

1996

## Recent Developments: The Uniform Arbitration Act

Dana A. Chamblee

Matthew S. Darrough

Reachel A. Jennings

Trina R. Ricketts

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Dana A. Chamblee, Matthew S. Darrough, Reachel A. Jennings, and Trina R. Ricketts, *Recent Developments: The Uniform Arbitration Act*, 1996 J. Disp. Resol. (1996)  
Available at: <https://scholarship.law.missouri.edu/jdr/vol1996/iss2/9>

This Summary is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# STUDENT PROJECT

## Recent Developments: The Uniform Arbitration Act\*

### I. INTRODUCTION

This Article is an overview of recent court decisions that interpret state versions of the Uniform Arbitration Act ("U.A.A.").<sup>1</sup> Arbitration statutes patterned after the U.A.A. have been adopted by thirty-four states and the District of Columbia.<sup>2</sup> The goal of this project is to promote uniformity in the interpretation of the U.A.A. by analyzing the various underlying policies and rationales of recent court decisions interpreting the U.A.A.<sup>3</sup>

### II. SECTION 1: VALIDITY OF ARBITRATION AGREEMENTS

Section 1 of the U.A.A. 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. This act also applies to arbitration agreements between employers and employees or between their respective representative [unless otherwise provided in the agreement].<sup>4</sup>

Our judiciary has been asked to decide a variety of issues raised by Section 1 of the U.A.A. When deciding any case involving an arbitration agreement, a court must first decide if the parties involved have entered into a valid agreement. To be valid, the agreement must satisfy all of the necessary conditions precedent.

---

\* This project was written and prepared by *Journal of Dispute Resolution* candidates under the direction of Associate Editor in Chief Kimberly D. Gibbens and Note and Comment Editor S. Christian Mullgardt.

1. UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 5 (1985).

2. Jurisdictions which have adopted arbitration statutes based on the U.A.A include: Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Wyoming.

3. This Article surveys cases decided between January 1995 and December 1995.

4. U.A.A. § 1.

If the court finds that the agreement is valid, the court must decide whether the parties' dispute falls within the ambit of the agreement. Periodically, the courts have also been called upon to decide what laws apply to the arbitration process and when specific provisions in the parties' agreement, although contracted to, may be void as a matter of law or public policy.

### *A. Technicalities of a Valid Agreement to Arbitrate*

When determining whether or not an arbitration agreement is valid, the court reviewing such an agreement must first determine whether certain threshold requirements have been met. One of the threshold requirements is a consensual understanding between the parties. A consensual understanding ensures that a party is not forced into arbitrating a dispute.<sup>5</sup> For an agreement to be valid, Section 1 of the U.A.A. requires a written understanding between the parties because it evidences a consensual understanding.<sup>6</sup>

A valid arbitration agreement between the parties must be found in every case. In *Mills v. J. Daunoras Constr., Inc.*,<sup>7</sup> the court required each party in the arbitration to have been a party to the written understanding that the dispute would be arbitrated.

In *Mills*, Daunoras Construction, Inc. ("Daunoras") and Venus Lounge, Inc. ("Venus") entered into a contract requiring Daunoras to perform work on property owned by Venus.<sup>8</sup> The Mills<sup>9</sup> filed a suit contending that Daunoras negligently, carelessly, and/or recklessly damaged their property.<sup>10</sup> The lower court dismissed Mills' claim with prejudice on the ground that the Mills were required to pursue their action in an already pending arbitration.<sup>11</sup> The trial judge felt that in order to avoid inconsistent results, the Mills were indispensable to the resolution of the bargained for arbitration clause.<sup>12</sup> The Mills, however, argued that even though Taylor Mills was an officer of Venus, the Mills were not parties to the written agreement between Venus and Daunoras which mandated arbitration of disputes.<sup>13</sup>

The court of appeals acknowledged that because the claims of both Venus and the Mills stemmed from Daunoras' work, they were inextricably linked.<sup>14</sup>

---

5. *Mills v. J. Daunoras Constr., Inc.*, 651 A.2d 114, 117 (N.J. Super. Ct. App. Div. 1995).

6. *Id.*

7. *Id.*

8. *Id.* at 115.

9. The Mills were the plaintiff property owners in this case whom brought the tort action for property damage against Daunoras, a contractor.

10. *Id.*

11. *Id.* The lower court felt that the pending arbitration between Venus and Daunoras was addressing this issue. *Id.*

12. *Id.* at 116.

13. *Id.*

14. *Id.* at 116-17.

Despite this link, the court of appeals held that such an observation cannot lead to the conclusion that all claims should be tried in one forum.<sup>15</sup> Instead, the court of appeals noted that the Mills were not parties to the contract and that the New Jersey Arbitration Act ("NJAA") requires that agreements to arbitrate be in writing.<sup>16</sup> It is important to note that the court did not dismiss the case because of the absence of a valid agreement. Instead, the court recognized that the NJAA did not abolish common law arbitration which allows parties to submit a dispute to an arbitrator by consent.<sup>17</sup> In light of the common law, the court of appeals remanded the case, stating that if Mills and Venus consolidated their claims in the submission to the arbitrator, they may have consented to arbitration and thus waived their right to pursue litigation against Daunoras.<sup>18</sup>

The Supreme Judicial Court of Maine faced a technicality question in *Maine State Employees Association, SEIU v. Bureau of Employee Relations*.<sup>19</sup> In this case, the *Maine State Employees Association* (MSEA), acting as a certified bargaining agent for employees working for the executive branch of the state government, had previously entered into a collective bargaining agreement with the Bureau of Employee Relations ("Bureau"), a statutorily designated representative for the executive branch in all collective bargaining activities.<sup>20</sup> The collective bargaining agreement provided for salary grade progression on the basis of satisfactory job performance and for the arbitration of all disagreements.<sup>21</sup> In March of 1992, the Maine Legislature enacted a law prohibiting the implementation of merit increases to state employees between July 1, 1992 and June 30, 1993.<sup>22</sup>

The MSEA filed a grievance on July 30, 1992, stating that the provision was unconstitutional and that the dispute should be heard by an arbitrator.<sup>23</sup> This grievance, however, was filed one month after the collective bargaining agreement had expired.<sup>24</sup> The Maine Supreme Court noted that because the U.A.A. mandates a written agreement to arbitrate, arbitration could not be compelled because the only written contract between the parties had previously expired.<sup>25</sup> Despite MSEA's argument that it had become common practice to arbitrate grievances after the expiration of a contract, the court felt that the Bureau's willingness to arbitrate some grievances could not be seen as an agreement to arbitrate all grievances.<sup>26</sup>

---

15. *Id.* at 117.

16. *Id.* (citing N.J. STAT. ANN. § 2A:24-1 (West 1987)).

17. *Id.*

18. *Id.* at 117-18.

19. 652 A.2d 654 (Me. 1995).

20. *Id.* at 654.

21. *Id.* The collective bargaining agreement at issue expired on June 30, 1992. *Id.*

22. *Id.*

23. *Id.* at 654-55.

24. *Id.* at 654.

25. *Id.* at 655.

26. *Id.*

When interpreting a document to decide if a valid agreement to arbitrate exists, the courts must first look to the document itself.<sup>27</sup> In *Reed v. Davis County School District*, Mr. Reed and his wife were both employees of the Davis County School District's Board of Education ("Board") under the terms of employment between the Board and the Davis Education Association ("DEA").<sup>28</sup> Mr. Reed had signed a contract designating the DEA as his exclusive bargaining agent.<sup>29</sup>

Pursuant to the Agreement, Mr. Reed sought to compel the Board to enter into arbitration.<sup>30</sup> The Board argued and the court agreed that the Agreement did not contain an arbitration provision.<sup>31</sup> The court looked at the unambiguous words of the Agreement and decided that the Agreement between the Board and the DEA did not explicitly contain the words "arbitration" or "arbitrate".<sup>32</sup> Mr. Reed, however, argued that the Board could be compelled to arbitrate under "Article V" of the Agreement.

Article V sets forth the proper procedure for resolving any complaints of educators for a violation or a misinterpretation of any of the provisions of the Agreement.<sup>33</sup> This grievance procedure contained a series of informal and formal steps to properly resolve disputes.<sup>34</sup> The court held that although it was Utah's policy to favor arbitration, the parties had not agreed to arbitrate disputes.<sup>35</sup> The court also noted that arbitration includes the presentation of conflicting claims to a neutral third party for resolution.<sup>36</sup> Because the clear language of the grievance procedure did not meet this condition, the intent of the parties could not have been to allow arbitration of disputes.<sup>37</sup>

In *Lancaster v. West*,<sup>38</sup> the Supreme Court of Arkansas decided whether a valid written agreement to submit disputes to arbitration existed between an employer and her former real estate associate.<sup>39</sup> West, doing business as Classic Realty Company of Conway, employed Lancaster as a sales associate from January

27. *Reed v. Davis County Sch. Dist.*, 892 P.2d 1063, 1064 (Utah Ct. App. 1995).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1065.

33. *Id.*

34. *Id.* Informal attempts at resolution with the grievant's immediate supervisor were encouraged. In addition, there was a four step formal procedure, involving a written complaint to the supervisor, an appeal of the supervisor to the Superintendent of Schools, an appeal of the superintendent to a "hearing examiner", and a direct hearing before the Board. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1065-66. Furthermore, the grievance procedure provided that nothing contained therein could be construed to limit the right of the parties to appeal to an appropriate court of law. The parties intended the term "appeal" to mean an intervention of the courts, not the narrow confirmation review contemplated in the Utah Arbitration Act. *Id.*

38. 891 S.W.2d 357 (Ark. 1995).

39. *Id.*

25, 1991 to July 20, 1991.<sup>40</sup> On July 10, 1991, Lancaster secured the execution of an offer-and-acceptance by the buyers and the seller for some farmland.<sup>41</sup> On July 22, 1991, two days after quitting her position at Classic Realty, Lancaster had the seller write "Void" on the instrument, effectively canceling the July 10 offer-and-acceptance.<sup>42</sup> Afterwards, Lancaster arranged for a new offer-and-acceptance contract between the buyers and the seller and then refused to pay West her share of the commission on the sale.<sup>43</sup> Both Lancaster and West were members of the Conway Board of Realtors.<sup>44</sup>

Lancaster argued that she could not be compelled to arbitrate under Arkansas' provision of the Uniform Arbitration Act because that provision barred the application of the Act to employer-employee disputes.<sup>45</sup> The court determined that the complaint did not fall under the employer-employee exception because the second contract was executed after Lancaster had severed her relationship with Classic Realty and because the sale was consummated only through that second contract.<sup>46</sup>

The court also concluded that because the parties were associated with different firms at the time the cause of action accrued, the mandatory arbitration agreement established in Article 14 of the Realtors' Code of Ethics was controlling.<sup>47</sup> Because this mandatory arbitration agreement controlled, the court held that the chancery court did not commit reversible error in finding that West was entitled to the amount set forth in her arbitration award, giving her a commission on the sale.<sup>48</sup>

Signatures on a contract may be sufficient to bind parties to an agreement to arbitrate if the language in the contract is clear and unambiguous.<sup>49</sup> In *Red Springs Presbyterian Church*, the plaintiff filed an action against the defendant, a company in the business of termite and pest control, for inadequate and unworkmanlike termite treatment and inspections, breach of contract, fraud, unfair and deceptive trade practices, and failure to seek in good faith a resolution of

---

40. *Id.* at 358.

41. *Id.*

42. *Id.* at 359.

43. *Id.*

44. *Id.* at 358.

45. *Id.* at 359. In 1991, Arkansas' version of the Uniform Arbitration Act barred the application of the act to employer-employee disputes, personal injury or tort matters, and any insured or beneficiary under any insurance policy or annuity contract. ARK.CODE ANN. § 16-108-201 (Michie 1987). In 1993, the statutory section was amended. The bar against application of the Act to employer-employee disputes, however, remained in cases involving a written agreement to submit to arbitration disputes arising between these parties. ARK.CODE ANN. § 16-108-201 (Michie Supp. 1993).

46. *Lancaster*, 891 S.W.2d at 360.

47. *Id.* Article 14 of the Code of Ethics was approved by the Professional Standards Committee and the Board of Directors of the National Association of Realtors and adopted by the Conway Board of Realtors. *Id.*

48. *Id.* at 361.

49. *Red Springs Presbyterian Church v. Terminix Co. of North Carolina*, 458 S.E.2d 270 (N.C. Ct. App. 1995).

plaintiff's claim.<sup>50</sup> The defendants filed a motion to dismiss, stating that the signed contract mandated arbitration of this dispute.<sup>51</sup> The plaintiff argued that the arbitration provision was void because it was not independently negotiated, and it cited several cases in which arbitration was not compelled because a party had not signed the agreement.<sup>52</sup> The court held that because the language in the contract was clear and unambiguous, mutual assent was evidenced by the signatures on the contract. Therefore, the court held that it was required to interpret the contract as written to be valid under North Carolina's U.A.A., and it compelled arbitration pursuant to the contract's arbitration provision.<sup>53</sup>

In *Curtis G. Testerman Co. v. E. Buck, III*,<sup>54</sup> the court was required to look at the signatures of the underlying contract to determine which parties had entered a written agreement to arbitrate.<sup>55</sup> Seeking damages for breach of contract, negligence and violation of the Maryland Consumer Protection Act, Walter and Gabrielle Buck ("Bucks") brought an action against the Curtis G. Testerman Company and against Curtis G. Testerman ("Testerman") as an individual.<sup>56</sup> The dispute arose out of a construction contract in which the company failed to complete an addition to the Bucks' house and various other improvements within the specified time period.<sup>57</sup>

Testerman argued that he was neither a party to the arbitration agreement nor a signatory of the underlying contract and, therefore, could not be forced to arbitrate his liability since he never agreed to resolve disputes through arbitration.<sup>58</sup> Testerman also claimed that he signed the contract in his capacity as president of the company, not as an individual.<sup>59</sup> The Bucks argued that because the contract was executed in the name of "Curtis G. Testerman, Inc." and not "Curtis G. Testerman Company," Testerman was personally liable because he entered a contract on behalf of an unincorporated entity.<sup>60</sup>

The court decided that a misnomer of a corporate name is not fatal where the identity of the corporation is apparent.<sup>61</sup> In particular, a corporation in a written contract is deemed sufficiently named if there is enough expressed to indicate that there is such an artificial being and to indicate that that artificial being can be distinguished from all others.<sup>62</sup> In this case, the court found that the

---

50. *Id.* at 271.

51. *Id.* at 272.

52. *Id.*

53. *Id.* at 273.

54. 667 A.2d 649 (Md. 1995).

55. *Id.* at 654.

56. *Id.* at 651.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 652.

61. *Id.*

62. *Id.* (citing *Seaboard Commercial Corp. v. Leventhal*, 178 A. 922 (1935)).

corporation's identity was apparent since there were no allegations that the Bucks thought they were dealing with Testerman in his individual capacity.<sup>63</sup>

Alternatively, the Bucks contended that Testerman was subject to the arbitration clause either as an agent or as a corporate officer of the company.<sup>64</sup> Addressing the first contention, the court stated that if Testerman fully disclosed the identity of his principal, then he would not be subject to the agreement unless the principal was nonexistent, fictitious, or legally incompetent.<sup>65</sup> Captioned by the title "President", Testerman's signature indicated that he signed in his capacity as agent of the company, thereby fully disclosing the principal's identity.<sup>66</sup>

Addressing the Bucks' second contention, the court stated that although a corporate officer may be liable for torts committed by his corporation, the officer cannot be bound individually by a contract containing an arbitration agreement unless he also consents to be bound by signing in his individual capacity.<sup>67</sup> The court held that based on the totality of the circumstances Testerman did not individually agree to arbitrate; therefore, he was not bound by the written agreement.<sup>68</sup>

This principle that only those who consent are bound by the written agreement was also evident in *Tom Savage Associates, Inc. v. Tetra Tech Richardson, Inc.*<sup>69</sup> In *Savage*, the plaintiff entered into a contract with the State of Delaware for certain work to be performed at a Women's Correctional Facility.<sup>70</sup> The plaintiff argued that the bid package which was prepared by the defendants as agents of the State of Delaware contained incomplete and inaccurate information which the plaintiff relied on.<sup>71</sup>

The plaintiff and its joint venture company, Nordic Construction, Inc., had previously arbitrated their dispute with the State pursuant to a compulsory arbitration provision and recovered on the theory of quantum meruit.<sup>72</sup> Not only were the defendants not parties to this arbitration agreement, but during this arbitration the applicable Statute of Limitations for filing an action against the defendants had run.<sup>73</sup> Because the applicable statute of limitations had run, the

---

63. *Id.*

64. *Id.*

65. *Id.* at 653.

66. *Id.*

67. *Id.*

68. *Id.* at 654.

69. No. CIV.A.94C-08-241, 1995 WL 48396 (Del. Super. Ct. Jan. 4, 1995).

70. *Id.* at \*1.

71. *Id.*

72. *Id.* at \*1-2.

73. *Id.* The plaintiff's only remedy against the defendants was, therefore, in a court of competent jurisdiction. The plaintiff argued that the statute of limitations in this action against defendants should have been tolled due to the pendency of its arbitration with the State. *Id.* at \*3.



court held that the defendants' motion to dismiss the case should be granted.<sup>74</sup> Therefore, the plaintiff's only remedy against the defendants, a suit in a court of competent jurisdiction, was barred because the former arbitration proceeding, involving the State of Delaware, did not toll the running of the statute of limitations.<sup>75</sup>

In *Carris v. John R. Thomas and Associates*,<sup>76</sup> the Oklahoma Municipal Power Authority ("OMPA") hired the architectural firm of John R. Thomas and Associates ("firm") to design the plans for a construction project. In a separate agreement OMPA hired Karen Carris ("Carris") to perform construction work on the project.<sup>77</sup> A dispute arose over the construction of a wheelchair ramp, in which Carris did not comply with the specifications prepared by the firm, and Carris invoked the arbitration clause contained in her contract with OMPA to compel arbitration with OMPA.<sup>78</sup> Although Thomas and the firm participated as witnesses in the proceeding, they were neither parties to the contract nor to the arbitration proceeding.<sup>79</sup>

Subsequently, Carris filed suit against the firm and Thomas as an individual, alleging that the plans were negligently prepared.<sup>80</sup> The trial court granted summary judgment to the defendants, holding that the arbitration award determined all of the issues in the negligence and fraud suits.<sup>81</sup> The appellate court affirmed the trial court's judgment, finding that the contractor had full opportunity to litigate the issue of damages in the arbitration proceeding.<sup>82</sup>

Upon review, however, the Oklahoma Supreme Court held that "although the contractor's injuries may have arisen from the same set of facts," one claim was based in contract and the other claim was based in tort.<sup>83</sup> Therefore, since Carris was prevented by the contract terms and the Uniform Arbitration Act from joining the firm and Thomas unless they consented to arbitration,<sup>84</sup> the court held that

---

74. *Id.* at \*4. The court found that all facts relevant to the plaintiff's claim against the defendants had occurred and were known to the parties as of May 25, 1991, and, therefore, the cause of action accrued at that time because it was not speculative or premature as of that date. *Id.* at \*3. The court reasoned that this case was analogous to the one in which the statute of limitations was not tolled against an architect who was not a party to an arbitration proceeding. *Id.* (citing *Framlau Corp. v. Kling*, 334 A.2d 780, 782-83 (Pa. Super. Ct. 1975)).

75. *Id.* Since the action was not filed until August 26, 1994, the plaintiff's cause of action against the defendants was time barred by 10 Del.Code § 8106. *Id.* at \*4.

76. 896 P.2d 522 (Okla. 1995).

77. *Id.* at 525.

78. *Id.* The arbitrator awarded Carris a portion of the amount due to her under the contract and awarded OMPA partial damages on its counterclaim for construction delays. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 526.

84. The court found that the firm and Thomas were not parties to the arbitration agreement, nor did they voluntarily consent or agree to arbitrate any claims Carris had against them. *Id.* at 529.

Carris' claims against the firm and Thomas could proceed separately and distinctly from the claims she previously arbitrated with OMPA.<sup>85</sup>

Additionally, state courts have attempted to determine outcomes based on notice provisions which ensure consensual arbitration. In *Casarotto v. Lombardi*,<sup>86</sup> the plaintiffs entered into a franchise agreement to operate a Subway Sandwich Shop.<sup>87</sup> Though this agreement contained a provision requiring arbitration of disputes, notice of this arbitration provision was not placed on the front page of the franchise agreement as required by § 27-5-114(4), MCA.<sup>88</sup>

The court held that the notice requirement in Montana's version of the U.A.A. would not be preempted by the Federal Arbitration Act ("FAA") because this state law did not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>89</sup> Justice Lephart also noted in his concurring opinion that the notice provision merely protects the consumer by requiring that notice be conspicuously placed on the front page of the contract.<sup>90</sup> This protection furthers the policy of meaningful and consensual arbitration by ensuring that a consumer who signs the usual nonnegotiated form contract knowingly agrees to arbitration of disputes.<sup>91</sup> As a result of the court's decision, the plaintiffs were not compelled to arbitrate the dispute as stated in the franchise agreement. Instead, the plaintiffs were allowed to file suit for breach of contract and tortious conduct.<sup>92</sup>

The United States Supreme Court, however, reversed this decision in *Doctor's Assocs., Inc. v. Casarotto*.<sup>93</sup> The Court remanded this case for further proceeding, holding that the Montana statute was inconsistent with and thus preempted by the FAA.<sup>94</sup> Acknowledging that the first-page notice requirement would make the arbitration contract invalid, the court reasoned that the Montana statute "singularly" limited the validity of arbitration agreements and, thus, contradicted the "goals and policies" of the FAA.<sup>95</sup>

---

85. *Id.* at 530. The elements of claim or issue preclusion were not met and, therefore, Carris could not be precluded from proceeding outside of arbitration with her claims against the firm and Thomas. *Id.*

86. 901 P.2d 596 (Mont. 1995), *rev'd*, 116 S. Ct. 1652 (1996).

87. *Id.* at 597. The applicable state statute required that notice be "typed in underlined capital letters on the first page of the contract" for a contract subject to arbitration. MONT. CODE ANN. § 27-5-114(4) (1995).

88. *Casarotto*, 901 P.2d at 597.

89. *Id.* at 599.

90. *Id.* at 598-99.

91. *Id.*

92. *Id.* at 596.

93. 116 S.Ct. 1652 (1996).

94. *Id.* at 1657.

95. *Id.* The court noted that §2 of the FAA provides the only limits on the enforceability of arbitration agreements: "save upon such grounds as exist at law or in equity for the revocation of any contract," arbitration agreements shall be enforced. *Id.* (quoting 9 U.S.C. §2 (1947)).

Finally, the court must determine if the agreement between the parties was intended to be an agreement to arbitrate.<sup>96</sup> In *DiLucente Corp. v. Pennsylvania Roofing Co., Inc.*, a general contractor ("Dilucente") brought an action against a subcontractor ("Roofing") seeking to stay arbitration of a contract dispute.<sup>97</sup> The court had to decide if the parties had entered into a valid agreement to arbitrate.<sup>98</sup> When the parties agree to arbitration in a clear and unmistakable manner, every reasonable effort will be made to favor such an agreement.<sup>99</sup> Generally, contract rules apply. As a result, the intent of the parties is ascertained by looking first at the four corners of the document and the express language of the contract.<sup>100</sup> Absent an express agreement between the parties to submit disputes to arbitration, a court may not compel arbitration.<sup>101</sup>

DiLucente argued that the case goes to court unless it elects otherwise.<sup>102</sup> The court, however, held that the express language of the agreement would subject all disputes to arbitration unless Roofing notified DiLucente and received DiLucente's approval to pursue the claim in court.<sup>103</sup> Therefore, because DiLucente was bound by the terms of the contract into which it willingly entered, it was not entitled to enjoin arbitration.<sup>104</sup>

According to Pennsylvania law, when an arbitration agreement is not clear as to whether common law or statutory arbitration rules apply, common law rules regulate the enforcement of the agreement unless the parties stipulate otherwise.<sup>105</sup> In *Patton v. J.C. Penney Ins. Co.*, the court held that the statutory rules govern because the insurance policies provided that the arbitrations shall be conducted in accordance with the U.A.A.<sup>106</sup> Similarly, in *Cotterman v. Allstate Ins. Co.*, the court held that an automobile policy provision stating that arbitration would take place as provided under the Uniform Arbitration Acts of 1927 and 1980 had expressly provided that the statutory arbitration rules govern the provision.<sup>107</sup>

---

96. *Dilucente Corp. v. Pennsylvania Roofing, Inc.*, 655 A.2d 1035 (Pa. Super. Ct. 1995).

97. *Id.* at 1036.

98. *Id.* Pennsylvania Roofing gave DiLucente written notice of its intention to arbitrate their unresolved dispute prior to filing a demand for arbitration. DiLucente filed a motion for injunction seeking to enjoin arbitration proceedings. DiLucente appealed after having its motion denied by the trial judge. *Id.* at 1036-37.

99. *Id.* at 1038.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* "Roofing did not choose the option of filing a lawsuit in court," but instead "notified DiLucente that it intended to file a demand for arbitration." *Id.*

104. *Id.* DiLucente could have only overruled Roofing's decision if Roofing had filed a suit in court, at which time DiLucente could have forced arbitration. Under the contract, however, DiLucente did not have the power to overrule Roofing's decision to arbitrate. *Id.*

105. *Patton v. J.C. Penney Ins. Co.*, 665 A.2d 510, 512 (Pa. Super. Ct. 1995); *Cotterman v. Allstate Ins. Co.*, 666 A.2d 695, 697 (Pa. Super. Ct. 1995).

106. *Patton*, 665 A.2d at 512.

107. *Cotterman*, 666 A.2d at 697.

### B. Scope of the Agreement

Once it is proven that an agreement to arbitrate exists, the arbitration clause will be liberally read and construed in favor of arbitration unless the clause positively cannot be interpreted to cover the asserted dispute.<sup>108</sup> In *KKM Medical*, MCS and KKM entered into a contract for the design and construction of a medical office building.<sup>109</sup> KKM filed a demand for arbitration in accordance with the terms of the contract.<sup>110</sup> MCS petitioned the court to find that there was "no binding agreement to arbitrate . . . because the arbitration agreement was null and void by the failure of a condition precedent to its effectiveness."<sup>111</sup> The court stated that because it could not positively state that the arbitration clause did not cover the parties' dispute, the agreement would be construed in favor of arbitration.<sup>112</sup>

Typically, when a party to an agreement seeks to avoid arbitration, the judiciary is asked to determine whether the dispute involved comes within the ambit of the arbitration provision.<sup>113</sup> In *Allstate Ins. Co. v. McBride*, Allstate petitioned the court to declare that McBride was not entitled to underinsured motorist coverage which she claimed under her automobile insurance policy.<sup>114</sup> Allstate relied upon a waiver form which allegedly contained McBride's signature.<sup>115</sup> McBride argued that her signature was forged on the waiver form and that pursuant to her insurance policy the dispute should be subject to arbitration.<sup>116</sup> Arguing that McBride essentially requested reformation of the contract, Allstate stated that such a request was outside the scope of the arbitration clause.<sup>117</sup>

The court noted that Pennsylvania courts interpreting clauses similar to the one at issue in *McBride* have found a wide range of disputes to fall within the scope of the arbitration agreement.<sup>118</sup> The court held that because Pennsylvania law affords arbitrators of disputes broad authority, the matter was within the ambit

---

108. See *Testerman*, 667 A.2d at 655; State *ex rel.* MCS Bldg. Co. v. KKM Medical, 896 S.W.2d 51, 53 (Mo. Ct. App. 1995).

109. *Id.* at 52.

110. *Id.* at 52.

111. *Id.* The contract stated that if a lease was not obtained from a local hospital ". . . by the commencement date, then unless the parties agree otherwise, [the] provisions of this Contract except for those contained in Part I and Part IV . . . shall be null and void." *Id.*

112. *Id.* at 53.

113. *Allstate Ins. Co. v. McBride*, No. CIV.A.94-6469, 1995 WL 3693, at \*2 (E.D. Pa. Jan. 3, 1995).

114. *Id.* at \*1.

115. *Id.*

116. *Id.*

117. *Id.* at \*2. The policy stated that disputes regarding the insured's "right to receive damages or the amount of those damages, . . . will be settled by arbitration as provided under the Pennsylvania Uniform Arbitration Acts of 1927 and 1980." *Id.* at \*1.

118. *Id.* at \*2.

of the insurance policy's arbitration clause.<sup>119</sup> Once a dispute is determined to be arbitrable, the arbitrator is typically authorized to decide all matters necessary to dispose of the claim.<sup>120</sup>

The decision in *United States v. Miller-Stauch Construction Co.*,<sup>121</sup> illustrated the principal that it is incumbent upon the side seeking to compel arbitration to show that the parties' agreement to arbitrate encompasses their claims.<sup>122</sup> In *Miller-Stauch*, the United States contracted with Miller-Stauch for the construction of a child care facility.<sup>123</sup> As part of this construction, Miller-Stauch entered into a subcontract in which Tech Coatings would provide and apply all special coatings for the facility.<sup>124</sup> Tech Coatings alleged that Miller-Stauch failed to pay the contractual price after Tech Coatings performed its contractual obligations.<sup>125</sup>

Miller-Stauch sought to compel arbitration of this dispute, citing both the Kansas Uniform Arbitration Act and the FAA.<sup>126</sup> Miller-Stauch's subcontract addendum deleted the arbitration paragraphs in the original contract and substituted dispute resolution paragraphs containing language from the Contract Dispute Act.<sup>127</sup> The court held that Miller-Stauch failed to prove that the dispute was one in which the parties had agreed to arbitrate because the dispute resolution procedures that the defendant sought to enforce did not apply to disputes exclusively between the subcontractor and the prime contractor.<sup>128</sup>

In *FCR Greensboro, Inc. v. C & M Investments of High Point, Inc.*,<sup>129</sup> the parties entered into an agreement in which the defendant agreed to construct and lease to plaintiff, FCR Greensboro, Inc., a building to be used for recycling operations.<sup>130</sup> Because the construction project did not begin on time, the parties entered into a written arbitration agreement to arbitrate the differences which had

119. *Id.* at \*4.

120. *Id.* at \*2. (citing *Brennan v. General Accident Fire and Life Assurance Corp.*, 574 A.2d 580, 583 (Pa. 1990).

121. 904 F.Supp. 1209 (D. Kan. 1995).

122. *Id.* at 1213. "Neither party devotes any portion of their briefs to discussing the particular terms of Article 14 of the subcontract or to arguing whether their dispute falls within the scope of claims or controversies subject to the mandatory dispute resolution procedure." *Id.*

123. *Id.* at 1211.

124. *Id.*

125. *Id.*

126. *Id.* at 1213.

127. *Id.* at n.3. See 41 U.S.C. § 601, et seq. (1994). The scope of the Contract Disputes Act is narrow and typically only governs disputes "in which the government is a party and makes no provision for disputes or claims between contractors." *Id.* at 1211-12. Similarly, Paragraph 14.2 of the parties' agreement stated in part, "Where the dispute is solely between the Contractor and Subcontractor and does not involve the Owner, all such disputes shall be resolved in the Circuit Court of Jackson County, Missouri." *Id.* at n.2.

128. *Id.* at 1213.

129. 459 S.E.2d 292 (N.C. Ct. App. 1995).

130. *Id.*

arisen with respect to liquidated damages, weather delays, and tenant change orders.<sup>131</sup>

The defendant argued that the arbitrator exceeded his authority by awarding liquidated damages which were not within the scope of the agreement by granting the plaintiff reimbursement for additions to a sprinkler system.<sup>132</sup> The defendant contended that the latter award did not fall within the scope of the agreement which involved only disputes regarding "claimed liquidated damages" or "claimed tenant change orders."<sup>133</sup>

The court stated that because the duty to arbitrate is contractual, a dispute can only be arbitrated if the parties agreed to submit the dispute to arbitration and if one can ascertain from the language in the agreement that the claim falls within the scope of the arbitration agreement.<sup>134</sup> The court held that it was apparent from the arbitration agreement that the parties did not contemplate liquidated damages for the delay of starting construction of the facility, but instead, intended such damages for any delay that extends construction beyond the agreed upon completion date.<sup>135</sup>

In *Aetna Casualty & Surety Co. v. Hiller*,<sup>136</sup> the court found that when the dispute is within the scope of the agreement, the claimant may proceed, notwithstanding the fact that his arguments are based in part on legal and public policy challenges, to other provisions in the agreement.<sup>137</sup>

In this case, Aetna issued an insurance policy to George S. Maier Co. of which John Hiller was the sole shareholder.<sup>138</sup> When Hiller was killed by a drunk driver, his parents brought this action as administrators of his estate.<sup>139</sup> Aetna argued that a dispute is beyond the scope of the arbitration agreement when the issue is whether a policy provision has violated "legislative or administrative mandates or public policy."<sup>140</sup> The court concluded that under *Erie Railroad Co. v. Tompkins*,<sup>141</sup> Pennsylvania law applied and that the dispute fell within the scope of the agreement, stating that under such contracts arbitration was mandated when the insured and the insurer disagreed as to when a party is legally entitled to recover damages.<sup>142</sup>

In *Miller v. Two State Construction Co., Inc.*,<sup>143</sup> Ms. Miller and Ms. Kellar, who ran a small painting subcontracting firm, entered into a contract with

---

131. *Id.*

132. *Id.* at 294.

133. *Id.* at 295.

134. *Id.* at 294.

135. *Id.*

136. No. CIV. A. 95-144, 1995 WL 322640 (E.D. Pa. May 25, 1995).

137. *Id.* at \*2.

138. *Id.* at \*1.

139. *Id.*

140. *Id.*

141. 304 U.S. 64 (1938).

142. *Hiller*, 1995 WL 322640 at \*1-2.

143. 455 S.E.2d 678 (N.C. Ct. App. 1995).

defendant to paint three inns.<sup>144</sup> Miller and Kellar were the only female subcontractors. They were subjected to "lewd remarks," "grabb[ing] of [their] buttocks," and "spanking."<sup>145</sup> In addition, a dispute arose as to the scope of the work.<sup>146</sup> The defendant demanded arbitration while the plaintiffs filed suit in the General Court of Justice.<sup>147</sup> Though the trial judge concluded that an arbitration agreement existed, he held that the arbitration provision was unconscionable and unenforceable under North Carolina law because it forced the plaintiffs to waive their right to a jury trial.<sup>148</sup> The court of appeals, however, disagreed and stated that once an agreement to arbitrate is found, courts should not only take a "step back and take a hands-off attitude during the arbitration proceeding," but [they] should also resolve all doubts involving the scope of the agreement in favor of arbitration.<sup>149</sup> Moreover, the court found that there was no bar to arbitrating claims based on tortious conduct, unfair and deceptive trade practices, or for punitive damages as long as they arise out of or relate to a contract that provides for arbitration of its breach.<sup>150</sup>

In *Greenwood v. Sherfield*, the Missouri Court of Appeals decided that a tort claim could only be characterized as "arising out of or related to" a contract if it at least raises some issue which requires reference to or construction of some portion of the contract for its resolution.<sup>151</sup> Further, a dispute cannot sufficiently "arise out of or [be] related to" a contract "simply because the dispute would not have arisen absent the existence of the contract between the parties."<sup>152</sup> The *Greenwood* court held that in a catalog merchant's action against a retailer and its manager for tortious interference with that merchant's contract to sell his business, arbitration could not be compelled<sup>153</sup> because there was "no meaningful connection between [the] [p]laintiffs' tort claim and the terms, conditions, or subject matter of the Merchant Contract."<sup>154</sup>

Sometimes courts are asked to interpret what was intended by the language of the agreement. In *May Construction Co. v. Benton School District No. 8*,<sup>155</sup> the school district brought suit against a contractor who built a middle school, alleging that the appearance of the floors was unacceptable.<sup>156</sup> May Construction requested that the school district be compelled to arbitrate.<sup>157</sup> The school district

---

144. *Id.* at 679.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 680.

150. *Id.* at 681.

151. *Greenwood*, 895 S.W.2d 169, 174 (Mo. Ct. App. 1995).

152. *Id.*

153. *Id.*

154. *Id.* at 175.

155. 895 S.W.2d 521 (Ark. 1995).

156. *Id.* at 522.

157. *Id.*

responded that claims relating to "aesthetic effect" are not subject to arbitration under the terms of the agreement.<sup>158</sup>

The Arkansas Supreme Court acknowledged that "arbitration agreements will not be construed to include only subjects within the strict letter of the agreement but will be construed to include subjects within the spirit of the agreement."<sup>159</sup> The court agreed with the school district, however, and held that the claim was related to "aesthetic effect" and, therefore, was not within the scope of the arbitration agreement.<sup>160</sup>

### *C. Void As a Matter of Law or Public Policy*

It is possible that a seemingly valid agreement to arbitrate may be unenforceable as a matter of law. In *Lambdin v. District Court*,<sup>161</sup> an employee brought an original action seeking to compel the district court to allow him to litigate rather than arbitrate his claims against his former employer, Sun Microsystems ("Sun").<sup>162</sup> Sun argued that the arbitration provision of a Sales Representative Incentive Compensation Plan governed the dispute pursuant to the Colorado Uniform Arbitration Act.<sup>163</sup> Sun further argued that because this valid arbitration agreement was in force, the court lacked jurisdiction.<sup>164</sup> The issue the court addressed was whether the Colorado Wage Claim Act ("Claim Act") prohibited employers from requiring employees to submit disputes over compensation to arbitration.<sup>165</sup>

The Claim Act entitles an employee to all wages earned and provides that upon termination of employment, "wages or compensation become due and payable on the next regular payday."<sup>166</sup> The Claim Act also entitles an employee to commence a civil action in court to pursue these claims.<sup>167</sup> These rights cannot be waived.<sup>168</sup> The court agreed with the plaintiff and held that an agreement to arbitrate that conflicts with the rights established by the Claim Act

---

158. *Id.*

159. *Id.* at 523.

160. *Id.* The contract only required arbitration for any controversy or claim arising out of or related to the contract or the breach thereof. *Id.*

161. 903 P.2d 1126 (Colo. 1995).

162. *Id.* at 1127.

163. *Id.* at 1128.

164. *Id.* The trial court "directed that the case proceed to binding arbitration under the . . . Compensation Plan's arbitration clause." *Id.* This clause determined the applicable law and venue. *Id.*

165. *Id.* at 1127.

166. *Id.* at 1129.

167. *Id.* Section 8-4-125 of the Wage Claim Act states: "Any agreement, written or oral, by any employee purporting to waive or to modify his rights in violation of this article shall be void." COLO. REV. STAT. § 8-4-125 (1986 & 1994 Supp.).

168. *Lambdin*, 903 P.2d at 1129.



cannot be enforced.<sup>169</sup> It stated, "We hold that the UAA cannot breathe life into an arbitration agreement that the Wage Claim Act deems void."<sup>170</sup>

In *Raytown Consolidated School District No. 2 v. American Arbitration Ass'n*,<sup>171</sup> the school district refused to arbitrate a contract dispute with Citizens Bank of Edina because the school district's contract was with Interstate Insulation of America.<sup>172</sup> The Bank had only obtained the rights to collect Interstate's accounts receivable through bankruptcy proceedings.<sup>173</sup> Interstate originally filed for arbitration claiming payment for asbestos removal.<sup>174</sup> Interstate's arbitration claim was filed pursuant to its contract with the school district and before Interstate was forced into bankruptcy.<sup>175</sup>

The school district argued that Mo. Rev. Stat. § 435.465 made it "immune" from the bank's arbitration action by effectively preventing governmental subdivisions from arbitrating against their will.<sup>176</sup> The court, however, decided that § 435.465.1 applies to agreements between a commercial person and a governmental body.<sup>177</sup> The only agreements not covered by the Uniform Arbitration Act are those between two governmental bodies.<sup>178</sup> Because in this case the contract was "between a governmental entity and a commercial person, the statute [did] not exempt the school district from arbitrating the claim."<sup>179</sup>

In two cases brought in the United States District Court for the District of Kansas, it was argued that the arbitration clauses were void and unenforceable because they violated Kansas law.<sup>180</sup>

*Federated Rural Electric Insurance Co. v. Nationwide Mutual Insurance Co.* involved a dispute between insurance companies over the terms and obligations created by two reinsurance treaties.<sup>181</sup> Under the terms of the treaties, Nationwide agreed to reinsure and indemnify Federated for certain losses under policies insuring risks in Kansas.<sup>182</sup> Both treaties contained clauses which provided that disputes arising out of the treaties be submitted to arbitration and that this arbitration would take place in Ohio.<sup>183</sup> A dispute arose, however, when Federated demanded arbitration following Nationwide's refusal to pay

169. *Id.* at 1130.

170. *Id.*

171. 907 S.W.2d 189 (Mo. Ct. App. 1995).

172. *Id.* at 190.

173. *Id.*

174. *Id.* at 190-91.

175. *Id.*

176. *Id.* at 191-92.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Federated Rural Elec. Ins. Co. v. Nationwide Mutual Ins. Co.*, 874 F. Supp. 1204 (D. Kan. 1995); *Federated Rural Elec. Ins. Co. v. International Ins. Co.* 884 F. Supp. 439 (D. Kan. 1995).

181. *Nationwide Mutual*, 874 F. Supp. at 1205.

182. *Id.*

183. *Id.*

amounts that Federated claimed were due.<sup>184</sup> Federated then claimed that the arbitration provisions were void and unenforceable under the laws of Kansas and filed a suit in state court alleging breach of contract.<sup>185</sup>

Federated contended that the Kansas version of the Uniform Arbitration Act excludes agreements related to insurance contracts from its definition of enforceable arbitration agreements.<sup>186</sup> The court, however, determined that this argument failed because a federal court must apply the law of the state in which it sits, including that state's choice of law rules. In that case, the federal court had to follow the law of the Kansas courts which apply the rule of *lex loci contractus* when the case involves interpretation of a contract.<sup>187</sup> Accordingly, the court found that the reinsurance treaties were issued in Ohio and Ohio law governs.<sup>188</sup> Since Ohio's version of the Uniform Arbitration Act contained no exclusion of insurance contracts, the agreements were treated as valid and enforceable.<sup>189</sup> Furthermore, the parties identified no other Ohio law which would exclude insurance disputes from the scope of arbitration.<sup>190</sup>

*Federated Rural Electric Insurance v. International Insurance Co.* is almost identical to *Nationwide Mutual*.<sup>191</sup> In *International Insurance Co.*, Federated urged the court to certify to the Kansas Supreme Court the question of whether Kansas public policy would render the arbitration provisions unenforceable.<sup>192</sup> The U.S. District Court in Kansas again concluded that there was sufficient case law to support a decision that Kansas did not have a strong enough public policy to render arbitration provisions unenforceable.<sup>193</sup>

### III. SECTION 2: PROCEEDINGS TO COMPEL OR STAY ARBITRATION

Section 2 of the U.A.A. governs proceedings to compel or stay arbitration.<sup>194</sup> In such a proceeding, the party seeking to compel or stay arbitration must show that an agreement to arbitrate exists and that the other party

---

184. *Id.* Federated argued that Nationwide should be precluded or estopped from asserting arbitration provisions contained in the reinsurance treaties because Nationwide breached the Submission to Arbitration agreement by refusing to complete the process for selecting arbitrators. *Id.*

185. *Id.*

186. *Id.* at 1207. Because "this provision is a law enacted for the purpose of regulating the business of insurance," it invokes the Ferguson Act. *Id.*

187. *Id.* The rule of *lex loci contractus* states that the law of the place where the contract was made is applicable. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* Federated also argued that Kansas would not enforce the laws of another state if they violated its public policy. *Id.* The court concluded that Kansas public policy was not violated. *Id.* at 1208.

191. *International*, 884 F. Supp. at 441.

192. *Id.* at 444.

193. *Id.*

194. U.A.A. § 2.

refuses to participate in the arbitration process.<sup>195</sup> Upon a party's motion to compel or stay arbitration, a court must decide: 1) whether there is a valid, written agreement to arbitrate, 2) whether the agreement covers the disputed issue, and 3) whether a party has waived its right to participate in an arbitration proceeding.<sup>196</sup>

### A. *The Existence of an Agreement Between the Parties*

"Arbitration is a matter of contract and absent an agreement between the parties to arbitrate an issue, they cannot be compelled to arbitrate."<sup>197</sup> Section 2 of the U.A.A. requires the party asking to compel arbitration to first show the existence of an agreement to arbitrate.<sup>198</sup> In *Curtis G. Testerman Co. v. Buck*,<sup>199</sup> the Bucks brought a breach of contract action against the Curtis G. Testerman Co. ("Company") and Curtis Testerman.<sup>200</sup> The Company sought to compel arbitration pursuant to the agreement between the parties.<sup>201</sup> After the Company's motion to compel was granted, the Bucks sought to compel Testerman in his individual capacity into the arbitration.<sup>202</sup>

The court held that Testerman could not be compelled to participate in the arbitration proceeding since Testerman did not sign the contract in an individual capacity.<sup>203</sup> This refusal to extend the arbitration agreement to Testerman was based on the "consensual" nature of arbitration proceedings.<sup>204</sup> Without an express agreement between two parties, a non-signatory will not be compelled to arbitrate.<sup>205</sup> A non-signatory seeking to join an arbitration, however, may be permitted to join since the danger of forcing parties into arbitration against their will would be eradicated.<sup>206</sup>

The *Testerman* court enunciated four situations when a non-signatory could be bound under an arbitration clause: (1) if the corporate veil is pierced to hold the party bound as the alter ego; (2) if there is a common bill of lading that expressly incorporates another contract's arbitration clause; (3) if an agreement to arbitrate is implied through the conduct of the parties; and (4) under certain circumstances, if a non-signatory seeks to enforce an arbitration agreement

195. U.A.A. § 2(a).

196. *Stinson-Head, Inc. v. City of Sanibel*, 661 So. 2d 119, 120 (Fla. Dist. Ct. App. 1995). See also *H.L. Libby Corp. v. Skelly and Loy, Inc.*, 910 F. Supp. 195, 199 (M.D. Pa. 1995).

197. *H.L. Libby*, 910 F. Supp. at 199.

198. U.A.A. § 2(a).

199. 667 A.2d 649 (Md. 1995).

200. *Id.* at 651.

201. *Id.*

202. *Id.*

203. *Id.* at 653.

204. *Id.* at 654.

205. *Id.*

206. *Id.* at 655.

contained in a contract that the non-signatory signed on behalf of its principal.<sup>207</sup> Finding that none of these four situations applied and that the parties to the agreement did not intend to bind Testerman in his individual capacity, the court refused to compel Testerman to arbitrate.<sup>208</sup>

In *Maine State Employees Ass'n v. Bureau of Employee Relations*,<sup>209</sup> the Supreme Judicial Court of Maine refused to extend past its expiration date a collective bargaining agreement containing a provision compelling arbitration.<sup>210</sup> The court reasoned that the expired agreement did not meet the U.A.A.'s requirement of a written agreement.<sup>211</sup> The court further refused to extend a possible statutory duty to arbitrate as a substitute for a written agreement.<sup>212</sup>

In *DiLucente Corp. v. Pennsylvania Roofing Co.*,<sup>213</sup> a party to a contract suit sought to stay arbitration proceedings.<sup>214</sup> The contract between the parties stated, "[i]n case of any dispute or disagreement under this agreement, or with respect to any other work performed on the job site, it is agreed that such dispute shall be submitted to the American Arbitration Association under the rules then pertaining to contractors or construction disputes."<sup>215</sup> The court held that in the absence of an express provision providing that the governing law was to be the U.A.A., the dispute would be decided under common law arbitration rules.<sup>216</sup>

In *Mahnke v. Maryland Casualty Co.*,<sup>217</sup> the Mahnkes filed suit alleging that the insurance company in bad faith refused to agree on an arbitrator to decide their dispute.<sup>218</sup> The United States District Court for the Eastern District of Pennsylvania dismissed the Mahnkes' claim for medical expenses and their claim of bad faith for failure to assert a claim.<sup>219</sup> The court then advised the plaintiffs to pursue their claim through the arbitration process under the U.A.A. since there was an agreement to arbitrate.<sup>220</sup>

---

207. *Id.* at 656.

208. *Id.* at 657-58.

209. 652 A.2d 654 (Me. 1995).

210. *Id.* at 655.

211. *Id.*

212. *Id.*

213. 655 A.2d 1035 (Pa. Super. Ct. 1995).

214. *Id.* at 1037.

215. *Id.* at 1036.

216. *Id.* at 1037 n.2.

217. No. CIV.A.95-3208, 1995 WL 574371 (E.D. Pa. 1995).

218. *Id.* at \*3.

219. *Id.* at \*2-3.

220. *Id.* at \*3.

### B. The Scope of the Agreement to Arbitrate

Once a court has determined that there is a valid agreement to arbitrate, it must decide if the disputed issue is covered under that agreement.<sup>221</sup> The Commonwealth Court of Pennsylvania in *Chester Upland School District v. McLaughlin*<sup>222</sup> overruled its previous holdings when it determined that an "arbitrator has sole discretion in the first instance to decide whether an issue is arbitrable."<sup>223</sup>

In *Allstate Insurance Co. v. Nodak Mutual Insurance Co.*,<sup>224</sup> the Supreme Court of North Dakota stated that under "the Uniform Arbitration Act, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."<sup>225</sup> In *Nodak Mutual*, the trial court construed one party's motion for declaratory judgment as a proceeding to compel arbitration.<sup>226</sup> The North Dakota Supreme Court ruled that the U.A.A. placed no limitations on arbitrators other than those in the contract between the parties to decide issues of law and fact.<sup>227</sup> Once it is found that an agreement to arbitrate exists and that the dispute is covered by the scope of the agreement, the arbitrator is deemed the judge of the legal and factual issues in controversy.<sup>228</sup>

In *United States v. Miller-Stauch Construction Co.*,<sup>229</sup> the United States District Court in Kansas held that since a party cannot be forced to arbitrate absent an agreement to do so, contract interpretation plays a large role in determining the existence and the scope of an agreement.<sup>230</sup> The party seeking to compel arbitration has the burden of establishing that an arbitration agreement exists and that the dispute is within the scope of that agreement.<sup>231</sup>

In *May Construction Co. v. Benton School District No. 8*,<sup>232</sup> the Supreme Court of Arkansas extended the rules for constructing and interpreting contracts to cover arbitration agreements as well.<sup>233</sup> Through this extension, the court sought to expand the scope of arbitration agreements "beyond the face of the agreement" to give effect to the intent of the parties making the agreement.<sup>234</sup>

221. *City of Sanibel*, 661 So. 2d at 120 (quoting *Piercy v. Bd. of Washington County*, 576 So. 2d 806, 807 (Fla. Dist. Ct. App. 1991)).

222. 655 A.2d 621 (Pa. Commw. Ct. 1995).

223. *Id.* at 629.

224. 540 N.W.2d 614 (N.D. 1995).

225. *Id.* at 619.

226. *Id.* at 616.

227. *Id.* at 617.

228. *Id.* at 617-18.

229. 904 F. Supp. 1209 (D. Kan. 1995).

230. *Id.* at 1213.

231. *Id.*

232. 895 S.W.2d 521 (Ark. 1995).

233. *Id.* at 523.

234. *Id.*

To encompass subjects falling within the "spirit" of the agreement, the court stated that any areas of doubt or ambiguity should be decided in favor of arbitration.<sup>235</sup>

In *Caretti, Inc. v. Colonnade Limited Partnership*,<sup>236</sup> the Court of Special Appeals of Maryland enforced the language of an agreement to arbitrate strictly, even though this strict interpretation clearly disadvantaged one of the parties by disallowing its claim.<sup>237</sup> The court suggested that the agreement should have been more carefully constructed and declined to adjudicate the merits of the case.<sup>238</sup>

In *Pioneer Water and Sewer District v. Civil Engineering Professionals, Inc.*,<sup>239</sup> Civil Engineering Professionals ("CEP") sought to stay arbitration proceedings on the grounds that the statute of limitations had expired.<sup>240</sup> The agreement between the parties stated that no demand for arbitration could be made after the statute of limitations for any equitable or legal proceeding had run.<sup>241</sup> The Supreme Court of Wyoming determined that the agreement was valid and that the statute of limitations clause could be used in a court's preliminary determination of whether there was a valid agreement to arbitrate.<sup>242</sup> The court concluded that the statute of limitations had expired and affirmed the lower court's decision to grant the motion to stay the arbitration proceedings.<sup>243</sup>

In *Charles Shaid of Pennsylvania, Inc. v. George Hyman Construction Co.*,<sup>244</sup> the United States District Court for the Eastern District of Pennsylvania decided the case under the F.A.A.<sup>245</sup> Since the U.A.A., F.A.A., and case law are "functionally equivalent"<sup>246</sup> on the issue of whether an agreement to arbitrate existed, the outcomes under each would be the same.<sup>247</sup> If a court makes the initial determination that an arbitration agreement exists and that the dispute is covered by that agreement, it must compel arbitration without considering the merits of the case.<sup>248</sup> When deciding the scope of the agreement, the court must give great deference to the intent of the parties as that intent is evidenced in the words of the agreement.<sup>249</sup>

---

235. *Id.*

236. 655 A.2d 64 (Md. Ct. Spec. App. 1995).

237. *Id.* at 66.

238. *Id.* at 67.

239. 905 P.2d 1245 (Wyo. 1995).

240. *Id.* at 1246.

241. *Id.*

242. *Id.* at 1247.

243. *Id.*

244. No. CIV.A.92-3654, 1995 WL 46702 (E.D. Pa. 1995).

245. *Id.* at \*1.

246. *Id.* at \*1 n.1.

247. *Id.*

248. *Id.* at \*2.

249. *Id.*

### C. Waiver of the Right to Arbitrate

A court may determine that the parties have waived their right to arbitrate a dispute, even though a valid agreement to arbitrate exists between the parties and even though the dispute is covered under the scope of the agreement.<sup>250</sup> In *Northland Insurance Co. v. Kellogg*,<sup>251</sup> the Court of Appeals of Oklahoma provided a six-factor test to determine whether an agreement to arbitrate has been waived:

- (1) [W]hether a party has taken actions that are inconsistent with a right to arbitrate;
- (2) [W]hether the issue of arbitration was raised only after there had been significant preparation for litigation;
- (3) [W]hether the trial date is near or there has been a long delay in raising the issue of contractual arbitration rights;
- (4) [W]hether the party invoking the arbitration right has filed pleadings in the litigation without seeking a stay of the proceedings;
- (5) [W]hether the party seeking arbitration has engaged in discovery proceedings that are not available in arbitration or participated in other "important intervening steps;" and,
- (6) [W]hether the opposing party has been prejudiced by the delay.<sup>252</sup>

The court further stated that the facts and circumstances of each case should be examined.<sup>253</sup> Any evidence revealed by this examination of a party acting in bad faith to delay or to harass another party would provide the basis for finding that such party had waived its right to arbitrate.<sup>254</sup> The appellate court found that the trial court had correctly decided the issues in this case, and it affirmed the trial court on the basis of the underlying factual determinations.<sup>255</sup>

In *Yandell v. Church Mutual Insurance Co.*,<sup>256</sup> the driver filed an action against the insurance company to recover underinsured motorist benefits.<sup>257</sup> When the insurance company asserted its right to arbitrate, the driver claimed that the insurance company had waived those rights.<sup>258</sup> On appeal, the Appellate Court of Illinois determined that a waiver would occur when a party acted

250. *City of Sanibel*, 661 So. 2d at 120.

251. 897 P.2d 1161 (Okla. Ct. App. 1995).

252. *Id.* at 1162. The court determined that the prejudice involved in the sixth factor must result from the delay in asserting the right to arbitrate and not in the arbitration process itself. *Id.*

253. *Id.* at 1163.

254. *Id.*

255. *Id.*

256. 654 N.E.2d 1388 (Ill. App. Ct. 1995).

257. *Id.* at 1389.

258. *Id.*

inconsistently with the arbitration clause in the agreement, such as indicating an "abandonment" of the right to arbitrate.<sup>259</sup> The court held that the insurance company's failure to properly assert its right to arbitrate within a reasonable time constituted a waiver because the insurance company failed to follow the provisions of the arbitration agreement.<sup>260</sup>

The insurance company also argued that it was not estopped from raising its right to arbitrate.<sup>261</sup> The court stated that to estop the insurance company from raising its right to arbitrate, the driver must establish that the insurance company misled him, that he relied on those misrepresentations, and that he was prejudiced by the insurance company's actions.<sup>262</sup> The driver was unaware of the arbitration agreement because the insurance company refused to answer his numerous requests for a complete copy of the insurance policy until after the suit was filed.<sup>263</sup> The defendant waited over eight months after the plaintiff filed suit to assert his arbitration rights.<sup>264</sup> The court concluded that these facts were sufficient to support a finding that the defendant was estopped from asserting his arbitration rights.<sup>265</sup>

#### IV. SECTION 4: MAJORITY ACTION BY ARBITRATORS

Section 4 of the U.A.A. provides that arbitrators may exercise their power by a majority except where otherwise provided by the arbitration agreement or the U.A.A.<sup>266</sup>

In *Linzey v. Carrion*,<sup>267</sup> a medical malpractice claim was submitted to arbitration under Maryland's Health Claims Arbitration Act.<sup>268</sup> In a 2 to 1 vote, the arbitration panel found in favor of the patient.<sup>269</sup> The doctor filed a motion with the arbitration panel requesting it to modify the award to reflect the 2 to 1 vote.<sup>270</sup> The chairman of the arbitration panel, however, denied the motion.<sup>271</sup>

---

259. *Id.* at 1390.

260. *Id.*

261. *Id.* at 1390-91.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. See U.A.A. § 4.

267. 652 A.2d 1154 (Md. Ct. Spec. App. 1995), *rev'd*, 675 A.2d 527 (Md. Ct. App. 1996). The court of appeals stated that it reversed the decision of the special court of appeals due to the specific facts of the case at hand, but the court of appeals clearly noted that it agreed with the framework of the special court of appeal's analysis. *Id.*

268. *Id.* at 1155. (citing MD. CODE ANN., CTS. & JUD. PROC. §3.2A.01 (1995)).

269. *Id.* at 1156.

270. *Id.*

271. *Id.*



At trial, the doctor made a motion in limine that any reference to the arbitration award should be qualified as a non-unanimous decision.<sup>272</sup> The trial court denied the motion and stated that the jury would not be informed that the award was made by a 2 to 1 vote, nor would a suggestion be made to the jury that the award was unanimous.<sup>273</sup>

After the jury returned a verdict for the patient, the doctor appealed and claimed that the non-disclosure of the 2 to 1 vote was contrary to Health Claims Arbitration Act.<sup>274</sup> The court of appeals stated that a court should properly inform the jury that the decision of a majority of the arbitration panel is presumed to be correct.<sup>275</sup> Furthermore, although a court's disclosure of the non-unanimous vote alone will not prejudice either party, the court held that informing the jury that one member of the arbitration panel dissented from the award was "improper" and "prejudicial" because it would "undermine the presumption of correctness of the award and thus defeat a major purpose of the Act."<sup>276</sup> Lastly, the court explained that if one party does discover the panel's vote, it is collateral to the issue before the jury and cannot be established by evidence if it is disputed or not stipulated to by the opposing party.<sup>277</sup>

## V. SECTION 5: HEARING

Section 5 of the U.A.A. governs the actual arbitration hearing.<sup>278</sup> The procedures outlined in this section are to be followed in the hearing unless otherwise determined by an agreement between the parties.<sup>279</sup>

In *Lancaster v. West*,<sup>280</sup> West filed a request for arbitration with the Board of Realtors against Lancaster concerning the sales commission from a real estate contract Lancaster executed while working for West.<sup>281</sup> After Lancaster had secured the real estate contract, she quit her job, canceled the contract, re-executed the contract, and refused to pay West her share of the commission on the sale.<sup>282</sup>

At the arbitration hearing, the Board awarded West an amount equal to the commission from the sale.<sup>283</sup> On appeal, Lancaster asserted that she did not receive proper notice of the hearing pursuant to U.A.A. section 5.<sup>284</sup> Though the

---

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at 1158.

276. *Id.*

277. *Id.* at 1159.

278. U.A.A. § 5.

279. *Id.*

280. 891 S.W.2d 357 (Ark. 1995).

281. *Id.* at 358-59.

282. *Id.*

283. *Id.* at 359.

284. *Id.* at 360.

evidence showed that defects existed in the notice provided to the parties,<sup>285</sup> the notice requirements were satisfied because Lancaster herself had called to determine the hearing date and had requested that the actual hearing be postponed.<sup>286</sup> Furthermore, by appearing at the hearing, Lancaster waived any right to assert lack of proper notice under the statutory provisions.<sup>287</sup>

## VI. SECTION 7: WITNESSES, SUBPOENAS, DEPOSITIONS

Section 7 of the U.A.A. governs the arbitrator's ability to subpoena witnesses and other evidence and to permit the taking of depositions.<sup>288</sup>

In *Cotterman v. Allstate Insurance Co.*,<sup>289</sup> Allstate appealed an unfavorable arbitration award on the grounds that Allstate was denied a fair hearing when the arbitrator did not permit Allstate to depose the plaintiff prior to the hearing.<sup>290</sup> The Pennsylvania Superior Court held that Section 7(b)<sup>291</sup> was not applicable in this case because the plaintiff was available and capable of being subpoenaed for the hearing and also attended the hearing.<sup>292</sup> The court, however, did interpret the statute's language, "may permit", as giving the arbitrator the final discretion to order a deposition.<sup>293</sup> Based on the arbitrator's discretion in this matter, the court affirmed the arbitrator's determination that the plaintiff's deposition was not a "condition precedent" to a fair hearing.<sup>294</sup>

The dispute in *National Avenue Building Co. v. Stewart*<sup>295</sup> involved an arbitration award between a landowner and a contractor.<sup>296</sup> The Missouri Court of Appeals refused to vacate the award on the basis that the parties were not allowed unlimited discovery.<sup>297</sup> The court explained that the very nature of arbitration requires participation without the same level of preparation as litigation.<sup>298</sup> Generally, civil discovery rules are unavailable to arbitration

---

285. *Id.* at 361.

286. *Id.*

287. *Id.*

288. U.A.A. § 7.

289. 666 A.2d 695 (Pa. Super. Ct. 1995).

290. *Id.* at 699.

291. U.A.A. § 7(b) provides: On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken of a witness who cannot be subpoenaed or who is unable to attend the hearing in the manner and upon the terms designated by the arbitrators.

292. *Cotterman*, 666 A.2d at 700.

293. *Id.*

294. *Id.*

295. 910 S.W.2d 334 (Mo. Ct. App. 1995).

296. *Id.* at 334.

297. *Id.* at 348.

298. *Id.*

participants because extensive discovery thwarts the goals of arbitration, mainly a less costly alternative to trial.<sup>299</sup>

## VII. SECTION 8: AWARD

Section 8 of the U.A.A. governs the requirements for the arbitration award.<sup>300</sup> It requires the award to be in writing, signed by the arbitrators, and delivered to each party as provided for in the agreement.<sup>301</sup> The award must also be made within the time specified in the agreement or within the time ordered by the court.<sup>302</sup> A party must make an objection to a late award before the award is delivered or else the objection will be waived.<sup>303</sup>

In *National Avenue Building Co. v. Stewart*,<sup>304</sup> the Missouri Court of Appeals defined the standard of review of the actual award document as follows: "Regardless of how a court might interpret an agreement, arbitrators do not exceed their powers if their interpretation, even if erroneous, nevertheless is rationally grounded in the agreement."<sup>305</sup> In *Stewart*, the agreement required the award to be presented as a net change proviso.<sup>306</sup> Upon evaluation of the agreement, the court found that this requirement was not as specific as the party seeking review contended.<sup>307</sup> Further, the court found that the arbitrators' interpretations were reasonably grounded in the agreement.<sup>308</sup> Thus, despite the fact that the arbitrators' interpretation of the agreement differed from the parties' view, the arbitrators "did not exceed their powers."<sup>309</sup>

## VIII: SECTION 9: CHANGE OF AWARD BY ARBITRATORS

Section 9 of the U.A.A. governs the modification or correction of an award by the arbitrator on application of a party or a court.<sup>310</sup>

In *Glass, Molders, Pottery, Plastics and Allied Workers International Union, Local 182b v. Excelsior Foundry Co.*,<sup>311</sup> the union filed an arbitration grievance

299. *Id.*

300. U.A.A. § 8.

301. U.A.A. § 8(a).

302. U.A.A. §8(b)

303. *Id.*

304. 910 S.W.2d 334 (Mo. Ct. App. 1995).

305. *Id.* at 349.

306. *Id.* at 348.

307. *Id.* at 350.

308. *Id.*

309. *Id.*

310. U.A.A. § 9.

311. 56 F.3d 844 (7th Cir. 1995).

on behalf of an employee who failed a drug test.<sup>312</sup> The arbitrator's decision required the employee to complete a drug rehabilitation program within sixty days of the award.<sup>313</sup> The award, however, failed to establish who would pay for the program.<sup>314</sup> After negotiations with the company failed, the arbitrator was asked to intervene and clarify the issue of payment.<sup>315</sup> When the employee was finally able to enroll in the program and successfully complete it, the sixty days set out in the award had elapsed.<sup>316</sup> The arbitrator, however, again intervened and stated that the sixty days had not started to run until the date the arbitrator clarified the award as to payment for the drug program.<sup>317</sup> The company refused to reinstate the employee, and the employee brought suit to compel reinstatement as per the arbitrator's decision.<sup>318</sup>

The lower court granted the employer's summary judgment motion against the employee's suit because an arbitrator is barred from revisiting the award by the doctrine of *functus officio*.<sup>319</sup> The Court of Appeals for the Seventh Circuit, however, placed the facts of this case within the clarification-completion exception to the doctrine.<sup>320</sup> This exception provides that the arbitrator must clarify the award within a reasonable period of time.<sup>321</sup> The court reasoned that arbitrators, like judges, are susceptible to mistakes and fallibility.<sup>322</sup> To hold an arbitrator to a higher standard than judges would reduce the utility of arbitration in the marketplace and would be contrary to the policy favoring arbitration under Illinois law.<sup>323</sup>

The employer argued that section 9 of the U.A.A. only allowed twenty days for a party to request a modification.<sup>324</sup> The court stated that although the U.A.A. appears to be written more narrowly than Illinois law so as to exclude requests for clarification, the Illinois Uniform Arbitration Act specifically excludes labor arbitration from its scope of coverage, thereby allowing the decision to be reached under Illinois common law.<sup>325</sup>

---

312. *Id.*

313. *Id.* at 845.

314. *Id.*

315. *Id.* at 845-46.

316. *Id.* at 846.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 848.

321. *Id.*

322. *Id.* at 847.

323. *Id.*

324. *Id.* at 848.

325. *Id.*

## IX: SECTION 11: CONFIRMATION OF AN AWARD

Section 11 of the U.A.A. provides that the court shall confirm an award upon application of a party unless grounds are imposed urging for a vacation, modification, or correction of the award within the time limits.<sup>326</sup> If such grounds are timely imposed, the court shall proceed as provided in U.A.A. Sections 12 and 13.<sup>327</sup> The confirmation of an award is normally required unless a party presents grounds for modification or vacation of an arbitration award.<sup>328</sup>

Following the mandate of Section 11, most courts confirm arbitration awards. In *American Federation of State, County and Municipal Employees v. Department of Central Management Services*,<sup>329</sup> the Appellate Court of Illinois held that a labor arbitration award must usually be enforced if the arbitrator acts within the scope of his authority.<sup>330</sup> The narrow exception to this rule is when an award violates public policy.<sup>331</sup> The court did not extend this public policy exception to permit the disregard of the time limitations set forth in public collective bargaining agreements.<sup>332</sup> The court also noted that the public policy exception had never been upheld in a case pertaining to the discharge of public employees covered by collective bargaining agreements.<sup>333</sup>

Although an arbitration award is normally confirmed, courts do apply section 11 of the U.A.A. to the award to be modified. In *FCR Greensboro, Inc. v. C and M Investments of High Point, Inc.*,<sup>334</sup> the Court of Appeals of North Carolina stated that although public policy favored confirmation of awards, such arbitration awards were not infallible.<sup>335</sup> In this case, the arbitrator entered an award on a matter that was not submitted to him.<sup>336</sup> The court held that the record presented no evidence that the arbitration agreement provided for the reimbursement of a sprinkler system addition that was part of the plaintiff's "claimed liquidated damages" and "claimed tenant change orders."<sup>337</sup> Based on this lack of evidence, the court held that the arbitrator exceeded his authority and that the trial court improperly confirmed that portion of the award.<sup>338</sup>

The language of section 11 requires that a party must apply to the court to confirm the arbitration award in order for the court to proceed with the

326. U.A.A. §11.

327. *Id.*

328. *Id.*

329. 651 N.E.2d 718 (Ill. App. Ct. 1995).

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. 459 S.E.2d 292 (N.C. Ct. App. 1995).

335. *Id.* at 295.

336. *Id.* The court relied on N.C. GEN. STAT. §1-567.14(a)(2) (1995). *Id.*

337. *Id.*

338. *Id.*

confirmation.<sup>339</sup> *Grubb and Ellis Co. v. First Colonial Trust Co.* illustrates a court's application of this section.<sup>340</sup> The Illinois U.A.A. expressly states that an arbitrators' decisions on the merits of a case are not self-executing.<sup>341</sup> Instead, each arbitration award requires judicial confirmation before it can attain the status of a judgment enforceable by execution.<sup>342</sup> Under the Illinois U.A.A., the power to enforce arbitration awards rests exclusively in the court, rather than in a nonjudicial arbitrator.<sup>343</sup> The court analogized this same concept to enforcement of a lien foreclosure to collect the proceeds of an award reading this enforcement procedure as a purely judicial function.<sup>344</sup>

In *Gilliland v. Chronic Pain Ass'n, Inc.*,<sup>345</sup> the court found that a nisi prius order which denied confirmation of an arbitration award was appealable.<sup>346</sup> In an evidentiary hearing for a breach of an employment contract claim, the judge found that the arbitration process contained the appearance of improprieties, but not fraud or collusion.<sup>347</sup>

Nevertheless, the judge signed the nisi prius order was signed and suggested that "the only remedy left" was to resubmit the dispute to another arbitration panel.<sup>348</sup> The Supreme Court of Oklahoma, however, found that the nisi prius order was appealable under Section 953 of the Oklahoma Statutes because it created an "insuperable barrier" to the confirmation of the arbitration award and, thus, precluded the desired relief from being obtained.<sup>349</sup>

## X. SECTION 12: VACATING AN AWARD

Courts have a very restricted review of arbitration awards under the U.A.A.<sup>350</sup> This limited review retains the separate function of arbitration and precludes courts from simply substituting their judicial review for the judgment

---

339. U.A.A. §11.

340. 1995 WL 549131 (N.D. Ill. 1995).

341. *Id.* at \*3. The court applied 710 ILL. COMP. STAT. ANN. 5/14 (West 1992).

342. *Id.* The court applied 710 ILL. COMP. STAT. ANN. 5/14 (West 1992).

343. *Id.*

344. *Id.*

345. 904 P.2d 73 (Okla. 1995).

346. *Id.* at 77.

347. *Id.* at 75.

348. *Id.*

349. *Id.* at 76. Section 953 of the Oklahoma Statutes states that:

An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment and an order affecting a substantial right, made in a special proceeding or upon a summary application in an action after judgment is a final order, which may be vacated, modified, or reversed, as provided in this article.

*Id.* (citing OKLA STAT. tit. 12, § 953 (1991)).

350. See *Stockade Enterprises v. AHL*, 905 P.2d 156, 157 (Mont. 1995) (citing *May v. First National Pawn Brokers, LTD.*, 887 P.2d 185, 187 (1994)).

of the arbitrators chosen by the parties.<sup>351</sup> If the review were not so limited, the arbitration award would become the commencement of litigation instead of the end.<sup>352</sup>

One jurisdiction has expanded the scope of judicial review slightly. If an arbitration award violates a "well-defined" and "dominant" public policy, it allows the court to vacate the award beyond the enumerated provisions in the U.A.A.<sup>353</sup> The Nevada Supreme Court expanded the limited review provided under the U.A.A. by concluding that the U.A.A. provisions are not exclusive.<sup>354</sup> The court held that despite the restriction of the district court's power of review to statutory grounds, if "an arbitrator manifestly disregards the law, [then] a reviewing court may vacate an arbitration award."<sup>355</sup>

### *A. Procurement of Award by Corruption, Fraud or Other Undue Means*

The U.A.A. directs the court to vacate an arbitration award which was procured by corruption, fraud, or other undue means.<sup>356</sup> Courts generally affirm an arbitration award, unless the arbitrator's conduct exceeded the bounds of propriety.<sup>357</sup>

In *Wojdak v. Greater Philadelphia Cablevision, Inc.*, the court held that since the U.A.A. uses the term "undue means" in conjunction with "corruption" and "fraud", "undue means" refers to conduct that is far outside the bounds of propriety.<sup>358</sup> The limited partners of Greater Philadelphia Cablevision, Inc. ("Cablevision") wanted to sell their interests to the general partners. According to the partnership agreement, if a price could not be agreed upon, an appraiser would determine it.<sup>359</sup> Without notifying the parties, the appraiser applied a 35% discount by consulting with cable television investors on the issue of valuation.<sup>360</sup> The limited partners filed to vacate the appraisal as to the discount.<sup>361</sup> The trial court vacated the appraisal, finding that it was procured by undue means because the appraisers went outside Cablevision without notifying the partners.<sup>362</sup> The Pennsylvania Superior Court reversed the trial court's decision, concluding that the appraiser's action did not rise to "undue means"

---

351. See *Hecla Mining Co. v. Bunker Hill Co.*, 617 P.2d 861, 867 (Idaho 1980) (citing *Burchell v. Marsh*, 58 U.S. 344, 349 (1854)).

352. *Id.*

353. *Arizona Elec. Power Coop. v. Berkely*, 59 F.3d 988, 991 (9th Cir. 1995).

354. *Graber v. Comstock Bank*, 905 P.2d 1112, 1115 (Nev. 1995).

355. *Id.* at 1115-16 (quoting *Winchinsky v. Mosa*, 847 P.2d 727, 731 (Nev. 1993)).

356. U.A.A. §12(a)(1).

357. *Wojdak v. Greater Philadelphia Cablevision, Inc.*, 664 A.2d 587, 592 (Pa. Super. Ct. 1995).

358. *Id.*

359. *Id.* at 589.

360. *Id.*

361. *Id.* at 590.

362. *Id.*

because the technique used by the appraiser was not improper.<sup>363</sup> When the parties agreed to be bound by a private appraisal, they were relying upon the appraiser's expertise.<sup>364</sup> The court found that applying the discount was part of that expertise.<sup>365</sup> The court also found that the limited partners had full opportunity to express their opposition to the discount.<sup>366</sup>

In *Patton v. J.C. Penney Insurance Co.*,<sup>367</sup> the court held that there was no fraud, misconduct, corruption or other irregularity where there was a mix-up and the incorrect arbitrator for Hanover decided an award with J.C. Penney's arbitrator in J.C. Penney's favor.<sup>368</sup> The plaintiff was injured in an accident involving two drivers. One of the drivers was insured by J.C. Penney and the other by Hanover.<sup>369</sup> The policies issued by Hanover and J.C. Penney provided for arbitration of claims which could not be amicably settled.<sup>370</sup> During the arbitration, there was a mix up and Daniel J. Ryan, not Daniel Ryan Jr., appeared at the hearing as an arbitrator for Hanover (also a defendant in the suit).<sup>371</sup> Subsequently, the mistake was discovered and the correct arbitrator, Daniel Ryan Jr., signed the award even though he did not participate in the actual decision-making process.<sup>372</sup> J.C. Penney was found not to be liable for Patton's uninsured motorist claim.<sup>373</sup> The superior court recognized that the arbitration award in favor of Hanover was properly vacated due to misconduct by the arbitrators.<sup>374</sup> On the other hand, the court affirmed the trial court's refusal to vacate the award for J.C. Penney on the basis of misconduct in formulation since the J.C. Penney arbitrator participated in the entire arbitration process with the incorrect Hanover arbitrator.<sup>375</sup>

This court adopted the Third Circuit Court of Appeals' rule which establishes that part of an arbitration award may be affirmed as long as it is separable from and not dependent on the rest of the award.<sup>376</sup> The court concluded that the vacation of the Hanover award does not necessarily mean that the award in favor of J.C. Penney was tainted by the Hanover misconduct.<sup>377</sup>

---

363. *Id.* at 592

364. *Id.*

365. *Id.*

366. *Id.*

367. 665 A.2d 510 (Pa. Super. Ct. 1995).

368. *Id.* at 513.

369. *Id.* at 511.

370. *Id.*

371. *Id.* at 512.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* at 513.

376. *Id.*

377. *Id.*



In *National Avenue Building Co. v. Stewart*,<sup>378</sup> an arbitration award in favor of Stewart was vacated by the trial court because it was procured by several undue means.<sup>379</sup> First, the trial court found that the arbitration panel used undue means to reach its decision because it failed to require Stewart to set forth a definite statement of his claim before the arbitration hearing.<sup>380</sup> The appellate court, however, held that the trial court erred in vacating the award based on procurement by undue means.<sup>381</sup> Adopting the Supreme Court of Arkansas' definition of undue means, the appellate court concluded that "undue" is something similar to fraud and corruption.<sup>382</sup> The appellate court concluded that there was no indication in the record that the arbitrators' failure to grant National's request that Stewart make his amended claim more definite was motivated by bad faith or corruption.<sup>383</sup> In addition, National only made a conclusional allegation that it was prejudiced by the arbitrator's failure to enforce the motion.<sup>384</sup>

Second, the trial court held that the arbitrator used undue means when he failed to require Stewart to produce documentary evidence for National to review prior to the arbitration.<sup>385</sup> The appellate court held that the trial court's vacation of this award based on procurement by undue means was in error.<sup>386</sup> The appellate court noted that the findings of fact identified no specific documents which were admitted into evidence without being inspected by National prior to the hearing.<sup>387</sup> In addition, National made no clear objections to the evidence as it was admitted during the arbitration proceedings.<sup>388</sup> The appellate court also stated that arbitrators exercising their good judgment are to decide all questions as to the admission or rejection of evidence.<sup>389</sup> The appellate court concluded that there was no evidence that the arbitrators used anything but their honest judgment to admit the exhibits.<sup>390</sup> Additionally, the appellate court noted that National did not demonstrate any prejudice from the receipt of the undisclosed documents into evidence.<sup>391</sup>

Third, the trial court determined that through his expert witness Stewart engaged in an effort to confuse and mislead National as to Stewart's claim and

---

378. 910 S.W.2d 334 (Mo. Ct. App. 1995).

379. *Id.* at 346-47.

380. *Id.* at 344.

381. *Id.* at 345.

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.* at 344.

386. *Id.* at 347.

387. *Id.* at 346.

388. *Id.*

389. *Id.* (citing *Gozdor v. Detroit Auto. Inter-Ins. Exch.*, 216 N.W.2d 436, 437 (Mich. 1974)).

390. *Id.*

391. *Id.* at 347.

supporting evidence.<sup>392</sup> Based on this finding, the trial court vacated the award concluding that it was procured by undue means.<sup>393</sup>

The arbitration was not conducted entirely "by ambush."<sup>394</sup> The arbitrators commanded Stewart's expert witness, Curd, to appear at the preliminary hearing and to bring certain documents.<sup>395</sup> Curd then attended that proceeding and nothing indicates that he failed to bring the requested information.<sup>396</sup>

The appellate court stated that even though National did not receive the benefit of the comprehensive discovery available in lawsuits, the absence of unlimited discovery does not justify vacating an arbitration award.<sup>397</sup> The appellate court went on to note that in the arbitration record containing Curd's testimony, National did not object to any of Curd's testimony on the ground that he refused to answer questions at a deposition nor did National request that Curd be barred from testifying.<sup>398</sup> The court also found that National identified no specific prejudice resulting from Curd's refusal to answer questions at the deposition.<sup>399</sup>

### *B. Arbitrator Partiality, Misconduct and Bias*

Since the courts have such a limited review of arbitration awards, it is important that the awards are procured fairly. Therefore, the U.A.A. provides that an award can be vacated when there is evident partiality by the arbitrator appointed as a neutral, corruption by any of the arbitrators, or misconduct prejudicing the rights of any party.<sup>400</sup> An award will not be vacated due to partiality, interest, or bias, unless their existence is direct and specific.<sup>401</sup> For example, if bias is allegedly due to a relationship between the arbitrator and a party, the award will not be vacated if the relationship is remote or has no affect on the arbitrator's interest in the outcome of the hearing.<sup>402</sup>

In *Lancaster v. West*,<sup>403</sup> the court held that in order to vacate an arbitration award, the interest, partiality, or bias must be certain and direct rather than remote, speculative, or uncertain.<sup>404</sup> Lancaster presented no specific testimony that the

---

392. *Id.*

393. *Id.*

394. *Id.* at 348.

395. *Id.* at 347.

396. *Id.* at 347-48.

397. *Id.*

398. *Id.*

399. *Id.*

400. U.A.A. §12(a)(2).

401. *Lancaster v. West*, 891 S.W.2d 357, 361 (Ark. 1995) (citing *Dean Witter Reynolds Inc. v. Dieslinger*, 711 S.W.2d 771 (Ark. 1986)).

402. *TUCO Inc. v. Burlington Northern R.R.*, 912 S.W.2d 311, 318 (Tex. Ct. App. 1995).

403. 891 S.W.2d 357 (Ark. 1995).

404. *Id.* at 361.

arbitrators were impartial.<sup>405</sup> The court deemed Lancaster's statement that it was her "belief that certain members were not impartial" to be insufficient to vacate the award on the grounds of bias.<sup>406</sup>

In *TUCO, Inc. v. Burlington Northern Railroad Co.*,<sup>407</sup> the parties arbitrated the proper construction to be given specific portions of shipping contracts.<sup>408</sup> TUCO selected Hardy as its arbitrator, and the carriers (Burlington and other shippers) selected Cole.<sup>409</sup> The parties then submitted lists of potential candidates for the third arbitrator's position.<sup>410</sup> Beall's name appeared on both lists and was selected.<sup>411</sup> After Beall's selection, but prior to the commencement of the arbitration proceeding, Beall accepted Mullan as a client.<sup>412</sup> Mullan was previously represented by a law firm with which arbitrator Cole was associated.<sup>413</sup> This fact was not brought to the attention of the parties.<sup>414</sup> During the arbitration, TUCO's attorney became aware of the referral from Cole's law firm to Beall, but no objections were made.<sup>415</sup>

The arbitration award was made in favor of the carriers with Hardy dissenting, Hardy claimed that the award was the result of actual bias by Beall.<sup>416</sup> TUCO sought to vacate the award in district court based on evident partiality by Beall.<sup>417</sup> The district court recognized that this argument rested largely on TUCO's position that Hardy and Cole were "party" arbitrators, favoring the parties that chose them. Beall was to be the neutral arbitrator. The problem arose because Beall's relationship with a "party" arbitrator was the same as a relationship with a party and, therefore, compromised Beall's authority.<sup>418</sup> The court not only recognized that the Texas General Arbitration Act, which is based on the U.A.A, adopts this "party" arbitrator theory, but it also looked to other jurisdictions and concluded that the carriers did not rebut the absence of evident partiality.<sup>419</sup> The court determined that a neutral arbitrator is under a duty to reveal any relationship which might reasonably create the appearance of partiality or bias.<sup>420</sup> The court stated that a relationship does not reasonably create the appearance of partiality if it is remote or has no affect on the arbitrator's interest

405. *Id.*

406. *Id.*

407. 912 S.W.2d 311 (Tex. Ct. App. 1995).

408. *Id.* at 312.

409. *Id.* at 313.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.* at 314.

415. *Id.*

416. *Id.*

417. *Id.* at 315.

418. *Id.* at 316.

419. *Id.* at 318.

420. *Id.*

in the outcome of the proceedings.<sup>421</sup> Therefore, since the carriers did not rebut the appearance of partiality, the case was reversed and remanded for further proceedings.<sup>422</sup>

In *Arizona Electric Power Cooperative, Inc. v. Berkeley*,<sup>423</sup> Berkeley, an attorney, made a claim against his client for an unpaid bill under a contingent fee arrangement (CFA) which provided for arbitration in the case of a dispute.<sup>424</sup> The parties could not select a neutral third arbitrator.<sup>425</sup> Finally, each party agreed to list six candidates from an American Arbitration Association (AAA) list. If a common candidate was listed, then he would be selected.<sup>426</sup> If not, each side would choose a candidate from the other's list, and the AAA would randomly choose the third arbitrator from those two candidates.<sup>427</sup> Because the parties did not select a common candidate, the AAA randomly chose Pfeiffer, a candidate Berkeley had nominated, to be the third arbitrator.<sup>428</sup> Upon notification of his selection, Pfeiffer disclosed that Berkeley had been on the staff of the Civil Aeronautics Board during the time that Pfeiffer served as a hearing examiner for that agency from 1947 to 1961.<sup>429</sup> Pfeiffer stated that he and his wife had visited Berkeley and his wife on two occasions, and he had lunch with Berkeley one or two times after he left the agency.<sup>430</sup> Pfeiffer went on to say that he had no further contact with Berkeley for at least twenty-seven years.<sup>431</sup>

A majority of the arbitration panel found that Berkeley was entitled to \$9,221,000.00 in contingent legal fees, but this was to be reduced by 15% in satisfaction of Arizona Electric Power Cooperative's ("AEPSCO") counterclaim for breach of fiduciary duty.<sup>432</sup> AEPSCO brought suit to vacate the award claiming that Pfeiffer was biased in favor of Berkeley.<sup>433</sup> The court concluded that the award should be confirmed since there was no "evident partiality" as required by §12-1512(A) of the Arizona Revised Statutes.<sup>434</sup>

AEPSCO unsuccessfully tried to persuade the court that the test for establishing bias should be more rigorous in cases where arbitrators are not experts in the field.<sup>435</sup> AEPSCO based this assertion on the fact that courts often premise their reluctance to find bias on the assumption that the parties have traded

---

421. *Id.*

422. *Id.*

423. 59 F.3d 988 (9th Cir. 1995).

424. *Id.* at 990.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.* at 992.

435. *Id.*

impartiality for expertise.<sup>436</sup> The court stated that no court has ruled that a non-expert arbitrator's impartiality should be tested by a higher standard.<sup>437</sup> The court also looked to federal law to determine that "the appearance of impropriety, standing alone, is insufficient to establish bias."<sup>438</sup> Instead, the party alleging bias must prove specific facts that create reasonable impressions of partiality.<sup>439</sup> The court concluded that a social relationship which ended over twenty-seven years ago is not sufficient to demonstrate bias<sup>440</sup> and that AEPCO failed to point to any facts in the hearing that showed bias.<sup>441</sup>

In *National Avenue Building Co. v. Stewart*,<sup>442</sup> evidence was introduced during the arbitration regarding what role Hood-Rich, the architect, played in the construction project. This was the basis of the dispute between the parties.<sup>443</sup> After the completion of the arbitration hearing, National's counsel, Evans, was talking with their expert witness, Dr. Morris, within a few feet of Findley, an arbitrator in the case.<sup>444</sup> During this conversation, Evans spoke in a tone which would allow Findley to overhear the substance of their conversation.<sup>445</sup> Evans told Morris that National approved of his presentation and that he would recommend to National that Evans be used as a consultant in the pending lawsuit they had filed against Hood-Rich.<sup>446</sup> Directly after the conversation, Findley called Evans aside and initiated a conversation in which Findley offered to serve as an expert consultant to National in a related lawsuit against Hood-Rich.<sup>447</sup> The trial court vacated the award and concluded that Findley was biased because Findley's services as an expert consultant to National in a related lawsuit would only be required if the panel entered an award for Stewart and against National.<sup>448</sup>

The appellate court, however, held that the trial court erred in vacating the award due to partiality.<sup>449</sup> The court concluded that an arbitrator is not precluded from developing views as to the merits of a dispute early in the arbitration.<sup>450</sup> An award should not be vacated on the ground of evident

---

436. *Id.*

437. *Id.*

438. *Id.* (quoting *Toyota of Berkely v. Automobile Salesmen's Union Local 1095*, 834 F.2d 751, 755 (9th Cir. 1987)).

439. *Id.*

440. *Id.*

441. *Id.*

442. 910 S.W.2d 334 (Mo. Ct. App. 1995).

443. *Id.* at 341.

444. *Id.* at 341-42.

445. *Id.* at 342.

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.* at 343-44.

450. *Id.* at 343.

partiality just because an arbitrator expresses those views on the matters at hand.<sup>451</sup> As long as an arbitrator's opinion arises from the evidence and conduct of the parties, it cannot be claimed that the expression of such opinion amounts to bias.<sup>452</sup> The appellate court also noted that the bias or interest of the arbitrator must be definite, direct, and capable of demonstration in order to show evident partiality.<sup>453</sup> In this case, the court concluded that the possibility that National would accept Findley's assistance in its suit against Hood-Rich was too speculative to constitute a financial interest in the outcome of the present arbitration, especially where the offer was uninvited by National.<sup>454</sup>

In *Cotterman v. Allstate Insurance Co.*,<sup>455</sup> an arbitration award was granted in favor of Cotterman, the insured.<sup>456</sup> After Allstate's timely petition to vacate the award was denied, Allstate contended on appeal that the arbitrators' award should be vacated on the ground that the arbitrators erred in denying Allstate's pre-arbitration requests to examine the insured under oath.<sup>457</sup> Allstate alleged that this examination would have allowed it to conduct an investigation into Cotterman's pre-existing conditions and into the validity of his alleged damages.<sup>458</sup> Allstate claimed that this denial was contrary to law and constituted misconduct by the arbitrators under the Pennsylvania Uniform Arbitration Act.<sup>459</sup> Allstate also argued that Cotterman had broken a provision in the insurance policy which imposed a duty on the insureds to cooperate in a settlement.<sup>460</sup> This breach, in turn, denied Allstate a full and fair hearing.<sup>461</sup>

Denying the petition, the court stated that Allstate's argument failed on both grounds.<sup>462</sup> The court determined that the arbitrators exercised their discretion and found that an examination under oath of Cotterman was not a condition precedent to beginning arbitration proceedings.<sup>463</sup> Because making the examination a condition precedent did not amount to misconduct and did not deprive Allstate of a fair hearing, the award did not require vacating.<sup>464</sup> The court also decided that the "contrary to law" standard of the 1927 U.A.A. was not applicable to this case which applied the 1980 U.A.A.<sup>465</sup>

---

451. *Id.* See also *Spector v. Torenberg*, 852 F. Supp. 201, 209 (S.D.N.Y. 1994).

452. *National Avenue*, 910 S.W.2d at 343.

453. *Id.*

454. *Id.*

455. 666 A.2d 695 (Pa. Super. Ct. 1995).

456. *Id.* at 697.

457. *Id.* at 699.

458. *Id.*

459. *Id.*

460. *Id.* See 42 PA. CONS. STAT. §7309(B) (1985).

461. *Id.* See 42 PA. CONS. STAT. §7309(B)(1985).

462. *Cotterman*, 666 A.2d at 699.

463. *Id.* at 700. See *Pennsylvania General Ins. Co. v. Barr*, 435 Pa. 456, 459 (1969).

464. *Cotterman* at 700.

465. *Id.* at 699.

### C. Arbitrator Exceeding the Scope of Authority

An arbitration award may be vacated if arbitrators exceed their authority when deciding the award.<sup>466</sup> The scope of an arbitrator's authority is determined by the parties' agreement.<sup>467</sup> Failure of an arbitrator to follow the law as a court would have does not render the award vacated due to an arbitrator exceeding his power.<sup>468</sup>

In *In re Estate of Sandefur v. Greenway*, Sandefur presented a claim for actual damages of \$200,000 against her securities broker, Greenway, alleging securities fraud, common law fraud, forgery, and churning.<sup>469</sup> Greenway had affiliated offices with Shearson Lehman Brothers, Inc (Shearson) after accepting Sandefur's account.<sup>470</sup>

During arbitration of the claim, Shearson settled for \$150,000.<sup>471</sup> Subsequently, Sandefur died and the arbitrators awarded her estate \$149,200 in actual damages and assessed costs and fees against Greenway.<sup>472</sup> The award was then presented to the circuit court for confirmation and the court found that the award was subject to set off under the Missouri Setoff Statute.<sup>473</sup> Accordingly, the court reduced the award to zero since the estate received a settlement from Shearson for an amount greater than the amount assessed for Sandefur's damages by the arbitrators.<sup>474</sup>

The appellate court concluded that the trial court did not have the power to vacate the award based on the set-off statute.<sup>475</sup> The court determined that even if the arbitrators chose to ignore Missouri's set-off law and even though its decision led to a double recovery, the award could not be set aside by the court.<sup>476</sup> The court further stated that "the [arbitrator's] failure to follow the law as a court would have done, without agreement to do so in the contract, does not afford relief through the courts."<sup>477</sup> The arbitration agreement did not bind the arbitrators to follow Missouri law, and a disregard for the law is not a statutory bases for vacating an award under the Missouri Uniform Arbitration Act.<sup>478</sup>

466. U.A.A. §12(a)(3).

467. *Id.*

468. *In re Estate of Sandefur v. Greenway*, 898 S.W.2d 667 (Mo.Ct.App. 1995) (quoting *Stifel, Nicolaus & Co. v. Francis*, 872 S.W.2d 484, 486 (Mo.Ct.App. 1994)).

469. *Id.* at 669.

470. *Id.* at 668.

471. *Id.*

472. *Id.*

473. Mo.Rev.Stat. §537.060 (1994).

474. *Sandefur*, 898 S.W.2d at 669.

475. *Id.* at 670.

476. *Id.*

477. *Id.* (quoting *Francis*, 872 S.W.2d at 486).

478. *Id.* See also *Western Waterproofing Co. v. Lindenwood Colleges*, 662 S.W.2d 288, 291-92 (Mo.Ct.App. 1983).

Therefore, the arbitrators did not exceed their powers and the award cannot be relitigated.<sup>479</sup>

In *Perkins Restaurants Operating Co. v. Van Den Bergh Foods Co.*,<sup>480</sup> Perkins purchased an allegedly defective oven from Van Den Bergh.<sup>481</sup> A provision of the purchase agreement submitted all disputes to arbitration and awarded the "prevailing party" reasonable attorney fees.<sup>482</sup> During arbitration, the panel requested briefs from both sides regarding the definition of "prevailing party."<sup>483</sup> The arbitrators awarded Perkins \$10,000 but refused to award attorney fees to either party.<sup>484</sup> The arbitration award was confirmed by the circuit court.<sup>485</sup>

Perkins appealed asserting that the arbitrators exceeded the scope of their authority by failing to award attorney fees as provided for in the agreement.<sup>486</sup> Perkins contended that the term "prevailing party" has a clear and unambiguous meaning.<sup>487</sup> The court noted that "an arbitrator has no authority to ignore the plain language of the contract or to interpret unambiguous contract language."<sup>488</sup> A contract term will be found ambiguous, however, where it is reasonably susceptible to more than one interpretation.<sup>489</sup> The court stated that an arbitrator exceeds his authority when he makes decisions upon matters which were not submitted to him.<sup>490</sup> If, however, the award is within the submission and contains an honest decision after a full and fair hearing, a court will not set it aside for errors of fact or law.<sup>491</sup> Concluding that the arbitrators were fully briefed on the issue by both sides, the court determined that neither party was entitled to attorney fees and refused to vacate the award.<sup>492</sup>

In *Graber v. Comstock Bank*,<sup>493</sup> Graber petitioned the court to vacate an arbitration award, claiming that the arbitrator ruled on issues outside the scope of the agreement when after the award was issued, the district court remanded the case to the arbitrator to clarify three findings.<sup>494</sup> Graber claimed that the scope of the arbitration process was restricted by the Bank's request for relief in its

---

479. *Sandefur*, 898 S.W.2d at 670.

480. 657 N.E.2d 1085 (Ill. App. Ct. 1995).

481. *Id.* at 1086.

482. *Id.*

483. *Id.* at 1087.

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.* at 1088. See *Shearson Lehman Bros., Inc. v. Hedrich*, 639 N.E.2d 228 (Ill. App. Ct. 1994).

489. *Perkins*, 657 N.E.2d at 1088.

490. *Id.*

491. *Id.* at 1089.

492. *Id.*

493. 905 P.2d 1112 (Nev. 1995).

494. *Id.* at 1117.



complaint for declaratory judgement.<sup>495</sup> The court concluded that the issues addressed in the arbitrator's clarification were within the scope of the arbitration since the district court's order to arbitrate included "all disputes, actions, claims or controversies arising out of . . . any aspect of the past, present or future relationship of the parties."<sup>496</sup> The court also noted that in Graber's brief that was sent to the arbitrator, Graber agreed to submit to arbitration any and all disputes arising out of the dealings between these parties.<sup>497</sup> The court went on to say that during the arbitration proceeding, Graber argued issues beyond those in the Bank's initial complaint.<sup>498</sup>

In *Tim Huey Corp. v. Global Bolier and Mechanical, Inc.*,<sup>499</sup> the court refused to vacate an arbitration award where the appellant asserted that the arbitrators exceeded their authority.<sup>500</sup> The arbitrators awarded Global Bolier money damages for extra work under a construction contract. This award contradicted the provision in the contract that Global Bolier waived all claims to compensation unless it submitted written change orders.<sup>501</sup> The court concluded that this did not warrant vacating the award since the arbitrators may have found that such provisions were waived.<sup>502</sup>

In *Chicoine v. Bignall*,<sup>503</sup> the court determined that an award could not be vacated in a negligence suit where it was alleged that an arbitrator exceeded his powers by finding no negligence due to lack of causation when the defendant had already confessed.<sup>504</sup> Chicoine sued an attorney, Bignall, for malpractice because Bignall failed to make a timely motion for a new trial.<sup>505</sup> The parties agreed to submit the matter to arbitration.<sup>506</sup> The arbitrator concluded that causation was missing and entered judgment for Bignall.<sup>507</sup> Chicoine sought to have the award vacated on the grounds that the arbitrator exceeded his powers.<sup>508</sup>

The court concluded that an arbitrator exceeds his powers when he decides an issue that is not submitted to him by the parties or that exceeds the bounds of the contract between the parties.<sup>509</sup> Because the issue to be decided was whether Bignall's admitted negligence was a proximate cause of any damage to Chicoine,

---

495. *Id.*

496. *Id.*

497. *Id.*

498. *Id.*

499. 649 N.E.2d 1358 (Ill. App. Ct. 1995).

500. *Id.* at 1364, 1366.

501. *Id.* at 1364.

502. *Id.* at 1365.

503. 899 P.2d 438 (Idaho 1995).

504. *Id.* at 441.

505. *Id.* at 439.

506. *Id.* at 440.

507. *Id.*

508. *Id.*

509. *Id.*

the arbitrator did not exceed any limitation contained in the parties' stipulation.<sup>510</sup>

In *National Avenue Building Co. v. Stewart*,<sup>511</sup> the parties agreed to allow the arbitrators "to construe the arbitration award as a net change order which set forth the original contract with the two change orders and then noted a net difference."<sup>512</sup> National argued that the arbitrators exceeded their powers because the award was "totally inconsistent with the authority granted to the arbitrators as to how the award should be set forth."<sup>513</sup> The trial court vacated the award in favor of Stewart, concluding that the arbitrators exceeded their authority since the award was not set forth as a net change order.<sup>514</sup>

The appellate court stated that when determining whether the arbitrators exceeded their powers, courts recognize that it is for the arbitrator, not the courts, to determine the construction of contracts involved in arbitration proceedings.<sup>515</sup> Based on this deference to the arbitrators, the appellate court concluded that arbitrators do not exceed their powers if their interpretation of a contract, even if erroneous and contrary to how a court might interpret it, is rationally grounded in the agreement.<sup>516</sup> The appellate court determined that although the arbitrators' interpretation of the net change requirements differed from National's, the award was rationally grounded in the net change provision, and as such the arbitrators did not exceed their powers.<sup>517</sup>

Also, the trial court in *National* vacated the award by concluding that the arbitrators exceeded their powers when they refused to clarify their award in conformance with the agreement.<sup>518</sup> The appellate court also found this vacation to be in error. It stated that the award was unambiguous and that nothing in the statute authorized a court to vacate an award when an arbitrator refuses to clarify the award.<sup>519</sup> The court went on to conclude that a court may only vacate an award on the grounds set out in the statute.<sup>520</sup>

#### *D. Refusal to Postpone Hearing or Hear Relevant Evidence*

An arbitration award may be vacated if the arbitrators refuse to postpone a hearing upon sufficient cause, refuse to hear evidence that is material to the controversy, or conduct a hearing which prejudices one of the parties.<sup>521</sup>

---

510. *Id.*

511. 910 S.W.2d 334 (Mo. Ct. App. 1995).

512. *Id.* at 348.

513. *Id.* at 349.

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.* at 350.

518. *Id.*

519. *Id.* at 351.

520. *Id.*

521. U.A.A. §12(a)(4).

In *Patton v. J.C. Penney Insurance Co.*,<sup>522</sup> the court refused to vacate an award based on alleged prejudice to a party due to the arbitrator's refusal to postpone an arbitration hearing.<sup>523</sup> Patton filed claims against two insurance companies, Hanover Insurance Co. and J.C. Penney Insurance Co., which insured the drivers involved in an accident which injured Patton.<sup>524</sup> Prior to arbitration, there was a mix-up in the mailing of notices. Daniel Ryan, Jr. was supposed to be the arbitrator representing Hanover. As a result of this mix-up, however, Daniel J. Ryan appeared at the hearing instead of Daniel Ryan, Jr.<sup>525</sup> Nevertheless, Daniel Ryan Jr. did sign the award following the arbitration hearing.<sup>526</sup>

The court refused to vacate the J.C. Penney award because the only misconduct that Patton could allege was that she was denied a chance to address the panel that signed the awards.<sup>527</sup> The court ruled that this may be the case with the Hanover claim, but Patton had the opportunity to address the J.C. Penney arbitrator who decided and signed the award.<sup>528</sup> Therefore, the court held that there were no facts to support Patton's claim of prejudice with respect to the J.C. Penney award.<sup>529</sup>

### *E. Public Policy*

Generally, the court's ability to vacate an arbitration award is limited to the enumerated provisions of the U.A.A. A court, however, may be able to vacate an award which contradicts a "well-defined" and "dominant" public policy by broadening its powers under the U.A.A.<sup>530</sup>

In *Arizona Electric Power Cooperative (AEPCO) v. Berkely*, AEPCO asserted that an arbitration award granting unpaid contingent fees to Berkely violated the public policy against paying unethical attorneys and, therefore, should be vacated.<sup>531</sup> Arizona courts have not addressed whether they recognize a public policy exception to the enforcement of arbitration awards.<sup>532</sup>

In *Berkely*, the court determined that it need not decide whether Arizona should have a public policy exception because this award would not qualify for such an exception anyway.<sup>533</sup> Since there are no Arizona cases discussing a

---

522. 665 A.2d 510 (Pa. Super. Ct. 1995).

523. *Id.* at 513.

524. *Id.* at 512.

525. *Id.*

526. *Id.*

527. *Id.* at 513.

528. *Id.*

529. *Id.*

530. *Arizona Elec. Power Coop. v. Berkely*, 59 F.3d 988, 992. (9th Cir. 1995).

531. *Id.* at 991.

532. *Id.*

533. *Id.* at 992.

public policy exception, the court looked to federal law.<sup>534</sup> Citing the test set forth by the 9th Circuit in *Stead Motors v. Automotive Machinists Lodge*,<sup>535</sup> the court concluded that in "order to vacate an award due to public policy, a court must articulate 'an explicit, well-defined and dominant public policy,' and it 'must demonstrate that the policy is one that specifically militates against the relief ordered by the arbitrator.'"<sup>536</sup> The court concluded that AEPSCO failed to meet the first prong of the *Stead* test.<sup>537</sup> Since the public policy against fee collection by unethical attorneys is fact-specific, it is not sufficiently "well-defined and dominant" to qualify as a public policy exception.<sup>534</sup> Furthermore, the court in *Berkely* cautioned that courts should be reluctant to use public policy as a reason to vacate an arbitration award.<sup>535</sup>

In *Schultz v. Aetna Casualty and Surety Co.*,<sup>536</sup> the court held that an arbitration award which upholds an insurance contract can only be vacated due to a violation of public policy if the insurance contract itself violates public policy.<sup>537</sup> The Schultzs' and their deceased son were insured by two policies issued by Aetna.<sup>538</sup> One policy provided liability coverage of \$100,000, and the other contained uninsured/underinsured motorist coverage of \$35,000.<sup>539</sup> After their son's death in a car accident, the Schultzs' sought \$100,000 from Aetna for coverage for each vehicle.<sup>540</sup> Aetna responded that it only owed the Schultzs \$35,000 per vehicle.<sup>541</sup> Aetna supported this position with an option selection signed by Mr. Schultz, Sr.<sup>542</sup> According to Aetna, the option selection constituted a request in writing for issuance of underinsured motorist coverage in an amount less than the limits of liability for bodily injury.<sup>543</sup>

The claim was submitted to arbitration, and the award was granted in favor of Aetna.<sup>544</sup> The Schultzs' moved to vacate the award and claimed that they were unaware of the lower limits provided in the policy.<sup>545</sup> They offered two explanations for being unaware.<sup>546</sup> First, the statutorily required notice language appeared on the back side of a two-sided sheet, and Mr. Schultz did not read the

---

534. *Id.*

535. 886 F.2d 1200 (9th Cir. 1990), *cert. denied*, 495 U.S. 946 (1990).

536. *Berkely*, 59 F.3d. at 992 (quoting *Stead*, 886 F.2d at 1211).

537. *Id.*

538. *Id.*

535. *Id.* See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

536. 663 A.2d 166 (Pa. Super. Ct. 1995).

537. *Id.* at 168.

538. *Id.* at 167.

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.*

545. *Id.*

546. *Id.*

back side prior to signing the application.<sup>547</sup> Second, the signed application was not attached to the policy which was issued to them.<sup>548</sup> Therefore, the Schultzs argued that Aetna's method of obtaining signatures on the waiver and notice provisions violated public policy.<sup>549</sup>

The trial court ruled that these claims did not justify vacation of the award since no public policy concerns about a specific clause were raised.<sup>550</sup> The trial court reasoned that an attack on the method used to obtain signatures and on whether a particular statutory provision applies to the case are questions to be addressed by the arbitration panel, not questions subject to review by the court.<sup>551</sup> Accordingly, the appellate court affirmed the trial court's decision.<sup>552</sup>

In *Kelly v. State Farm Insurance Co.*,<sup>553</sup> Michelle Kelly, eleven years old, was killed while riding her bicycle when she was struck by a pick-up truck driven by Mr. Alberti.<sup>554</sup> Michelle's parents ("Kellys") on behalf of Michelle's estate brought a wrongful death action against Mr. Alberti, the bicycle manufacturer and against the bicycle owner.<sup>555</sup> Damages to Michelle's estate were estimated at \$600,000.<sup>556</sup> Each of the defendants carried insurance.<sup>557</sup> The parties settled for the sum of \$64,500 to which the Kellys' insurance carrier, State Farm, consented and waived its subrogation rights.<sup>558</sup>

State Farm, however, refused to grant underinsured benefits to Michelle's estate.<sup>559</sup> It denied this claim because the Kellys allegedly failed to comply with the terms of an "exhaustion clause" in their policy.<sup>560</sup> According to State Farm, the exhaustion clause required the Kellys to receive the tortfeasor's liability limits before they could claim underinsured motorist benefits.<sup>561</sup> Since Mr. Alberti carried \$50,000 worth of liability insurance and his portion of the settlement was only \$12,500, State Farm claimed the Kellys did not meet the conditions of the exhaustion clause.<sup>562</sup> Pursuant to the policy's arbitration provision, this dispute was submitted to arbitration where the arbitration panel found in favor of State Farm.<sup>563</sup> The Kellys moved to vacate the award alleging that it was contrary to

---

547. *Id.*

548. *Id.*

549. *Id.* at 167-68.

550. *Id.* at 168.

551. *Id.*

552. *Id.* at 169.

553. 668 A.2d 1154 (Pa. Super. Ct. 1995).

554. *Id.* at 1154.

555. *Id.*

556. *Id.*

557. *Id.*

558. *Id.* at 1155.

559. *Id.*

560. *Id.*

561. *Id.*

562. *Id.*

563. *Id.*

law and against public policy.<sup>564</sup> The trial court denied their petition, concluding that it had no jurisdiction to review a claim that an award was contrary to law and that even if the panel could address the merits of the arbitration, it was not clear that the decision violated precedent.<sup>565</sup> The Kellys appealed.<sup>566</sup>

The appellate court held that a court has the power to review an arbitration award that is based on a provision in an insurance policy which is alleged to be void as against public policy.<sup>567</sup> The court concluded that this power of revision gave the court jurisdiction where a claimant asserted that a particular provision was contrary to public policy.<sup>568</sup> The court reversed the trial court's decision and determined that the clause must be interpreted to credit State Farm for the \$50,000 of the liability insurance carried by Mr. Alberti.<sup>569</sup> Under this interpretation, the Kellys were entitled to the full \$30,000 of underinsurance that they carried with State Farm.<sup>570</sup>

In *Doe v. Central Arkansas Transit*,<sup>571</sup> the appellate court reversed the trial court's vacation of an arbitrator's award which had been previously vacated because the arbitrator's reinstatement of a discharged employee violated public policy.<sup>572</sup> Doe, an employee of Central Arkansas Transit ("CAT"), was discharged for testing positive for drug use.<sup>573</sup> Filing a claim on her behalf, the union claimed that Doe was not discharged for "just cause" as required under the Collective Bargaining Agreement.<sup>574</sup> When the matter was submitted to arbitration, the arbitrator reinstated Doe.<sup>575</sup> CAT appealed to the trial court which vacated the award because it violated the public policy against allowing drug users to operate public transportation.<sup>576</sup> The appellate court concluded, however, that this was not a well-defined and dominant public policy since it was not derived from legal precedents and laws.<sup>577</sup> Therefore, the *Doe* court reversed the trial court's vacation order, claiming it was impermissibly based on general considerations of public interest.<sup>578</sup>

---

564. *Id.*

565. *Id.*

566. *Id.*

567. *Id.* at 1156.

568. *Id.*

569. *Id.* at 1158.

570. *Id.*

571. 900 S.W.2d 582 (Ark. Ct. App. 1995).

572. *Id.* at 587-88.

573. *Id.* at 583.

574. *Id.*

575. *Id.*

576. *Id.*

577. *Id.* at 585.

578. *Id.* Moreover, the concurring opinion recognized and found persuasive the public policy of Arkansas which "favors arbitration as an alternative method of dispute resolution." *Id.* at 588.

### F. The Exclusivity of Statutory Grounds to Vacate an Award

In *Graber v. Comstock Bank*,<sup>579</sup> the court concluded that the U.A.A.'s grounds to vacate an arbitration award are not exclusive.<sup>580</sup> The court decided to follow the decision in *Winchinsky v. Mosa* that a district court's power of review is restricted to statutory grounds unless "an arbitrator manifestly disregards the law."<sup>581</sup> If there is such a manifest disregard, a reviewing court may vacate an arbitration award.<sup>582</sup> In *Graber*, the court concluded that in the case at hand the district court had the authority and obligation to review the award to determine whether it manifestly disregarded the law.<sup>583</sup> Review under this standard does not permit plenary judicial review.<sup>584</sup> Instead, a court should attempt to locate arbitrators who appreciate the significance of legal principles, but choose to ignore them.<sup>585</sup> Furthermore, for an award to be vacated due to a manifest disregard of the law, the governing law that is alleged to be disregarded must be explicit, well-defined, and clearly applicable.<sup>586</sup>

In direct contradiction to the holding in *Graber*, the court in *Dick v. Dick*<sup>587</sup> held that an arbitration award can only be vacated for the reasons set out in the statute.<sup>588</sup> In *Dick*, the parties in a divorce proceeding agreed to submit all issues of the divorce to arbitration.<sup>589</sup> The parties also agreed that any appeal could only be based on the arbitrator's substantive decisions, not his procedural decisions.<sup>590</sup> The court concluded that since the parties invoked binding arbitration, they were required to abide by the statute.<sup>591</sup> Because the award did not satisfy the justifications for vacation under the statute, the court refused to vacate the award.<sup>592</sup> Instead, the court reformed the agreement to comport with the requirements of the statute.<sup>593</sup>

In *Stockade Enterprises v. Ahl*,<sup>594</sup> Stockade sued Ahl in an attempt to collect on a construction lien.<sup>595</sup> The dispute was submitted to arbitration where

579. 905 P.2d 1112 (Nev. 1995).

580. *Id.* at 1115.

581. *Id.* at 1115-1116 (quoting *Winchinsky v. Mosa*, 847 P.2d. 727, 730-731 (Nev. 1993)).

582. *Id.* at 1115.

583. *Id.* at 1116.

584. *Id.* See *City of Boulder v. General Sales Drivers*, 694 P.2d 498 (Nev. 1985).

585. *Graber*, 905 P.2d at 1116. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986).

586. *Graber*, 905 P.2d at 1116. See *Bobky*, 808 F.2d at 934.

587. 534 N.W.2d 185 (Mich. Ct. App. 1995).

588. *Id.* at 191.

589. *Id.* at 187.

590. *Id.*

591. *Id.* at 191.

592. *Id.*

593. *Id.*

594. 905 P.2d 156 (Mont. 1995).

595. *Id.* at 156.

the award was made in favor of Ahl.<sup>596</sup> Stockade moved to "vacate or modify the award on the grounds that the award was beyond the scope of inquiry, in error, and contrary to law."<sup>597</sup> Although the district court has the power to vacate the award, it concluded that Stockade failed to raise one of the grounds required by the Montana U.A.A. to trigger the district court's authority.<sup>598</sup>

The Montana Supreme Court, however, ruled that the district court was incorrect in concluding that there was "no authority" for the court to set aside the award.<sup>599</sup> The court reasoned that the Montana U.A.A. conferred authority on the courts to vacate the award on statutory grounds.<sup>600</sup> The court also stated that the party wishing to vacate an award bears the burden of alleging and proving that one of the statutorily enumerated grounds exists.<sup>601</sup>

In *Tim Huey Corp. v. Global Boiler and Mechanical*,<sup>602</sup> the court ruled that arbitration awards are not vacated for mere error and refused to vacate an arbitration award which awarded Huey less than the cost to complete the contract despite its ruling that Global had breached the construction contract with Huey.<sup>603</sup> The court further noted that it cannot correct such an insufficient award where the parties have selected an alternate forum to resolve their disputes.<sup>604</sup>

Huey also argued that to affirm this award would violate public policy because it would undermine public confidence in arbitration and discourage the use of arbitration as a dispute resolution process.<sup>605</sup> The court rejected this argument and held that it will not enforce an arbitration award only if the award violates a dominant and well-defined public policy that refers to laws and legal precedents, but not if the award only violates general considerations of public interests.<sup>606</sup>

## XI. SECTION 13: MODIFICATION OR CORRECTION OF AWARD

As previously noted, courts traditionally have confirmed arbitration awards. Section 13 states that the court must confirm an award as made unless the court shall find grounds to modify or correct an award.<sup>607</sup> The court may modify or correct an award if: "1) an evident miscalculation of figures or an evident mistake has occurred, 2) an arbitrator has awarded upon a matter not submitted to him/her,

---

596. *Id.*

597. *Id.*

598. *Id.* at 158.

599. *Id.* at 157.

600. *Id.*

601. *Id.* at 157-58.

602. 649 N.E.2d 1358 (Ill. Ct. App. 1995).

603. *Id.*

604. *Id.* at 1364.

605. *Id.* at 1365.

606. *Id.*

607. U.A.A. § 13.



and 3) the award is imperfect in matter of form.<sup>608</sup> An application to modify or correct may be joined in the alternative with an application to vacate the award.<sup>609</sup>

Courts have been rather stringent when applying this section of the U.A.A. by specifically requiring parties to meet the statutory criteria to modify or correct an award. According to *FCR Greensboro, Inc. v. C and M Investments of High Point*,<sup>610</sup> judicial review is limited to determining whether one of the specific grounds for vacating or modifying an award exists.<sup>611</sup>

In this case, the arbitrator awarded liquidated damages for late completion of the project and awarded additional reimbursement for additions made to the sprinkler system.<sup>612</sup> The builder filed a motion to vacate the award on the grounds that the arbitrator exceeded his authority by awarding liquidated damages which were not within the scope of the parties' arbitration agreement and by awarding monies for changes concerning a controversy not within the scope of the parties' arbitration agreement.<sup>613</sup> Relying on the language of section 13 of the U.A.A. and finding that the arbitrator's award exceeded his authority, the appellate court held that the trial court improperly confirmed the liquidated damages and additional reimbursement portion of the award.<sup>614</sup>

This interpretation was noted in *Stockade Enterprises v. Ahl*.<sup>615</sup> The Montana Supreme Court found that the scope of judicial review of arbitration awards was very limited under the Montana U.A.A.<sup>616</sup> provisions which did not permit the court to review the merits of controversies.<sup>617</sup> The statute provided that the party seeking to modify or correct the award carried the burden of alleging and proving that one of the statutory grounds existed.<sup>618</sup> In this case, the court held that because Stockade failed to address the statutory criteria set forth in the Montana U.A.A., the district court did not abuse its discretion in refusing to vacate the award.<sup>619</sup> The Montana Supreme Court rejected Stockade's argument for an extremely broad scope of judicial review by holding that neither the district court nor the court of appeals had any authority to engage in a sufficiency of the evidence review.<sup>620</sup>

608. *Id.*

609. *Id.*

610. 459 S.E.2d 292 (N.C. Ct. App. 1995).

611. *Id.* at 294; N.C. GEN. STAT. §§ 1-567.13, 1-567.14 (1983).

612. *FCR Greensboro*, 459 S.E.2d at 292.

613. *Id.* at 294.

614. *Id.* at 295.

615. *Stockade*, 905 P.2d at 156.

616. MONT. CODE ANN. 27-5-313(1)(1985).

617. *Stockade*, 905 P.2d at 156.

618. *Id.* at 157-58.

619. *Id.*

620. *Id.*

In *Cotterman v. Allstate*,<sup>621</sup> the Superior Court of Pennsylvania found that the trial court did not err in refusing to modify the arbitrator's award which reflected the \$5,000 wage loss payment.<sup>622</sup> The court upheld the award for loss of household services as being within the arbitrator's discretion, noting that there was no evidence of out-of-pocket expenses or concrete damages incurred by plaintiff.<sup>623</sup>

Allstate tried to argue that the award should have conformed to the contractual liability limits of the policy. The court, however, held that the award could only be modified if it met the statutory criteria of Pennsylvania's provision to modify or correct the award.<sup>624</sup> Since Allstate's argument did not fit within any of the statutory criteria, the court found that it was without merit.<sup>625</sup>

Most of the recent controversy surrounding section 13 involves the issue of an arbitrator entering an award upon a matter not submitted to arbitration (i.e., where the arbitrator is exceeding his/her authority). For example, in *Perkins Restaurant v. Van Den Bergh Foods Co.*,<sup>626</sup> Perkins Restaurant asserted that the arbitrator exceeded his authority by refusing to award plaintiff its attorney fees since the arbitration agreement provided that the "prevailing party" shall receive attorney fees.<sup>627</sup> The Appellate Court of Illinois stated that courts must afford arbitrators the presumption that they did not exceed their authority.<sup>628</sup> Even an arbitrator's gross abuse of discretion, according to the court, is not grounds for modifying an arbitration award under Section 13.<sup>629</sup> Furthermore, an illogical or inconsistent decision on the part of the arbitrator is not a sufficient basis to overturn an arbitration award.<sup>630</sup> The court reasoned that an arbitrator exceeds his authority when he decides matters which were not submitted to him, not when he decides matters differently than the court would have reached.<sup>631</sup> The court concluded that as long as the arbitrator's interpretation of the agreement is reasonable, it will not set aside the award.<sup>632</sup> Since the arbitrator's decision was reasonable in this case, the court concluded that the award was valid.<sup>633</sup>

---

621. 666 A.2d 695 (Pa. Super. Ct. 1995).

622. *Id.* at 700. The court applied 42 PA. CONS. STAT. §§ 7302(d) and 7315 (1980). *Id.*

623. *Id.*

624. *Id.* Pennsylvania's U.A.A. provides, in part, that:

an award may be modified only if the complaining party can demonstrate that the award was miscalculated, that the arbitrators based the award upon a matter not submitted to them, or that the award is deficient in form, but which does not affect the merits of the arbitration decision.

PA. CONS. STAT. §7315(A) (1980).

625. *Cotterman*, 666 A.2d at 700.

626. 657 N.E.2d 1085 (Ill. Ct. App. 1995).

627. *Id.* at 1086.

628. *Id.* at 1088.

629. *Id.*

630. *Id.*

631. *Id.* at 1089.

632. *Id.*

633. *Id.*

## XII. SECTION 14: JUDGMENT OF DECREE ON AWARD

Once the arbitration order has survived the obstacles of Section 12 and 13 of the U.A.A., Section 14 provides that the judgment or decree shall be entered in conformity with the U.A.A. and shall be enforced as any other judgment or decree.<sup>634</sup>

In *Sandefur v. Greenway*,<sup>635</sup> the Missouri Court of Appeals dealt with the issue of an appeal that requested confirmation of an arbitration award in favor of a customer against her stockbroker.<sup>636</sup> Sandefur's estate was awarded actual and punitive damages in an arbitration proceeding on the grounds that the stockbroker, Greenway, committed securities fraud, common law fraud, forgery, and churning.<sup>637</sup> The trial court's confirmation of the award of punitive damages prompted Greenway to appeal.<sup>638</sup>

The appellate court held that under Missouri's U.A.A., arbitration awards are to be confirmed by the courts and given the status of judgments.<sup>639</sup> A party challenging the award is not entitled to a resolution on the merits since the court's function is merely to determine if the arbitrator acted within his jurisdiction.<sup>640</sup> Because of the court's limited function, the court held that parties to an arbitration agreement could not relitigate a matter on the law or facts.<sup>641</sup> This, in effect, gives arbitrators the ability to settle legal as well as factual issues with little interference from the courts.<sup>642</sup> In this case, the court upheld the trial court's decision that arbitrators could award Sandefur punitive damages.<sup>643</sup>

## XIII. SECTION 17: JURISDICTION OF THE COURT

Section 17 of the U.A.A. defines the court's jurisdiction to review the arbitration award, as opposed to the arbitrator's jurisdiction or authority to hear the issue.<sup>644</sup> The U.A.A. defines "court" as any court of competent jurisdiction of this state.<sup>645</sup> As established in Section 1, the arbitration agreement provides

634. U.A.A. § 14.

635. 898 S.W.2d 667 (Mo. Ct. App. 1995).

636. *Id.* at 668.

637. *Id.* at 669.

638. *Id.* The trial court found that a set-off was allowed as the Sandefur estate received a settlement from Shearson, Lehman Brothers, Inc., Greenway's affiliated office, which reduced the actual damages to zero. *Id.*

639. *Id.* at 670. See MO. REV. STAT. §§ 435.350-435.470 (1986).

640. *Id.* at 670.

641. *Id.*

642. *Id.*

643. *Id.* at 672.

644. U.A.A. § 17.

645. *Id.*

for arbitration in the state which confers jurisdiction on the court to enforce the agreement under the U.A.A. and to enter judgment on an award.<sup>646</sup>

In *MacDonald v. Hayman*,<sup>647</sup> the parties filed a stipulation with the superior court which reflected the parties' agreement to submit their dispute to binding arbitration with no right to appeal.<sup>648</sup> The case was submitted to arbitration in which the arbitrators rendered a decision in favor of the Haymans.<sup>649</sup> The Haymans then moved to have the award entered as a final judgment.<sup>650</sup> Ten days later, the superior court granted the Hayman's motion for final judgment.<sup>651</sup> The MacDonalds moved to be relieved of the judgment, arguing that the superior court lacked jurisdiction under the Delaware U.A.A. to enter a final judgment on the arbitrators' award in this case.<sup>652</sup> Though the superior court held that the Delaware U.A.A. does vest jurisdiction in the Court of Chancery to enter a final judgment on an arbitrator's award, the supreme court found that the court in this case was not vested with such jurisdiction.<sup>653</sup> The superior court did not obtain jurisdiction over this dispute until the parties entered their arbitration agreement in 1994, several years after the original complaint had been filed.<sup>654</sup> Because of this delay, the parties' later arbitration agreement did not "arise under" and was not subject to the provisions of the Delaware U.A.A.<sup>655</sup> As a result, the superior court retained jurisdiction to enter the arbitrator's award as a final judgment.<sup>656</sup>

#### XIV. SECTION 19: APPEALS

The very essence of Section 19 is to define what is appealable. This section provides that a party may appeal from an order: 1) denying an application to compel arbitration, 2) granting an application to stay arbitration, 3) confirming or denying confirmation of an award, 4) modifying or correcting an award, 5) vacating an award without directing a rehearing, or 6) entering a judgment pursuant to the U.A.A.<sup>657</sup>

In *Gilliland v. Chronic Pain Associates, Inc.*,<sup>658</sup> the Supreme Court of Oklahoma held that to be appealable under Oklahoma's Arbitration Act, "an order

---

646. *Id.*

647. No. 188, 1995 WL 449354, \*1 (Del. July 27, 1995).

648. *Id.* at \*1.

649. *Id.*

650. *Id.*

651. *Id.*

652. See DEL. CODE ANN. tit. 10, § 5701 (1974).

653. *MacDonald*, 1995 WL 449354 at \*1.

654. *Id.*

655. See DEL. CODE ANN. tit. 10, § 5701 (1974).

656. *Id.*

657. U.A.A. § 19.

658. 904 P.2d 73 (Okla. 1995).

which 'prevents a judgment' must preclude the appealing party from proceeding further in the case for the pursuit of the very relief that is then and there sought.<sup>659</sup> Because the nisi prius order precluded Gilliland from obtaining the desired relief and barred judgment on the arbitration award tendered for confirmation, the court held that it was appealable.<sup>660</sup>

Section 19 of the U.A.A. provides clear cut standards of the statutory criteria to be used by parties appealing a decision. For instance, in *Kemether v. Aetna Life & Casualty Co.*,<sup>661</sup> the Superior Court of Pennsylvania found that an order denying a petition to vacate or modify an award is not appealable under the Pennsylvania U.A.A.<sup>662</sup> After the court of common pleas denied the Kemethers' petition to vacate or modify an arbitration award and reduced the order denying relief to judgment, the Kemethers appealed.<sup>663</sup> Aetna asserted that this appeal must be quashed since an order denying a petition to vacate or modify an arbitration award cannot be appealed.<sup>664</sup> The appellate court held that the responsibility for entering a confirming order lay with the trial judge, not the appellate court.<sup>665</sup> The appellate court also stated that the trial court's judgment on the order denying the petition to vacate or modify was a final judgment.<sup>666</sup> In this case, the Superior Court of Pennsylvania held that since the judgment was considered final, the record failed to reveal any reason not to confirm the order after the trial court denied the petition to vacate or modify.<sup>667</sup>

A particularly problematic issue under Section 19 is whether a final judgment addressing a particular issue has been reached. In *Red Springs Presbyterian Church v. Terminex*,<sup>668</sup> the Court of Appeals of North Carolina found that because the parties were appealing from an order which denied in part and stayed in part arbitration of plaintiff's claim against defendant, the appeal was interlocutory.<sup>669</sup> According to the court, the portion of the order that denied arbitration was immediately appealable because a substantial right was

659. *Id.* at 77. See OKLA. STAT. tit. 12, § 953 (1991).

660. *Id.*

661. 656 A.2d 125 (Pa. Super. Ct. 1995).

662. *Id.* at 127. See 42 PA. CONS. STAT. ANN. § 7320(a) (1982). The court noted that the proper procedure is for the court to enter an order confirming the arbitrator's award, either simultaneously with or following the entry of the order denying the petition to vacate or modify. *Kemether*, 656 A.2d at 127.

663. *Id.* at 126.

664. *Id.* at 127.

665. *Id.*

666. *Id.*

667. *Id.* at 128. Subchapter A of the Pennsylvania U.A.A. requires that an appealing party must petition the court to vacate or modify the award. 42 PA. CONS. STAT. ANN. §§7314 and 7315 (1982). The Kemethers filed the correct petition in accordance with the statute. *Kemethers*, 656 A.2d at 128.

668. 458 S.E.2d 270 (N.C. Ct. App. 1995).

669. *Id.* at 272. The court noted that the arbitration was controlled by and under the provisions of the North Carolina U.A.A., N.C. GEN. STAT. §§1.567.1-1.2. *Id.*

involved.<sup>670</sup> An order compelling arbitration, however, did not affect a substantial right and, therefore, was not immediately appealable.<sup>671</sup>

In Missouri, the Western District Court of Appeals in *State ex rel. MCS Building Co. v. KKM Medical*<sup>672</sup> held that an order compelling arbitration was not a final appealable order because the Missouri U.A.A. did not authorize an appeal from an order compelling arbitration.<sup>673</sup> The court held that the order compelling the parties to arbitrate their disputes over the construction of a medical office building did not dispose of all parties and all issues.<sup>674</sup> According to the court, "an appeal without statutory sanction conferred no authority upon an appellate court except to enter an order dismissing the appeal."<sup>675</sup> The court held that "ripe for review" was not one of the statutory listings of the Missouri U.A.A. and, therefore, was not capable of appellate review.<sup>676</sup>

The Missouri Court of Appeals for the Southern District in *Abrams v. Four Seasons Lakesites* followed the *MCS Building* decision.<sup>677</sup> In *Abrams*, the Southern District held that there was no final judgment from which an appeal could be taken since the order denying the motion to compel did not dispose of all parties and issues and failed to comply with the Rule 74.01(b) exception.<sup>678</sup>

In this case, *Abrams* first brought an action for damages against the condominium developer and officer for breach of contract and then moved to compel arbitration.<sup>679</sup> When his order to compel was denied, *Abrams* appealed to the appellate court.<sup>680</sup> The court noted that the Missouri U.A.A. allows appeals from orders denying an application to compel arbitration.<sup>681</sup> Orders or judgments, however, that otherwise partake of finality by reason of Missouri's appeal process could only be appealed "in the manner and to the same extent as appeals from orders or judgments in a civil case".<sup>682</sup> In a Missouri civil case, "for a judgment to be final and appealable, it must dispose of all parties and all issues in the case, leaving nothing for future determination".<sup>683</sup> The court noted

---

670. *Id.*

671. *Id.*

672. 896 S.W.2d 51 (Mo. Ct. App. 1995).

673. *Id.* at 53. See MO. REV. STAT. §§435.440 and 435.330 (1986).

674. *MCS*, 896 S.W.2d at 53.

675. *Id.*

676. *Id.* See MO. REV. STAT. § 435.440 (1986).

677. 904 S.W.2d 37 (Mo. Ct. App. 1995).

678. *Id.* at 38.

679. *Id.*

680. *Id.* The trial judge denied *Abrams*' motion to compel arbitration concluding that he "failed to prove the existence of a valid agreement between the parties to arbitrate." *Id.*

681. *Id.* at 39. See MO. REV. STAT. § 435.355 (1986) (proceedings to compel or stay arbitration).

682. *Abrams*, 904 S.W.2d at 39. Section 435.400.1(1) provides in pertinent part: "An appeal may be taken from an order denying an application to compel arbitration under § 435.355." MO. REV. STAT. §435.400.1 (1986).

683. *Abrams*, 904 S.W.2d at 39. Section 435.440(2) states that an appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action. MO. REV. STAT. §435.440(2) (1986).

that an exception to the aforementioned rule exists in Missouri Court Rule 74.01(b) which permits appeals from a judgment that disposes of less than all parties and issues if the trial court makes an "express determination that there is no just reason for delay".<sup>684</sup> Because the order of the trial court in *Abrams* did not dispose of all parties and all issues and because the trial court did not state in its determination that there was no just reason for delay, the court held that the order denying arbitration was not appealable.<sup>685</sup>

The issue of possible appeal may become even more confusing when various orders are delivered. For instance, in *National Avenue Building Co. v. Stewart*,<sup>686</sup> the trial court issued an order which denied confirmation of the award, vacated the award, and directed a rehearing.<sup>687</sup> Because the trial court issued all three orders, National Avenue Building Company (NABC) claimed that the Missouri U.A.A. provision governing appeals barred Stewart's appeal.<sup>688</sup> If Stewart was barred from appealing, the court held that he must arbitrate again.<sup>689</sup> If NABC was dissatisfied with the result of the new arbitration, it could seek a trial court order vacating the new award and directing another rehearing.<sup>690</sup> If NABC was successful in the vacating motion, Stewart would have to arbitrate a third time.<sup>691</sup> According to the Missouri Court of Appeals, this cycle could continue indefinitely.<sup>692</sup> The court found nothing in the Missouri U.A.A. suggesting that if an order was appealable under one subdivision, appealability was extinguished if the order was unappealable under another.<sup>693</sup> A party could manipulate the system if a party sought an order vacating the award and directing a rehearing and if the trial court entered such an order. Such an order would be unappealable because neither subparagraph 3 nor subparagraph 5 of section 435.400.1 of Missouri's U.A.A. conferred appealability.<sup>694</sup> The court in *National* held that the order was appealable, basing appealability on subparagraph 3 which allows an appeal of an order denying confirmation of an award.<sup>695</sup> The court specifically noted, however, that it was not implying that the order would have been appealable absent the provision denying confirmation.<sup>696</sup>

684. *Abrams*, 904 S.W.2d at 39.

685. *Id.*

686. 910 S.W.2d 334 (Mo. Ct. App. 1995).

687. *Id.* at 338.

688. *Id.* The provision provides that a party may appeal from an order vacating an award without directing a rehearing. MO. REV. STAT. §435.440(5) (1986).

689. *National*, 910 S.W.2d at 340.

690. *Id.*

691. *Id.*

692. *Id.*

693. *Id.* at 341.

694. *Id.* MO. REV. STAT. § 435.440(3) (1986) provides that an appeal may be taken from an order denying confirmation of an award.

695. *Id.* The court noted that this holding was consistent with Missouri public policy which allows an appeal from an order granting a new trial in a civil case. *Id.*

696. *Id.*

Other courts have tried to simplify the matter by looking to the actions of the trial court. In *Britt v. Phoenix Indemnity Insurance Co.*,<sup>697</sup> the Supreme Court of New Mexico affirmed the trial court's decision to refer to arbitration the question of whether a passenger was entitled to recover from an uninsured motorist and uninsured motorists benefits.<sup>698</sup> The court found that an order compelling arbitration was final if it was the "last deliberative action of the court with respect to the controversy before it."<sup>699</sup> In other words, as far as the merits of the controversy are concerned, the court was finished with the case when it went to the arbitrators.<sup>700</sup> Therefore, the trial court's order to compel arbitration was final for purposes of appeal and did not exceed the trial court's power in the form of the award.<sup>701</sup> The construction of the contract as to the award is within the scope of the arbitrators' powers, not the court's powers.<sup>702</sup>

DANA A. CHAMBLEE  
MATTHEW S. DARROUGH  
REACHEL A. JENNINGS  
TRINA R. RICKETTS

---

697. 907 P.2d 994 (N.M. 1995).

698. *Id.* at 996. The court noted N.M. STAT. ANN. § 44-7-2(A) (Michie 1978), which provides that if an agreement to arbitrate exists, the court shall order parties to proceed to arbitration. *Id.* at n.1.

699. *Id.*

700. *Id.*

701. *Id.* at 997.

702. *Id.*



