Recent Developments: The Uniform Arbitration Act

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# RECENT DEVELOPMENTS: THE UNIFORM ARBITRATION ACT*

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The Uniform Arbitration Act (UAA) was proposed in 1955 by the National Conference of Commissioners on Uniform State Laws. Since that time, well over half of the states have enacted statutes modeled after the UAA. This survey's purpose is to present and explain recent decisions interpreting the UAA, and assist in analyzing future cases.

I. Variations on the UAA

Tennessee and Kentucky have recently adopted the UAA. Although these acts are in substantial conformity with the model act, the Tennessee and Kentucky statutes contain some significant modifications and omissions from the model act which are worthy of consideration.

A. Tennessee

Tennessee's most significant modification is section 1. Section 1 of the UAA provides that a clause in a written contract to submit a dispute to arbitration is valid, enforceable and irrevocable. Further, section 1 provides that...
valid arbitration agreements can be made between employees and employers. The Tennessee statute, in comparison, does not make every arbitration clause in a written contract enforceable. In a specific protected class of transactions, not only do the parties have to assent to the contract for the arbitration agreement to be valid, but the parties must additionally sign or initial the specific clause which provides for arbitration. The protected class of transactions in which the arbitration clause must be signed or initialed includes contracts relating to "farm property, structures or goods, or to property and structures utilized as a residence of a party . . . " The policy behind signing or initialing the arbitration clause is to insure that these clauses are read. A contract pertaining to a statutorily protected transaction which contains an arbitration clause which is not signed or initialed will result in the arbitration clause being struck from the rest of the contract.

The Tennessee statute also differs from section 1 by omitting any mention of the enforceability of arbitration agreements in employment contracts. Whether such agreements will be enforceable can be argued either way. Since the Tennessee statute deviates from the model act which explicitly includes a provision asserting that employer—employee arbitration agreements are valid, it could be argued that the legislature's intent was to not recognize such agreements. However, a fair reading of the Tennessee statute does not indicate any intent to exclude arbitration agreements when the parties stand in an employer—employee relationship. Further, many states which have adopted versions of the model act have explicitly excluded employer—employee arbitration agreements as opposed to Tennessee's failure employees or between their respective representatives [unless otherwise provided in the agreement].

6. Id.
(a) 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; provided, however, that for contracts relating to farm property, structures or goods, or to property and structures utilized as a residence of a party, the clause providing for arbitration shall be additionally signed or initialed by the parties.
(emphasis added)
9. Supra note 7.
11. Id.
12. UAA § 1.
13. At least ten jurisdictions have explicitly excluded arbitration agreements between employers and employees: Alaska, Arizona, Arkansas, Idaho, Kansas, Maryland,
to mention whether such agreements are arbitrable.

Tennessee's version of the UAA also omits several provisions of the model act. The most significant omissions are sections 20 and 22. Section 20 stipulates that the act is not retroactive. Consequently, the act only applies to agreements made after the act takes effect. Tennessee's omission of the provision can be interpreted as meaning that the UAA applies to all arbitration agreements whether made before or after the act has taken effect.

Section 22 provides that all the provisions of the model act are severable. The omission of the provision from the Tennessee act permits the entire arbitration statute to be declared invalid if one section is found unconstitutional. It has been contended that the absence of a severability provision may make it more difficult to hold a section of a statute unconstitutional since the consequence of such a ruling would invalidate the entire act.

B. Kentucky

Kentucky has also omitted and modified significant provisions from the model act. First, Kentucky, like Tennessee, has omitted the severability provision from the model act.

Second, Kentucky modified section 1 of the UAA to explicitly prohibit arbitration of insurance contracts and employment contracts. Third, Kentucky modified the law concerning when a court may order a rehearing before new arbitrators after an arbitration award has been vacated. Section 12 of the UAA allows a rehearing after vacating an award produced by "corruption,


14. UAA § 20 provides: "This act applies only to agreements made subsequent to the taking effect of this act."

15. This would not be a violation of the Contract Clause of the United States Constitution, U. S. CONST. art. I, § 10, since it is not impairing the rights of the parties but rather modifying the means of enforcing those rights.

16. UAA § 22 provides:

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

17. See Recent Developments 1984, supra note 3, at 207-08.

18. Id. at 201. At least six other states have omitted this section from their versions of the UAA: Alaska, Arkansas, Kansas, Massachusetts, and Nevada, 7 U.L.A. 81 (1978), and Kentucky, infra notes 21-22 and accompanying text.


20. Kentucky modified UAA §§ 1 and 12.

21. See supra notes 14-15 and accompanying text.

22. See supra § 22.

fraud, or other undue means;" however, this section does not allow a rehearing if the court finds that there was "no arbitration agreement and the issues were not adversely determined." The Kentucky provision is the converse of the UAA since it allows a court to order a rehearing after vacating an award if it was found that no arbitration agreement existed and the issues were not adversely determined. Further, when an award is vacated because of "corruption, fraud, or other undue means" a rehearing is not allowed. This modification from the model act makes little sense. It is a waste of time to order a rehearing before new arbitrators if no valid arbitration agreement existed between the parties. Furthermore, an arbitration award procured by corruption, fraud or other undue means can only be vacated; there is no statutory authority to order a rehearing.

II. VALIDITY OF AN ARBITRATION AGREEMENT

Under the UAA, arbitration agreements are to be enforced except where legal or equitable grounds exist to revoke the agreement. Several states that

24. UAA § 12(a) provides:

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

UAA § 12(c) provides:

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


26. Id.

27. UAA § 1 provides:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy
have adopted the UAA, however, forbid arbitration agreements concerning certain matters. 28 Recent decisions suggest various considerations affecting the validity of an arbitration agreement: (1) the statute may be narrowly construed to avoid a statutory exception; (2) whether the possibility of piecemeal resolution of a dispute renders an arbitration agreement invalid; (3) the terms of the underlying contract determine whether an arbitration clause is enforceable, and by whom; and (4) public policy considerations may render certain arbitration agreements unenforceable.

A. Statutory Construction

Generally, state courts have chosen to construe arbitration statutes broadly in order to promote a policy of enforcing arbitration agreements. 29 For example, in Wilson v. McGrow, Pridgeon & Co., 30 the Maryland Court of Appeals determined that an arbitration agreement in an employment contract between a professional corporation and an individual was enforceable. 31 Maryland's arbitration statute validates any agreement to arbitrate a present or future controversy except where grounds exist at law or in equity for revocation of the agreement. 28 In contrast to the UAA, however, Maryland's version of the UAA will not apply between employers and employees or their respective representatives unless it is expressly provided that the arbitration statute will apply. 33 Wilson had signed a series of employment contracts with McGrow, an accounting firm, which contained an agreement to settle controversies by arbitration. Wilson then left to start his own accounting firm. McGrow sued Wilson for breach of fiduciary duties to McGrow. Wilson petitioned the trial court to compel arbitration. The trial court and intermediate appellate court denied enforcement of the arbitration clause because the contract involved was between an employer and employee. The intermediate court stated that the Maryland's arbitration statute required an express provision in the contract stating that the statute would apply. The court then ruled that such an express provision is required.

29. See id. at 147.
31. Id. at 78, 467 A.2d at 1031.
33. Id. at § 3-206(b). This provision differs from UAA § 1, which states in pertinent part: "This act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement]."
agreement was absent. On appeal, The Maryland Court of Appeals conceded that an express agreement was absent, but construed the Maryland arbitration statute broadly, holding that the intent of the Maryland legislature was to exclude only employment contracts that had been bargained for collectively and not those similar to the one between McGrow and Wilson. Therefore, the Court of Appeals reversed the lower courts' decision and granted enforcement of the agreement.

Another decision involving a statutory restriction on the enforceability of an arbitration clause was State ex rel. Tri-City Construction Co. v. Marsh. In Marsh, the respondent argued that an arbitration agreement was unenforceable because it did not contain a notice of arbitration as required by Missouri's arbitration act. Although the Missouri statute requires that notice be included in each contract, the court reasoned that the law favors a statutory reading which results in a reasonable interpretation. Since the contract involved was solely an agreement to arbitrate, the court, in holding the arbitration agreement enforceable, stated that it would have been illogical and unnecessary to include a notice clause.

B. Piecemeal Resolution

In Forest City Dillon, Inc. v. Superior Court for Pima, the Arizona Court of Appeals held that although only one of several respondent subcontractors had an arbitration agreement with the petitioner general contractor, the arbitration agreement was valid. The court stated that "arbitration law requires piecemeal resolution when necessary to give effect to an arbitration agreement."

This rationale was further supported by the decision in J & K Cement Construction Inc. v. Montalbano Builders, Inc. In this case, subcontractors attempted to foreclose on a lien against several property owners. The property owners crossclaimed against the general contractor. The general contractor moved to compel arbitration pursuant to an agreement between the general

34. Wilson, 298 Md. at 69, 467 A.2d at 1026.
35. Id. at 78, 467 A.2d at 1031.
36. Id.
37. 668 S.W.2d 148 (Mo. Ct. App. 1984).
38. Mo. REV. STAT. § 435.460 (Supp. 1982) requires contracts containing arbitration clauses to contain the following notice: "This contract contains a binding arbitration provision which may be enforced by the parties." For a discussion of the Missouri arbitration statute, including the notice requirement, see Recent Developments 1983, supra note 3, at 140-42.
41. Id. at , 675 P.2d at 299.
42. Id.
contractor and the property owners. The trial court denied a motion by the
general contractor, Montalbano, to compel arbitration.44 The Appellate Court
of Illinois reversed, holding that the subcontractor's argument for efficiency
was not strong enough to overcome the policy favoring the enforcement of
arbitration agreements.45

C. Application of Contract Principles

Many decisions determining the validity of arbitration agreements involve
an analysis of the contractual language and relationships. Recent cases indi-
cate that the ordinary rules of contract interpretation apply in determining the
validity of a particular provision.

In Computer Corp. of America v. Zarecor46 the Massachusetts Court of
Appeals addressed the issue of determining the parties to an arbitration agree-
ment. A developer brought an action against the promoters of a corporation to
recover his licensing fee because the corporation had never been created. The
promoters sought to compel arbitration by invoking the arbitration agreement
between the corporation and the developer. Since the promoters were never
intended to be parties to the agreement, the court found that they had no
power to compel arbitration. The court emphasized that the policy of the
UAA is to enforce contracts as broadly as the parties intended, but that those
who were not parties to the agreement had no right to compel arbitration no
matter how broadly the agreement was construed.47

Another frequently encountered problem involving validity arises where
one party tries to use an arbitration agreement to force a dispute over the
existence of the underlying contract to arbitrate. Generally, courts have held
that if the contract's existence is disputed, a party cannot rely on the arbitra-
tion provision of the contract in question to force arbitration.

In Paramore v. Inter-regional Financial Group Leasing Co.,48 the North
Carolina Court of Appeals was asked to determine whether a lease dispute
was subject to arbitration based on the arbitration provision contained in the
lease. The dispute concerned whether a farm lease agreement had been cre-
ated through fraud and forgery. The court held that the arbitration agreement
could not be enforced to compel arbitration when the agreement was part of
the contract in dispute, and that the validity of the contract as a whole must
be established to show the validity of the arbitration agreement.49

In City of Wamego v. L.R. Foy Construction Co.,50 the Kansas Court of

44. Id. at 666, 456 N.E.2d at 892.
45. Id. at 675-78, 456 N.E.2d at 900-03.
47. Id. at ___, 452 N.E.2d at 269.
49. Id. at ___, 316 S.E.2d at 92.
Appeals applied a similar analysis to a dispute in which the party who repudiated the contract sought to compel arbitration. Although the written contract included a provision giving each party the right to compel arbitration, the city claimed that Foy waived its right to compel arbitration when it denied the existence of a binding contract. The court ruled that if the dispute is over whether the contract has been executed, that issue cannot go to arbitration under the clause.\textsuperscript{51} Foy argued, however, that this rule did not apply because the arbitration agreement was severable from the underlying contract. The court rejected Foy's argument, saying that where there is no evidence of an independent meeting of the minds on the arbitration agreement, the agreement is not severable.\textsuperscript{52}

In \textit{Fraternal Order of Police v. Village of Washington Park},\textsuperscript{53} an Illinois appellate court held the fact that one party may have violated the terms of an agreement is not enough to make the arbitration provision contained therein unenforceable. \textit{Fraternal Order} involved an epidemic of "blue flu" among the members of the village police force following the firing of one of their union organizers. The village claimed that the action constituted a strike which breached their employment contract and gave the village the right to pass a resolution terminating the agreement. The court found, however, that the village did not have the unilateral right to revoke the agreement. Since earlier decisions held that the UAA was part of the agreement as a matter of law, the parties' agreement was irrevocable except by their mutual consent.\textsuperscript{54}

\section*{D. Statutory Causes of Action}

Another reason that arbitration agreements may be rendered unenforceable is that courts favor litigation of certain statutory causes of action. In \textit{Blow v. Shaughnessy},\textsuperscript{55} the North Carolina Court of Appeals determined that securities trading litigation should not be stayed pending arbitration even though there was an arbitration clause in the securities agreement between the plaintiffs and respondents.\textsuperscript{56} A factor in the court's ruling was a pending Securities and Exchange Commission regulation stating that any securities broker who entered into an agreement binding the customer to arbitration concerning disputes arising under federal securities laws had committed a fraudulent, manipulative, or deceptive act.\textsuperscript{57} The court stated that although

\begin{footnotesize}
\begin{enumerate}
\item[51.] \textit{Id.} at \_\_, 675 P.2d at 916.
\item[52.] \textit{Id.} (citing Pollux Marine Agencies v. Louis Dreyfuss Corp., 455 F. Supp. 211 (S.D.N.Y. 1978)).
\item[54.] \textit{Id.} at \_\_, 462 N.E.2d at 857.
\item[55.] 68 N.C. App. 1, 313 S.E.2d 868 (1984).
\item[56.] \textit{Id.} at \_\_, 313 S.E.2d at 874.
\item[57.] \textit{Id.} at \_\_, 313 S.E.2d at 876. The rule involved, 48 Fed. Reg. 53,404 (1983) (to be codified at 17. C.F.R. § 240.15c2-2), provides in pertinent part:
\begin{enumerate}
\item[(a)] it shall be a fraudulent, manipulative or deceptive act or practice for a
\end{enumerate}
\end{enumerate}
\end{footnotesize}
North Carolina law approves arbitration as a manner of settling disputes, it was compelled to recognize the federal law and underlying policy as relevant.

Antitrust cases are another area where federal policy is relevant in determining whether an issue should be arbitrated. In Sabates v. International Medical Centers, Inc., a Florida District Court of Appeal ruled that a state antitrust claim was not a proper subject for arbitration. The court stated that although Florida favors agreements to arbitrate, that policy was not without exceptions. Although the Florida Antitrust Act contained no express provision preserving the right of litigation, the court stated that the policy favoring arbitration must give way to the policy favoring litigation of antitrust claims. The court held that because this issue had not been addressed in Florida courts, "great weight" was to be given federal authority, which does not allow arbitration of antitrust claims.

Arbitration is a useful tool which provides for economical, speedy resolution of disputes. Courts generally construe arbitration statutes broadly to promote the enforceability of arbitration agreements. It is apparent, however, that when the public in general has an economic interest in the outcome, as in cases involving antitrust and securities practices, courts are hesitant to enforce arbitration agreements.

III. WAIVER

The right to arbitrate is a contract right which can be waived. By waiving

broker or dealer to enter into an agreement with any public customer which purports to bind the customer to an arbitration of future disputes between them arising under the federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer.

59. Blow, 68 N.C. App. at ___, 313 S.E.2d at 876. The court indicated that the Securities Act was promulgated to protect the rights of investors and that federal policy forbids a waiver of any of these rights.
61. Id. at 516-17.
62. Id. at 516.
64. Sabates, 450 So. 2d at 516-17.
65. Id. at 517; see, e.g., Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); A. & E. Plastic Pak Co. v. Monsanto Co., 396 F.2d 710 (9th Cir. 1968). The court indicated that federal policy not to arbitrate antitrust claims had several rationales. First, antitrust claims affect a wide range of public interests. Second, complexity of antitrust claims make them more suitable for a judicial forum. Third, commercial arbitrators should not be allowed to decide matters of such great public interest. Finally, arbitrators are not bound by rules of law and do not have to cite reasons for their rulings. Sabates, 450 So. 2d at 517.
ing the right to arbitrate, a party loses the power to compel arbitration of
disputes covered by the arbitration provision.\textsuperscript{67} Waiver, therefore, is an im-
portant preliminary issue which must be decided when a dispute arises and one of
the parties seeks to compel arbitration. If both parties submit themselves to
the court’s jurisdiction in determining a dispute, they waive their right to enter
into subsequent arbitration agreements,\textsuperscript{68} and the court cannot order binding
arbitration even if both parties consent.\textsuperscript{69}

In determining whether a party has waived its right to arbitrate, the court
looks for conduct inconsistent with an intent to arbitrate.\textsuperscript{70} However, the con-
duct and surrounding circumstances must evidence a clear intent to forego the
use of arbitration.\textsuperscript{71} Waiver will not be found from equivocal language or con-
duct.\textsuperscript{72} Examples of conduct which constitute a waiver of a party’s right to
arbitrate include: (1) repudiating the entire contract of which the arbitration
agreement was a part;\textsuperscript{73} (2) utilizing litigation to settle a dispute which the
agreement specified was to be arbitrated;\textsuperscript{74} and (3) “preventing arbitration,
making arbitration impossible, proceeding at all times in disregard of the arbi-
tration clause, expressly agreeing to waive arbitration, or unreasonable de-
lay.”\textsuperscript{75} Waiver will not be inferred, however, when a party who does not have
the obligation to initiate arbitration does not do so.\textsuperscript{76} Nor will waiver be found
when the action which allegedly constitutes a waiver occurred in a completely
independent lawsuit.\textsuperscript{77}

A. Repudiation of the Underlying Contract

In \textit{City of Wamego v. L.R. Foy Construction Co.},\textsuperscript{78} the Kansas Court of
Appeals ruled that repudiation of the contract containing an arbitration provi-
sion acts as a waiver of the right to arbitrate.\textsuperscript{79} Wamego sued L.R. Foy Con-
struction Company (Foy) for breach of contract after the latter denied the

\begin{itemize}
  \item \textsuperscript{67} City of Wamego v. L.R. Foy Constr. Co., 9 Kan. App. 2d 168, ____,
  \item \textsuperscript{68} Rustad v. Rustad, 68 N.C. App. 58, ____,
  \item \textsuperscript{69} Cyclone Roofing Co. v. David M. LaFave Co., 67 N.C. App. 278, ____,
  \item \textsuperscript{70} Forest City Dillon, Inc. v. Superior Court for Pima, 138 Ariz. 410, ____,
  \item \textsuperscript{71} Gold Coast Mall, 298 Md. at 109, 468 A.2d at 98.
  \item \textsuperscript{72} \textit{Id}.
  \item \textsuperscript{73} City of Wamego, 9 Kan. App. 2d at ____,
                  675 P.2d at 916.
  \item \textsuperscript{74} Cyclone Roofing, 67 N.C. App. at ____,
                  312 S.E.2d at 711.
  \item \textsuperscript{75} Forest City, 138 Ariz. at ____,
                  675 P.2d at 299.
  \item \textsuperscript{76} Gold Coast Mall, 298 Md. at 113, 468 A.2d at 98.
  \item \textsuperscript{77} Forest City, 138 Ariz. at ____,
                  675 P.2d at 299.
  \item \textsuperscript{78} 9 Kan. App. 2d 168, 675 P.2d 912 (1984).
  \item \textsuperscript{79} \textit{Id} at ____,
                  675 P.2d at 916.
\end{itemize}
existence of a contract between it and the city. 80 Foy moved to stay the suit and compel arbitration. 81 The court ruled that the arbitration provision could not be held a separate contract absent evidence of an independent meeting of the minds regarding arbitration. 82 It then noted that Foy did not qualify or limit its repudiation of the contract and held that the repudiation constituted conduct "inconsistent with a continued right to compel arbitration." 83

B. Participation in the Judicial Process

In Cyclone Roofing Co. v. David M. LaFave Co., 84 the court held that pursuing legal adjudication of a dispute constituted a waiver of the right to arbitrate. 85 Cyclone Roofing Company was a subcontractor of LaFave Company (LaFave) for a contract which required the latter to construct a house for Joseph and Emma Frye (the Fryes). Cyclone sued both LaFave and the Fryes. LaFave then filed a cross-claim against the Fryes, who answered with a cross-claim against LaFave and its owner individually. In its answer to the Fryes' cross-claim, LaFave alleged for the first time that arbitration was mandated by its contract with the Fryes. 86 The court ruled that after the defendants filed cross-claims against each other, a civil suit was pending; therefore, the court could not order arbitration "even with the consent of both parties." 87 The dissent argued that participation in litigation or other conduct inconsistent with a right to arbitrate should not result in waiver absent prejudice to the other party. Finding that the Fryes had not been prejudiced by LaFave's legal actions, the dissent would have affirmed the trial court's order directing arbitration. 88

In Rustad v. Rustad, 89 the Court of Appeals of North Carolina also ruled that submitting a dispute to litigation results in a waiver of the right to arbitrate. An ex-husband brought suit against his former wife to reduce his support obligations under their separation agreement. The defendant moved to dismiss on the basis that she and her former spouse were contractually bound to submit that issue to mediation and arbitration. 90 The court held that both parties had waived their right to arbitrate disputes under the separation agree-

80. Id. at ___, 675 P.2d at 915.
81. Id. at ___, 675 P.2d at 913.
82. Id. at ___, 675 P.2d at 916.
83. Id. at ___, 675 P.2d at 917.
85. Id. at ___, 312 S.E.2d at 711.
86. Id. at ___, 312 S.E.2d at 710.
87. The court noted that LaFave's cross-claim was permissive and not compulsory and that the conduct of both parties in filing such claims constituted the election of a legal forum and a waiver of their right to arbitrate. Id. at ___, 312 S.E.2d at 711.
88. Id. at ___, 312 S.E.2d at 712.
90. Id. at ___, 314 S.E.2d at 277.
ment by submitting themselves to the court’s jurisdiction in an earlier custody
dispute involving the same agreement. Further, the court ruled that the par-
ties had foreclosed their right to enter into subsequent arbitration agreements
concerning the same subject matter. Therefore, the arbitration agreement they
made following the custody suit was void ab initio.

In Forest City Dillon, Inc. v. Superior Court for Pima, the court held
that pursuit of a legal remedy in an independent action regarding a separate
dispute based on the same relationship did not result in a waiver. Forest City
Dillon, general contractor for development of a shopping mall, filed a demand
for arbitration of a dispute with one of its subcontractors. Thereafter, the sub-
contractor filed a complaint against Forest City Dillon in Superior Court. For-
est City Dillon responded with an application for a stay pending arbitration
and an order compelling arbitration. The subcontractor asserted that Forest
City Dillon had waived the right to arbitrate by prosecuting a cross-claim
against the subcontractor in an independent action based on the same pro-
ject. The court rejected this argument, noting that the contractor had “con-
tinuously insisted upon arbitration of any dispute arising out of its subcontract
with respondent.”

C. Dilatory Conduct

In Gold Coast Mall v. Larmar Corp., the court held that a party does
not waive the right to arbitrate by failing to timely initiate arbitration if it is
under no obligation to do so. A dispute arose between Gold Coast Mall, as
tenant, and Lamar, as landlord, over rent owed under their lease agreement.
Lamar brought suit against Gold Coast, who filed a motion to compel arbitra-
tion. Lamar asserted that Gold Coast waived its right to compel arbitration by
failing to timely appoint an arbitrator as required by their agreement. The
court rejected this argument, ruling that where the agreement did not specify
who was to initiate arbitration, that burden rested with the party asserting a

91. Id.
92. In so ruling, the court stated: “Once a civil action has been filed and is
pending, it is too late to enter into an agreement to arbitrate.” Id. at ___, 314 S.E.2d
at 278.
94. Id. at ___, 675 P.2d at 298.
95. Id. at ___, 675 P.2d at 299. In holding that conduct “in a completely
independent action” did not result in waiver, the court noted that “no waiver can be
inferred from either concurrent pursuit of a remedy other than arbitration or from the
breach of any other provision of a contract without first asking for arbitration concern-
ing the parties’ rights under that provision.” The court also held that the presence of
additional parties to the dispute who had no contract with the general contractor was
not a sufficient reason to deny arbitration. Id.
96. 298 Md. 96, 468 A.2d 91 (1983).
97. Id. at 100, 468 A.2d at 93.
Further, the court stated that since the party against whom a claim was asserted did not have an obligation to commence arbitration, that party did not waive the right to arbitrate by failing to appoint an arbitrator.99 Public policy favors arbitration as a means of dispute resolution.100 Consequently, courts are reluctant to find a waiver absent a clear indication of an intent to waive.101 The Arizona Court of Appeals has ruled that no waiver occurs where a party seeks legal relief for a dispute different from the one in issue but arising from same relationship.102 This apparently conflicts with a ruling by the Court of Appeals of North Carolina that the utilization of a legal remedy not only results in waiver of the parties' rights to arbitrate under their previous agreement, but also prevents them from entering into a new arbitration agreement.103 The better view is that the party utilizing litigation to settle a dispute is in default of the agreement and waives the right to compel arbitration as to any dispute arising under that agreement.104 Otherwise, a party would be able to pick and choose those disputes which it would be to his advantage to litigate and those which it would be better to arbitrate, thereby weakening the effectiveness of an arbitration agreement to enforce the public policy favoring arbitration.

IV. Arbitrability

When a party seeks to compel arbitration, or affirm an award, adverse parties may contest the arbitrability of the claim. Generally, the language of the parties' agreement determines the arbitrability of an issue. Courts follow several recognized principles in determining the scope of arbitrability afforded parties by the language of their agreement: (1) legislative intent is to refer a dispute to arbitration when the issue is reasonably interpreted as arbitrable unless there is positive assurance that the disputed issue was not within the scope of the agreement; (2) broad arbitration clauses are to be interpreted to favor arbitration; (3) public interest in prosecution of private anti-trust actions militates against the policy encouraging arbitration of disputes; and (4) a policy encouraging arbitration requires the severing of non-arbitrable issues and their independent adjudication if necessary to preserve the right to arbitrate. Some courts hold that the court shall initially determine arbitrability, others refer the question to the arbitration panel.

98. Id. at 109, 468 A.2d at 98.
99. Id. at 113, 468 A.2d at 100.
100. Forest City, 138 Ariz. at ___, 675 P.2d at 298.
101. Gold Coast Mall, 298 Md. at 109, 468 A.2d at 98.
102. Forest City, 138 Ariz. at ___, 675 P.2d 299.
103. Rustad, 68 N.C. App. at ___, 314 S.E.2d at 277-78.
104. Gold Coast Mall, 298 Md. at 110, 468 A.2d at 99.
In Cloquet Education Association v. Independent School District No. 94, the court employed a "reasonably debatable" test to determine whether an issue is arbitrable. If the application of the agreement to arbitrate the disputed issue is reasonably debatable, the question should be resolved in favor of arbitration. Teachers contended that chaperone duties at school functions were within the definition of terms and conditions of employment and were arbitrable under their contract. The school district contended such assignments were not only shielded from arbitration by inherent managerial policy, but were also excluded by the union contract and a state public employment statute. The court held the issue arbitrable because it was debatable whether out-of-class assignments were controlled by the arbitrable provisions. In addition to the language of the agreement, the court found it significant that the parties had previously treated such assignments as negotiable bargaining issues.

In Iowa City Community School District v. Iowa City Education Association, the court stated even more strongly that issues are arbitrable unless the contract language provides "positive assurance" that the dispute is not within the scope of the arbitration agreement. Teacher salary schedules were expressly arbitrable under one provision of an employment contract and were subject to denial for unsatisfactory performance. The school board sought to vacate an arbitration award to a teacher, arguing that the definition of unsatisfactory performance was reserved to the board exclusively under another provision. The court ruled that the arbitrator did not exceed his authority in determining what constituted unsatisfactory performance within the meaning of the contract. The opinion also dismissed the board's contention that public policy demanded reservation of that authority to elected officials, reasoning that the state public employment statute expressed a policy favorable to arbitration.

In Gold Coast Mall, Inc. v. Larmar Corp. the court held that a generic arbitration agreement included all disputes under the contract not specifically and expressly excluded. When the scope of an agreement under that stan-
standard is unclear, the question of substantive arbitrability is left to the arbitrator. At issue in the case was the interpretation of a percentage rental claim in a commercial lease. One clause of the lease provided for arbitration of "any and all disputes arising out of the contract," initiated by either party if negotiations failed. When the tenant sought to compel arbitration thereunder, the landlord contended that another provision reserved his right to use legal process of re-entry for rental non-payment. The landlord pointed to a provision stating that nothing in the contract would prevent his exercise of his re-entry right. The court held the arbitration clause controlling, reversing a lower court ruling that had given the landlord an option to arbitrate under the agreement.

In Havens v. Safeway Stores the court declined to order arbitration where the agreement did not track the language of Kansas' version of UAA section 1. The court stated that it could not imply additional terms where the arbitration agreement is complete and unambiguous. Havens involved a sub-contractor suing his general contractor for payment for work performed. The parties disputed the interpretation of a method of payment clause. The court found that the language of the agreement, which referred to arbitration all disputes "subject to arbitration under this contract," was significantly different than the language of UAA section 1, which referred to "any controversy." The court found that the parties intended only that disputes expressly arbitrable were included. None of the provisions specifying arbitrable issues included interpretation of the payment clause; consequently, the general contractor was not entitled to arbitration.

In Keller v. Health Management Foundation, the court stated that where no substantial issue exists regarding the making of the arbitration agreement, disputes must be arbitrable. The plaintiff architect made a claim against the defendant for payment. The defendant moved for dismissal or stay pending arbitration. The lower court decided that since the defendant did not file an answer to the complaint, no dispute existed and, therefore, it denied arbitration. In reversing, the appellate court reasoned that the arbitration clause made the dispute arbitrable. Since the plaintiff was suing on the contract, no issue as to its making was raised. Therefore, the arbitration provision must be enforced, regardless of the otherwise justiciable nature of the

117. Id. at 107, 468 A.2d at 97.
118. Id. at 102-03, 468 A.2d at 93-95.
119. Id. at 115, 468 A.2d at 101.
121. Id. at __, 678 P.2d at 628-29.
122. Id. at __, 678 P.2d at 630.
123. Id. at __, 678 P.2d at 628.
124. Id. at __, 678 P.2d at 628-29.
126. Id. at 1077.
127. Id. at 1076.
The court in *Moseley v. Brewer* stated that the language of an arbitration agreement must be read broadly and given its most reasonable interpretation. Attorneys submitted to the arbitrator alternative amounts claimed due in a dispute over division of fees. The arbitrator awarded neither of the amounts submitted, but arrived at his own figures by interpreting the contract's procedures for determining fees. Upholding the award, the court stated that in the absence of an express limitation in the submission, the arbitrator's award was within the scope of the issue presented.

In *Logan & Clark, Inc. v. Adaptable Development Inc.*, the court declined to interpret a submission agreement as including a quantum meruit theory of recovery not expressly included. The agreement established a bifurcated hearing on the issues of liability and damages in a construction contract dispute. No mention of quantum meruit was made in the submission, which alleged breach of contract for which the subcontractor sought recovery. In the first phase, the panel found the subcontractor in material breach and without contract damages. Since the general contractor asserted no counterclaim, the panel dismissed. In contesting the validity of the award for exceeding the scope of the submission agreement, the subcontractor argued that it had a quantum meruit claim reserved for phase two, and that the panel had prematurely dismissed the claim in phase one. The court ruled that the clear intent of the parties was to determine liability in phase one, regardless of the theory of liability. It therefore declined to presume that a quantum meruit theory was implicitly reserved for phase two.

In *Notaro v. Nor-Evan Corp.*, the Illinois Supreme Court was called upon to determine exactly how broadly an arbitration agreement should be construed. The plaintiff argued that since a stock purchase agreement contained an arbitration clause which named an accounting firm as arbitrator, the provision applied only to technical disputes in the agreement. In rejecting this argument, the court relied on section 1 of the UAA and earlier Illinois decisions holding that arbitration agreements were to be read as broadly as possible. The court stayed the plaintiff's action for breach of contract because...
cause the provisions that "any such claim or claims" in dispute be settled by arbitration included the claim involving payment of problem loans. 140

In Rentar Industries, Inc. v. Rubenstein,141 defendant entered into a five-year employment contract with plaintiff. The agreement required the parties to submit to arbitration "disputes over any provision of the agreement."142 Defendant was discharged and subsequently sought to compel arbitration. Plaintiff claimed that since the issue of termination was not mentioned in the contract, it was not subject to arbitration. The court held that the issue of termination was subject to arbitration since the subject matter of the dispute involved the contract provision establishing the five-year term of employment. 143

B. Proper Forum for Determining Arbitrability

In Board of Education, North Palos Elementary School District No. 117 v. Williams,144 the court held that when the scope of the agreement is reasonably in doubt arbitrability is decided by the court.145 Teachers sought arbitration of a grievance concerning the assignment of extra classroom duties to substitute teachers. The board of education moved for and received a stay of arbitration, contending that the right to make teaching assignments was reserved in their collective bargaining agreement with the teacher's union as non-arbitrable.146 The appellate court reversed the stay of arbitration order, finding that the classroom assignments procedure was an arbitrable issue, although the right to make such assignments was non-delegable under the reserved authority proviso.147

In contrast to the general rule, the court in Farm Family Mutual Insurance Co. v. Blevins148 stated that an arbitrator, not a court, should determine initially whether a dispute is arbitrable.149 Defendant insured wished to collect for uninsured driver loss under three policies he held with the plaintiff. The company sought a declaratory judgement of nonliability, since stacking of policy claims was prohibited by Delaware law. Defendant resided in Delaware, whereas the accident occurred in Pennsylvania, which permits stacking of claims.150 The court ruled that the defendant was entitled to arbitration. It

16 Ill. 99, 102 (1854)).
140. Id. at __, 456 N.E.2d at 95 (1983).
141. 118 Ill. App. 3d 1, 454 N.E.2d 752 (1983).
142. Id. at 2, 454 N.E.2d at 753.
143. Id. at 3, 454 N.E.2d at 754.
145. Id. at 263, 454 N.E.2d at 778.
146. Id. at 262, 454 N.E.2d at 775-77.
147. Id. at 266-67, 454 N.E.2d at 779-80.
149. Id. at 401.
150. Id. at 398-400.
reasoned that eligibility for damages, and the amount thereof, are arbitrable under the agreement. If determining eligibility requires the arbitrator to determine the controlling state law, it is within the scope of his authority by express contract.\textsuperscript{151}

In accordance with the general rule, \textit{J & K Cement Construction v. Montalbano Builders}\textsuperscript{152} ruled that the arbitrability of a dispute is determined by the court, according to the same rules of construction as any other contract—by construing the wording of the arbitration clause and the terms of the entire contract.\textsuperscript{153} The court stated that a broad generic arbitration clause which does not enumerate specific arbitrable issues evinces a clear intent of the parties to arbitrate all issues arising out of the contract.\textsuperscript{154} When an owner sued for damages resulting from delays in building his house, defendant contractor sought to compel arbitration. The court found the clause encompassing all claims "arising out of, or relating to this Agreement, or the breach thereof" sufficiently broad to include damages for delay.\textsuperscript{155} Moreover, the court ruled that a count in fraud was also arbitrable, since the claimed fraud concerned the contract as a whole rather than an agreement to arbitrate.\textsuperscript{156}

In \textit{Detroit Automobile Inter-Insurance Exchange v. Maurizio},\textsuperscript{157} the court noted that in determining the question of arbitrability, trial courts are to avoid ruling on the substantive provisions of a contract. The court refused to rule on an anti-stacking provision in an insurance contract because it thought that to do so would encroach on the merits of the case.\textsuperscript{158}

\section*{C. Arbitrability of Specific Claims}

In \textit{Sabates v. International Medical Centers, Inc.},\textsuperscript{159} the court declined to construe a generic arbitration clause broadly enough to encompass state antitrust claims.\textsuperscript{160} The plaintiff doctor filed breach of contract, civil theft, and antitrust claims against defendant hospital. The disputed contract language called for arbitration of all disputes and claims arising in connection with the agreement. The court affirmed compulsory arbitration on the civil theft and breach of contract claims, but reversed the order of arbitration on the antitrust issue.\textsuperscript{161} It reasoned that the policy underlying the private right to antitrust actions was to promote vigorous prosecution. Furthermore, the policy favoring

\begin{thebibliography}{99}

\bibitem{151} \textit{Id.} at 400-01.
\bibitem{152} 119 Ill. App. 3d 663, 456 N.E.2d 889 (1983).
\bibitem{153} \textit{Id.} at 670-71, 456 N.E.2d at 894-95.
\bibitem{154} \textit{Id.} at 671, 456 N.E.2d at 895.
\bibitem{155} \textit{Id.} at 671, 456 N.E.2d at 894-95.
\bibitem{156} \textit{Id.} at 671-72, 456 N.E.2d at 896.
\bibitem{158} \textit{Id.} at 176-77, 341 N.W.2d at 268.
\bibitem{159} 450 So. 2d 514 (Fla. Dist. Ct. App. 1984).
\bibitem{160} \textit{Id.} at 517-18.
\bibitem{161} \textit{Id.} at 517-19.

\end{thebibliography}
arbitrated settlement must give way to the interest of the public in enforcing antitrust statutes. Arbitrators selected for business acumen and not bound by rules of law are inadequate to administer antitrust issues.\textsuperscript{162}

D. \textit{Severability of Claims}

\textit{Sabates}\textsuperscript{163} also addressed the issue of severability of claims. If a non-arbitrable claim will necessarily survive any decision in arbitration on the other issues, it need not be stayed pending results of the arbitration.\textsuperscript{164} Thus, plaintiff's antitrust complaint was independent of his other complaints, and could be ordered to trial.

In \textit{Forest City Dillon, Inc. v. Superior Court for Pima},\textsuperscript{165} the court also considered the severability of non-arbitrable claims. The \textit{Dillon} court stated that piecemeal resolution of a party's claims against multiple opponents is necessary where not all of the claims are arbitrable.\textsuperscript{166} The general contractor on a construction project sought arbitration against a subcontractor. The defendant contended, \textit{inter alia}, that arbitration could not be successfully completed because he had brought actions against co-defendants who were not parties to the contract to arbitrate. The court ruled that the arbitration agreement was enforceable regardless of third party defendants who might be liable to defendant for contribution or indemnity. If the subcontractor was found liable to the general in arbitration, the subcontractor could still pursue his claims against the cross-defendants in litigation.\textsuperscript{167}

Generally, courts interpret arbitration clauses broadly, referring disputes to arbitration unless the agreement clearly indicates that the disputed issue was not within the scope of the arbitration clause. The issue of arbitrability is generally decided by the court according to contract rules of construction. Where the public has an interest in certain disputes being litigated, such as antitrust claims, courts will not enforce arbitration clauses encompassing such claims. When non-arbitrable issues are involved, courts will sever those issues and order arbitration of the remaining arbitrable claims.

V. \textbf{PROCEEDINGS TO COMPEL OR STAY ARBITRATION}

A. \textit{Compelling Arbitration}

Arbitration agreements are statutorily recognized contracts and are subject to judicial enforcement by a petition to compel arbitration. Thus, an order to compel arbitration is equivalent to an order for specific performance of the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{162} Id. at 517.
\item \textsuperscript{163} Id.
\item \textsuperscript{164} Id. at 519.
\item \textsuperscript{165} 138 Ariz. 410, 675 P.2d 297 (Ct. App. 1984).
\item \textsuperscript{166} Id. at 519, 675 P.2d at 299.
\item \textsuperscript{167} Id. at 519, 675 P.2d at 298-99.
\end{enumerate}
\end{footnotesize}
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arbitration agreement. Under the UAA, a party may compel arbitration by showing both an agreement to arbitrate and the opposing party's refusal to arbitrate. Compelling arbitration is a function of the court, not the arbitrator who does not have the power to determine his own jurisdiction. Thus, the purpose of compelling arbitration is to provide a judicial safeguard necessary to insure that arbitration is the proper manner to settle the underlying dispute.

When a petition to compel arbitration is filed, the court's role is to make a threshold determination of whether an agreement to arbitrate exists between the parties and whether such agreement includes arbitration of the specific point in dispute. If the court finds a valid agreement which covers the dispute, arbitration will be compelled. In answering these threshold questions, the court will usually interpret both the arbitration agreement and the applicable state arbitration statutes. The goal is to ascertain the parties' intent with respect to arbitration. Accordingly, the only question that the aforementioned threshold test addresses is whether the dispute is arbitrable. Therefore, courts should not make substantive decisions on the merits of the dispute.

1. Jurisdiction

A court's power to compel arbitration is determined by statute. For example, in Architects Collaborative, Inc. v. Bates College, the Federal District Court of Maine was required to interpret Massachusetts' arbitration statute to determine whether a Maine court would have the power to compel arbitration. Architects involved a building contract between an architect and the owner of the building. The building was to be built in Maine and the

169. UAA § 2(a) provides:

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

175. MASS. GEN. LAWS ANN. ch. 251, § 2 (West 1984).
contract, which was to be governed by Massachusetts law, contained an arbitration provision. After the architect rendered his services, the owner complained that the building was defectively designed and filed suit in Maine Superior Court. The architect then sought to compel arbitration but the owner resisted, claiming that the Maine court lacked jurisdiction to compel arbitration because jurisdiction had been exclusively reserved for the courts of Massachusetts by agreement of the parties. The court held, however, that it was not deprived of jurisdiction because the Massachusetts statute only permitted the action to be brought in state court, and because it did not otherwise display an intent to limit the forums from which a party could seek relief.

2. Notice

A petition to arbitrate must be served to the opposing party before a court can compel arbitration. By signing a contract containing an arbitration provision, a party does not waive the right to notice of the proceedings to compel arbitration. Notice is governed by section 16 of the UAA, and is generally provided by the application to compel arbitration. Since the application is normally the “initial application” made to a court, the application “shall be served in the manner provided by law for the service of summons in an action.”

177. The parties had agreed Massachusetts law would govern. Id. at 381.
178. The provision provided that all disputes “shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise.” Id.
179. Id. at 380.
180. Id. at 381.
181. Id. at 382-83.
182. MASS. GEN. LAWS ANN. ch. 251, § 2(a) (West Supp. 1984).
183. 576 F. Supp. at 382. In part the Massachusetts arbitration provision states: “A party ... may apply to the superior court [of Massachusetts] for an order directing the parties to proceed to arbitration ...” (emphasis supplied). MASS. GEN. LAWS ANN. ch. 251, § 2(a) (West Supp. 1984). The court held that the word “may” in the statute allowed arbitration in either state. 576 F. Supp. at 382.
185. 6 C.J.S. Arbitration § 41 (1975).
186. UAA § 16 provides:

Except as otherwise provided, an application to the court under this act shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of summons in an action. (emphasis added)
187. Id.
In *Cassidy v. Keystone Ins. Co.*\(^{188}\) the court recognized that a court order compelling arbitration must be vacated if the opposing party was not served in the manner prescribed by law. The insurance company sought to strike the arbitrator’s award,\(^ {189}\) claiming that it had not been given sufficient notice of the arbitration hearing and that, therefore, it was not bound by the award given at the hearing. The Pennsylvania Supreme Court agreed with the insurance company and struck down the award. *Cassidy* demonstrates that an opposing party must be given notice before a motion to compel arbitration, or any other type of arbitration proceeding,\(^ {190}\) can be heard.

### 3. Party Determination

As a general rule, a court may only compel arbitration between the parties to the arbitration agreement.\(^ {191}\) On its face, this appears to be a simple determination; however, as *Computer Corp. of America v. Zarecor*\(^ {192}\) demonstrates, the problem becomes more complex when potential parties have acted in different capacities. In *Zarecor*, Computer Corporation of America (CCA) granted to European Market Consultants (EMC), a purported business entity, an exclusive license to distribute its software.\(^ {193}\) The contract was negotiated for EMC by Copeland and Zarecor, both of whom were defendants in this action. The contract was executed in the respective corporate names.\(^ {194}\) Copeland signed as “president” of EMC but Zarecor did not sign the contract in any capacity. The contract contained an arbitration provision.\(^ {195}\) After EMC failed to pay a license fee, CCA brought an action against Copeland and Zarecor. CCA alleged that EMC had not been formed or capitalized and that both defendants were liable by acting together as joint venturers. In their answers, both defendants sought unsuccessfully to compel arbitration. Copeland then appealed this ruling.\(^ {196}\)

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189. *Id.* at __, 469 A.2d at 236.
190. *Cassidy* involved a petition to appoint an arbitrator but the court implicitly recognized that a petition to appoint an arbitrator encompasses a petition to compel arbitration when filed as the initial appearance before a court since there is no purpose in such an appointment unless the parties are also compelled to arbitrate. *Id.* at 239.
192. *Id.*
193. *Id.*
194. *Id.* at __, 452 N.E.2d at 268.
195. *Id.* Section 17(a) of the contract was a provision which related to arbitration and stated in part: “All disputes ... which may argue between the parties hereto out of or in relation to or in connection with this Agreement, shall be finally settled in arbitration ... The decision of such arbitration shall be binding on both parties.” *Id.* at 268, n. 2.
196. *Id.* Apparently Zarecor did not appeal because his case for compelling arbitration was much weaker than Copeland’s since Zarecor did not sign the contract. *See*
The Massachusetts Appellate Court noted that the contract contained no clear indication that either Copeland or Zarecor should be considered parties to the agreement. The contract was executed between two "corporations." Copeland's signature, as "president," indicated that only EMC was intended to be bound by the contract's terms. Further, both Copeland and Zarecor denied they were liable under the executed contract. The court recognized that Copeland's repudiation and abandonment of the contract was wholly inconsistent with his attempt to compel arbitration. Thus, the court refused to allow Copeland to be a party for purposes of compelling arbitration since he would deny being a party to the contract as a defense in arbitration.

4. Contract Determination

The most fundamental issue before a court asked to compel arbitration is whether the parties are bound to the contract. As stated by the court in *Wamego v. L.R. Foy Construction Co., Inc.*, if there is no valid agreement between the parties, compelling arbitration is not proper. Defendant subcontractor's bid was conditionally accepted by the City (plaintiff). A dispute arose over whether the subcontractor had received final written notice of the award within the time necessary to formally award the contract. The subcontractor claimed that he was not bound to the contract because this time had expired before he received written notice. The subcontractor refused to commence work and the City brought suit for breach of contract. In response, the subcontractor filed a motion to compel arbitration pursuant to the contract. Thus, the subcontractor inconsistently argued for the nonexistence of the contract while seeking to compel arbitration according to its terms.

In affirming the trial court's refusal to compel arbitration, the *Wamego* court reasoned that the existence of the arbitration agreement is dependent on

infra note 199.

198. Id. at ___, 452 N.E.2d at 270.
199. But see MASS. GEN. LAWS ANN. ch. 251 § 2(e) (West 1984) (This provision from Massachusetts' arbitration act, which is identical to UAA § 2(e), forbids an order for arbitration to be refused because the claim lacks merit or bona fides). One further note on Zarecor. In dicta, the court reasoned that judicial economy would not be served by compelling arbitration with respect to Copeland while permitting litigation against Zarecor. 16 Mass. App. Ct. at ___, 452 N.E.2d at 270. Since Zarecor never signed the contract it is almost certain that he was never intended to be a party. Furthermore, allowing both litigation and arbitration to rule on the same dispute presents an unnecessary delay and expense.

202. Id. at ___, 675 P.2d at 913.
203. Id. at ___, 675 P.2d at 915.
204. Id. at ___, 675 P.2d at 913.
the underlying contract. Since the dispute questioned whether a contract was ever executed, arbitration was not proper. Because he denied the initial contractual obligation, the subcontractor was prevented from claiming the benefits of the contractual provisions.205

5. Contract Interpretation

In Havens v. Safeway Stores,206 a subcontractor sued a general contractor after a dispute arose over method for payment. The general contractor sought to compel arbitration relying on the parties' contract, which stated that, "All disputes, claims, or questions subject to arbitration under this contract shall be submitted to arbitration . . ." (emphasis added).207 The Kansas Supreme Court, however, refused to compel arbitration because, after examining the contract's other provisions, it concluded that the parties intended only to arbitrate specific issues. Since the method of payment was not one of these issues, the court would not compel arbitration.208

In Cloquet Education Association v. Independent School District No. 94,209 a dispute arose when Independent School District (ISD) assigned a teacher to chaperone a dance. A union, representing the teacher, asserted that such assignment constituted a change in the terms and conditions of the teacher's employment and therefore required negotiation. ISD claimed that the assignment was within its "inherent managerial policy" and, thus, ISD had the right to make such assignment despite the fact that it was against the teacher's will. The parties' contract contained an arbitration clause which covered disputes involving changes in the terms and conditions of employment, but did not cover changes in "inherent managerial policy."210 The union sought to compel arbitration and ISD claimed the dispute was not within the reach of the arbitration provision.

The Minnesota Supreme Court stated that the issue of whether to compel arbitration is controlled by the intention of the parties as manifested in the arbitration agreement.211 The court set forth the following standard to be applied to petitions to compel arbitration:

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

(2) If the intention of the parties is reasonably debatable as to the scope of the arbitration clause, the issue of arbitrability is to be initially determined

205. Id. at ___, 675 P.2d at 916.
207. Id. at ___, 678 P.2d at 628.
208. Id.
209. 344 N.W.2d 416 (Minn. 1984).
210. Id. at 417.
211. Id. at 418.
by the arbitrators subject to the rights of either party reserved under Minn. Stat. 572.19 (3, 5) (1982).

(3) If no agreement to arbitrate exists, either in fact or because the controversy sought to be arbitrated is not within the scope of the arbitration clause of the contract, the court may interfere and protect a party from being compelled to arbitrate.213

According to the Cloquet court, requiring the teacher to chaperone "clearly" came within the intended meaning of "terms and conditions of employment." Thus, the court compelled arbitration holding that this dispute fell within the first standard mentioned above.213

In Gold Coast Mall, Inc. v. Larmor Corp.,214 the court applied the second test set forth in Cloquet.216 The court interpreted a lease which provided that disputes between the landlord and tenant which were not settled within sixty days would be committed to arbitration.216 However, another clause in the lease allowed the landlord to use legal process for disputes involving payment of rent. After a dispute arose between the tenant and the landlord,217 the landlord brought suit against the tenant.218 The tenant then sought to compel arbitration. The court held that where there was disagreement over the applicability of an arbitration provision and where the parties' intention as to the scope of such provision is "reasonably debatable," the question of arbitrability is to be determined initially by the arbitrator.219 Since it was "reasonably debatable" whether the arbitration clause covered disputes involving payment of rent, the court compelled arbitration.220

Adherence to the terms of the parties' contract is a major consideration for the courts in compelling arbitration. In Notaro v. Nor-Evan Corp.,221 where the contract allowed arbitration of "any objection to any claim," the Illinois Supreme Court compelled full arbitration despite the claim that arbitration was limited to the arbitrators' expertise.222 Notaro involved the sale of bank stock. The seller (plaintiff) sought discharge from all contractual duties due to a breach by the buyer (defendant). The buyer, in turn, sought to com-

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212. Id. (it should be noted that this case law interpretation of the application of a statute compelling arbitration strongly favors allowing arbitration, for even if no agreement to arbitrate exists the court "may" still compel arbitration).
213. Id.
215. Supra note 212 and accompanying text.
216. 298 Md. at 101-02, 468 A.2d at 94.
217. The dispute was over interpretation of a contractual provision pertaining to percentage payments made to the landlord. Id. at 100, 468 A.2d at 93.
218. Id.
219. Id. at 107, 468 A.2d at 97; see also supra note 205 and accompanying text.
220. 298 Md. at 107, 468 A.2d at 97.
221. 98 Ill. 2d 268, 456 N.E.2d 93 (1983).
222. Id. at 275, 456 N.E.2d at 97.
pel arbitration under the arbitration provision in the contract.\textsuperscript{223} The court decided that the arbitration provision did not limit arbitration solely to technical issues that were within the expertise of the certified public accountants who were to serve as the arbitrators. Instead, the court interpreted the general arbitration provision in the broad terms in which it was written.\textsuperscript{224}

In \textit{Manalili v. Commercial Mowing \& Grading},\textsuperscript{225} the court compelled arbitration despite the claim that a condition precedent to the applicability of the arbitration clause had not been met.\textsuperscript{226} The defendant agreed to construct a driveway on plaintiff's property. The parties' contract stipulated that if a dispute arose, arbitration could not be demanded until there was a written decision on the matter by the architect or until ten days after the evidence had been presented to him.\textsuperscript{227} The court ruled that this clause only established time limits and was not a precondition to arbitration. Because the agreement contained an arbitration clause and since there was an arbitrable issue, the court compelled arbitration.\textsuperscript{228}

\textit{Rentar Industries, Inc. v. Rubenstein}\textsuperscript{229} involved the interpretation of an arbitration clause in an employment contract. The employer argued that the dispute centered around termination of the employment and was not arbitrable because the contract did not address termination. The court, however, compelled arbitration holding that the termination of an employee prior to the termination date set in the contract was subject to the contract's general arbitration clause.\textsuperscript{230}

The Indiana Court of Appeals, in \textit{State v. Van Ulzen},\textsuperscript{231} refused to compel arbitration since the party seeking such relief did not meet the requirements of the parties' agreement.\textsuperscript{232} \textit{Van Ulzen} involved a dispute between state prison teachers and the state. After an administrative appeals board refused to grant the teachers relief, they sought to compel arbitration.\textsuperscript{233} The court held that under the State Personnel Act, only "recommendations" of the State Employees Appeals Commission could be arbitrated.\textsuperscript{234} In this case, the Commission's finding was not a recommendation.\textsuperscript{235} Consequently, the teachers only
remedy was to file a timely petition to have the court review the Commission's order. 236

Courts' jurisdiction to compel arbitration is derived from statutes. Before a court can compel arbitration, however, notice of the hearing must be given to the opposing party. Only parties can compel arbitration; but, if there is no valid arbitration agreement between the parties, compelling arbitration is not proper. Courts generally construe arbitration clauses broadly, compelling arbitration unless it is clear that the arbitration clause does not cover the dispute.

B. Staying Court Proceedings

When the subject matter of a pending lawsuit includes an arbitrable issue, a motion to compel arbitration is proper. 237 If the motion is granted, the court's order must include a stay of the court proceedings. 238 The stay may be made only with respect to the arbitrable issue if that issue is severable from the other issues in the case. 239

In Blow v. Shaughnessy, 240 the court refused to stay litigation concerning a securities matter because there was not a valid arbitration agreement between the parties. Investors had, as part of a limited partnership, invested money with a broker who then entered into agreements, containing arbitration clauses with several major brokerage firms. The court held that, because of non-compliance with statutory requirements governing the creation of a partnership, the investors were not bound by the arbitration clauses in the agreements signed by the broker. 241

In Walter L. Keller & Associates v. Health Management Foundation, 242 the court stayed litigation proceedings because a party sought damages for the breach of a contract containing an arbitration clause. 243 Keller and Health Management Foundation (HMF) were co-defendants in a lawsuit. Keller cross-claimed against HMF, alleging a contract and refusal to pay for services provided according to its terms. In support of its motion to stay the arbitration, Keller cited a case involving similar facts in another district of the Flor-

236. Id.
237. UAA § 2(a), supra note 169.
238. UAA § 2(d) provides:
   Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.
239. Id.
241. Id. at ____, 313 S.E.2d at 880.
243. Id. at 1077.
Florida District Court of Appeals, which had held that there was not an arbitrable issue until an answer to the complaint had been filed. Disagreeing with the other district, the court in Keller held that because there was neither an issue as to the existence of the contract nor the arbitration provision, the trial court was correct in finding that the Florida statute paralleling UAA section 2(a) applied. Accordingly, the court stayed the litigation and compelled arbitration.

In two recent cases, J & K Cement Construction v. Montalbano Builders and Forest City Dillon, Inc. v. Superior Court for Pima, courts enforced arbitration agreements even though enforcement required staying court proceedings involving parties not covered by the arbitration agreements. In J & K Cement, a landowner entered into a contract with a general contractor to build a home. The contract contained an arbitration clause. The general contractor subsequently entered into contracts with subcontractors to do the work. None of these contracts contained arbitration clauses. After a dispute arose, the subcontractors filed suit against the general contractor and the owner. The owner counterclaimed against the general contractor, who then moved to compel arbitration and for a stay of the court proceedings. The court consolidated all of the parties' claims and compelled arbitration, and also ordered a stay of the court proceedings. The appellate court, in reaching its conclusion, rejected the following arguments: concern for judicial economy; duplication of proof; and the potential for inconsistent results. Instead, the court relied on the Illinois policy favoring arbitration as a method of dispute resolution and the enactment of the UAA by the legislature as evidencing an intent that arbitration not be enjoined to prevent a multiplicity of actions.

In Forest City, the general contractor for construction of a mall contracted with a subcontractor. The contract contained an arbitration clause. The subcontractor then contracted with several other parties. The general contractor moved to arbitrate a dispute with the subcontractor. The subcontractor then filed an action in superior court against the general contractor and the parties he had subcontracted with. The general contractor filed a motion to stay the court proceeding and to compel arbitration. In granting the motion, the Arizona Court of Appeals cited the public policy favoring arbitration as a means of resolving disputes. The court indicated a willingness to resort to

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245. Keller, 438 So. 2d at 1076.
246. Supra note 169.
247. Keller, 438 So. 2d at 1077.
251. Id. at 681, 456 N.E.2d at 902.
252. Forest City, 138 Ariz. at __, 675 P.2d at 298.
253. Id.
piecemeal litigation if necessary to enforce an arbitration agreement. The fact that other parties might eventually be liable to the subcontractor was no reason to invalidate the arbitration agreement. 284

Generally, if a motion to compel arbitration is granted, the court will order a stay of litigation. Enforcement of arbitration agreements may require staying court proceedings involving parties not covered by such agreements.

VI. AWARDS

The UAA contains six sections which deal specifically with awards. These sections set forth guidelines and procedures concerning delivering, confirming, vacating, and modifying or correcting an award. 285 The courts use these guidelines to determine whether judicial intervention is warranted.

Courts' deference to the arbitrator's decision underscores the basic tenets of the arbitration process—the informal, speedy, and inexpensive resolutions of disputes. 286 Stressing that arbitration awards are independent and separate from judicial proceedings 287 and the need for certainty and finality, 288 courts generally uphold awards even if an error of fact or law was made. 289 The courts often recognize the arbitrator's superior position for making fair determinations 290 and give every reasonable presumption to the arbitrator's decision unless there is a finding that the arbitrator clearly exceeded the scope of the arbitration agreement. 291

A. Awards Based on Errors of Law or Fact

Generally, errors of law or fact made by arbitrators will not justify vacating an arbitration award. In Wicomico County Education Association v. Board of Education, 292 the court stated that an arbitration award can be set aside for errors of fact by an arbitrator only when those errors give rise to

254. Id. at ___, 675 P.2d at 299.
255. UAA §§ 8, 9, 11-14.
grounds sufficient under the UAA to vacate an award.\textsuperscript{263} A teacher and his union petitioned to vacate an arbitration award which declined to install the teacher as a baseball coach. The teacher and union contended that the arbitrator erred in finding that there was more than one applicant for the coaching position. Petitioners did not make a transcript of the arbitration proceeding and, therefore, could not provide a transcript to the court.\textsuperscript{264} The court stated that without a transcript of the arbitration proceeding it could not determine whether the arbitrator erred in his fact finding, much less determine whether any factual error gave rise to a statutory claim for vacation of the award.\textsuperscript{265}

In a dispute between the Massachusetts Transportation Authority and the Carmen's Union, the court in Massachusetts Bay Transportation Authority v. Boston Carmen's Union, Division 589\textsuperscript{266} ruled that an arbitrator's award should be upheld even if after reinspection the award is erroneous in fact or law.\textsuperscript{267} The transportation authority contracted with a non-profit corporation to provide bus services for the elderly and handicapped. The arbitrator determined that the employees of the new service were employees of the transportation authority for labor relations purposes. The court found the arbitrator had not exceeded his scope of authority by making this determination.\textsuperscript{268} The authority further argued that the arbitrator's finding was outside the scope outlined by the "issue." In response, the court stated that an award may be extended by consent. In this instance "consent" was inferred by "mutual acquiescence" because of the transportation authority's failure to make a timely protest to the extension.\textsuperscript{269}

In Western Waterproofing Co. v. Lindenwood Colleges,\textsuperscript{270} the court addressed whether a mistake of law by arbitrators constitutes an act in excess of their powers.\textsuperscript{271} Western installed a soccer field which Lindenwood claimed was defective. The arbitrator found that the defective condition of the field was predominately caused by Western, but that Lindenwood was partially responsible. Western asserted that since the arbitrators found Lindenwood guilty of contributory negligence,\textsuperscript{272} the arbitrators exceeded their powers and exhibited a "manifest disregard of the law" in granting the award.\textsuperscript{273} The court

\begin{itemize}
  \item \textsuperscript{263} \textit{Id.} at 568, 477 A.2d at 281.
  \item \textsuperscript{264} \textit{Id.} at 566, 477 A.2d at 280.
  \item \textsuperscript{265} \textit{Id.} at 570, 477 A.2d at 282.
  \item \textsuperscript{267} \textit{Id.} at ____, 455 N.E.2d at 1234.
  \item \textsuperscript{268} \textit{Id.} at ____, 455 N.E.2d at 1235.
  \item \textsuperscript{269} \textit{Id.}
  \item \textsuperscript{270} 662 S.W.2d 288 (Mo. Ct. App. 1983).
  \item \textsuperscript{271} \textit{Id.} at 291.
  \item \textsuperscript{272} When this case was decided contributory negligence was a complete bar for breach of implied warranty. Missouri has now adopted comparative fault. \textit{See} Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983) (en banc).
  \item \textsuperscript{273} \textit{Lindenwood}, 662 S.W.2d at 290.
\end{itemize}
held, however, that erroneous interpretations of law do not constitute an excess of power, and, to establish a manifest disregard of the law, it must be shown that the arbitrator understood and correctly stated the law but ignored it.

In contrast to the general rule, in *Plymouth-Carver Regional School District v. David M. Crawley Associates*, the court ruled that arbitrators had exceeded their authority in rendering an award that violated municipal finance laws. The towns in the school district had voted substantial sums to construct a high school, but had placed specific limits on amounts authorized and had refused to vote supplemental appropriations. The regional school committee voted to use a surplus revenue account to pay for additional costs and made payments from this fund until abandoning the project. Crawley Associates filed a demand for arbitration under the contract for additional costs and was awarded $58,637 by the arbitrators. The court decided that to use this fund to pay the award would circumvent the towns' veto power provided by statute and affirmed the judgment vacating the award.

In *National Indemnity Co. v. Farm Bureau Mutual Insurance Co.*, the court ruled that even though the jury found that the plaintiff sustained no damage in a negligence suit, the arbitrator's subsequent indemnification award should be upheld. Southwest Cab Company was responsible for an accident. National, its insurer, was required to reimburse Farm Bureau for a $10,000 no-fault insurance claim paid to the other motorist despite the fact that the jury found he had suffered no injuries. In upholding the award, the court recognized two general principles: first, that arbitration is independent from judicial fact-finding; and second, that allowing a jury to be conclusive on an arbitrator's decision encourages litigation since it may provide the basis for a different result.

**B. Modification of Awards**

Modification or correction of awards is governed by section 9 and sec-

274. Id. at 291-92.
275. Id. at 292.
277. Id. at __, 455 N.E.2d at 991.
278. Id.
279. Id. at __, 455 N.E.2d at 992.
280. 348 N.W.2d 748 (Minn. 1984).
281. Id. at 749.
282. Id. at 749-50.
283. Id. at 751.
284. UAA § 9 states:

On application of a party or, if an application to the court is pending under Sections 11, 12 or 13, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in paragraphs (1) and (3) of sub-
tion 13 of the UAA. A court applied these principles in *Minnesota Licensed Practical Nurses Association v. Bemidji Clinic,* where the statutory requirements for modification of an award were strictly enforced. Nelson, a part-time nurse, was replaced by a full-time nurse with less seniority. Nelson then requested reinstatement and back pay in accordance with the collective bargaining agreement. At arbitration the arbitrator established a procedure for handling lay-offs of full and part-time employees. A year later, Nelson sued for enforcement of the arbitration award asking for back pay and full-time employment pursuant to the arbitration award. The court first decided that Nelson was asking for a modification rather than an enforcement since the award did not specifically grant back pay. Under the Minnesota statute, application for modification must be made within ninety days after delivery of a copy of the award. Regarding her request for full-time employment, the court held that since the award did not specifically state that she must be offered full-time employment, she was not entitled to it.

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division (a) of Section 13, or for the purpose of clarifying the award. The application shall be made within twenty days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within ten days from the notice. The award so modified or corrected is subject to the provisions of Sections 11, 12 and 13.

285. UAA § 13 provides:

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

1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

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

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


287. *Id.* at 67.

288. *Id.* at 66.

289. *Id.* at 67.

290. MINN. STAT. 572.20(1) (1982). This provision is identical to § 13(a) of the UAA.

291. *Bemidji Clinic,* 352 N.W.2d at 67.

292. *Id.* at 68.
C. Binding Effect of an Award

As a general rule, an arbitrator’s decision is final and binding upon the parties. This principle was followed in *Eisen v. State Department of Public Welfare*, where Eisen, a state employee represented by his union pursuant to the collective bargaining agreement, sued his employer seeking to have an arbitration award vacated. The court first decided that Eisen had been properly represented by his union and was without standing to appeal. Eisen also asserted that the arbitrator was guilty of “misconduct” under the Minnesota statute for erasing the recording of the arbitration proceedings. The court determined that there had been no misconduct since the tape was considered to be part of the arbitrator’s personal notes and not a transcript of the proceedings.

D. Collateral Proceedings

In *Bertling v. Roadway Express*, the court held that the failure to utilize the statutory procedure for attacking the validity of an arbitration award precludes consideration of an attack on the validity of the award in a collateral proceeding. Bertling filed a grievance after being discharged from his job with Roadway. The arbitration panel found that Bertling’s discharge had been for “just cause.” Bertling then filed suit against Roadway for retaliatory discharge. After determining that the issues in the arbitration proceeding and in the retaliatory discharge suit were substantially the same, the court found that Bertling’s failure to challenge the arbitration award under the statutory procedure precluded him from challenging the award by means of the retaliatory discharge proceeding.

E. Vacation on Nonstatutory Grounds

In *Harris v. Haught*, the court held that an arbitration award can be vacated only upon the grounds stated in the UAA. The court also decided that an arbitrator’s award cannot be vacated on the ground that the arbitrator

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293. 352 N.W.2d 731 (Minn. 1984).
294. Id. at 736-37.
295. MINN. STAT. § 572.19 (1982). This statute provides in pertinent part: “1. Upon application of a party, the court shall vacate an award where: ... (2) there was evident of partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party.”
296. Eisen, 352 N.W.2d at 738.
297. Id.
299. Id. at 64, 459 N.E.2d at 267-68.
300. Id. at 61-62, 459 N.E.2d at 265-66.
301. Id. at 64-65, 459 N.E.2d at 267-68.
lacked jurisdiction over an issue when that issue had been voluntarily submitted to the arbitrator.\textsuperscript{303} Haught, Harris, and Mumby were partners; Haught and Harris were also partners in a separate enterprise. Haught and Harris dissolved their partnership and signed an agreement mutually releasing each other from further liabilities arising from that partnership. Later, Haught made a claim against Harris and Mumby for repayment of loans to the Haught-Harris-Mumby partnership.\textsuperscript{304}

At arbitration, Harris and Mumby argued that the Harris-Haught release operated to release them from any further liability to Haught with respect to the Haught-Harris-Mumby partnership. The arbitrator found against Harris and Mumby and ordered them to repay the loan to Haught. After Harris and Mumby refused to comply, Haught filed suit to have the award confirmed. Harris and Mumby argued that the arbitrator lacked jurisdiction to construe the release provision.\textsuperscript{305} The court decided that since Harris and Mumby voluntarily submitted that issue to the arbitrator without objection as to the arbitrator’s jurisdiction, they could not raise lack of jurisdiction on appeal. The court further decided that confirmation of the award was proper since an arbitration award can be vacated only upon the grounds stated in the UAA and Harris and Mumby failed to plead any of these statutory grounds for vacation of the award.\textsuperscript{306}

VII. CONFIRMATION AND VACATION OF AWARDS

A. Confirmation

The UAA provides that the court shall confirm an arbitration award upon application by a party unless a party presents grounds for the modification or vacation of the award.\textsuperscript{307} Generally, a motion to vacate the award must be made within ninety days of the applicant’s receipt of the award.\textsuperscript{308} This time limit is equally applicable if the grounds for vacation are asserted as a defense to an action to confirm the award\textsuperscript{309} or as a “counterclaim” in a confirmation suit.\textsuperscript{310}

Courts are reluctant to disturb awards based on issues properly submitted

\begin{itemize}
  \item \textsuperscript{303} Id. at 928.
  \item \textsuperscript{304} Id. at 927.
  \item \textsuperscript{305} Id. at 927-28.
  \item \textsuperscript{306} Id. at 928.
  \item \textsuperscript{307} UAA § 11 states: “Upon application of a party, the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13.”
  \item \textsuperscript{308} UAA § 12(b).
  \item \textsuperscript{310} See Id.
\end{itemize}
to arbitration. In considering whether the arbitrators exceeded their powers by deciding issues not submitted to them, courts will construe the arbitration agreement and stipulation broadly. Because arbitration laws are enacted to expedite the settlement of disputes and avoid the delay caused by litigation, participation in arbitration proceedings without objection results in the waiver of certain non-statutory defenses to confirmation. Likewise, courts will not allow the re-litigation of a factual or legal issue decided by the arbitrator on proper submission thereof by the parties. The independent nature of arbitral and judicial proceedings has led courts to prohibit the assertion of res judicata as a defense to confirmation where the underlying claim arbitrated was decided differently by a jury. Furthermore, the mootness of the underlying claim is not a defense to a motion for confirmation because the obligation of an arbitral award is not necessarily coterminous with the life of the agreement under which it was rendered.

In *Moseley v. Brewer*, the Arizona Court of Appeals broadly construed an arbitration agreement to defeat the objecting party's contention that the arbitrators had exceeded their powers by awarding the other party an amount different from the two figures submitted by the parties. The parties were attorneys who disputed the appropriate division of a contingent fee. Moseley retained Brewer to try a personal injury suit and the two agreed that Brewer would receive two-thirds of the total one-third contingent fee. During the course of the litigation, the contingent fee was increased from one-third to forty-five percent. Moseley claimed that he was entitled to one-third of the revised fee although Brewer wanted to split that one-third between Moseley and another attorney. The two submitted their dispute to an arbitration committee which would determine whether Moseley was entitled to the amount he sought or the amount Brewer wished him to have. The arbitrators awarded Moseley a third amount, one-third of the original one-third contingent fee agreement. At the subsequent confirmation hearing, Brewer argued that because the parties had not stipulated that the arbitrators could award a third amount, the arbitrators exceeded their authority under the arbitration agree-

312. *See Koch v. Waller & Co.*, 439 So. 2d 1041, 1043 (Fla. Dist. Ct. App. 1983). The defense waived was that the objecting party signed the arbitration agreement in his representative rather than his personal capacity. *Id.*
317. *Id.* at ___, 679 P.2d at 564.
ment. The trial court agreed and vacated the award. The appellate court, considering the agreement broadly, held that the compromise figure was well within the issues submitted. Since the agreement did not explicitly limit the arbitrators to the two figures submitted, the award was proper.

In Koch v. Waller & Co., the Florida District Court of Appeals relied on one of the fundamental policy bases of arbitration—expeditious resolution of disputes—in holding that an objection to an award on a non-statutory ground was waived. The plaintiff had contracted to do construction work for the defendant. The plaintiff appended to his signature on the contracts “Pres. Multiple Images, Inc.” A dispute arose between the parties that ended in arbitration. The resulting award was binding both on the plaintiff personally and on the corporation. After a petition for confirmation was filed, the plaintiff raised the issue that the award was not binding on him personally since he had signed the construction contracts in his representative capacity. The trial court held that he had waived this objection by participating in the arbitration hearings without raising the issue. The appellate court agreed, noting that arbitration laws were enacted to avoid the sort of dilatory maneuvering the plaintiff in this case sought to employ.

In Harris v. Haught, the Florida District Court of Appeals rejected a party's contention that the arbitrators had misconstrued the contract at issue because such factual issues are not to be re-litigated after having been resolved in the arbitral proceeding. Harris and Haught were parties to two separate partnership agreements. A dispute arose over whether Harris owed Haught for the repayment of certain loans made between the two partnerships. At the arbitration hearing, Haught argued that a provision in one of the agreements released him from the debt at issue. The arbitrators ruled that the release did not have the effect suggested by Haught and awarded Harris the money he sought. Harris applied for confirmation of the award and Haught defended on the basis of the purported release. The trial court rejected this defense and confirmed the award. The appellate court affirmed, observing that arbitration awards cannot be vacated simply because a court may disagree with the arbitrators' resolution of an issue properly submitted for their consideration.

The Florida District Court of Appeals in Logan & Clark, Inc. v. Adapta-
ble Development, Inc., held that an arbitration agreement should not be construed narrowly. The plaintiff, a sub-contractor, submitted to arbitration a claim against the defendant based on the defendant's breach of contract. The parties stipulated bifurcation of the arbitration proceedings: the first proceeding would consider the issue of liability and the second proceeding would assess damages. During the first proceeding, the arbitrators found that the defendant had materially breached the contract by failing to post a construction bond, but that the plaintiff had suffered no damages. Consequently, the arbitrators dismissed the second proceeding. The defendant filed to have the proceeding confirmed, but the plaintiff argued that the arbitrators had exceeded their powers by reaching the issue of quantum meruit in the first proceeding. The trial court confirmed the award, and the appellate court affirmed, stating that since the stipulation agreement did not expressly reserve the issue of quantum meruit for the second proceeding, the arbitrators did not exceed their authority in considering that issue at the first proceeding.

The Massachusetts Appeals Court ruled on two attacks to an arbitration award in Massachusetts Bay Transportation Authority v. Boston Carmen's Union, Division 589. The objecting party contended that the award was beyond the scope of the issues submitted for arbitration and that the award had been rendered moot by the expiration of the collective bargaining agreement on which the claim had been based. The appellate court dismissed both of these challenges. The court stated that if in fact the award was beyond the scope of the issues submitted, the absence of protest by the objecting party at the hearing created a presumption that the scope of the arbitration was extended by the parties' consent. A party will not be heard to object to the scope of the award after failing to raise the issue at the arbitration proceeding. Likewise, the court rejected the plaintiff's argument that the claim had been rendered moot by the expiration of the collective bargaining agreement upon which it was based. The court first observed that the agreement may not have expired because of a carry-over provision. Nevertheless, the court stated that even had the agreement expired, this would not be a defense to confirmation; the obligation of an arbitration award is not necessarily co-terminous with the life of the agreement upon which it was based.

In Helmerichs v. Bank of Minneapolis & Trust Co., the Minnesota Court of Appeals held that a party is estopped from objecting to an award on

329. Id. at 1191.
330. Id. at 1190.
331. Id. at 1191.
333. Id. at , 455 N.E.2d at 1235.
334. Id. at , 455 N.E.2d at 1236.
335. Id. at , 455 N.E.2d at 1235-36.
the grounds that there was no agreement to arbitrate where the issue was not raised at the arbitration hearing. Helmerichs submitted to arbitration his claim for wages due under his fixed-term employment contract. At the hearing, the employer argued that the contract was void as against public policy. In a post-hearing brief, the employer contended for the first time that the illegality of the contract voided the arbitration clause. The employer moved to have the award vacated on the grounds that there was no agreement to arbitrate. The court of appeals rejected this contention. The court held that it would be inequitable to allow a party to submit to arbitration and reserve objections to the agreement to arbitrate until after the hearing; the other party should have the opportunity to make an informed choice as to whether arbitration should be continued at the risk of having the agreement ruled invalid or to pursue an alternative remedy. Consequently, the bank was estopped from raising the issue of no agreement to arbitrate after the hearing.

In *National Indemnity Co. v. Farm Bureau Mutual Insurance Co.*, the Minnesota Supreme Court held that res judicata principles do not apply to an arbitration award which is based on a claim previously decided differently by a jury. The defendant’s insured was involved in an automobile accident. Under Minnesota’s No-Fault Act, the insured was paid his claim by Farm Bureau who then sought indemnity from National, the other driver’s insurer, through arbitration. Prior to the hearing, Farm Bureau’s insured secured a jury-verdict against the other driver for personal injuries purportedly arising from the accident. The jury found that the other driver was at fault, but that Farm Bureau’s insured had suffered no injuries. The arbitrators awarded Farm Bureau the full amount of the benefits paid its insured. The plaintiff sought to have the award vacated, contending that the jury verdict precluded a finding that plaintiff was liable for indemnity. The supreme court, relying on its earlier decision in *Milwaukee Mutual Insurance Co. v. Currier*, held that res judicata is not a defense to the confirmation of an arbitration award solely because the underlying claim would have been barred by res judicata if asserted in a court action. The court noted that there is a strong policy against judicial interference in the arbitral process. A contrary result would encourage litigants expecting a favorable jury verdict to “stall out” arbitration.

337. *Id.* at 327.
338. *Id.* at 328. The employer also argued that the issue was non-arbitrable. The appellate court held that this objection had been waived because of the employer’s failure to raise it at the hearing. *Id.* at 327.
339. *Id.* at 328.
340. *Id.*
341. 348 N.W.2d 748 (Minn. 1984).
344. 310 Minn. 81, 245 N.W.2d 248 (1976).
346. *Id.* at 751.
In *State ex rel. Tri-City Construction Co. v. Marsh*, the Missouri Court of Appeals held that jurisdiction to confirm an arbitration award rests with the state where the award was made. The parties in that case entered into an arbitration agreement in Kansas which provided that the dispute would be decided under Kansas' version UAA but did not specify a location for arbitration. Arbitration was held in Jackson County, Missouri, where an award in favor of Alliett and Williams (Alliett) was entered. Alliett filed the award in Wyandotte County, Kansas, and then filed a petition to confirm in Jackson County. Tri-City, against whom the award was made, answered the Jackson County action and filed a motion to vacate. The Jackson County Circuit Court dismissed the pleadings on the grounds that the court lacked subject matter jurisdiction because the arbitration agreement was made in Kansas. The court of appeals reversed, holding that in the absence of Missouri precedents, and with no "compelling policy to overcome the need for uniformity," Missouri should follow the rule adopted by every other state that had considered the issue and vest jurisdiction at the place of arbitration. The court noted that if Missouri based jurisdiction on the site of the contract, while other states based it on the place of arbitration, a Missouri resident who contracted in another state and arbitrated in Missouri would be without a forum to enforce its award.

In *Klimeck v. State Farm Mutual Automobile Insurance Agency*, the court held in the confirmation hearing that it did not properly have before it an alleged agreement between the parties which would provide for a different result from that reached by the arbitrator. The plaintiff received an award in its favor at arbitration, but asserted that the award was incorrectly figured in light of an agreement it had with the defendant. The court reasoned that since the plaintiff had settled with defendant's joint tortfeasor and provided him with a "Pierringer-type" release, thereby protecting the settling tortfeasor from subrogation claims, the defendant would not be liable for more than its proportion of the damages as determined by the arbitrators.

The reluctance of courts to vacate arbitration awards is illustrated by their readiness to find that objections and defenses to confirmation have been waived or have not been raised within the appropriate time limits. This attitude is an appropriate manifestation of the general policy behind the UAA: that arbitration should be an alternative to litigation rather than merely a prelude thereto.

347. 668 S.W.2d 148 (Mo. Ct. App. 1984).
348. *Id.* at 150.
349. *Id.* at 151-52.
350. *Id.* at 152.
351. 348 N.W.2d 103 (Minn. Ct. App. 1984).
352. *Id.* at 105.
353. *Id.* at 105-06.
B. Vacation

A party against whom an arbitration award has been issued may apply to the court to set aside the award. The court may then vacate the award, but only if one or more of the five grounds specified in the UAA apply. The aggrieved party must make this application to vacate the award in a timely fashion or lose the right to have the award vacated. Courts generally hold that an arbitration award can be vacated only on the grounds specifically set forth in the UAA.

1. Exceeding the Arbitrator's Authority

Courts in states that have enacted the UAA generally agree that a mistake or erroneous interpretation of law by an arbitrator does not constitute an act in excess of the arbitrator's power. Therefore, the award may be unassailable even if the court believes it may be wrong in fact, or in law, or in both. However, some courts hold that an award which is contrary to law is in excess of the arbitrator's authority and should be modified or corrected. An award may not be disturbed unless the arbitrator showed a manifest disre-

354. UAA § 12(a) provides:

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

355. UAA § 12(b) states:

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


gard of the arbitration agreement, and a court must vacate an award only where the arbitrators clearly exceeded their powers. When determining whether to vacate an award, the opinions of courts of other jurisdictions which have enacted the UAA are shown greater than usual deference.

In Rural Water District No. 6 Butler County v. Ziegler Corp., the court held that arbitrators do not exceed their authority by issuing an award which requires a mathematical calculation for its implementation. Ziegler and the water district entered into a contract which contained a liquidated damages clause. A dispute arose that was taken to arbitration. The arbitrators terminated Ziegler's services on the project and awarded the water district liquidated damages of $250 per day as provided in the contract. A portion of the liquidated damages was to be determined by multiplying the number of days remaining until completion by $250. Ziegler sought to vacate the award on the ground that the arbitrators exceeded their authority by failing to render a final award on the water district's claim for liquidated damages. The court held that the award for future liquidated damages, being ascertainable by a simple mathematical calculation, was a final award.

McDonald v. Hardee County School Board similarly held that an arbitrator does not exceed his authority by reaching a decision on an issue voluntarily submitted to arbitration. McDonald was dismissed from his job as a teacher. He filed a grievance seeking reinstatement and back pay. The parties stipulated that the arbitrator could decide the appropriate remedy. The arbitrator sustained the grievance and reduced the discipline from discharge to suspension without pay. McDonald filed suit to vacate the award and contended that in sustaining the grievance the arbitrator had no authority to do other than order reinstatement with back pay. The court stated that since McDonald initially stipulated that the arbitrator had authority to modify the discipline, the arbitrator did not exceed his authority in doing so.

In Moseley v. Brewer, the court held that arbitrators do not necessarily

363. Id. at , 677 P.2d at 581.
364. Id. at , 677 P.2d at 577.
365. Id. at , 677 P.2d at 580.
366. Id. at , 677 P.2d at 581.
368. Id. at 595.
369. Id. at 594-95.
exceed their authority by awarding an amount that is not the exact dollar sum claimed by either party. Moseley and Brewer were attorneys who disagreed on the appropriate division of the fee in a case in which they were joint counsel. The parties submitted their dispute, along with their fee agreement, to arbitration. The arbitrators awarded to Moseley an amount based on the fee agreement but different from that which each party claimed was due to him. Brewer challenged the award on the basis that the arbitrators had no authority to award an unsubmitted compromise figure. The court found that even though the award varied from the amount claimed by the parties, the award was valid. Arbitrators do not exceed their authority by awarding an amount that differs from the amounts claimed by the parties where the arbitrators arrive at their figure on the basis of the agreement between the parties.

In *Plymouth-Carver Regional School District v. David M. Crawley Associates*, the court held that arbitrators do exceed their authority where the award effectively circumvents the provisions of a statute. Pursuant to a statute, two towns voted substantial sums for expenses to build a regional high school. When the amount authorized was exhausted, the architectural firm indicated it would not continue work without assurances that sufficient funds would be available to pay for its services. The two towns disapproved a supplemental appropriation, but the school committee voted to use its “surplus revenue” account. The committee made payments from this fund until it abandoned the project. Consequently, the school district challenged an arbitration award made to the architectural firm. The court held that the arbitrators exceeded their authority by ordering the use of the “surplus revenue” to pay the architectural firm because the use of such funds would, in these circumstances, effectively circumvent the veto powers provided to the towns by the statute.

In *In re Arbitration between AFSCME District Council 96 & Independent School District No. 381, Two Harbors*, dealt with whether seniority would accrue from the date of joining a union or from the date of employment. The court ruled that as long as the award derived its “essence” from the collective bargaining agreement the arbitrator had not exceeded his or her power. According to the court, “essence” is determined from the language and context which indicate the party’s intent. It is only where there is a total disregard of the agreement and of principles of contract construction that the court may find that the arbitrator exceeded his or her permissible scope.

In *Iowa City Community School District v. Iowa City Education Assoc*...
The school district appealed from an arbitrator's decision that the district had wrongfully denied a teacher a scheduled salary increase when the district found the teacher's performance unsatisfactory. The district argued that the arbitrator exceeded his authority in deciding what constituted unsatisfactory teacher performance. The Supreme Court of Iowa said the standard for deciding if an arbitrator had exceeded his authority was whether the award "drew its essence" from the collective bargaining agreement. The court stated that this was an extremely broad concept which included written and unwritten agreements, and concepts of fairness, reasonableness, and practicality in the industry in question. Because the agreement to arbitrate did not limit the issues that the arbitrator could decide, it was left up to the arbitrator to decide what constituted satisfactory performance. The court stated that the arbitrator did not ignore his duty to the agreement and that this decision was within the principles of similar cases.

In *Aamot v. Eneboe*, the South Dakota Supreme Court held that when an arbitration award does not conform to the subject matter of the agreement, the arbitrators have exceeded their powers and the award may be set aside by the courts. Aamot bought some land from Eneboe and made payments for four years. Aamot tried to pay the balance of the contract price, but Eneboe refused payment. When the disagreement was submitted to arbitration, the arbitrators divided the land between Aamot and Eneboe. This solution was not one of the possibilities specified in the arbitration agreement. Therefore, the court ruled that since arbitrators derive their power from the arbitration agreement, the arbitrators exceeded their power and the trial court acted properly in vacating the award.

In *National Indemnity Co. v. Farm Bureau Mutual Insurance Co.*, the court held that fact-findings in judicial proceedings and in arbitration actions are independent and therefore, arbitrators are not bound by fact-findings of a jury in a prior action involving the same dispute. The court affirmed the principle that only where the arbitrators have clearly exceeded their powers must a court vacate an award. Farm Bureau had recovered sums it had paid its no-fault insured from National, the insurer of the defendant in an action brought

379. 343 N.W.2d 139 (Iowa 1984).
380. *Id.* at 140-41.
381. *Id.* at 141.
382. *Id.* at 142.
383. *Id.*
384. *Id.* at 143.
385. *Id.* at 144.
387. *Id.* at 648.
388. *Id.* at 648-49.
389. *Id.* at 649-50.
390. 348 N.W.2d 748 (Minn. 1984).
391. *Id.* at 750.
by Farm Bureau's insured. The recovery had been in an arbitration proceeding under the Minnesota No-Fault Automobile Insurance Act. The decision of the arbitrators was rendered after a jury verdict, in a case between the insureds, which found that Farm Bureau's insured had sustained no damage from the automobile accident with National's insured. The court concluded that even though the jury found that the insured had suffered no loss, the award should not be vacated because the arbitrators found that Farm Bureau had suffered loss and was entitled to reimbursement.

2. Bias or Partiality

An award may be vacated where there is evidence of bias or arbitrator partiality which prejudiced the rights of any party. Arbitration awards have been vacated when there was an appearance of possible bias or when relationships were long-standing and repeated.

In Safeco Insurance Co. v. Stariha the appellant, an insurance company, moved to vacate the arbitration award claiming that the arbitrator's failure to disclose an attorney-client relationship constituted "fraud or other undue means" or "evident partiality." During the arbitration proceedings, the neutral arbitrator did not disclose that he represented the law firm of the attorney for one of the parties who sought arbitration. The United States Supreme Court and the Minnesota Supreme Court have reversed arbitration awards where relationships were long-standing and repeated; however, in this case, the court found neither condition existed. The court did recognize the need for arbitrators to disclose any relationship which could affect their impartiality and outlined disclosure standards.

393. Id. at 752.
394. UAA § 12(a)(2).
398. Id. at 666, citing Minn. Stat. § 572.19.1 (1982).
399. Stariha, 346 N.W.2d at 665.
401. Stariha, 346 N.W.2d at 666.
402. Id. at 666-67 (arbitrators should, before accepting an appointment, disclose any financial interests in the dispute and any relationships which are likely to affect impartiality or give the appearance of partiality or bias, and should make a reasonable effort to inform themselves of any such interests or relationships).
In *Hartman v. Cooper*, the court ruled that vacation of an award on the ground of evident partiality required only an appearance of possible bias. An arbitration panel denied recovery on a medical malpractice claim. In answering questions on a data sheet, a doctor, who was a member of the arbitration panel, failed to disclose that he was being sued for malpractice and that he had been deposed as a witness in other malpractice suits. The court stated that the failure of the doctor to disclose relevant information supported the inference of the existence of bias, prejudice, or partiality. The court overturned the award and held that the appearance of possible bias was sufficient to require the vacation of the award.

In *Bernstein v. Grammercy Mills, Inc.*, the court held that minor undisclosed connections between an arbitrator and the attorneys for one of the parties to the proceeding are not sufficient to compel vacation of an award on the ground of evident partiality of an arbitrator. Grammercy sought vacation of the award on the ground that it had discovered connections between the arbitrator and Bernstein’s attorneys. The arbitrator was associated with a law firm, and Bernstein’s attorneys were associated with another law firm. The arbitrator and one of Bernstein’s attorneys had represented clients with divergent interests in a legal controversy three years previously. Moreover, attorneys from the two firms had been mutually involved in legal matters on nine occasions and had met socially on six occasions over a five year period. However, in none of these instances was the arbitrator a participant. The court held that these undisclosed relationships were so minor that any challenge to the award on the basis of evident partiality would fail.

### 3. Refusal to Postpone Hearing

In *L.R. Foy Construction Co. v. Spearfish School District*, the court held that refusal to postpone a hearing was not sufficiently prejudicial to the complaining party to justify vacation of the arbitrator's award. Foy claimed that the arbitrator should have postponed the hearing until it could produce a witness to testify to issues for which it claimed surprise. The court rejected these arguments because the facts showed that the proposed testimony went to issues on which Foy had notice, and the substance of the proposed testimony was

404. *Id.* at 168, 474 A.2d at 967.
405. *Id.* at 158-59, 474 A.2d at 962.
406. *Id.* at 167-68, 474 A.2d at 966-67.
408. *Id.* at ____, 452 N.E.2d at 237.
409. *Id.* at ____, 452 N.E.2d at 232-34.
410. *Id.* at ____, 452 N.E.2d at 237.
had already been heard in other forms. 412

4. Different Parties

In State v. Martin, 413 the court found that the state could not challenge an award under the UAA through a case with similar facts but different parties. 414 A group of state prison system teachers filed a complaint charging unsatisfactory working conditions based on disparity of wages and hours among professionals of the same level. The disparity resulted from an arbitration award in a prior claim by other teachers. 415 The court refused to hear an argument that the prior award was inconsistent with legislative intent, holding that the state was attempting to vacate an award outside the statutory provisions. 416

5. Failure to Provide Transcript

In Wicomico County Education Association v. Board of Education, 417 the court ruled that the plaintiff’s failure to provide the court with a transcript of the arbitration proceeding rendered the court powerless to vacate an award. 418 A transcript was never made of the proceeding in which the plaintiff sought appointment as the Wicomico High School baseball coach. 419 The plaintiff sought a trial de novo on part of the factual evidence heard by the arbitrator. The court held that the arbitration statute 420 did not authorize the court to conduct a partial or complete hearing de novo on a factual issue. Furthermore, where there is a factual dispute, a transcript may be necessary. 421

Similarly, in Rural Water District No. 6 Butler County v. Ziegler Corp., 422 the failure to provide a transcript of the arbitration proceedings rendered an arbitrator’s order unappealable. The court held that it could not rule on the question of whether the arbitrator exceeded his authority by refusing to grant a request for postponement 423 since Ziegler failed to present a document or transcript to the court reflecting the request. Although Ziegler alleged that

412. Id. at 385-86.
414. Id. at ——, 460 N.E.2d at 991.
415. See State Dep’t of Admin., Personnel Div. v. Sightes, —— Ind. App. ——,
416. Martin, —— Ind. App. at ——, 460 N.E.2d at 991.
418. Id. at 570, 477 A.2d at 282.
419. Id. at 565-67, 477 A.2d at 280.
420. MD. CTS. AND JUD. PROC. CODE ANN. § 3-224(b) (1973).
423. Id. at ——, 677 P.2d at 579.
it asked for a postponement, it made no record of its request.\footnote{424}{Id. at \text{-\text{-}}, 677 P.2d at 579-80.}

6. Standing to Apply for Vacation of an Award

In {	extit{Eisen v. State Department of Public Welfare}}, the court concluded that to determine who is a "party" for purposes of applying for vacation of an arbitration award, the collective bargaining agreement providing for arbitration must be consulted since the UAA does not define "party" for such purposes.\footnote{425}{352 N.W.2d 731 (Minn. 1984).} The court also concluded that the arbitrator was justified in denying a request for the transcript of the arbitration hearing and in subsequently destroying the transcript in the normal course of business.\footnote{426}{Id. at 734.} Eisen was fired from his job at Faribault State Hospital. The propriety of the discharge was submitted to arbitration by the union under the collective bargaining agreement. The arbitrator's award sustained the discharge and the union decided not to appeal. Eisen retained an attorney to seek vacation of the award. The attorney requested a copy of the taped recording of the hearing from the arbitrator, but did not state that she represented Eisen or her reasons for wanting the recording. The arbitrator refused the request, claiming the recording was part of his personal notes because neither party to the arbitration had requested a recording be made of the hearing, and later erased the recording. The lower court vacated the award, but the Supreme Court of Minnesota reversed because Eisen was not a "party" for purposes of appealing the award under the collective bargaining agreement\footnote{427}{Id. at 738.} and because, under the circumstances of this case, the arbitrator was justified in denying Eisen's attorney's request. Also, erasing the recording in the normal course of business was not misconduct by the arbitrator.\footnote{428}{Id. at 736.}

7. Waiver of Right to Vacate

In {	extit{Helmerichs v. Bank of Minneapolis & Trust Co.}}, the court stated the principle that by participating in arbitration without raising an objection to the arbitration, a party may lose the right to object to arbitration and thereby the right to have an award vacated under UAA section 12(a)(5),\footnote{430}{349 N.W.2d 326 (Minn. Ct. App. 1984).} and under UAA section 12(a)(3)\footnote{431}{UAA § 12 (a)(5), supra note 354.} when the claim that the arbitrators exceeded their powers is based on the issue of arbitrability.\footnote{432}{UAA § 12 (a)(3), supra note 354.} In a post-arbitra-
tion brief, the bank argued that the employment contract which was the subject of the arbitration was illegal, and that this illegality voided the arbitration clause of the contract. Because of this, the bank moved to vacate the award under Minnesota Statutes section 572.19, which contains provisions identical to UAA section 12(a)(3) and (5). The trial court confirmed the award in favor of Helmerichs, finding the bank's objection to arbitrability untimely since the illegality argument was not raised until a post-hearing brief was submitted to the arbitrators. Because this finding was not clearly erroneous, the court of appeals dismissed the bank's appeal.

8. Notice of Arbitration Proceedings

Basic due process notions apply to hearings connected with arbitration. In Cassidy v. Keystone Insurance Co., the court vacated the arbitrators' award due to the insufficient service of a petition to appoint an arbitrator. Although this is not an express ground for vacation of an award, the UAA does provide for service of a writ of summons as prescribed by law in a civil action. Under the Pennsylvania Rules of Civil Procedure, service under the circumstances of this case had to be made by a sheriff. The original petitioner, appellee here, mailed the petition after the court held a hearing and appointed an arbitrator. The petition to compel arbitration was viewed by the court as a bill to compel specific performance of an arbitration agreement, and as such, it required that the petition be served by a sheriff prior to the hearing.

VIII. Appeals

Section 19 of the UAA specifies those orders, judgments or decrees from which an appeal may be taken. While most enacted versions of the UAA

434. Id.
435. Id. at 328.
437. UAA § 16 provides:
Except as otherwise provided, an application to the court under this act shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.
The Pennsylvania Arbitration Act contains language substantially similar to that of UAA § 16.
439. 322 Pa. Super. at ___, 469 A.2d at 239.
440. UAA § 19(a) provides that an appeal may be taken from:
(1) An order denying an application to compel arbitration under section 2; (2) An order granting an application to stay arbitration made under section 2(b); (3) An order confirming or denying confirmation of an award; (4) An
contain appeal provisions, the content of those provisions vary. Additionally, even where the appeal provisions are identical, judicial interpretations of those provisions vary. Courts consistently agree, however, on the importance of allowing an appeal from the denial of a motion to compel arbitration. On the other hand, section 19 does not permit an interlocutory appeal from an order compelling arbitration. Section 19 does permit appeals from orders which modify, correct, confirm, or deny confirmation of an arbitrator’s award, and allows review of any judgments or decrees which result from arbitration. Appeals taken under the UAA are to follow the same procedure and are permitted to the same extent as appeals from orders of judgments in civil actions.

A. Orders Compelling Arbitration

Although the UAA allows interlocutory appeals from orders which deny parties an opportunity to arbitrate, there is no similar provision for appeals from orders compelling arbitration. Thus, a party who has been ordered to submit to arbitration following his refusal to do so voluntarily, ordinarily may not appeal the order until after the conclusion of arbitration. This is consistent with the policy of encouraging arbitration.

In Bluffs, Inc. v. Wysocki, the North Carolina Court of Appeals dismissed an appeal from an order compelling arbitration. The court did not believe that the order compelling arbitration affected a substantial right or that the appellant would be harmed by delaying review of the issues. On the basis of these conclusions, the court could find no justification outside the UAA for allowing an appeal. The court also noted the UAA’s objective of promoting uniformity in the laws of states which adopt the act. In light of that

order modifying or correcting an award; (5) An order vacating an award without directing a rehearing; or (6) A judgment or decree entered pursuant to the provisions of this Act.

Section 19(b) provides that appeals are to be taken in the same manner and to the same extent as from orders or judgments in civil actions.

444. UAA § 19(a)(3)-(5).
445. UAA § 19(a)(6).
446. UAA § 19(b).
447. UAA § 19(a)(1),(2).
449. Id. at ____. 314 S.E.2d at 293.
450. Id.
objective, it followed the lead of cases from other jurisdictions in holding that there is no right of appeal from an order compelling arbitration.

In Old Rochester Regional Teacher's Club v. Old Rochester Regional School District, the defendant school district appealed from an order compelling arbitration and the denial of its motion to enjoin the plaintiff's pursuit of arbitration. The court dismissed the appeal from the order compelling arbitration since an order compelling arbitration was not listed as an appealable order in Massachusetts' arbitration statute. The appeal from the denial of the injunction against plaintiff's pursuit of arbitration was also dismissed, since an injunction in this case would be the equivalent of a motion to stay arbitration, the denial of which would not be appealable under Massachusetts' arbitration statute. The appellate court stated that since Massachusetts views the list of appealable orders as comprehensive, an appeal (at least as of right) from any type of order not listed is precluded.

In Hodes v. Comprehensive Health Associates, the plaintiff physician filed a petition for breach of contract in response to the defendant's demand for determination of the controversy by arbitration. The plaintiff then filed for a stay of arbitration and a temporary restraining order (TRO). The TRO was granted by the trial court to restrain the defendant from prosecuting the demand for arbitration pending the outcome of the plaintiff's application for a stay of the arbitration proceedings. Following judicial review of the contract's arbitration provision, the court dissolved the TRO, denied the motion to stay arbitration, and directed the parties to proceed with arbitration. The plaintiff appealed from the court's order denying the motion to stay arbitration. Under the UAA, however, an order denying a motion to stay arbitration is not listed as an appealable order. Therefore, according to the Hodes court, "the fact the legislature saw fit to specify in one code section the different orders and judgments from which appeals may be taken clearly indicates . . . an intention to restrict the appeals in such proceedings to the orders and judgments therein specified." Accordingly, the appeal was dismissed.

452. Wysocki, Id. at __, 314 S.E.2d at 293.
455. Id. at __, 463 N.E.2d at 582.
457. Id. at 36, 670 P.2d at 76.
459. Hodes, 9 Kan. App. 2d at __, 670 P.2d at 78.
460. Id. The plaintiff also urged that the trial court's order should be construed...
In *Rural Water District No. 6 Butler County v. Ziegler Corp.*, the Water District and Ziegler Corporation were parties to a construction contract which contained an arbitration clause. Upon receiving written demand to terminate work on the District's water supply system, Ziegler filed a motion to compel arbitration, which the trial court granted. At arbitration, the arbitrators denied Ziegler's claim, terminated Ziegler's work on the project, and awarded damages to the District. The District then filed a motion to confirm the award which was granted. Ziegler appealed from this order. On appeal, the court stated that while the right to appeal is statutorily mandated, the scope of judicial review of an arbitration award is severely limited. The trial court's confirmation of the award was affirmed.  

In *Anthony Plumbing v. Attorney General*, Anthony Plumbing was found to have violated the Maryland Consumer Protection Act by engaging in unfair and deceptive trade practices. The defendant appealed to the court of special appeals. Before any proceeding in that court, the Maryland Court of Appeals granted the State's petition for a writ of certiorari. Although the case did not involve an arbitration agreement, appeals from arbitration orders were mentioned by the court. In specifying those interlocutory orders entered by a circuit court in a civil case from which an appeal may be taken, the court stated that an appeal is allowable from an order granting a petition to stay arbitration. No other arbitration order or judgments are specifically listed as appealable by Maryland's arbitration statute.

as an order denying or dissolving an injunction. *Id.* at —, 670 P.2d at 77 (such an order would be appealable under Kan. Stat. Ann. § 60-2102(a)(2)(1982)). The appellate court held that the order could not be so construed as the plaintiff had realized the relief sought in his TRO; the defendant was restrained from prosecuting on the arbitration issue until the decision was made concerning the plaintiff's application to stay arbitration. *Id.*

462. *Id.* at —, 677 P.2d at 577.
463. *Id.* Although the appellate court did not specify its jurisdictional basis for hearing the appeal, the right to appeal from an order confirming an arbitration award exists under Kan. Stat. Ann. § 5-418(a)(3)(1982), which provides that an appeal may be taken from an order confirming or denying confirmation of an award.
464. *Rural Water District*, 9 Kan. App. 2d at —, 677 P.2d at 579 (quoting Coleman v. Local No. 570, 181 Kan. 969, 980, 317 P.2d 831, 841 (1957) ("[n]othing in the award relative to the merits of the controversy as submitted, even though incorrectly decided, is grounds for setting aside an award in the absence of fraud, misconduct, or other valid objections.").
465. *Id.* at —, 677 P.2d at 579.
466. 298 Md. 11, 467 A.2d 504 (1983).
468. *Anthony Plumbing*, 298 Md. at 11, 467 A.2d at 504.
**Schmidt** v. **Clothier** was a consolidation of cases which involved various aspects of underinsurance coverage and subrogation rights. In the first case discussed, plaintiff Schmidt and defendant Safeco were unable to agree on their rights and obligations under an underinsurance policy. Upon motion by the defendant, the district court ordered Safeco to pay underinsured benefits of $100,000 to the plaintiff or submit the matter to arbitration. Safeco failed to comply with either order. The appellate court granted discretionary review even though no right to appeal an order compelling arbitration exists under Minnesota's arbitration statute.

**B. Orders Denying the Compulsion of Arbitration**

Interlocutory orders denying the compulsion of arbitration are appealable under the UAA. In **Blow v. Shaughnessy**, the defendants were permitted to appeal an order by the trial court denying their application to compel arbitration. The North Carolina Court of Appeals, relying on the UAA, summarily concluded that the defendants' appeal was not premature since the statute specifically provided for appeals in these circumstances. The court then affirmed the trial court's holding that the controversy was not subject to a valid arbitration agreement.

As in **Blow**, the Texas Court of Appeals in **NCR Corp. v. Mr. Penguin Tuxedo Rental and Sales**, also addressed whether a valid arbitration agreement existed between the parties and whether an interlocutory appeal was appropriate from an order denying compulsion of arbitration. The court first determined that the agreements to arbitrate did not bind the parties. Unlike the court in **Blow**, however, the court concluded that because the arbitration agreements were unenforceable, the UAA and its provisions for interlocutory

471. 338 N.W.2d 256 (Minn. 1983).
472. Id.
473. Id. at 263 (construing MINN. STAT. ANN. § 572.26 (West Supp. 1983)).
474. UAA § 19(a)(1).
476. Id. at ___, 313 S.E.2d at 874.
477. N.C. GEN. STAT. § 1-567.3 (1983) (similar to UAA § 19).
478. Blow, 68 N.C. App. at ___, 313 S.E.2d at 874.
479. Id. at ___, 313 S.E.2d at 880.
481. The arbitration agreements in this case were invalid on their face, and the appellant apparently did not contend otherwise. TEX. REV. STAT. ANN. art. 224 (1973) applied to the agreements in question. This statute requires that an agreement to arbitrate show that it was concluded with the aid of counsel. The agreements in this case did not comply with this requirement. 663 S.W.2d at 108.
appeals did not apply. Because it could find no basis outside the UAA for allowing an interlocutory appeal on the trial court's order, the appellate court dismissed the appeal.

In *J & K Cement Construction v. Montalbano Builders*, defendant-appellee Falbo entered into a construction contract with defendant-appellant Montalbano. The contract included an arbitration agreement. Montalbano subsequently entered into contractual agreements with several subcontractors. During the course of construction a dispute arose and Falbo refused to make further payments until certain corrections were made. Several subcontractors filed suit to foreclose mechanics' liens. Falbo filed an answer and counterclaimed against Montalbano. In response to the complaints, Montalbano filed a motion to stay all proceedings and compel arbitration between Montalbano and Falbo. The trial court denied the motion and Montalbano appealed. On appeal, the appellate court stated that "although the order appealed from in the instant case is interlocutory, we nonetheless have jurisdiction, for the trial court’s denial of the requested relief is analogous to the denial of an injunction." After finding that the contract contained a valid arbitration agreement, the court stated that "the policy of the Uniform Arbitration Act adopted by Illinois and other States which favors arbitration as a means of dispute resolution would be frustrated if the courts could not enforce arbitration agreements." The court added that the denial of Montalbano's motion to compel arbitration would effectively deny the parties their contractual right to arbitrate their disputes.

*Notaro v. Nor-Evan Corp.* is another Illinois case involving the denial of a motion to compel arbitration. In a dispute over obligations under a purchase agreement, seller Notaro filed a complaint seeking declaratory judgment. Buyer Nor-Evan moved to dismiss the complaint and to compel arbitration. Upon denial of its motion, Nor-Evan appealed. The appellate court granted the appeal, and the Illinois Supreme Court affirmed the decision. In granting the appeal, no reference was made to Illinois' arbitration act. Instead, both courts analogized the denial of the defendant's motion to compel arbitra-

482. 663 S.W.2d at 108.
483. *Id.*
485. *Id.* at 663, 456 N.E.2d at 889. The appeal sections of Illinois' arbitration statute contain only a portion of § 19 of the UAA. ILL. ANN. STAT. ch. 10 § 118 (Smith-Hurd 1975) (identical to UAA § 19(b)) provides that "appeals are to be taken in the same manner and to the same extent as from orders or judgments in civil actions."
487. *Id.* at 681, 456 N.E.2d at 902.
488. *Id.*
489. 98 Ill. 2d 268, 456 N.E.2d 93 (1983).
490. *Id.*
tion to an order granting or denying a temporary injunction. \(^491\) Viewing it as such, the court held that an appeal may be taken from an interlocutory court order granting, modifying, refusing, dissolving, or refusing to dissolve an injunction. \(^492\)

In *Manalili v. Commercial Mowing and Grading*, \(^493\) a dispute arose regarding payment under a contract which contained an arbitration provision. Following Commercial Mowing's filing of a complaint for breach of contract, Manalili filed a motion to stay the proceedings and a demand for arbitration. The motion was denied and Manalili appealed. \(^494\) The right to appeal from this order apparently existed as a matter of law. \(^495\) However, appellants sought discretionary review through a writ of certiorari. \(^496\) The court allowed the appeal, stating its jurisdiction was "invoked pursuant to Florida Rule of Appellate Procedure 9.100." \(^497\) As authority for granting the appeal, the *Manalili* court relied on *Vic Potamkin Chevrolet v. Bloom*. \(^498\) In *Vic Potamkin Chevrolet*, an appeal was taken from the denial of a motion to compel arbitration. The appellants claimed that the "right to an interlocutory appeal was conferred by Florida Arbitration Code section 682.20(1)(a)." \(^499\) The court of appeals stated that Florida Rule of Appellate Procedure 9.010 provides in part: "[t]hese rules shall supersede all conflicting rules and statutes." \(^500\) The court interpreted this procedural rule to mean that all other statutes purporting to govern the right to appeal are inoperative. \(^501\)

In both *Vic Potamkin Chevrolet* and *Manalili*, the order denying the motion to compel arbitration was interlocutory in nature. As a general rule, non-final orders are not immediately appealable. \(^502\) In *Manalili*, however, the Florida District Court of Appeals granted the appeal stating that where a "right to compel arbitration exists, such a denial departs from the essential requirements of law." \(^503\)

*Sabates v. International Medical Centers* \(^504\) is a Florida case in which the plaintiff petitioned for a writ of certiorari following a court order compelling

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491. *Id.* at 270, 456 N.E.2d at 94 (construing Notaro v. Nor-Evan Corp., 197 Ill. App. 3d 1168, 441 N.E.2d 186 (1982)).
492. *Id.* (quoting Ill. R. Civ. P. 307(a)(1)).
494. *Id.*
496. *Manalili*, 442 So. 2d at 411.
497. *Id.* at 412.
499. *Id.* at 287.
500. *Id.*
501. *Id.*
arbitration. Respondent Medical Center contended that, unlike an order denying a motion to compel arbitration, an order granting a motion to compel arbitration was not immediately appealable. 505 The Florida District Court of Appeals held that “orders compelling arbitration and staying court proceedings pending the outcome of arbitration were reviewable by certiorari.” 506

As in Manalili, it is difficult to ascertain the grounds upon which the Florida District Court of Appeals based its jurisdiction. Florida Appellate Court jurisdiction to hear appeals is quite broad. While Rule 9.130 507 appears to limit the court’s jurisdiction in this area, Rule 9.030 grants certiorari jurisdiction to the district courts of appeal to review “non-final orders of the lower tribunals other than those described by Rule 9.130.” 508 Without further guidance from the court it is difficult to ascertain the category of non-final trial court orders to which this order belongs.

Western Waterproofing Co. v. Lindenwood Colleges 509 involved a contractual dispute. After filing complaints and counterclaims, the parties filed a joint stipulation in court to have their claims resolved in accordance with the Federal Arbitration Act, 510 and Missouri’s arbitration act. 511 Following a hearing, the arbitrators rendered a decision for Lindenwood in the amount of $92,000. Western’s motion to vacate the award was denied, while Lindenwood’s motion to confirm the award was granted. Western appealed from the denial of its motion to vacate the award. 512 The appellate court stated that no right to appeal from the denial of a motion to vacate an award exists under Missouri’s arbitration act. 513 The court construed the appeal from the denial of a motion to vacate the award as a premature appeal from the trial court’s order confirming the award. 514 The latter is appealable under Missouri’s arbitration statute while the former is not. 515

The Lindenwood court set forth several reasons for allowing the appeal. Citing Rule 81.05(b) of Missouri Rules of Court, the court stated that “when ‘a notice of appeal has been filed prematurely, such notice shall be considered as filed immediately after the time the judgment becomes final for the purpose of appeal.’ ” 516 The court also noted that it is often difficult, especially in the area of arbitration, to tell when a judgment is final. 517

505. Id.
506. Id. at 516.
509. 662 S.W.2d 288 (Mo. Ct. App. 1983).
512. Western Waterproofing, 662 S.W.2d at 288.
513. Id. at 289 (construing Mo. Rev. Stat. § 435.440 (Supp. 1982)).
514. Id.
516. Western Waterproofing, 662 S.W.2d at 289 (quoting Mo. R. Ct. 81.05(b)).
517. Id. at 289.
Rule 81.05 seeks to preserve an appeal for litigants whose overly cautious or mistaken counsel prematurely filed an appeal. For these reasons, the court of appeals treated the appeal from the denial of the motion to vacate the award as a good faith effort to appeal from the trial court’s confirmation of the award.518

C. Orders Confirming an Arbitrator’s Award

The UAA also permits appeals from orders confirming an arbitrator’s award.519 This provision has been used to permit appeals even when other claims between the parties are pending. By allowing an immediate appeal, a court may avoid the possibility of inconsistent holdings. This procedure was followed in Cyclone Roofing Co. v. David M. Lafave Co.,520 where the trial court affirmed the arbitrator’s award. One of the defendants subsequently appealed, despite the fact that other claims between the defendants remained to be adjudicated.521 The North Carolina Court of Appeals allowed an interlocutory appeal, noting that if the trial court adjudicated the parties’ remaining disputes before the appeal, the holding eventually reached on the appeal could be inconsistent with the trial court’s other rulings.522

D. Appellate Procedure

Appeals permitted by section 19 of the UAA are to be taken in the same manner and to the same extent as appeals from civil actions.523 The implications of this section were examined in Haegele v. Pennsylvania General Insurance Co.,524 where the trial court denied the defendant’s motion to vacate or modify the arbitrator’s award. The defendant entered no objections to the trial judge’s order, and the plaintiff contended that, as a consequence, no issues were preserved for appeal. The defendant, however, argued that the proceeding before the trial judge had been a hearing on a petition and not a bench trial, thus making it exempt from the rule525 which requires exceptions to the

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518. Id.
519. UAA § 19(a)(3).
521. Id. at ____, 312 S.E.2d at 710. The other claims were not subject to arbitration.
522. Id.
523. UAA § 19(b).
525. Pa. R.C.P. 1038(d) provides:
Within ten (10) days after notice of the filing of the decision, exceptions may be filed by any party to the decision or any part thereof, to rulings on objections to evidence or to any other matters occurring during the trial. Each exception shall set forth a separate objection precisely and without discussion. Matters not covered by exceptions are deemed waived unless, prior to final judgment, leave is granted to file exceptions raising these matters. No motion
trial court's order to be filed within ten days after notice of the filing of the decision. The court agreed with the defendant and allowed the appeal. Its decision was based in part on Pennsylvania's version of the UAA which states that applications to the court concerning arbitration shall be by petition. The court interpreted this to mean that applications to modify or vacate an arbitrator's award are to be made on petition and are to follow regular petition rules. Thus, an appeal from the court's order in this matter should follow the same procedure as the appeal from a hearing on a petition in a civil action.

The UAA furthers the policy of encouraging arbitration by permitting interlocutory appeals from orders denying compulsion of arbitration. This policy is not served, however, when a court denies an appeal from such an order when, for example, it finds that an arbitration agreement is invalid. The UAA also furthers the policy of encouraging arbitration by not allowing interlocutory review of orders compelling arbitration and by permitting parties to seek review of a court's order modifying, correcting, confirming or denying confirmation of an arbitrator's award. By allowing immediate appeals from orders confirming an arbitrator's award, courts may avoid the possibility of inconsistent holdings.

IX. Jurisdiction

Under the UAA, courts have subject-matter jurisdiction to determine whether a valid arbitration agreement exists and to compel or stay arbitration depending on that determination. Courts can also enforce, confirm, correct, modify or vacate the arbitration award. Jurisdiction will lie with the courts of "competent jurisdiction" of the state where the arbitration occurred, even if the agreement was made in another state. This is true for a new trial, for judgment non obstante verdicto, in arrest of judgment or to remove a nonsuit may be filed.

This rule was rescinded October 19, 1983, effective January 1, 1984. Pa. R.C.P. 227.1, adopted Oct. 19, 1983 and effective Jan. 1, 1984 now includes these provisions.

526. Haegle, 300 Pa. Super. at —, 479 A.2d at 1008.
528. Haegle, 300 Pa. Super. at —, 479 A.2d at 1009.
529. UAA § 2(a).
531. UAA § 2(b).
532. UAA § 17.
534. UAA § 12.
535. UAA § 17.
536. State ex rel. Tri-City Constr. v. Marsh, 668 S.W.2d 148, 151 (Mo. Ct.
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unless the courts of that state have been explicitly deprived of jurisdiction by statute.537 State courts will not have jurisdiction to settle arbitration disputes when the agreement was entered into before the enactment of the UAA and the previous state arbitration law did not confer such jurisdiction.538

In State ex rel. Tri-City Construction Co. v. Marsh,539 a Missouri appellate court held that jurisdiction to confirm an arbitration award lies with the courts of the state where the arbitration took place, rather than with the courts of the state where the agreement was executed.540 The parties had executed an agreement in Kansas providing for arbitration under Kansas’ arbitration act. However, by mutual consent, the parties had undertaken the arbitration and entered the award in Missouri. The court held that a Missouri court had jurisdiction to confirm the award, acknowledging that every state that has considered the question of jurisdiction has focused on the place of arbitration, rather than on the locus of the agreement.541

In Detroit Automobile Inter-Insurance Exchange v. Maurizio,542 a Michigan appellate court held that a state court is not deprived of jurisdiction over arbitration disputes unless a statute explicitly deprives the court of jurisdiction.543 The defendants pointed to two provisions of Michigan’s arbitration statute544 from which it could be inferred that jurisdiction of state courts over arbitration disputes is limited. In holding that jurisdiction is not so limited,545 the court reasoned that jurisdiction can be denied only when the statutory language “leave[s] no doubt that the Legislature intended to deprive the circuit court of jurisdiction of a particular subject matter.”546

Similarly, in Architects Collaborative, Inc. v. President and Trustees of Bates College,547 a Maine federal district court held that a federal court did not lose jurisdiction merely because it could be inferred from a state arbitra-

539. 668 S.W.2d 148 (Mo. Ct. App. 1984).
540. Id. at 151-52.
541. Id. at 152.
543. Id. at ___, 341 N.W.2d at 266-67.
544. MICH. COMP. LAWS ANN. § 600.5001(2) (West 1968), similar to UAA § 1, states in part: “Such an agreement shall stand as a submission to arbitration of any controversy arising under said contract not expressly exempt from arbitration by the terms of the contract.” MICH. COMP. LAWS ANN. § 600.5025 (West 1968), similar to UAA § 17, states in part: “Upon the making of an agreement described in section 5001, the circuit courts have jurisdiction to enforce the agreement . . . .”
545. 341 N.W.2d at 266-67.
546. Id. at 267.
tion act that jurisdiction rested only with the state courts. The plaintiff, a corporation principally doing business in Massachusetts, petitioned the federal district court in Maine to compel arbitration of a dispute with a college located in Maine. The agreement had provided for arbitration under Massachusetts' arbitration act, from which it could have been concluded that state courts had exclusive jurisdiction. The federal court held that it was not deprived of jurisdiction because the act in question only permitted the action to be brought in state court, and because it did not otherwise display an intent to limit the forums from which a party could seek relief.

Illinois courts were explicitly deprived of jurisdiction by statute in Local 3236 of Illinois Federation of State Office Educators v. Illinois State Board of Education. The plaintiff, a union of state office educators, brought an action to compel the defendant board members to arbitrate salary grievances as provided by the parties' agreement. The defendants had entered into the agreement on behalf of the state. An Illinois appellate court held that, because the suit was against the state, jurisdiction was controlled by the state immunity statute, which granted exclusive jurisdiction in such cases to the Illinois Court of Claims.

In Medicine Shoppe International, Inc. v. J-Pral Corp., a Missouri appellate court held that a state court does not have jurisdiction when the arbitration agreement in question is governed by a previous state arbitration law that does not give state courts jurisdiction to enforce such agreements. The agreement had been executed in 1979, before Missouri enacted the UAA.

549. 576 F. Supp. at 380.
552. 576 F. Supp. at 382-83. The court specifically declined to hold whether a state legislature could, if it intended to do so, deprive the federal courts of jurisdiction over disputes under that state's arbitration act. When the states have attempted to limit the power of the federal courts, they have almost uniformly been unsuccessful. C. Wright, The Law of Federal Courts, § 46, at 273 (4th ed. 1983).
554. Id. at ____, 459 N.E.2d at 301-02.
555. Id. at ____, 459 N.E.2d at 304.
556. 662 S.W.2d 263 (Mo. Ct. App. 1983).
557. Id. at 274.
Missouri's previous arbitration statutes had no provision for judicial enforcement of arbitration agreements, and Missouri courts had held that they could not enforce these agreements. The court held that the agreement in question was governed by the prior law, and therefore, the state courts did not have jurisdiction over the dispute.

The issue in Medicine Shoppe was raised as a question of personal jurisdiction, the question being whether the parties by their agreement had consented to the jurisdiction of the Missouri courts. Generally, by agreeing to arbitrate in a designated state, the parties are held to have impliedly consented to that state's jurisdiction to enforce the arbitration agreement. The court in Medicine Shoppe, however, decided the issue on the basis of the courts' statutory authority to decide arbitration disputes, which is a matter of subject-matter jurisdiction. Both personal and subject-matter jurisdiction must be present before a court can decide a dispute, and in bringing the suit the issues should not be confused.

The rules for jurisdiction in arbitration disputes do not differ from those in other judicial proceedings. The court must have both personal and subject-matter jurisdiction. Personal jurisdiction is obtained through consent of the parties or sufficient contacts of the parties with the forum state, together with adequate notice. Subject-matter jurisdiction is obtained directly from statutes. State courts have plenary jurisdiction; thus, they will have subject-matter jurisdiction unless they have been explicitly deprived of it by the arbitration act or other relevant state statute. The federal courts have limited jurisdiction; thus, they will have subject-matter jurisdiction only when either the diversity of citizenship or federal question statutes are satisfied.

X. Judicial Review

Because arbitration is an alternative dispute resolution process favored by the courts, judicial restraint is exercised in reviewing arbitration proceed-
After the parties have agreed to accept an arbitrator's findings of fact and view of the law, even an award based on a mistake of fact or law generally will not be set aside. In making a decision to vacate or confirm an award, a trial court considers only the specific grounds set forth in its jurisdiction's arbitration statute. Appellate courts generally hold that the UAA restricts the trial court's review of the arbitrator's award but does not impose restrictions on the appellate court's power to review the trial court's decision.

In *McDonald v. Hardee County School Board,* the court held that an arbitrator's award may not be vacated upon a mistake of fact or law but only upon one of the statutory grounds listed in the UAA. A tenured teacher who had been dismissed sought to have the arbitrator's award vacated on the ground that the arbitrator had exceeded his powers (a ground for vacating recognized by UAA section 12 (a)(3)). The arbitrator found that the teacher's conduct was unacceptable, but that the school administration failed to comply with the required dismissal procedure. Consequently, the award sustained the grievance and it reduced the discipline from discharge to suspension without pay. The trial court confirmed the award. The teacher contended, however, that under Florida law a school employee should be reinstated immediately and receive back pay if the charges against him are not sustained. He argued that a finding that the grievance was sustained left the arbitrator no alternative but to order reinstatement with back pay. In affirming, the appellate court disagreed, holding that the arbitrator's conclusion that the grievance was sustained (because of procedural irregularities) was not the equivalent to a finding that the charges against the teacher had not been sustained.

In *Fraternal Order of Police Lodge No. 108 v. Village of Washington Park,* the court held that under the applicable rules concerning arbitration,
the trial court's review is limited to a determination of whether the plaintiff's claims are arbitrable. The trial court is thus precluded from ruling on the merits of the case. An action was brought by the police organization to compel the village to arbitrate the issue of sick pay for police officers. The village argued that before the grievance procedures were initiated, the village had lawfully terminated the collective bargaining agreement which contained the arbitration clause. The village also contended that the police officers' strike in violation of the agreement had given the city the right to terminate the agreement unilaterally. The circuit court ordered the village to submit to arbitration. The court explained that the only issue before it was whether the plaintiffs had a right to arbitrate the question of sick pay and not whether the police officers' actions constituted a strike which barred them from receiving such benefits. The appellate court held that the lower court properly limited its inquiry to the arbitrability of the plaintiffs' claims.

In Massachusetts Bay Transportation Authority v. Boston Carmen's Union, Division the court explained that an arbitrator's award may be unassailable even if re-examination suggests that it is wrong in fact, or in law, or both (including errors in the interpretation of agreements and statutes). It pointed out, however, that such awards are still open to oblique attacks that are in a sense jurisdictional. For example, a party may argue that public policy should prevent the delegation of some issues to arbitration. The Massachusetts Bay Transportation Authority (Authority) decided to furnish special services for the elderly and handicapped by contracting with a non-profit corporation (THEM) to operate a "dial-a-ride" service (Ride). When Ride became a large, permanent operation, the Union called on the Authority to recognize the service as Union work within the collective bargaining agreement. After a hearing, the arbitrator found that the Authority had violated the agreement by contracting with THEM and ordered it to assign the work to Union employees.

On appeal, the Authority argued that part of the arbitrator's finding was outside the permissible scope of arbitration. The court, however, held that the portion of the finding thus criticized was surplusage and that, even if it was not, the scope of arbitration had been extended by consent when the Authority had failed to protest at the hearing. In response to the Authority's policy argument that the Urban Mass Transportation Act was meant to discourage

577. Id. at ___, 462 N.E.2d at 858 (citing ILL. REV. STAT. ch. 10, par. 102 (1979)).
578. Id. at ___, 462 N.E.2d at 857.
579. Id.
580. Id. at ___, 462 N.E.2d at 858.
582. Id. at ___, 455 N.E.2d at 1234.
583. Id.
584. Id. at ___, 455 N.E.2d at 1235.
state agencies from using federal funds to compete with private transportation, the court concluded that the Authority had so taken control of THEM that THEM was no longer a private company. Consequently, the appellate court affirmed the trial court's confirmation of the award.

In Wicomico County Education Association, Inc. v. Board of Education, the court held that the Maryland UAA does not sanction a modification of an arbitrator's award merely because there is a bald allegation that it was based on a factual error not apparent on the face of the award. Reddish, a teacher who had not been hired for a coaching position, asked the court to modify or correct the arbitrator's factual finding that there had been two qualified applicants for the coaching position. Reddish and the teachers' collective bargaining agent, WCEA, claimed that there was no testimony that anyone except Reddish had applied for the position. However, no transcript of the arbitration proceedings had been made, and the circuit court entered judgment in favor of the Board. Reddish and WCEA appealed, arguing that the judge should have taken testimony to determine whether evidence before the arbitrator established that there was more than one applicant. The appellate court held that the teacher's failure to request that a transcript be made should not be converted to his advantage by granting him a trial de novo at the trial court level. The court explained that if the law were otherwise, the arbitration hearing would be merely a first airing of the evidence rather than the termination of the evidentiary phase of the dispute. The court pointed out that without a transcript, the circuit court had no way to determine whether particular evidence was presented to the arbitrator. Although the court recognized the parties' reluctance to incur the expense of having a transcript made unnecessarily, the court noted that the cost of taping an arbitration proceeding would not be prohibitive and that, when required, a transcript could subsequently be prepared.

In Helmerichs v. Bank of Minneapolis & Trust Co., the court stated that the arbitrators' award should be set aside only when the objecting party meets its burden of proof that the arbitrators have clearly exceeded the powers granted to them in the arbitration agreement. Courts should not overturn an award merely because they disagree with the arbitrators' decision on the merits. Helmerich, a former president of the bank, demanded arbitration pursu-
ant to his employment contract. After the arbitrator entered an award in his
favor, the bank argued, in a post-hearing brief, that the illegality of the em-
ployment contract voided the arbitration clause. The circuit court held that
the bank's objection to arbitrability was untimely made, and it confirmed the
award. The appellate court held that the trial court's finding that the ques-
tion of arbitrability was raised only in a one-sentence paragraph in a post-
hearing brief submitted to the arbitrators was not clearly erroneous. The court
concluded that allowing a party to claim, after the hearing is over, that there
was no agreement to arbitrate results in a waste of time and money.

In Rustad v. Rustad the court held that it always retains ultimate au-
thority to review and modify arbitration awards involving custody and child
support, but parties may agree initially to submit such controversies to an ar-
bitrator. After the Rustads had gone to court to obtain a divorce, they signed
an agreement to arbitrate any future issues of spousal and child support. Nev-
ertheless, the husband subsequently went to court to reduce his support obliga-
tion. The wife moved to dismiss the action on the ground that the parties were
contractually bound to submit to arbitration. The court held that it retained
jurisdiction over the matter and, consequently, arbitration was not a necessary
precondition to litigation. On appeal, the appellate court held that the wife's
motion for arbitration was properly denied. By submitting themselves initially
to the jurisdiction of the court in their controversy over custody, the parties
foreclosed their right to enter into a subsequent arbitration agreement. When
they later agreed to arbitrate disputes, including child support, their agree-
ment was void ab initio.

In AFSCME District Council 96 v. Independent School District the court ruled that when the parties have agreed to avail themselves of the
benefits of arbitration, judicial interference should be kept to a minimum. For
that reason, courts which are reviewing arbitration awards should be deferen-
tial to the arbitrator's decision. Four teachers' aides requested that seniority
be determined from their dates of hire rather than from the dates of their
joining AFSCME, the employee's exclusive bargaining representative. When
the school board agreed, AFSCME filed a grievance concerning the board's
action, and the matter went to arbitration. The arbitrator determined that
under this particular collective bargaining agreement, seniority was to be
credited not from the length of service with the employer but from the time
within the bargaining unit. The district court affirmed the arbitrator's deci-

594. Id. at 327.
595. Id. at 328.
597. Id. at ___, 314 S.E.2d at 277.
598. Id. at ___, 314 S.E.2d at 277-78.
600. Id. at 35.
601. Id. at 34.
sion, and the employees appealed, claiming that the arbitrators exceeded their powers. The appellate court held that an award is appropriate so long as the interpretation can be derived in some rational manner from the agreement. The court explained that a reviewing court can disturb an arbitration award only where there has been such obvious disregard of the agreement that the award is totally unsupported by the usual principles of contract construction. Applying those standards, the court affirmed the district court's decision.

In Eisen v. Minnesota, the court ruled that the UAA ordinarily governs authority and procedure for judicial review of an arbitration proceeding, but if the UAA is silent regarding a particular matter, the court must look to the collective bargaining agreement. Eisen, an employee of Faribault State Hospital, was discharged for allegedly slapping a patient. At the subsequent arbitration hearing, Eisen was represented by his union representative. The arbitrator issued an award in favor of the employer, and the union decided not to appeal. Eisen then retained an attorney to appeal the matter to the district court. The court vacated the award and ordered a rehearing before another arbitrator. The employer appealed that decision, claiming that Eisen did not have standing as a party to seek vacation of the arbitration award. Because the UAA does not define "party" for purposes of an appeal, the appellate court looked to the collective bargaining agreement for a definition and determined that under the agreement the union and not the individual employee was a party to the arbitration proceedings.

In Western Waterproofing Co. v. Lindenwood Colleges, the court stated that the purpose of the UAA is to afford the parties the opportunity to reach a final disposition of differences in an easier and more expeditious manner than by litigation. Consequently, judicial review of arbitration awards is severely limited. An arbitration award of $92,500 was entered in favor of

602. Id. at 35 (quoting Ramsey County v. AFSCME, Council 91, Local 8, 309 N.W.2d 785 (Minn. 1983)).
603. 351 N.W.2d at 35.
604. 352 N.W.2d 731 (Minn. 1984) (en banc).
605. Id. at 734.
606. Id. at 733.
607. Id. at 734-35. The appellate court also reasoned that just as a non-organized employer can accept an employee's waiver of any challenge to his discharge as a final resolution of the matter, an organized employer should be able to rely on a comparable waiver made by the employee's exclusive representative. Id. at 735. The court held that, unless the collective bargaining agreement provides otherwise, an individual employee may not appeal an unfavorable award where the union expressly determines not to appeal. This policy, however, does not foreclose the employee's right of action against a union which fails to fairly represent his interests. Id at 738.
609. 662 S.W.2d 288 (Mo. Ct. App. 1983).
610. Id. at 291.
Lindenwood Colleges and against Western, the installer of a defective soccer field. The trial court confirmed the award. Western appealed, claiming that the arbitrators had found Lindenwood guilty of contributory negligence in overwatering the field and that, under Missouri law, a finding of contributory negligence bars an action for breach of an implied warranty. Western argued that in making such a mistake of law, the arbitrators had exceeded their powers.\textsuperscript{611} The court held, however, that a mistake of law or an erroneous interpretation of the law by the arbitrators does not constitute an act in excess of their powers under the UAA.\textsuperscript{612} In any event, the court found that Western and not the arbitrators had misinterpreted Missouri law and that the award was not based on an error of law.\textsuperscript{613}

In \textit{House Grain Co. v. Obst}, \textsuperscript{614} a Texas court of appeals held that a mistake of fact or law is not enough to set aside the arbitration award.\textsuperscript{615} Obst contracted to sell corn to House Grain Company. When a dispute arose over the amount of corn contracted for, the parties voluntarily submitted to arbitration. The arbitrators found that Obst should have shipped twice as much corn according to the standard of interpretation of the contract. Obst then petitioned the trial court, which reversed the arbitrators' decision. House Grain Company then appealed.\textsuperscript{616} Since the award was based on the proper interpretation of the terms of the contract and no impropriety was shown by the evidence, the court affirmed the arbitrators' decision.\textsuperscript{617}

In \textit{International Union of Electrical, Radio & Machine Workers v. Ingram Manufacturing Co.},\textsuperscript{618} the Fifth Circuit held that absent a showing of fraud, bias, or prejudice, the courts have no power to review an arbitrator's findings of fact.\textsuperscript{619} Following a strike by employees of Ingram Manufacturing Co., a dispute arose concerning striking employees who had been permanently replaced. The union claimed that there was an agreement that all striking employees would be recalled even if permanent replacements had been hired.\textsuperscript{620} The company denied the agreement. When the issue was arbitrated, an award was given to the employees. Upon petition, both the trial and appel-
late courts found that the decision was within the authority given by the collective bargaining agreement. The question of interpretation of the agreement is for the arbitrator, and as long as the decision involves construction of the contract, the courts have no business overruling the arbitrator.\textsuperscript{621} Since the main issue in the case was whether a reinstatement agreement existed between the union and Ingram, it was an issue of fact and not subject to review.\textsuperscript{622}

In \textit{Iowa City Community School District v. Iowa City Education Association},\textsuperscript{623} the court noted that unless something in a contract provides positive assurance that a dispute is not arbitrable, the arbitrator's interpretation and award is not subject to review.\textsuperscript{624} A teacher was not allowed to benefit from an "across the board" pay increase because of his alleged unsatisfactory service in the classroom. The teachers' association pursued grievance measures and received a favorable arbitration decision for the teacher. The school district contended that the arbitrator's award did not draw its essence from the collective bargaining agreement.\textsuperscript{625} The Supreme Court of Iowa said that so long as the arbitrator's interpretation can in some rational manner be derived from the agreement, it is not subject to review.\textsuperscript{626} In this case the arbitrator's decision was well within the principles applied in upholding arbitration awards.\textsuperscript{627}

Under the Pennsylvania Arbitration Act, a mistake of law is grounds for reversal or modification.\textsuperscript{628} In \textit{Haegele v. Pennsylvania General Insurance Co.},\textsuperscript{629} the Superior Court of Pennsylvania modified an arbitration award to make the award conform with state law. Linda Haegele was killed while riding in an automobile owned by Kaisinger. Kaisinger's insurance company paid the maximum amount allowed under Kaisinger's insurance policy, but the payment was less than the claimed damages. Since Linda was covered under her father's policy with Pennsylvania General Insurance Company, Linda's estate filed a claim with that company to collect uninsured motorist benefits.\textsuperscript{630} After a dispute and submission to arbitration, an award was made which allowed the Haegele estate to combine or "stack"\textsuperscript{631} the insurance coverage of

\begin{footnotes}
\footnotetext{621}{Id. at 892.}
\footnotetext{622}{Id. at 891.}
\footnotetext{623}{343 N.W.2d 139 (Iowa 1983).}
\footnotetext{624}{Id. at 144.}
\footnotetext{625}{Id. at 142.}
\footnotetext{626}{Id. at 144 (quoting Amoco Oil Co. v. Oil, Chemical & Chemical Workers Int'l Union, Local 7-1, Inc., 548 F.2d 1288, 1294 (7th Cir. 1977)).}
\footnotetext{627}{343 N.W.2d at 145.}
\footnotetext{628}{42 PA. CONS. STAT. ANN. § 7302(a)(2) (Purdon 1982).}
\footnotetext{629}{479 A.2d 1005 (Pa. Super. Ct. 1984).}
\footnotetext{630}{Id. at 1006.}
\footnotetext{631}{When an insurance policy covers more than one vehicle, certain classes of people under specified circumstances can "add up" or "stack" the coverage of those vehicles. Thus if each of ten vehicles had a $10,000 liability limit, the coverage would be $100,000 if "stacking" were allowed. For a discussion of stacking of insurance coverage, see Comment, \textit{Stacking of Uninsured Motorist Coverage}, 49 Mo. L. Rev. 571.}
\end{footnotes}
multiple vehicles covered by the Pennsylvania General policy. This award was affirmed in the trial court, but the Superior Court of Pennsylvania overruled the trial court and found that the award was in violation of Pennsylvania law. The Haegele's insurance policy contained a valid and enforceable provision which prevented "stacking," so the award was modified to conform with state law.

In the very similar case of *Flamini v. General Accident Fire & Life Assurance Co.*, the court said that when Pennsylvania's UAA governs a dispute, the arbitrator's decision is reviewable by the courts as to matters of law. In that case, Flamini, a police officer, was injured as a result of his patrol car being struck by a hit-and-run driver. Flamini sought compensation from the police fleet's insurer and a dispute arose as to "stacking" the coverage of the fleet vehicles. The dispute was arbitrated and "stacking" was allowed, but when Flamini sought confirmation of the award, the trial court modified the award, disallowing the "stacking" as a matter of law. The superior court affirmed the modification, saying that the arbitrator's allowance of "stacking" was an error of law under the facts of the case.

Another Pennsylvania case applied the same principle. In *Pennsylvania State Education Association v. Appalachia Intermediate Unit 08*, the court noted that great deference is given to arbitrators' awards. Unless the award violates a law it shall stand, provided it could rationally be derived from the collective bargaining agreement. The case involved a strike which caused state special education employees to miss several days of work. Appellee did not reschedule the missed days of work. The arbitrator ordered the state to pay the employees for the missed work days, with interest compounded annually on the missed wages. The Pennsylvania Supreme Court affirmed the decision, but changed the interest to simple interest, saying the law in Pennsylvania permits compound interest only when it is explicitly provided for by contract or statute.

In *Utica Mutual Insurance Co. v. Contrisciane*, the court said that where an arbitrator's award is against the law and is such that had it been a jury verdict, the court would have entered a different or other judgment not-


632. *Haegele*, 479 A.2d at 1006.
633. Id. at 1011.
634. Id.
636. Id. at ___, 477 A.2d at 511.
637. Id. at ___, 477 A.2d at 509-11.
638. Id. at ___, 477 A.2d at 514.
640. Id. at ___, 476 A.2d at 361-62.
641. Id. at ___, 476 A.2d at 363.
withstanding the verdict, the court has grounds for modifying or correcting the award.\textsuperscript{643} Kenneth Contrisciane was killed while standing beside a police car at the scene of a minor traffic accident in which Contrisciane had been involved. The driver of the car which hit and killed Contrisciane was uninsured. Contrisciane’s estate sought recovery from the insurer of the car Contrisciane had been driving. When arbitrators concluded that Contrisciane was not occupying the car at the time of his death, and thus was not covered under the policy, the estate appealed.\textsuperscript{644} The Pennsylvania Supreme Court indicated that the construction of individual terms of the insurance policy was a matter of law which was subject to review. Subsequently, the court found that Contrisciane was occupying the vehicle for insurance purposes, thereby affirming the trial court’s reversal of the arbitrator’s decision on that issue.\textsuperscript{645}

In \textit{Bromley v. Erie Insurance Group},\textsuperscript{646} the court held that the scope of judicial review under Pennsylvania’s version of the UAA is broader than at common law, and thus under the statute, an arbitrator’s award can be vacated for a mistake of law.\textsuperscript{647} Bromley and his wife were seriously injured in an automobile accident. The driver of another car involved in the accident was negligent and his insurance company paid the policy limit amount, but the Bromleys were not compensated fully for their injuries. The Bromleys subsequently sought additional benefits from their own insurer, Erie, under the uninsured motorist policy provision. The arbitrators granted the Bromleys an award and the trial court affirmed.\textsuperscript{648} On appeal, the Superior Court held that underinsured motorists cannot be equated with uninsured motorists.\textsuperscript{649} Since the negligent driver was insured in compliance with state law, the arbitrators made a mistake of law in awarding compensation under the uninsured clause of Erie’s insurance policy. Consequently, the Superior Court vacated the award because it was contrary to law.\textsuperscript{650}

In \textit{Whitt v. Philadelphia Housing Authority},\textsuperscript{651} the court found that resolution of factual disputes is solely within the province of the arbitrator, especially when the court has no transcript with which to evaluate the evidence and the findings.\textsuperscript{652} Whitt filed a grievance with arbitrators after her housing unit fell into disrepair. She received an award which was later confirmed by the trial court. The award included abatement of rent until certain repairs were made. The landlord ignored the arbitration award, but did make some repairs and gave Whitt a termination notice for non-payment of rent. Whitt

\textbf{643.} \textit{Id.} at ___, 473 A.2d at 1008.
\textbf{644.} \textit{Id.} at ___, 473 A.2d at 1007.
\textbf{645.} \textit{Id.} at ___, 473 A.2d at 1009.
\textbf{647.} \textit{Id.} at ___, 469 A.2d at 1128.
\textbf{648.} \textit{Id.} at ___, 469 A.2d at 1126.
\textbf{649.} \textit{Id.} at ___, 469 A.2d at 1128.
\textbf{650.} \textit{Id.}
\textbf{652.} \textit{Id.} at ___, 472 A.2d at 689.
appealed a second time to the arbitration board, but because of change of circumstances the board awarded Whitt significantly less than in the previous award. Whitt then tried to have the second award vacated or modified because it did not seem justified in light of the first award. The Superior Court found that the second award was based on conclusions of fact; that the drawing of such conclusions is within the authority of the arbitrators, and that since Whitt sought a second decision from the arbitrators, she was bound by their decision.

In Cargill v. Northwestern National Insurance Co., the court applied common law principles, upholding arbitration awards despite mistakes of fact or law. Cargill was injured in an automobile accident. When the responsible insurer and Cargill could not agree on the amount of the claim, the dispute was submitted to arbitration. The insurer included the wrong cover sheet with the insurance policy when they submitted it to arbitration. As a result, the arbitrators’ award to Cargill was in excess of the policy limits. Northwestern petitioned for vacation or modification on the grounds that the award was excessive; Cargill petitioned for confirmation of the award. The lower court confirmed the award. On appeal, the Superior Court of Pennsylvania affirmed because the arbitrators had acted under the common law. The court held that, in common law arbitration, the arbitrators’ award is conclusive as to law or fact, and is not subject to reversal for a mistake of either.

Another common law arbitration case was Gentile v. Weiss, where the court held that the arbitrators’ decision is binding unless it is shown that a party was denied a hearing, or there was misconduct, fraud, corruption, or other irregularity resulting in an unjust, inequitable, or unconscionable award. Gentile and Weiss, after disputing termination provisions of a construction contract, were ordered to arbitration under the terms of the contract. The arbitrators granted an award to Gentile. Weiss petitioned to have the award corrected or modified on the basis that it was wrong as a matter of law. The trial court denied Weiss’s motion, and the Superior Court of Pennsylvania affirmed. The court reasoned that unless the parties specifically agree upon statutory arbitration, common law arbitration principles apply. Since the terms of the contract did not provide for statutory arbitration, the common law applied and thus, errors of law were not reviewable.

653. Id. at ____, 472 A.2d at 686.
654. Id. at ____, 472 A.2d at 688.
656. Id. at ____, 462 A.2d at 835.
657. Id. at ____, 462 A.2d at 834.
658. Id. at ____, 462 A.2d at 835.
660. Id. at ____, 477 A.2d at 546.
661. Id. at ____, 477 A.2d at 545-46.
662. Id. at ____, 477 A.2d at 546.
Courts conduct only a limited review of arbitration proceedings and will not overturn an award merely because they disagree with the arbitrator's decision on the merits. Consequently, appellants usually attempt to attack awards on grounds that are "extra-jurisdictional," such as a claim that the arbitrator exceeded his powers. Even in those cases, the courts make every presumption in favor of the validity of the award.

If arbitration awards are not given finality, arbitration fails its primary purpose. Instead of being a speedy and efficient substitute for litigation, it becomes merely the beginning of litigation. Judicial reconsideration of arbitration awards would delay final decisions rather than bring controversies to a speedy resolution. Accordingly, courts justifiably conduct a very limited review of arbitration awards.

XI. TIMELINESS

Under the UAA, applications to vacate an arbitrator's award must be made within ninety days after the award is made. However, if the motion to vacate is based on allegations of "corruption, fraud or other undue means," the ninety-day period does not begin to run until "such grounds are known or should have been known." The UAA does not specify any other exceptions to this limitations period. Likewise, applications to modify or correct an award must be made within ninety days after the award is made. The limitation period normally begins to run when a copy of the award is delivered to the applicant. Recent cases indicate that application of the UAA's statute of limitations is inappropriate in actions brought by employees under section 301 of the National Labor Management Relations Act to enforce a labor arbitration award made under a collective bargaining agreement.

A. Vacation

In Bernstein v. Grammercy Mills, Inc., the Massachusetts Appeals Court held that the form in which an attack on an arbitration award is made (in this case as a "counterclaim" in an action for confirmation) does not save a motion for vacation that would otherwise be time-barred. Plaintiff claimed that he was owed a sales commission by the defendant. The arbitrators

663. UAA § 12(b).
664. Id.
665. UAA § 13(a).
666. UAA § 12(b), 13(a).
awarded the plaintiff approximately one-half the amount he sought. After the defendant refused to pay the award, the plaintiff filed a petition for confirmation and enforcement. In reply, the defendant counterclaimed for vacation of the award, charging that an arbitrator had improperly failed to disclose his connections with one of the plaintiff's attorneys. The plaintiff denied the substance of the defendant's challenge and further argued that it was time-barred, having been raised more than thirty days after the effective date of the award. The trial court confirmed the award on the merits. On appeal, the court held that the "counterclaim" was time-barred and that neither the fact that the attack on the award was nominally a counterclaim nor the fact that it was made in response to a petition for confirmation exempted the defendant's prayer for vacation from the time limits imposed on such attacks. The defendant also argued that its claim was exempt from the normal time limits by virtue of a statute that excepts compulsory counterclaims from the general statutes of limitations. The appellate court rejected that argument, noting that even if the defendant's challenge to the award was a compulsory counterclaim within the contemplation of the statute, the provisions of the arbitration act, intended to "flush out objections to awards with dispatch," would control.

In *Best Coin-Op, Inc. v. Clementi,* an Illinois appellate court held that the ninety-day limit for the assertion of grounds for the vacation of an award is not extended by either the filing of a motion for confirmation or by the trial court's giving the answering party twenty-one days to file a response to such motion. The parties to a lease agreement concerning coin-operated washing machines submitted a dispute over the lease to arbitration. The arbitrators resolved the dispute in favor of the plaintiff, who then filed a motion for confirmation. Over five months after the entry of the award, the defendant moved the trial court to vacate the award on the ground that no valid lease existed. The trial court had previously granted the defendant's request for an additional twenty-one days in which to answer the plaintiff's petition for confirmation.

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670. *Id.* at ___, 452 N.E.2d at 232.
671. *Id.* at ___, 452 N.E.2d at 233.
676. *Id.* The appellate court also agreed with the court below that the social contacts alleged by the defendant to have existed between one of the plaintiff's attorneys and a member of the arbitration panel were not sufficient to support a claim of partiality. *Id.* at ___, 452 N.E.2d at 237.
678. *Id.* at 894, 458 N.E.2d at 1059.
tion.679 The trial court’s extension of time in which to file an answer did not, however, extend the ninety-day time limit for the assertion of grounds for vacation, nor did the filing of the petition for confirmation toll the running of the limit. Consequently, the defendant was barred from raising the issue of whether there existed a legal basis for the award.680

B. Modification

In *Minnesota Licensed Practical Nurses Association v. Bemidji*,681 the court strictly enforced the ninety-day time limit for seeking a modification of an award.682 One year after receiving a favorable arbitration award, plaintiff brought an action against her employer for back pay and immediate placement as a full-time employee. The court held that the motion was untimely because plaintiff had waited nearly a year before filing her application for a modification of the award.683

C. Federal Cause of Action

When a federal statute involving arbitration does not specify a statute of limitations, the courts in some cases have looked to the UAA to supply one.684 However, recent cases indicate that in some instances the UAA is not the appropriate source from which to borrow a limitation period for a federal cause of action. One such case is *Barnett v. United Airlines*,685 where the plaintiff asserted two claims pursuant to the Railway Labor Act686 in connection with a dispute over the terms of his employment. The plaintiff claimed that his employer had breached the terms of a collective bargaining agreement and that his union had breached its duty to handle properly his grievance against his employer.687 Because the Railway Labor Act contains no provision for a statute of limitations on this type of claim, the district court applied the ninety-day limitations period of Colorado’s arbitration act.688 The court of appeals, however, relying on *DelCostello v. International Brotherhood of Team-

679.  *Id.* at 896, 458 N.E.2d at 1060.
680.  *Id.* at 896, 458 N.E.2d at 1061.
685.  738 F.2d 358 (10th Cir. 1984).
687.  738 F.2d at 360.
sters, held that the appropriate statute of limitations for the plaintiff's "hy-

Another recent case illustrating the appropriate source of a limitations
period for a federal cause of action involving arbitration is Hand v. Interna-
tional Chemical Workers Union. Hand involved a claim against an em-
ployer for breach of a collective bargaining agreement and a claim against a
union for breach of the duty of fair representation. The Eleventh Circuit
Court of Appeals originally held that Florida's ninety-day statute of limita-
tions for vacation of an arbitration award applied to the claim. However, on
the basis of DelCostello, the court vacated its first decision and held that the
six-month statute of limitations found in Section 10(b) of the National Labor
Relations Act applied to the plaintiff's cause of action.

To promote finality, courts require timely filing of any challenges to arbi-
tration awards. The UAA's ninety-day limitation period on petitions to vacate,
modify, or correct arbitration awards has been strictly enforced, and normally
may not be extended by the trial court. The ninety-day limitations period has
been held inappropriate, however, in certain labor cases where an employee
alleges breach of a collective bargaining agreement by the employer and
breach of the duty of fair representation by the union.

XII. PREEMPTION

In the recent decision of Southland Corp. v. Keating the United States
Supreme Court held that the Federal Arbitration Act (FAA) preempted a
provision of the California Franchise Investment Law which required litiga-
tion of claims brought under the act. The extent of the federal preemption,
however, is not clear from the Court's opinion. The Court stated that "[i]n

689. 462 U.S. 151 (1983). In DelCostello, the court refused to follow Mitchell,
discussed supra note 684. The court determined that the interests at stake in an em-
ployee's claim against his employer and union in a fair representation case were best
served by applying the six-month statute of limitations from section 10(b) of the Na-
tional Labor Relations Act, 29 U.S.C. § 160(b) (1982), instead of the ninety-day stat-
ute of limitations from the UAA.

690. 29 U.S.C. § 160(b) (1982), which provides for a six-month statute of limi-
tations for filing unfair labor practice charges.

691. 738 F.2d at 364.

692. 712 F.2d 1350 (11th Cir. 1983).


694. Id. at 1313.


696. 712 F.2d at 1351.


creating a substantive rule [the FAA] applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.\textsuperscript{700} Consequently, \textit{Southland} has the effect of making most "arbitration agreements specifically enforceable nationwide in state as well as federal courts."\textsuperscript{701} Recently, \textit{Southland} has been interpreted by courts considering the extent of preemption of state statutes, including arbitration statutes, by the FAA.

In \textit{Commerce Park at DFW Freeport v. Mardian Construction Co.},\textsuperscript{702} the Fifth Circuit Court of Appeals relied on \textit{Southland} to invalidate a Texas statute\textsuperscript{703} which precluded arbitration of claims asserted under the statute. Commerce Park and Mardian executed a contract which included an arbitration clause for claims and disputes arising out of or relating to the contract. When Commerce Park rejected part of Mardian's work, Mardian sought arbitration and Commerce Park, in turn, filed suit.\textsuperscript{704} The federal district court granted Mardian's motion to stay proceedings pending arbitration and Commerce Park appealed.\textsuperscript{705}

The Fifth Circuit faced three issues. First, Commerce Park claimed that under the Texas Deceptive Trade Practices-Consumer Protection Act\textsuperscript{706} (DTPA) its right to sue could not be waived.\textsuperscript{707} Any provision to the contrary, Commerce Park claimed, was void and unenforceable as against public policy.\textsuperscript{708} The court rejected this contention, holding that enforcement of the

\textsuperscript{700}. \textit{Southland}, 104 S. Ct. at 861.

\textsuperscript{701}. Note, \textit{Federal Preemption of Arbitration}, 1984 \textit{J. Dispute Resolution} 193 (1984). Although arbitration clauses are to be specifically enforced under the FAA, the question remains as to which other provisions of the FAA must be applied by state courts. See \textit{id}. at 203.

\textsuperscript{702}. 729 F.2d 334 (5th Cir. 1984).


\textsuperscript{704}. 727 F.2d at 336. Suit was originally filed in state court and then removed to federal district court. \textit{id}.

\textsuperscript{705}. \textit{id}. at 336-37. Holding the order appealable, the court stated:

Both an order staying an action pending arbitration and an order staying arbitration, though interlocutory, are appealable under 28 U.S.C. § 1292(a)(1) as orders similar to an injunction if (1) the action in which the order was made is an action which would have been an action at law prior to the fusion of law and equity; and (2) the stay was sought to permit the prior determination of an equitable defense.

\textit{id}. at 337 (quoting Coastal Indus. Inc. v. Automatic Steam Prods. Corp., 654 F.2d 375, 377 n.1 (5th Cir. 1981)).

\textsuperscript{706}. TEX. BUS. \& COM. CODE ANN. § 17.41-.63 (Vernon Supp. 1984).

\textsuperscript{707}. 729 F.2d at 337.

\textsuperscript{708}. \textit{id}. TEX. BUS. \& COM. CODE ANN. § 17.50 (Vernon Supp. 1984) provides that a consumer may maintain a cause of action when any of the specified events under that section causes actual damage. \textit{TEX. BUS. \& COM. CODE ANN.} § 17.42 (Vernon Supp. 1984) provides that any waiver of the provisions of the Texas Deceptive Trade
DPTA waiver provision would abrogate section 2 of the FAA\(^{708}\) and violate the supremacy clause.\(^{710}\) Second, Commerce Park challenged the district court's conclusion that the dispute was arbitrable. The court also rejected this claim, holding that since arbitrability of claims is decided on the basis of the contract and the arbitration clause in this case was broad enough to cover the claims, the district court was correct in its determination.\(^{711}\) Finally, the court rejected Commerce Park's argument that the non-arbitrable and arbitrable claims were so "intertwined" that no issue should be resolved through arbitration. The court noted that the "intertwining doctrine" is a narrow exception to the "otherwise strictly-construed mandate of section 3" of the FAA.\(^{712}\) This exception is properly applied only where an action states claims both under state and federal law, and the federal action is not subject to arbitration. In such situations, the competing federal policies of encouraging arbitration and exclusive subject-matter jurisdiction "are resolved in favor of litigation."\(^{713}\) Commerce Park argued that the Texas DTPA no-waiver provision was analogous to the federal laws which preempt arbitration. The court held, however, that in this case of actual conflict between state and federal regulations, where compliance with both was a physical impossibility, federal preemption by section 3 of the FAA was automatic.\(^{714}\)

In *Towers, Perrin, Forster & Crosby, Inc. v. Brown*,\(^{715}\) the court held that if a party seeks arbitration under a state arbitration act and does not assert its rights under the FAA, the state court decision denying arbitration will be given res judicata effect. Plaintiffs sought a declaratory judgment in California state court that certain terms of a shareholder agreement were unenforceable. The defendant filed a petition to compel arbitration pursuant to California's arbitration act.\(^{716}\) The state court denied the petition and the defendant ap-

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Practices-Consumer Protection Act is against public policy and void. Thus, an arbitration clause precluding litigation of the DTPA claims was void as against public policy. 709. 9 U.S.C. § 2 (1982), which provides in pertinent part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.  


710. 729 F.2d at 338.  
711. *Id.* at 338-39.  
712. *Id.* at 339. 9 U.S.C. § 3 (1982) provides that, on the application of one of the parties, the court shall stay the trial until the arbitrable issue is arbitrated.  
713. 729 F.2d at 339.  
714. *Id.* at 339-40.  
715. 732 F.2d 345 (3d Cir. 1984).  
716. *Id.* at 353. See also *CAL. CIV. PROC. CODE* § 1280 (West 1982).
pealed. While the appeal was pending, the defendant filed a petition in federal district court to compel arbitration pursuant to the FAA and to stay the California proceeding. Before the district court reached a decision, the California Court of Appeals affirmed the state court decision on the ground that the California Labor Code prohibited arbitration of disputes involving employee compensation. The district court then granted the petition to compel arbitration and stay the state proceedings.717

On appeal, the United States Court of Appeals for the Third Circuit ruled that the California decision would be given res judicata effect in California and must be given the same effect in the federal district court under the full faith and credit clause.718 In reaching this decision, the Third Circuit stated that the California decision was incorrect because under Southland, the FAA applied and the federal right to arbitration was superior to the state right created under the California Labor Code. The court reasoned, however, that the failure to apply federal law was an error of law719 and did not affect the res judicata effect of the decision.720 The court also rejected the defendant's argument that the California decision violated the supremacy clause. The court distinguished Southland from the case at bar, since the defendant had never asserted its rights under the FAA. The decision did not violate the supremacy clause since it only addressed the issue of the federal right to arbitration versus the state right to a judicial forum. The court pointed out that the defendant could have asserted its rights under the FAA in the state court.721 The FAA will preempt a state act as to the enforceability of an arbitration agreement, but the party seeking to compel arbitration must assert its rights under the federal act.

In Speck v. Oppenheimer & Co.,722 the court compelled arbitration under a contract involving interstate commerce, even though the dispute would not have been arbitrable under state law.723 The plaintiff brought suit against the defendant brokerage house in six counts. Two counts were based on federal securities law, while the other four counts were based on state statutory and common law. The defendant moved to compel arbitration of the non-federal claims and to stay arbitration of those claims pending resolution of the federal claims.724 In granting the defendant's motion, the court rejected the plaintiff's argument that Missouri law ought to control since the claims were based on state statutory and common law. The plaintiff relied on case law and Missouri Revised Statute sections 435.010 and 435.460 for the proposition that Mis-

717. 732 F.2d at 347.
718. Id. at 350.
719. Id. at 348.
720. Id. at 351.
721. Id.
723. Id. at 328.
724. Id. at 326-27.
souri courts would not enforce the arbitration agreement. The court, however, stated that Missouri law was not applicable regardless of whether Missouri would allow arbitration. The court relied on *Moses H. Cone Memorial Hospital v. Mercury Construction Co.* as authority for two propositions. First, section 2 of the FAA creates a "body of federal law" that applies to any contract involving interstate commerce. Second, the FAA policy favoring arbitration takes priority over "state substantive or procedural policies to the contrary."

In *Garmo v. Dean, Witter, Reynolds, Inc.*, the court followed *Southland*, holding that arbitration clauses in brokerage agreements must be enforced pursuant to the FAA. Customers brought suit against their securities broker, alleging violations of the Consumer Protection Act, Securities Act, and various common law causes of action. The customers had previously signed an agreement to settle any contract disputes by arbitration. The trial court ruled that the customers' common law claims were subject to arbitration under the agreement, but their Consumer Protection and Securities Act claims were subject to judicial determination. The Supreme Court of Washington reversed the lower court and held that the FAA mandates that all claims, both statutory and non-statutory, be settled by arbitration in accordance with the brokerage agreement.

In *Xaphes v. Mowry* the court held that it was not obligated to apply a federal court jurisdictional rule merely because a stay of proceedings was filed pursuant to the FAA. A customer sued two stock brokerage firms alleging breach of contract, breach of fiduciary duties, fraud and negligence in the management of his securities portfolio. The defendants' motion for a stay of proceedings pending arbitration was granted and plaintiff sought an interlocu-

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725. *Id.* at 328 n. 3.
726. *Id.* at 328.
728. 583 F. Supp. at 328. The court indicated that the FAA controlled regardless of whether Missouri would enforce the arbitration agreement under the UAA. However, the court's analysis was limited and it did not discuss the effect of the *Southland* decision.
730. *Id.* at ____, 681 P.2d at 255.
731. *Id.* at ____, 681 P.2d at 253.
732. *Id.* Two of the five plaintiffs signed a "customer's agreement" containing an arbitration clause. The arbitration clause had no effect on the remaining plaintiffs.
733. *Id.* at ____ , 681 P.2d at 254.
734. *Id.* at ____ , 681 P.2d at 255.
735. 478 A.2d 299 (Me. 1984).
736. Under the federal rules, "a stay of proceedings involving an action at law is analogous to an injunction, and an injunction is appealable in the federal courts pursuant to 28 U.S.C. § 1292(a)(1)." *Id.* at 301.
737. *Id.* at 300.
tory appeal from that order. The court denied the appeal saying "[a]lthough the issue of arbitrability involves substantive federal law . . . the question of appealability depends on this Court's interpretation of state procedural requirements."738

As a result of Southland, most state statutes which limit the enforceability of arbitration clauses are invalid. Thus, courts, in following Southland, consistently hold that arbitration agreements are enforceable under the FAA, notwithstanding state law to the contrary. The UAA, however, does not conflict with the FAA with regard to the enforceability of arbitration agreements. The procedural provisions of the UAA should remain applicable in actions brought in state courts, regardless of whether the FAA was utilized to enforce the arbitration agreement.

738. Id. at 301.