *Id.* at 149.

127. *Id.* at 145.

128. *Id.*

129. *Id.* at 147.

130. *Id.*

131. *Id.* at 148.

subject matter of the contract that are not specifically excluded by the clause.¹³² Since doubts under New York law are construed in favor of arbitration, and the language of the agreement expressly encompassed conduct prior to the agreement, such as fraudulent inducement, the court held that this dispute was within the scope of the arbitration agreement.¹³³

The court's final inquiry was whether fraud permeated the whole contract, including the arbitration clause.¹³⁴ In such a case the court noted New York courts might strike down an arbitration clause.¹³⁵ The court concluded, however, that there was no evidence that the contract was not negotiated at arm's length or that the arbitration clause was inserted into the contract to further a fraudulent scheme.¹³⁶

Overall, courts are very willing to find a valid arbitration clause and to determine that most issues related to the underlying contract are within the clause. This willingness effectuates the policy favoring arbitrability. There are no signs of this policy weakening as courts continue to require a clear intent to exclude an issue from arbitration before they will actually exclude it. This ever increasing judicial acceptance of arbitration makes such clauses powerful and useful tools in today's contracts.

C. Waiver

A party has a right to court enforcement of arbitral agreements upon a showing that such an agreement exists.¹³⁷ However, arbitration agreements are essentially contractual in nature.¹³⁸ As with any contract, the right to enforce the agreement may be waived when a party acts in a manner inconsistent with their contractual rights.¹³⁹ Parties desiring arbitration are often found to have waived their right to do so when they have participated in litigation, not fulfilled a condition precedent, failed to initiate arbitration, or when there has been undue prejudice and delay in seeking arbitration.¹⁴⁰ When a court finds that a waiver has occurred, it is as if the agreement to arbitrate never existed, and the party who waived their right has no grounds for asking the court to compel arbitration.¹⁴¹

132. *Id.*

133. *Id.* at 148-49.

134. *Id.* at 149.

135. *See id.*

136. *Id.* at 150.

137. U.A.A. § 2(a).

138. *See generally* 17A C.J.S. Contracts § 515(6) (1963).

139. *Id.* § 515(11).

140. *Id.*

141. *See generally* *Yates v. Doctor's Assocs., Inc.*, 193 Ill. App. 3d 431, 437-41, 549 N.E.2d 1010, 1015-17 (1990).

1. Participating in Litigation

*Yates v. Doctor's Associates, Inc.*¹⁴² is an example of the general rule for waiver of the right to arbitrate based on participating in litigation. *Yates* involved a rather complicated dispute over franchising agreements.¹⁴³ Plaintiff Yates and his partner filed a lawsuit against several defendants based on disagreements concerning their contract with the defendants.¹⁴⁴ Defendants responded with a motion to compel arbitration under the terms of the contract.¹⁴⁵ While the motion was pending, several of the defendants filed forcible entry and detainer actions to recoup claimed losses for non-payment of royalties under the same contract.¹⁴⁶

The Illinois Court of Appeals held that defendants' actions constituted a waiver of their right to compel arbitration.¹⁴⁷ The court based its decision on the fact that "defendants were not content to rely on the arbitration process with respect to their own claims against plaintiffs."¹⁴⁸ Thus, the court held that the defendants "must be regarded as having submitted arbitrable issues for judicial determination."¹⁴⁹

In *Costello v. Aetna Casualty and Surety Co.*,¹⁵⁰ the Minnesota Court of Appeals held that plaintiff waived his right to compel arbitration by initiating a lawsuit.¹⁵¹ In *Costello*, plaintiff already had been awarded damages in an action against the other driver for injuries sustained in an auto accident.¹⁵² Plaintiff sought to force his own insurance company, Aetna, to arbitrate a claim against his underinsured motorists policy.¹⁵³ The *Costello* court pointed out that a claim which would be barred by res judicata in a court of law is not necessarily barred from arbitration.¹⁵⁴ The court, however, distinguished *Costello* from a situation in which a party defendant in an earlier action asks to arbitrate the claim with a third party (i.e. the insurance company).¹⁵⁵ Such a claim may still be arbitrated in some instances even if the underlying claim has already been decided against the party seeking arbitration in a court of law.¹⁵⁶ In *Costello*, the party seeking

142. 193 Ill. App. 3d. 431, 549 N.E.2d 1010.

143. *Id.* at 432-33, 549 N.E.2d at 1011-12.

144. *Id.* at 434, 549 N.E.2d at 1013.

145. *Id.* at 434-35, 549 N.E.2d at 1013.

146. *Id.* at 435, 549 N.E.2d at 1013.

147. *Id.* at 440, 549 N.E.2d at 1017.

148. *Id.* at 440, 549 N.E.2d at 1016.

149. *Id.*

150. 463 N.W.2d 911 (Minn. Ct. App. 1990).

151. *Id.* at 913.

152. *Id.* at 912.

153. *Id.*

154. *Id.*

155. *Id.* at 913.

156. *Id.*

arbitration initiated a previous lawsuit and received a verdict in his favor.¹⁵⁷ This precluded him from arbitrating the same issue with his carrier.¹⁵⁸

In *Valley Construction v. Perry Host Management*,¹⁵⁹ a Kentucky appellate court found that waiver of the right to compel arbitration does not occur when the party seeking arbitration files a claim in a lawsuit while continuing to seek arbitration.¹⁶⁰ In that case, a hotel developer (Perry Host) brought an action against a contractor (Valley Construction) based on breach of contract after a building sank and was condemned.¹⁶¹ The contractor asked the court to stay the proceedings and compel arbitration according to the terms of the contract.¹⁶²

In the meantime, Star Bank, who had provided \$4,000,000 in funding for the project, brought a separate action to foreclose its construction mortgage.¹⁶³ The contractor filed a cross-claim against the developer based on claims arising under another promissory note.¹⁶⁴ The cross-claim was dismissed by the state court which was hearing the foreclosure suit, so the contractor filed his claim in federal court as a plaintiff.¹⁶⁵

While considering the breach of contract action, the trial court denied the motion to stay the proceedings and compel arbitration because "for a while, I [the trial judge] thought it might be a good idea to arbitrate it, [but] a judge always has a right to change his mind, and I've changed mine, and we're going to litigate."¹⁶⁶ The contractor, of course appealed the denial of his motion and the court was forced to consider whether he had waived his right to arbitrate by filing a cross-claim and subsequent action against the developer.¹⁶⁷

The *Valley* court reversed the decision of the trial court and ordered the proceedings stayed and arbitration compelled.¹⁶⁸ They ruled that the contractor's actions were simply in the nature of defending his rights and that he had taken every opportunity to demand arbitration.¹⁶⁹ Therefore he had preserved his right to seek arbitration.¹⁷⁰

Similarly, in *Underwriting Members of Lloyd's of London v. United Home Life Insurance*,¹⁷¹ the defendant actively sought arbitration while participating in the litigation. In *Lloyd's*, plaintiff, United Home Life Insurance, sought a

157. *Id.*

158. *Id.*

159. 796 S.W.2d 365 (Ky. Ct. App. 1990).

160. *Id.* at 368.

161. *Id.* at 365.

162. *Id.*

163. *Id.* at 367.

164. *Id.*

165. *Id.* at 368.

166. *Id.* at 367.

167. *Id.*

168. *Id.* at 368.

169. *Id.*

170. *Id.*

171. 549 N.E.2d 67 (Ind. Ct. App. 1990).

declaratory judgment and damages under a contract with its reinsurer, Lloyd's, over obligations under a reinsurance agreement.¹⁷² The trial court granted United's motion to stay arbitration and proceed to litigation on grounds that the claim for damages was not covered by the arbitration agreement.¹⁷³

On appeal, the court found that the damages claim did not invalidate the agreement to arbitrate the underlying construction of the contract, the court then went on to discuss United's claim that Lloyd's had waived its right to arbitrate.¹⁷⁴ United argued that Lloyds' active participation in the lawsuit via discovery proceedings constituted an implied waiver of its right to seek arbitration.¹⁷⁵ The court found that participating in discovery does not waive that party's right to compel arbitration especially when the party continues to assert a right to arbitrate and complies with discovery only under a court order.¹⁷⁶

2. Failure to Fulfill Conditions Precedent

In *Burgess v. Lewis & Clark City-County Board of Health*,¹⁷⁷ the Montana Supreme Court held that the plaintiff could not seek arbitration of his wrongful discharge claim until he had completed a mandatory probation period as required by his employment contract.¹⁷⁸ In *Burgess*, the employee had been terminated from his position and asserted a right to arbitrate based on the personnel manual he had been issued.¹⁷⁹ The court held that the plaintiff was barred from seeking arbitration because he had not completed the probationary period that was also required by the manual.¹⁸⁰

3. Undue Prejudice or Delay

The right to arbitrate may also be waived when there is a finding of undue prejudice or delay to the party not requesting arbitration.¹⁸¹ This principle was applied in *D.M. Ward Construction Co. v. Electric Corp.*,¹⁸² when the party seeking arbitration did not file its motion to compel until 10 months into the proceedings.¹⁸³ At this point discovery had been completed and a trial date set.¹⁸⁴ The Kansas Court of Appeals found that such actions constituted undue

172. *Id.* at 68.

173. *Id.*

174. *Id.* at 71.

175. *Id.*

176. *Id.*

177. 244 Mont. 275, 796 P.2d 1079 (1990).

178. *Id.* at 278, 796 P.2d at 1081.

179. *Id.*

180. *Id.*

181. *Sturm v. Schamens*, 99 N.C. App. 207, 208, 392 S.E.2d 432, 433 (1990).

182. 803 P.2d 593 (Kan. Ct. App. 1990).

183. *Id.* at 595.

184. *Id.*

delay and thus affirmed the trial court's denial of a motion to compel arbitration even though the contract specifically called for arbitration.¹⁸⁵ The decision cited several cases on undue delay, but seemed to rely primarily on the prejudice to the non-moving party, who had actively participated in discovery and trial preparation.¹⁸⁶

In *Sturm v. Schamens*,¹⁸⁷ the North Carolina Court of Appeals ruled that the defendant's participation and gathering of evidence in an earlier litigation was not unduly prejudicial to the plaintiff when the defendant had taken a voluntary dismissal in the earlier action.¹⁸⁸ In *Sturm*, an investor brought an action against his broker alleging unauthorized trading in the investor's account.¹⁸⁹ When the defendant broker sought an order compelling arbitration, the plaintiff investor argued that there had been an implied waiver of the right to arbitrate.¹⁹⁰ The court stated the general rule that in order to show implied waiver, "the party resisting arbitration must demonstrate he was prejudiced by his adversary's delay in seeking arbitration."¹⁹¹

In applying that standard to the facts of the case, the court refused to find a waiver due to the defendant's failure to request arbitration in earlier litigation in which both parties had been involved.¹⁹² The court proceeded under the assumption that the previous suits never existed because they were voluntarily dismissed.¹⁹³

4. Failure to Initiate Arbitration

*Mountain Plains Constructors v. Torrez*¹⁹⁴ presented the issue of which party bears the burden of initiating arbitration. In that case, a contractor sued to foreclose a mechanic's lien.¹⁹⁵ The owner, upon entering his appearance, moved to dismiss until arbitration was complete.¹⁹⁶ The contractor, however, opposed arbitration and pointed to language in the contract that required the party desiring arbitration to notify the American Arbitration Association within a reasonable time after the dispute arose.¹⁹⁷ The trial court ordered the dispute to proceed to trial,

185. *Id.* at 599.

186. *Id.*

187. 99 N.C. App. 207, 392 S.E.2d 432.

188. *Id.* at 209, 392 S.E.2d at 433.

189. *Id.* at 207, 392 S.E.2d at 432.

190. *Id.* at 208, 392 S.E.2d at 433.

191. *Id.* (citing *Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986)).

192. *Id.* at 209, 392 S.E.2d at 433.

193. *Id.*

194. 785 P.2d 928 (Colo. 1990).

195. *Id.* at 930.

196. *Id.*

197. *Id.*

finding that the owner had not fulfilled the terms of the contract.¹⁹⁸ The Supreme Court of Colorado reversed that portion of the decision.¹⁹⁹ The Supreme Court held that the owner did not have the burden to initiate arbitration since he was not the party asserting a claim under the contract.²⁰⁰ Therefore, since the owner did not have the burden of initiating arbitration, he did not have the obligation to notify the Arbitration Association as a condition precedent to seeking arbitration.²⁰¹

III. PROCEEDINGS TO COMPEL OR STAY ARBITRATION

Once the court finds that an agreement to arbitrate exists, the U.A.A. requires the court to compel arbitration²⁰² without giving any consideration to the merits of the claim.²⁰³ On the other hand, if the court finds that there is no agreement to arbitrate, it may stay the arbitration proceeding.²⁰⁴ The U.A.A. also provides that stays of arbitration may be granted with respect to certain issues if those issues are severable from the arbitrable dispute.²⁰⁵ The issue of whether an agreement to arbitrate exists is to be tried summarily by the court.²⁰⁶ When faced with a motion to stay or compel arbitration, courts must also decide whether the current controversy is within the scope of the agreement by resorting to general contract principles.

A. The Threshold Requirements

In Minnesota, the Supreme Court has set forth certain guidelines to determine whether arbitration is to be compelled:

(1) If the parties evinced a clear intent to arbitrate a controversy arising out of specific provisions of the contract, the matter is for arbitrators to determine and not the court.

(2) If the intention of the parties is reasonably debatable as to the scope of the arbitration clause, the issue of arbitrability is to be initially determined by the arbitrators subject to the rights of either party reserved under [the Minnesota U.A.A.].

(3) If no agreement to arbitrate exists, either in fact or because the controversy sought to be arbitrated is not within the scope of the

198. *Id.*

199. *Id.* at 931.

200. *Id.* at 930.

201. *Id.*

202. U.A.A. § 2(a).

203. *Id.* § 2(e).

204. *Id.* § 2(b).

205. *Id.* § 2(d).

206. *Id.* § 2(a).

arbitration clause of the contract, the court may interfere and protect a party from being compelled to arbitrate.²⁰⁷

In *School Service Employees Union Local No. 284 v. Independent School District No. 86*,²⁰⁸ the Minnesota Court of Appeals used these guidelines to determine whether a disagreement over the subcontracting out of a food service operation was within the scope of the arbitration clause in the collective bargaining agreement.²⁰⁹ The collective bargaining agreement defined an arbitrable grievance as "an employee allegation, disputed by the employer, relating to the interpretation or application of terms and conditions of employment insofar as such matters are contained in this agreement."²¹⁰ The Minnesota Court of Appeals began its analysis with "the proposition that arbitration to resolve disputes over terms and conditions of employment is favored in Minnesota."²¹¹ The court then added that "arbitrability of an issue is determined in the first instance by an arbitrator if it is reasonably debatable that the issue is covered under the arbitration clause in question."²¹²

Given this relatively easy standard to satisfy, the court found that the subcontracting out of the food service operation was "unequivocally a termination of the employees and not of the jobs," and therefore a "reasonably debatable" issue covered under the arbitration clause in question.²¹³ Thus the court granted the union's motion to compel arbitration.²¹⁴

In *Local No. 1119 American Federation State, County, and Municipal Employees v. Mesabi Regional Medical Center*,²¹⁵ the Minnesota Court of Appeals again used the "reasonably debatable" standard set forth in *Atcas v. Credit Clearing Corp.*²¹⁶ The dispute in *Local No. 1119* centered around a class action grievance filed by Local 1119 regarding the way in which the Medical Center was assigning full-time and part-time positions.²¹⁷ The union especially contested the Medical Center's practice of breaking up full-time positions and converting them into part-time positions with casual employees in avoidance of the collective bargaining agreement.²¹⁸

207. *School Serv. Employees Union Local No. 284 v. Independent School Dist. No. 88*, 459 N.W.2d 336, 338 (Minn. Ct. App. 1990) (quoting *Atcas v. Credit Clearing Corp.*, 292 Minn. 334, 341, 197 N.W.2d 448, 452 (1972)).

208. 459 N.W.2d 336.

209. *Id.* at 338.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 339.

214. *Id.*

215. 463 N.W.2d 290 (Minn. Ct. App. 1990).

216. 292 Minn. at 341, 197 N.W.2d at 452.

217. *Local No. 1119*, 463 N.W.2d at 292.

218. *Id.*

The trial court found that the "language of the Collective Bargaining Agreement clearly precludes from arbitration or negotiation the matter of the number of full or part time positions created by the Medical Center."²¹⁹ Applying the *Atcas* guidelines, the court of appeals overruled the trial court by finding that the grievance was well within the "broad scope of the arbitration clause contained in the collective bargaining agreement."²²⁰ The court found that the conflicting positions held by the union and the Medical Center regarding the utilization of casual employees were "a good indication that, at least for the purpose of determining arbitrability, the language of the collective bargaining agreement does not clearly express the intention of the parties."²²¹ The court then stated that "[s]ince the union and the Medical Center disagree about the scope of the arbitration clause and whether the grievance is subject to arbitration under it, the intention of the parties to arbitrate the dispute is at least reasonably debatable."²²² Therefore, the court concluded that "under *Atcas* the issue of arbitrability must be determined by the arbitrator and not by the court as was done here."²²³

B. Scope of Court Findings

Along with *Local No. 1119*, the court of appeals also decided *Local No. 791 American Federation State, County, and Municipal Employees v. City of Hibbing*.²²⁴ The controversy in *Local No. 791* concerned the hiring of non-union temporary truck drivers by the City of Hibbing and the refusal of the city to let equipment operator employees "bump" these temporary employees from the truck driving positions.²²⁵ The trial court found that these practices by the City of Hibbing did not violate the provisions of the collective bargaining agreement and specifically found that the hiring of the temporary employees was within the exclusive management rights provision.²²⁶

Applying the standards set forth in *Atcas*, the court of appeals overruled the trial court by holding that "a trial court is not allowed to make factual findings when a motion to compel arbitration is brought before it."²²⁷ The appeals court found that the conclusions of the trial court were based upon factual findings.²²⁸ The court held that "[i]n judicial proceedings to stay or compel arbitration, the

219. *Id.* at 296.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. 463 N.W.2d 290 (Minn. Ct. App. 1990).

225. *Id.* at 293.

226. *Id.* at 296.

227. *Id.*

228. *Id.*

limited issue presented is the existence and scope of the arbitration agreement.²²⁹ In addition, the court found support in the Minnesota U.A.A. which specifically provides that "[a]n order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown."²³⁰

In *Crown Oil and Wax Co. v. Glen Construction Co.*,²³¹ the Maryland Court of Appeals reiterated the Minnesota Court's holding that the trial court is prohibited from inquiring into the merits of the claim.²³² The controversy arose out of a contract between Crown Oil and Glen Construction to construct a Quality Inn under a franchise agreement.²³³ Crown Oil, however, transferred the franchise agreement to Frederick Inn Limited Partnership (FHLP).²³⁴ On October 29, 1985, Crown Oil gave notice to Glen that they were terminating the construction contract.²³⁵ In November 1985, Glen demanded arbitration with Crown Oil under their contract.²³⁶

In June 1987, Crown Oil filed an amended answer and counterclaim in arbitration "on its own behalf, and on behalf of FHLP."²³⁷ On August 11, 1987, Glen filed a complaint in the Circuit Court of Frederick County naming Crown Oil and FHLP as defendants and seeking to restrain Crown Oil and FHLP from pursuing in arbitration "any claim by or on behalf of FHLP."²³⁸

Glen acknowledged that it agreed to arbitrate with Crown Oil but its position was that FHLP was not a party to the construction contract, that Glen has not agreed to arbitrate with FHLP claims by FHLP, and that Glen has not agreed to arbitrate claims on behalf of FHLP asserted by Crown Oil.²³⁹

The circuit court found that FHLP was not a third party beneficiary of the construction contract—the fact that FHLP was not named in the contract as "most significant," and the fact only Crown Oil had counterclaimed for damages in the arbitration as "particularly significant."²⁴⁰ Therefore the court enjoined Crown Oil and FHLP "from pursuing against Glen . . . in any arbitration proceeding, any claim by or on behalf of FHLP."²⁴¹

In interpreting the Maryland U.A.A., the court of appeals found that where the parties use broad, all encompassing clauses, it is presumed they intended all

229. *Id.* (quoting *United States Fidelity & Guar. Co. v. Fruchtmann*, 263 N.W.2d 66, 71 (Minn. 1978)).

230. MINN. STAT. § 572.09(e) (1988).

231. 320 Md. 546, 578 A.2d 1184 (1990).

232. *Id.* at 557-58, 578 A.2d at 1189.

233. *Id.* at 550, 578 A.2d at 1186.

234. *Id.*

235. *Id.* at 553, 578 A.2d at 1187.

236. *Id.*

237. *Id.* at 555, 578 A.2d at 1188.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

matters to be arbitrated.²⁴² But in determining the scope of these matters, the court relied on their previous decision in *Gold Coast Mall v. Larmar Corp.*²⁴³ in which they held: "[i]n accord with this legislative policy [favoring enforcement of arbitration agreements], the Act strictly confines the function of the court in suits to compel [or stay] arbitration to the resolution of a single issue—is there an agreement to arbitrate the subject matter of a particular dispute."²⁴⁴

Also in *Gold Coast*, Judge Davidson writing for the court of appeals, classified disputes over the scope of an arbitration clause into three types.²⁴⁵ The first type is "where the language of the arbitration clause is clear, and the dispute in question falls clearly within the provision."²⁴⁶ The second kind is "where it is clear that the issue sought to be arbitrated lies beyond the scope of the arbitration clause."²⁴⁷ In both of these situations the court decides the issue of arbitrability and compels or stays arbitration accordingly.²⁴⁸ The third type is where the language is unclear as to "whether the subject matter of the dispute falls within the scope of the arbitration agreement."²⁴⁹ It is in this third class of disputes that "the Court should promote the legislative policy favoring arbitration and leave the issue of arbitrability to the arbitrators."²⁵⁰ The dispute addressed in *Crown Oil* was of this third kind.²⁵¹

The court in *Crown Oil* held that Crown Oil "at least equitably assigned its benefits under the construction contract to FHLP and FHLP assumed the obligations of Crown Oil under the contract" and thus had the right to compel arbitration of the dispute with the contractor.²⁵² The court relied on the reasoning of *Rubberoid Co. v. Glassman Construction Co.*,²⁵³ which states that "any words or transaction(s) which show an intention on one side to assign, and on the other to receive . . . will operate as an effective equitable assignment."²⁵⁴ Therefore, the court found that if the language of the "lease is not an express assumption by FHLP of Crown Oil's obligations as owner under the construction contract, the entire transaction compels the finding that there was an implied assumption."²⁵⁵

242. *Id.* at 558, 578 A.2d at 1189.

243. 298 Md. 96, 468 A.2d 91 (1983).

244. *Id.* at 103-04, 468 A.2d at 95.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *See Crown Oil*, 320 Md. at 557-60, 578 A.2d at 1189-90.

252. *Id.* at 564, 578 A.2d at 1192.

253. 248 Md. 97, 234 A.2d 875 (1967); *see Crown Oil*, 320 Md. at 564, 578 A.2d at 1192.

254. *Rubberoid Co.*, 248 Md. at 103, 234 A.2d at 878.

255. *Crown Oil*, 320 Md. at 565, 578 A.2d at 1192-93.

In *Slutsky-Peltz Plumbing & Heating Co. v. Vincennes Community School Corp.*,²⁵⁶ the Indiana Court of Appeals was forced to interpret the Indiana U.A.A. in a controversy between a contractor and a corporation created for the purpose of financing construction of a school building.²⁵⁷ The dispute arose out of coordination and delay problems on behalf of Slutsky-Peltz.²⁵⁸ The electrical contractor, one of the three contractors working on the construction project, exercised its right under the prime contract to demand arbitration.²⁵⁹ In response to the electrical contractor's demand for arbitration, the corporation filed a motion requesting joinder of Slutsky-Peltz and Traylor Bros., the project coordinator, as third party defendants in the electrical contractor's arbitration.²⁶⁰ As a result, Slutsky-Peltz filed a separate demand for arbitration against the corporation.²⁶¹

After the arbitrators held a pre-arbitration hearing in which they determined that Slutsky-Peltz and Traylor Bros. could not be joined in the electrical contractor's arbitration, the arbitrators gave the corporation time in which to obtain a court order compelling Slutsky-Peltz and Traylor Bros. to participate in the electrical contractor's arbitration.²⁶² The corporation then promptly filed an application to compel arbitration in which it requested joinder of the two contractors and subsequently amended its application to request a stay of the Slutsky-Peltz arbitration pending decision of the joinder and consolidation issues arising from the electrical contractor's arbitration.²⁶³

The trial court entered extensive findings of fact and conclusions of law determining that the corporation was entitled to summary judgment and therefore ordered a stay of the Slutsky-Peltz arbitration and joinder of the two contractors in the electrical contractor's arbitration.²⁶⁴ Slutsky-Peltz then appealed on the sole issue of whether consolidation and joinder of all the contractors into one arbitration proceeding was proper under the terms of the prime contracts and under Indiana Law.²⁶⁵

In applying the Indiana U.A.A., the Indiana Court of Appeals found that the contract which existed provided for arbitration.²⁶⁶ The court then addressed the question of whether the arbitration provision in the contract amounted to an agreement by Slutsky-Peltz and Traylor Bros. to submit to arbitration through consolidation and joinder.²⁶⁷ In applying the rule that a trial court may not extend arbitration agreements by construction or implication, the court of appeals

256. 556 N.E.2d 344 (Ind. Ct. App. 1990).

257. *Id.* at 345.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 346.

266. *Id.*

267. *Id.*

held that the trial court may "determine the issues and the parties subject to arbitration pursuant to the plain meaning of the agreement."²⁶⁸ As a result, the court found that the arbitration provisions in the prime contract were unambiguous, substantially involved in the legal and factual questions raised by the electrical contractor's arbitration, necessary to accord complete relief in that proceeding, and therefore the trial court properly ordered them to participate in the electrical contractor's arbitration.²⁶⁹

C. Severability

Section 2(d) of the U.A.A. expressly permits the severing of issues into arbitral and non-arbitral categories.²⁷⁰ If the issues are separate and distinct, the fact that one issue in a dispute is not arbitrable or exceeds the scope of the arbitration agreement does not negate the arbitration process for the rest of the dispute.²⁷¹

In *Lawrence Street Partners Ltd. v. Lawrence Street Venturers*,²⁷² a general partner brought an action against other general partners of a joint venture seeking a declaratory judgment. The request for declaratory judgment required that the other general partners fund capital contributions, and asserted claims of breach of contract, breach of fiduciary duty, misrepresentation, rescission, promissory estoppel, and breach of good faith dealing.²⁷³ The other partners moved that a valid arbitration agreement required the issues be submitted to arbitration.²⁷⁴

The Colorado Court of Appeals held that while the claims of breach of contract, breach of fiduciary duty, misrepresentation, rescission, promissory estoppel, and breach of good faith dealing were all subject to arbitration, the issue of capital contributions was not.²⁷⁵ The Court found that the capital contribution claims were expressly excluded from arbitration in the arbitration agreement.²⁷⁶ However, the mere fact that one claim among many is not arbitrable does not foreclose arbitration: "[t]o the extent [the] claims were distinctly separate and severable from capital contribution claims . . ." the claims are arbitrable.²⁷⁷

Sometimes, just determining whether an arbitration agreement was meant to cover a particular dispute presents problems. In *Columbia Heights Teachers v. School District 13*,²⁷⁸ the Minnesota Court of Appeals offered the following

268. *Id.*

269. *Id.* at 347.

270. U.A.A. § 2(d).

271. See *Lawrence Partners Ltd. v. Lawrence St. Venturers*, 786 P.2d 508, 511 (Colo. Ct. App. 1989).

272. 786 P.2d 508.

273. *Id.* at 508.

274. *Id.*

275. *Id.* at 511.

276. *Id.*

277. *Id.*

278. 457 N.W.2d 775 (Minn. Ct. App. 1990).

analysis in determining what an arbitration agreement covers: "[i]n determining whether an arbitration agreement was meant to cover a particular dispute, we look to the language of the agreement."²⁷⁹ The simple analysis taken by the court rendered the deceptively simple result of only those things mentioned in the agreement being covered by arbitration.²⁸⁰ This approach was very different from that taken by the court in *Lawrence*.

The *Lawrence* court simply took a practical and common sense approach in interpreting an arbitration agreement. The arbitration agreement was clear as to what was arbitrable and what was not.²⁸¹ And that which was arbitrable was subject to severance and therefore immune from litigation.²⁸² The rigid approach of the *Columbia Heights* court virtually disregards the utility of Section 2(d).²⁸³

IV. APPOINTMENT OF ARBITRATORS BY COURT

Where an otherwise valid arbitration agreement is involved, Section 3 of the U.A.A. espouses the proposition that absent a method for appointing an arbitrator or where that method has been frustrated for any reason, the court "on application of a party shall appoint one or more arbitrators."²⁸⁴ There appears to be little hesitation on the part of courts to appoint arbitrators where the dominant intent of the parties to arbitrate is clear; even when the specific provisions of the arbitration agreement, dealing with the appointment of an arbitrators, cannot be fulfilled.²⁸⁵

In *Moore, Costello & Hart v. Albrecht*,²⁸⁶ the Minnesota Court of Appeals compelled arbitration where the arbitration agreement specifically named the arbitrator to be used, but did not provide for an alternative arbitrator in cases where the original arbitrator was unable to fulfill his responsibility.²⁸⁷ The Minnesota Court of Appeals reversed the trial court's holding that the parties had "agreed to arbitrate, if at all, only before [the original arbitrator]."²⁸⁸ The court held that the dominant intent of the parties was to arbitrate and that pursuant to Minnesota Statute 572.10 (U.A.A. § 3) arbitration was required.²⁸⁹

279. *Id.* at 777.

280. *Id.*

281. *Lawrence*, 786 P.2d at 510.

282. *Id.*

283. See *Columbia Heights*, 457 N.W. at 777.

284. U.A.A. § 3.

285. See *Moore, Costello & Hart v. Albrecht*, No. C4-90-1086, slip op. at 2-3 (Minn. Ct. App. Oct. 30, 1990) (WESTLAW, MN-CS database). This unpublished opinion is not considered precedential by the Minnesota Court of Appeals, but is included in this survey due to the insight it lends to the understanding of the appointment of arbitrators under the U.A.A. See MINN. STAT. ANN. § 480A.08(3) (1990).

286. No. C4-90-1086 (Minn. Ct. App. Oct. 30, 1990).

287. *Id.* at 1.

288. *Id.*

289. *Id.* at 3.

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators²⁹⁰

Both parties applied to the trial court for appointment of arbitrators.²⁹¹ However, the number of arbitrators was a divisive issue.²⁹² The defendant, Albrect, wanted a single arbitrator consistent with the arbitration agreement in question,²⁹³ while Moore, Costello, and Hart desired a three-member panel pursuant to an earlier agreement.²⁹⁴ The Court, however, did not hesitate to find that the dominant intent of the parties was to arbitrate and that the arbitration agreement naming a specific arbitrator who was unable to arbitrate, did not frustrate the intent to arbitrate.²⁹⁵ Therefore, the Court remanded the case for appointment of a single arbitrator.²⁹⁶

V. CONFIRMATION AND VACATION OF AWARDS

Although arbitration provides an alternative to judicial resolution of disputes, the court still may play a limited role. Upon application of a party, the court, pursuant to Section 11 of the U.A.A.,²⁹⁷ may confirm the arbitration award, unless a party moves pursuant to Section 12 of the U.A.A.²⁹⁸ to have the award

290. MINN. STAT. § 572.10 (1988).

291. *Moore*, No. C4-90-1086, slip op. at 1.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 3.

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

298. Section 12 of the U.A.A. concerns vacating an award and provides:

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

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

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

(3) The arbitrators exceeded their powers;

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

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection;

vacated. Such judicial review of the arbitration decision ensures the integrity of the arbitration process as an effective means of resolving disputes.

A. Arbitrator Misconduct, Partiality, and Bias

In *Hough v. Oswald*,²⁹⁹ the Illinois Court of Appeals held that an arbitrator who acts within her granted authority and whose decision is absent partiality or misconduct, decides an award which is not reviewable.³⁰⁰ In *Hough*, a partner in a law firm, Hough, alleged that an award resulting from arbitration was invalid.³⁰¹ Hough argued that his former partner, Oswald, had procured the award through fraud and thus the award should be vacated.³⁰² Hough, however, alleged no misconduct on the part of the arbitrator.³⁰³ The court reasoned that the only relevant question is whether the arbitrator committed fraud or wrongdoing.³⁰⁴ Absent such wrongdoing, fraud or "mistake appearing on the face" of the award, the award is valid.³⁰⁵ Thus, an allegation that one of the parties to an arbitration committed fraud to procure an award is not grounds for vacating.³⁰⁶

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.

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

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

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

U.A.A. § 12.

299. 556 N.E.2d 765 (Ill. App. Ct. 1990).

300. *Id.* at 766.

301. *Id.*

302. *Id.*

303. *Id.* at 767.

304. *Id.*

305. *Id.*

306. *Id.*; see also *Integrated Resources Equity Corp. v. Fairbanks N. Star Borough*, 799 P.2d 295, 298 (Alaska 1990) (the court held "an arbitration award shall be vacated if an arbitrator has been guilty of misconduct prejudicing the right of a party," citing Alaska Arbitration Act, ALASKA STAT. § 09.43.120(a)(2)).

B. The Arbitrator's Scope of Authority

In *Mandich v. North Star Partnership*,³⁰⁷ Mandich was a party to a two-year contract with North Star Partnership.³⁰⁸ The contract provided for arbitration of any disputes and further stated that, "this agreement contains the entire agreement between the Parties and there are no oral or written inducements, promises, or agreements, except as provided herein."³⁰⁹ Mandich's agent agreed orally with the agent for North Star that if Mandich retired and collected under a disability insurance policy that North Star would not then be obligated to pay his salary under the contract.³¹⁰

The Minnesota Court of Appeals held that the arbitrator did not exceed his authority by recognizing the validity of the oral agreement.³¹¹ The court relied on the general proposition that "[i]f the arbitrator's decision is challenged on the merits, the decision must be upheld if the award draws its essence from the collective bargaining agreement."³¹² In addition, an award "does draw its essence from the collective bargaining agreement so long as the interpretation can in some rational manner be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention."³¹³ A reviewing court may only vacate the award where there is "manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop."³¹⁴

307. 450 N.W.2d 173 (Minn. Ct. App. 1990).

308. *Id.* at 174.

309. *Id.* at 175.

310. *Id.*

311. *Id.* at 177.

312. *Id.* at 176; see *County of Hennepin v. Hennepin County Ass'n of Paramedics and Emergency Medical Technicians*, 464 N.W.2d 578, 580 (Minn. Ct. App. 1990) (holding that the award must draw its essence from the collective bargaining agreement).

313. *Mandich*, 450 N.W.2d at 176 (quoting *Ramsey County v. Local 8*, 309 N.W.2d 785, 790 (Minn. 1981)); see *In re Robinson/Keir Partnership*, 573 A.2d 1188, 1191 (Vt. 1990) (holding that the original arbitration agreement granted authority but this authority is not fixed by the only agreement). If the parties submit a written demand for an arbitration then the arbitrator has the authority necessary to resolve the demands. *Id.* at 1191-92.

314. *Mandich*, 450 N.W.2d at 176. *But see* *Rauh v. Rockford Prods. Corp.*, 281 Ill. App. 3d 361, 363, 559 N.E.2d 73, 75 (1990). The court agreed that an arbitrator exceeds his authority by deciding issues not submitted by the parties. *Id.* at 365, 559 N.E.2d at 75. The court in *Rauh*, gave a narrow interpretation to the issues submitted by the parties. The court found that because neither party mentioned in their written demands for arbitration the correct clause in the original contract, to fire the Chief Executive Officer of the corporation; the arbitrator had exceeded her authority by relying on such clause in terminating the officer. *Id.* at 366-67, 559 N.E.2d at 76-77. The decision by the court is narrow because the parties clearly desired the arbitrator to resolve the broad issue of termination yet the court relied on the technical point of failing to specify the correct clause. The court could have let the arbitration award stand on the grounds that the parties' written demands presented the issue for termination or resolution; and therefore, the arbitrator had as her authority to resolve the termination issue the original agreement regardless of the errors in the written demands to specify the correct clause within such agreement.

The court, recognizing the extent of the arbitrator's powers, concluded that the arbitrator may consider aspects of the parties' relationship that a court would otherwise not be allowed to recognize.³¹⁵ Hence, the arbitrator did not exceed his powers by looking to the oral agreement as the more "persuasive indicia of the parties' intent."³¹⁶

In Pennsylvania, once it is determined that the agreement encompasses the subject matter of the dispute, review of arbitrator's findings with regard to a collective bargaining agreement is limited to whether the decision draws its essence from the collective bargaining agreement.³¹⁷ Accordingly, the court in *American Federation of State, County and Municipal Employees Local v. Borough of State College*³¹⁸ concluded that notwithstanding "irregularities" during the investigation process, the arbitrator's award will not be reversed or vacated where full and complete hearings were conducted, witnesses were offered, permitted to testify, and subject to cross examination, and all evidence and arguments were considered by the arbitrator.³¹⁹ Since the arbitrator's award was based on a reasonable interpretation of the collective bargaining agreement and standards of conduct developed by the department pursuant to the collective bargaining agreement, the award draws its essence from the agreement, and thus, shall not be reversed or vacated.³²⁰

In *David Co. v. Jim W. Miller Construction, Inc.*,³²¹ Miller contracted with David Co. to construct townhouses.³²² Disputes arose concerning claims of defective workmanship.³²³ The arbitrators, taking a somewhat novel approach, ordered the general contractor, Miller, to purchase the real property on which the townhouses had been erected.³²⁴ Miller contended that the arbitrators, in fashioning such equitable relief, exceeded their authority.³²⁵

The Minnesota Supreme Court, based on the general tradition of favoring the use of arbitration in dispute resolution, recognized that while parties may by contract or written submission limit the arbitrators' authority, absent such limitation, the arbitrators are the final judges of both the facts and the law concerning the merits.³²⁶ The court concluded that, in light of the extremely broad arbitration clause in the contract, the arbitrators did not exceed their

315. *Mandich*, 450 N.W.2d at 176.

316. *Id.*

317. *See Neshaminy Fed'n of Teachers v. Neshaminy School Dist.*, 501 Pa. 534, 539-54, 462 A.2d 629, 632 (1983).

318. 578 A.2d 48 (Pa. Commw. Ct. 1990).

319. *Id.* at 52.

320. *Id.* at 53.

321. 444 N.W.2d 836 (Minn. 1989).

322. *Id.* at 837.

323. *Id.* at 837-38.

324. *Id.* at 838.

325. *Id.* at 840.

326. *Id.*

authority in fashioning such equitable relief.³²⁷ In addition, the fact that the arbitrators were able to make an alternative monetary award has no relevance to the determination of the scope of powers delegated to them.³²⁸

With regard to the award of punitive damages, the court in *Complete v. Behan*³²⁹ concluded that where the parties' agreement did not provide for award of punitive damages, the award of such damages exceeded the arbitrator's authority.³³⁰ Whereas, some courts hold that broad arbitration clauses show intent to give arbitrators broad powers to decide any claim, including the allowance of punitive damages,³³¹ the court in *Complete* reasoned that punitive damages may not be awarded absent express authorization in the agreement or pursuant to a stipulated submission.³³²

In *Granger Northern, Inc., v. Cianchette*,³³³ the Maine Supreme Court established an even broader spectrum in which arbitrators may interpret contracts. In order for the arbitrator to exceed her authority "fair and reasonable minds" must agree that the interpretation given the agreement by the arbitrator is *impossible* if fairly construed.³³⁴ In *Granger*, the arbitration agreement contained an "all disputes" clause which refers all disputes arising from the parties' original contract to arbitration.³³⁵ The defendant, Cianchette, argued that a dispute over "change orders" did not lie within the original contract with Granger Northern, Inc., and therefore, the arbitrator exceeded his authority by issuing an award effecting such orders.³³⁶

The court determined that absent an express exclusion of the change orders from the "all disputes" arbitration agreement, the orders were well within the arbitrator's scope of authority.³³⁷ The court relied on *Acevedo Maldonado v. PPG Industries*,³³⁸ which held "contract-generated or contract-related dis-

327. *Id.* at 840-42.

328. *Id.* at 842.

329. 558 So. 2d 48 (Fla. Dist. Ct. App. 1990).

330. *Id.* at 51.

331. See *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1387-88 (11th Cir. 1988); *Willoughby Roofing & Supply v. Kajima Int'l, Inc.*, 598 F. Supp. 353, 357-59 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985); *Ehrich v. A.G. Edwards & Sons, Inc.*, 675 F. Supp. 559, 563-65 (D.S.D. 1987).

332. *Complete*, 558 So. 2d at 51.

333. 572 A.2d 136 (Me. 1990).

334. *Id.* at 137; see *Kilianek v. Kim*, 192 Ill. App. 3d 139, 140, 548 N.E.2d 598, 599 (1989) (holding that in contract interpretation an arbitrator will not exceed her authority unless "all fair and reasonable minds would agree that the construction of the contract made by the arbitrator was not possible under a fair interpretation thereof").

335. *Granger*, 572 A.2d at 138-39.

336. *Id.* at 137-38 (citing the Uniform Commercial Code, Article 9, which defines a change order as "a written order to the Contractor signed by the Owner or his authorized agent and issued after the execution of this Agreement, authorizing a Change in the Guaranteed Maximum Price . . .").

337. *Id.* at 139.

338. 514 F.2d 614 (1st Cir. 1975).

putes³³⁹ fall within the arbitration agreement because the parties specified an "all disputes" clause in the arbitration clause.³⁴⁰ For a dispute to be nonarbitrable it must be so unrelated that any fair interpretation of the arbitration agreement could not possibly cover the dispute.³⁴¹

C. Errors of Fact and Law

In the absence of fraud or misconduct, courts will generally not vacate an arbitration award that contains errors of fact or law.³⁴² In *C Ltd. v. Creative Microsystems, Inc.*,³⁴³ the court quoted the Kansas Supreme court which held: "[w]here parties have agreed to be bound by a submission to arbitration, errors of law and fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made."³⁴⁴ In *C Ltd.*, a computer software company, C Ltd., contended that Creative Microsystems, Inc. breached an exclusivity agreement in a contract regarding a certain piece of software.³⁴⁵ An arbitrator concluded that C Limited suffered no damages.³⁴⁶ C Ltd. appealed, arguing that the arbitrator had made an error in not awarding damages and that the error was of such magnitude that the awards should be vacated.³⁴⁷

The court affirmed the arbitration award citing the Kansas Supreme Court which stated: "it is not the function of the court to hear the case de novo and consider the evidence presented to the arbitrators."³⁴⁸ The court recognized that "[a] mistake or error of fact of law which is so gross and palpable as to be evidence of misconduct or undue partiality may, however, be a ground of impeachment, as may a misconstruction of the law which is so perverse as to work manifest injustice."³⁴⁹ However, the court found that award to be valid because the evidence did not support C Ltd.'s contention that the award constituted manifest injustice.³⁵⁰ Of course, a court has discretion in deciding whether a

339. *Id.* at 616.

340. *Granger*, 572 A.2d at 139.

341. *Id.*

342. *See* *Batten v. Howell*, 389 S.E.2d 170, 171-72 (S.C. Ct. App. 1990).

343. No. 62984 (Kan. Ct. App. Dec. 22, 1989) (WESTLAW, KS-CS data base). This unpublished opinion is not considered precedential by the Kansas Court of Appeals, but is included in this survey to aid the understanding of the U.A.A. *See* KAN. SUP. CT. R. 7.04.

344. *Id.* at 6 (quoting *Coleman v. Local No. 570*, 181 Kan. 969, 980-81, 317 P.2d 831, 841 (1957). The Kansas Supreme Court stated "Nothing in the award relative to the merits of the controversy as submitted, even though incorrectly decided, is ground for setting aside an award in the absence of fraud, misconduct or other valid objections.").

345. *Id.* at 3.

346. *Id.* at 4.

347. *Id.*

348. *Id.* at 5 (quoting *Jackson Trak Group, Inc. v. Midstates Port Auth.*, 242 Kan. 683, 689, 751 P.2d 122, 127 (1988)).

349. *Id.* at 7 (quoting from 6 C.J.S. *Arbitration* § 154, 410-12)).

350. *Id.* at 8-9.

mistake of law is of such a nature as to be manifestly unjust and therefore require vacating.³⁵¹

D. Validity of Award

*Air Conditioning Equipment, Inc. v. Rogers*³⁵² involved a non-final order entered by the original arbitrator, subsequent disqualification of the arbitrator, and eventual removal of the matter from arbitration by the court. The court concluded that the interim ruling should not have been confirmed as an "award."³⁵³

An arbitration award should resolve and determine all matters that have been submitted,³⁵⁴ and generally, a confirmation of an "award" that is not final is considered invalid.³⁵⁵ However, an incomplete award may be confirmed where the omitted matters are severable and sufficiently independent of the matters determined in the order.³⁵⁶ In *Air Conditioning Equipment*, the arbitrator's order left unresolved "numerous interrelated issues, and did not contain within its terms an objective formula for adequately disposing of them."³⁵⁷ The court additionally found that the trial court had no authority to remove the matter from arbitration regardless of its frustration with the lack of progress.³⁵⁸ A successor arbitrator should have been appointed. The court ordered appointment of such an arbitrator and commencement of arbitration de novo due to the uncertainty of the interim order.³⁵⁹

In *Goeller v. Liberty Mutual Insurance Co.*,³⁶⁰ a panel of three arbitrators assembled as provided in an insurance policy contract. The neutral arbitrator issued an order signed only by the neutral arbitrator, and the arbitrator appointed by Goeller maintained that he had not been consulted and that the order misrepresented his opinion.³⁶¹ Liberty Mutual then filed a petition to confirm the award.³⁶² Because all the panel members had not participated in the

351. See *Raugh*, 201 Ill. App. 3d at 367, 559 N.E.2d at 77. That court held that an "arbitrator's mistakes of fact and errors in application of the law cannot be excused because they are apparent on the face of the award," and therefore the award is invalid and must be vacated. *Id.*

352. 551 So. 2d 554 (Fla. Dist. Ct. App. 1989).

353. *Id.* at 556.

354. See *Hearst Corp. v. Swiss Bank Corp.*, 584 A.2d 655, 658 (Me. 1991) (the court held that an award must meet a standard of "clear and definiteness" to be enforceable; a court can not confirm or enter judgment on an award which is incomplete).

355. *Air Conditioning Equipment*, 551 So. 2d at 556.

356. *Id.*

357. *Id.*

358. *Id.* at 557.

359. *Id.*

360. 568 A.2d 176 (Pa. 1990).

361. *Id.* at 177.

362. *Id.*

deliberations, the trial court refused to confirm the award as it was found not to be a final award.³⁶³ A new panel was ordered to try the case.³⁶⁴

The Pennsylvania Supreme Court concluded that the purported award failed to meet the statutory requirement that the "award of the arbitrators shall be in writing and signed by the arbitrators joining in the award," and thus the award was a nullity.³⁶⁵ The court reasoned that when an arbitrator "properly appointed and entitled to act, is denied access to the deliberations of the other arbitrators, their decision is not a decision."³⁶⁶ While a strong presumption exists "in favor of an arbitration panel's final award," it must be the result of corporate actions of the panel.³⁶⁷ Hence, the award should not be confirmed, and a new arbitration panel was properly ordered to try the case.³⁶⁸

E. Collateral Proceedings

According to Florida's U.A.A. sections 682.12-14, a trial court has four options when faced with an arbitration award: (1) it can confirm the award, (2) vacate the award, (3) modify the award, or (4) correct the award.³⁶⁹ In *Carpet Concepts v. Architectural Concepts*,³⁷⁰ pursuant to AAA Commercial Arbitration Rule B, the arbitrator prohibited the filing of a new or different claim after the arbitrator had been appointed.³⁷¹ Subsequent to the appointment of the arbitrator, Architectural Concepts served a counterclaim that had not been discussed at the preliminary hearing.³⁷² The arbitrator dismissed the counterclaim without prejudice.³⁷³ Thereafter, Carpet Concepts filed an application for confirmation and within ninety days Architectural Concepts filed a motion to refer the application to arbitration.³⁷⁴ The trial court granted the motion and referred the matter back to arbitration.³⁷⁵

The District Court of Appeals found that Carpet Concepts was entitled to confirmation because Architectural Concepts failed to establish one of the limited grounds upon which the award could be vacated, e.g. the award was modified or corrected.³⁷⁶ The court went on to conclude that even if Architectural Concept's motion impliedly stated grounds for relief based on the arbitrator's "refusal to hear

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* at 178.

367. *Id.*

368. *Id.*

369. FLA. STAT. § 682.12-14 (1987).

370. 559 So. 2d 303 (Fla. Dist. Ct. App. 1990).

371. *Id.* at 304-05.

372. *Id.* at 304.

373. *Id.* at 305.

374. *Id.*

375. *Id.*

376. *Id.*

evidence material to the controversy . . . as to prejudice substantially the rights of a party", Architectural Concepts failed to demonstrate the requisite prejudice.³⁷⁷ The court could not find prejudice, as Architectural Concept's counterclaim was not barred, it was simply referred to a separate arbitration.³⁷⁸

F. Vacation Based on Nonstatutory Grounds

The standard of review for arbitration awards is limited, and in Illinois an arbitration award must be enforced if the arbitrator acts within his scope of authority and the award draws its essence from the parties' collective bargaining agreement.³⁷⁹ However, if the award violates public policy it will not be enforced.³⁸⁰ Furthermore, courts refuse to enforce arbitration awards that require violations of laws.³⁸¹ This sentiment was echoed in *AFSCME v. Department of Corrections*.³⁸² The court in *AFSCME* supported the trial court's vacation of an arbitration award where the arbitrator applied the exclusionary rule outside the realm of criminal law, a misapplication violative of public policy.³⁸³

Similarly, in *Department of Central Management Services v. AFSCME*,³⁸⁴ the court concluded that where an arbitration award arises from a collective bargaining agreement that violates public policy, the reviewing court has the power to vacate the award. In that case, the Illinois Public Labor Relations Act (Act) governed the parties' collective bargaining agreement, which contained a provision allowing the parties to submit employee discharges to arbitration.³⁸⁵ The Act provided that the arbitration provisions of collective bargaining agreements are subject to the Illinois U.A.A.³⁸⁶ Accordingly, section 12(a) of the U.A.A. allowed for circuit court vacation of arbitration awards under certain circumstances.³⁸⁷ This section also provided that, with respect to vacating, modifying, or correcting awards entered as a result of arbitration provisions in collective bargaining agreements, the grounds for vacating, modifying, or correcting shall be those "which existed prior to the enactment of this Act."³⁸⁸ In fact, public policy was grounds for vacation of an arbitration award that existed at common law prior to the enactment of the U.A.A.³⁸⁹

377. *Id.*

378. *Id.*

379. *See AFSCME v. State*, 124 Ill. 2d 246, 253-55, 529 N.E.2d 534, 537 (1988).

380. *Id.* at 260, 529 N.E.2d at 540.

381. *Id.* at 263, 529 N.E.2d at 541.

382. 192 Ill. App. 3d 108, 548 N.E.2d 592 (1989).

383. *Id.* at 110, 548 N.E.2d at 594-95.

384. 554 N.E.2d 759 (Ill. App. Ct. 1990).

385. *Id.* at 760.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 762.

The court concluded that "section 8 of the Act makes the UAA applicable for review of the instant arbitrators' awards."³⁹⁰ "As the award arises from provisions of a collective bargaining agreement, section 12(e) of the UAA makes the common law grounds for vacation of awards the test we must apply, and a violation of public policy is one of those grounds."³⁹¹

This conclusion settled the dispute as to whether the Illinois State Labor Relations Board had exclusive jurisdiction over challenges to arbitration awards issued under collective bargaining agreements where the challenge to the award is violative of public policy; the court concluded that the trial court, in reviewing the award, has the power to vacate on the grounds of public policy.³⁹²

VI. MODIFICATION OR CORRECTION OF AWARDS

Pursuant to section 9 of the U.A.A.,³⁹³ the arbitrator(s) may modify or correct a faulty arbitration award. Likewise, pursuant to section 13³⁹⁴ of the U.A.A., the court may modify or correct an arbitration award. Because the arbitration process is to remain an effective alternative to judicial resolution, the grounds for modification or correction are limited. The award may be modified or corrected only upon a finding of evident miscalculation, evident mistake in

390. *Id.*

391. *Id.*

392. *Id.* at 762-63.

393. Section 9 of the U.A.A. concerns the change of award by arbitrators and provides:

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.

U.A.A. § 9.

394. The U.A.A. section concerning modification or correction of awards 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 controversy.

(b) If the application is granted, the court shall modify and correct the award as so 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.

U.A.A. § 13.

description, a matter not properly submitted, imperfect form of award, or where clarification of the award is necessary.³⁹⁵

In *Kersting v. Royal-Milbank Insurance*,³⁹⁶ arbitrators concluded that the collateral source rule was inapplicable to arbitration proceeding and did not act to reduce the arbitrator's award.³⁹⁷ The Minnesota collateral source rule provides that in a civil action a party may file a motion to determine collateral sources and the trial court shall reduce the award by that amount.³⁹⁸ The court of appeals concluded that arbitration is not an "action" within the meaning of the collateral source statute.³⁹⁹ Accordingly, the language of the statute cannot require its application in arbitration proceedings.⁴⁰⁰

The court went on to state that even if it had accepted the argument that the collateral source statute applied to arbitration proceedings, the court would still "disagree as to the duty of the trial court to correct the arbitration panel's error in not applying the statute."⁴⁰¹ The court stated that the grounds for "vacating or modifying an arbitration award are specific and narrow."⁴⁰² Additionally, the court cited previous cases holding that "a court will not ever set aside an arbitration award because it thinks the arbitrators erred as to the law or facts, as long as the reasoning and judgment are consistent."⁴⁰³ The court also cited precedent holding "no statutory or case law authority exists giving the district court jurisdiction to vacate an award because the arbitrator(s) made an error of law."⁴⁰⁴ The court concluded that under existing case law the court did not have jurisdiction to modify the arbitration award.⁴⁰⁵

VII. TIMELINESS

Motions to vacate must be made "within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known."⁴⁰⁶ A motion to modify or correct must also be made within ninety days measured from the delivery date of a copy of the award to the applicant.⁴⁰⁷ Courts will follow time requirements strictly either

395. *Id.*

396. 456 N.W.2d 270 (Minn. Ct. App. 1990).

397. *Id.* at 274.

398. *Id.* at 272.

399. *Id.* at 274.

400. *Id.* at 273-74.

401. *Id.* at 274.

402. *Id.*

403. *Id.* at 274 (quoting *Johnson v. American Family Mut. Ins.*, 426 N.W.2d 419, 421 (Minn. 1988)).

404. *Id.* (quoting *Lucas v. American Family Mut. Ins.*, 403 N.W.2d 646, 649 (Minn. 1987)).

405. *Id.*

406. U.A.A. § 12(b) (Vacating an award).

407. U.A.A. § 13(a) (Modification or correction of an award).

adhering to the ninety day requirement of the U.A.A. or the time requirement of the state's version of the U.A.A.⁴⁰⁸

A. *Motions to Vacate, Motions to Modify or Correct, and Appeals*

In *Local 2, International Brotherhood of Electrical Workers, v. Anderson Underground Construction, Inc.*,⁴⁰⁹ a joint labor-management committee conducted an arbitration hearing of a grievance asserting violation of the parties' collective bargaining agreement.⁴¹⁰ The committee issued the arbitration award, a finding against Anderson, without signatures.⁴¹¹ Anderson received a copy of the award on February 14, 1986.⁴¹² Anderson never questioned the finality of the committee's award until the committee recirculated the award after making minor calculation corrections.⁴¹³ This modified award was signed on July 2, 1986.⁴¹⁴ Anderson asserted grounds to vacate for the first time on April 3, 1987.⁴¹⁵ The district court adopted the provision of the Missouri U.A.A. which requires final application to vacate an award to be filed "within 90 days after delivery of a copy of the award to the applicant."⁴¹⁶ Accordingly, the court of appeals refused to hear the motion to vacate as it was time-barred.⁴¹⁷

While the copy of the award did not have signatures, the court concluded that the "record shows the parties understood the final award was circulated in February and, indeed, Anderson acknowledged 'the complete award was read . . . and summarily approved'" at the February meeting.⁴¹⁸ Additionally, the court found that the committee's "ministerial activity of correcting a minor computational error did not alter the essential elements of the February award's finality."⁴¹⁹

B. *Actions to Confirm or Enforce*

The Minnesota Court of Appeals in *Hanson v. Larson*⁴²⁰ dealt with an arbitration action involving interpretation of a collective bargaining agreement subject to federal labor law under the Labor Management Relations Act. The court, in considering what statute of limitations to apply to determine timeliness,

408. See *Local 2, Int'l Brotherhood of Elec. Workers v. Anderson Underground Constr., Inc.* 907 F.2d 74, 75-76 (8th Cir. 1990).

409. 907 F.2d 74.

410. *Id.* at 75.

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.* (quoting MO. REV. STAT. § 435.405(2) (1986)).

417. *Id.* at 76.

418. *Id.*

419. *Id.*

420. 459 N.W.2d 339 (Minn. Ct. App. 1990).

referred to the Minnesota Supreme Court's conclusion that "an action in district court to *compel* arbitration is an action 'upon a contract' subject to the six-year limitation period."⁴²¹ The court found no reason to distinguish between actions to compel and actions to enforce with respect to limitation periods.⁴²² The court concluded that the action brought to enforce the award, brought less than six years after the award upon employer's breach of the collective bargaining agreement, was not time-barred by the applicable statutes of limitations.⁴²³

VIII. JUDGMENTS ON AWARDS

Attorney's fees may not be made a part of an arbitrator's award even if the arbitration agreement expressly provides for such payment.⁴²⁴ Some state versions of the U.A.A. also expressly prohibit awarding attorney fees in a final award.⁴²⁵ The general rationale behind such prohibition is that arbitrators are frequently unqualified to determine reasonable attorney fees.⁴²⁶

The Florida Arbitration Code prohibits awarding attorney's fees for services rendered by the attorney during arbitration.⁴²⁷ Section 682.11 provides that unless otherwise provided, the arbitrator's expenses and other expenses shall be paid in the award, "not including counsel fees."⁴²⁸ Previous Florida cases hold that, "[a]ttorney's fees for arbitration proceedings are expressly excluded by section 682.11, Florida Statutes (1985)."⁴²⁹

In *Fewox v. McMerit Construction Co.*,⁴³⁰ the Florida Court of Appeals retreated from this previous blanket denial of attorney's fees in concluding that "the 'not including counsel fees' clause in section 682.11 merely indicates that an arbitrator may not include attorney's fees in his award of expenses and fees incurred during arbitration proceedings."⁴³¹ The court discussed the original purpose in excluding attorney's fees from the subject matter jurisdiction of arbitration, reasoning that arbitrators are generally businessmen and are chosen because of expertise in particular areas, and as such, have no expertise for analyzing a attorney's reasonable fee.⁴³² The *Fewox* court concluded that "the intent of the statute is merely to prohibit arbitrators from awarding attorney's fees," and that "[t]he proper place to determine the entitlement to and amount of

421. *Id.* at 341.

422. *Id.*

423. *Id.* at 342-43.

424. U.A.A. § 10 (fees and expenses of arbitration).

425. *See, e.g.*, FLA. STAT. § 682.11 (1990).

426. *See Fewox v. McMerit Constr. Co.*, 556 So. 2d 419, 421-22 (Fla. Dist. Ct. App. 1989).

427. FLA. STAT. § 682.11.

428. *Id.*

429. *Glen Johnson, Inc. v. L.M. Howdeshell, Inc.*, 520 So. 2d 297, 298 (Fla. Dist. Ct. App. 1988); *St. Paul Fire & Marine Ins. v. Sample*, 533 So. 2d 1196 (Fla. Dist. Ct. App. 1988).

430. 556 So. 2d 419.

431. *Id.* at 421.

432. *Id.* at 421-22.

attorney's fees . . . is in the circuit court upon application for the confirmation of the [arbitrator's] award."⁴³³

Fewox involved seemingly conflicting statutes. Sections 627.428 and 627.756 allowed an award of attorney's fees against a surety insurer under a performance bond.⁴³⁴ Section 682.11, on the other hand, prohibited attorney's fees in an arbitration award.⁴³⁵ The court in *Fewox* ultimately concluded that "sections 627.428 and 627.756 authorize an award of attorney's fees to appellants, notwithstanding section 682.11, which merely prohibits the *arbitrator* from making such an award."⁴³⁶

The court in *Raymond James & Associates, Inc. v. Wieneke*⁴³⁷ reiterated this philosophy regarding attorney's fees. The *Wieneke* court concluded that it was improper for arbitrators to include attorney's fees within their award.⁴³⁸ The court stated that when the trial court reconsiders the petition for attorney's fees, "if there exists a contract or statute which allows the parties to be awarded fees on the underlying lawsuit, the trial judge may then award fees."⁴³⁹

IX. JURISDICTION

Jurisdiction under the U.A.A. is provided for by section 17. This section states that the making of a valid arbitration agreement under section 1 of the U.A.A. "providing for arbitration in this State confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder."⁴⁴⁰ Jurisdictional problems usually arise when an arbitration agreement does not specifically provide for arbitration in a named state.

In *Dewitt v. Al-Haddad*,⁴⁴¹ the appellate court held that the Tennessee U.A.A. confers jurisdiction on Tennessee courts if an agreement for arbitration could result in arbitration in Tennessee.⁴⁴² Relying upon the reasoning set forth in *L.R. Foy Construction Co. v. Dean L. Dauley and Waldorf Associates*,⁴⁴³ the appellate court found that as long as the requirements of in personam jurisdiction are met, then an agreement to be bound by a process that could result in Tennessee as the site of arbitration confers jurisdiction on Tennessee courts to confirm arbitration awards.⁴⁴⁴ The court also used this requirement of personal

433. *Id.* at 422.

434. FLA. STAT. §§ 627.428(1), 627.756 (1990).

435. *Id.* § 682.11.

436. *Fewox*, 556 So. 2d at 425; *see also* Park Shore Dev. Co. v. Higley South, Inc., 556 So. 2d 439, 439-40 (Fla. Dist. Ct. App. 1990).

437. 556 So. 2d 800 (Fla. Dist. Ct. App. 1990).

438. *Id.*

439. *Id.* at 801.

440. U.A.A. § 17.

441. No. 89-394-II (Tenn. Ct. App. Apr. 25, 1990) (WESTLAW, TN-CS database).

442. *Id.* at 2-3.

443. 547 F. Supp. 166 (D. Kan. 1982).

444. *Dewitt*, No. 89-394-II, slip op. at 3.

jurisdiction to refute the defendant's claim that an extremely expansive interpretation of the Tennessee U.A.A. "would in effect confer upon Tennessee courts jurisdictional power to enforce virtually any contract anywhere in the country providing for arbitration."⁴⁴⁵

In *H.T.I. Corp. v. Lida Manufacturing Co.*,⁴⁴⁶ the Missouri Court of Appeals held that jurisdiction was to be decided by the contract itself regardless of the contract's validity.⁴⁴⁷ *H.T.I.* involved a contractual dispute over a contract that called for arbitration and specified that the contract would be governed by the laws of New York.⁴⁴⁸ When *H.T.I.* asked a Missouri court to issue an order to stay the arbitration proceedings, the trial court dismissed for lack of jurisdiction.⁴⁴⁹ On appeal, *H.T.I.* argued that although Missouri might be the improper forum for arbitration, the contract did not deprive the Missouri court of the jurisdiction to decide whether the arbitration clause existed in the first place.⁴⁵⁰ The appellate court found that cases concerning the confirmation of an arbitration award were instructive.⁴⁵¹ These cases have held that jurisdiction to confirm an award arises out of a Missouri statute which is verbatim to section 17 of the U.A.A.⁴⁵² This section bestows jurisdiction only when the agreement provides for "arbitration in this state".⁴⁵³ Therefore, the court went on to hold that "since Missouri is not the state in which arbitration is specified, Missouri is without jurisdiction to proceed."⁴⁵⁴

X. APPEALS

The U.A.A. authorizes appeals to be taken from:

(1) An order denying an application to compel arbitration made under Section 2; (2) An order granting an application to stay arbitration made under Section 2(b); (3) An order confirming or denying confirmation of award; (4) An order modifying or correcting an award; (5) An order vacating an award without directing a rehearing; or (6) A judgment or decree entered pursuant to the provisions of this act.⁴⁵⁵

445. *Id.*

446. 785 S.W.2d 110 (Mo. Ct. App. 1990).

447. *Id.* at 111.

448. *Id.*

449. *Id.*

450. *Id.* at 112.

451. *Id.*; see *State ex rel. Tri-City Constr. Co. v. Marsh*, 668 S.W.2d 148, 152 (Mo. Ct. App. 1984).

452. *H.T.I. Corp.*, 785 S.W.2d at 112; see MO. REV. STAT. § 435.430 (1980).

453. *H.T.I. Corp.*, 785 S.W.2d at 112 (quoting MO. REV. STAT. § 435.430).

454. *Id.* at 113.

455. U.A.A. § 19.

In addition, the Act allows appeals to be taken "in the same manner and to the same extent as from orders or judgments in a civil action."⁴⁵⁶ Because courts grant deference to an arbitrator's decision, courts generally are not willing to accommodate parties desiring to appeal.

A. Appeals Same as Civil Actions

As the U.A.A. provides, appeals are allowed to be taken in the same manner as civil cases.⁴⁵⁷ In most civil cases, one may only appeal final orders. In *Ector v. Motorists Insurance Cos.*,⁴⁵⁸ the Pennsylvania Superior Court agreed that an order compelling arbitration is interlocutory and not appealable as a matter of right.⁴⁵⁹ But pursuant to Pennsylvania statute title 42 section 7320(a)(1), the court held that since the appellant was only appealing the trial court's denial of summary judgment and the grant of the appellee's summary judgment motion, the appeal was not an order compelling arbitration.⁴⁶⁰ An appeal of a court's denial or grant of summary judgment motions is clearly appealable in civil actions and therefore appealable under the U.A.A.⁴⁶¹

In *Saltzman Printers, Inc. v. Gunthrop-Warren Printing Co.*,⁴⁶² an Illinois appellate court denied an appeal because parties did not comply with statutory prerequisites.⁴⁶³ In *Saltzman*, the court had to decide if an order granting summary judgment in favor of Gunthrop-Warren was appealable as a final order.⁴⁶⁴ The parties also presented multiple issues for the court to decide.⁴⁶⁵ According to Illinois Supreme Court Rule 304(a), in the absence of a special finding that there is no just reason to delay enforcement or appeal, "any judgment that adjudicates fewer than all parties is not enforceable or appealable."⁴⁶⁶ Because the parties failed to request a special finding in accordance with the rule, the Illinois court refused to allow an appeal.⁴⁶⁷

456. *Id.*

457. *Id.*

458. 391 Pa. Super. 458, 571 A.2d 457 (1990), *appeal denied*, 525 Pa. 646, 581 A.2d 572 (1990), *appeal denied*, 575 Pa. 647, 581 A.2d 573 (1990).

459. *Id.* at 461, 571 A.2d at 459.

460. *Id.*

461. *Id.*

462. 192 Ill. App. 3d 130, 548 N.E.2d 585 (1989).

463. *Id.* at 133, 548 N.E.2d at 587.

464. *Id.* at 131, 548 N.E.2d at 586.

465. *Id.*

466. *Id.* at 133, 548 N.E.2d at 587.

467. *Id.*

B. UAA Authorized Appeals

The U.A.A. authorizes appeals in several circumstances.⁴⁶⁸ In *Valley Construction Co. v. Perry Host Management Co.*,⁴⁶⁹ the Kentucky Supreme Court allowed an appeal to be taken under Kentucky's version of the U.A.A.⁴⁷⁰ In a dispute between a hotel developer and contractor, the developer sued for breach of contract, breach of warranties and negligence.⁴⁷¹ When the contractor moved to stay proceedings and to compel arbitration the lower court denied both motions.⁴⁷² The Kentucky Supreme Court allowed an appeal on the grounds that although the motion lacked language of finality, the U.A.A. specifically allows appeals from a denial to stay and appeal from a motion to compel arbitration.⁴⁷³

A somewhat different result occurred under the Maryland U.A.A. in *Regina Construction Corp. v. Envirmech Contracting Corp.*⁴⁷⁴ In *Regina*, a subcontractor sued a general contractor arguing that their dispute was not covered by the arbitration clause in the parties' contract.⁴⁷⁵ But the Maryland Court of Special Appeals decided that the trial court's order denying defendant's motion to dismiss was functionally equivalent to an order denying a motion to compel arbitration, which is specifically authorized under Maryland's version of the U.A.A.⁴⁷⁶

In *National Avenue Building v. Stewart*,⁴⁷⁷ a property owner and an excavation contractor arbitrated a dispute.⁴⁷⁸ When the property owner filed a motion for the court to reconsider various prior orders, the circuit court granted the motion and entered an order purporting to stay arbitration.⁴⁷⁹ The Missouri

468. U.A.A. § 19.

469. 796 S.W.2d 365.

470. *Id.*

471. *Id.* at 367.

472. *Id.*

473. *Id.* at 366.

474. 80 Md. App. 662, 565 A.2d 693 (Ct. Spec. App. 1989).

475. *Id.* at 664, 565 A.2d at 694.

476. *Id.* at 672, 565 A.2d at 698.

477. 794 S.W.2d 304 (Mo. Ct. App. 1990).

478. *Id.* at 304-05.

479. *Id.* at 307.

Court of Appeals disallowed the contractor's appeal.⁴⁸⁰ The court articulated two grounds for its decision. First, the order to stay arbitration was not appealable when the order was entered 19 months after completion of arbitration, because at that time there was neither threat of arbitration nor pending arbitration.⁴⁸¹ Second, the appeal was disallowed as an order vacating an existing award.⁴⁸² The trial court has neither "confirmed, vacated, modified, or corrected the arbitrator's award."⁴⁸³ Therefore, no appeal is warranted.

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480. *Id.* at 309.

481. *Id.* at 308.

482. *Id.* at 309.

483. *Id.*

