Uniform Arbitration Act, The

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RECENT DEVELOPMENTS: THE UNIFORM ARBITRATION ACT*

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* This project was written and prepared by Missouri Law Review* Candidates under the direction of Associate Editor in Chief Deanna A. Burns.
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In 1955, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Arbitration Act (U.A.A.). Since that time, approximately half of the states have enacted statutes modeled after it. Arbitration today is becoming more and more popular as a form of dispute resolution, and thousands of cases are decided by arbitrators every year under the U.A.A. This survey is intended to collect and present recent decisions as a general guide to various problems that arise under the U.A.A.

I. VARIATIONS ON THE U.A.A.

The provisions of the U.A.A., while similar in most of the adopting jurisdictions, are not identical. There are variations in subject matter coverage and procedures. In late 1980, both Missouri and Pennsylvania adopted statutes that generally conform to the U.A.A. but contain variations that alter its scope and application.


2. Jurisdictions that have adopted the U.A.A. include Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, and Wyoming.

3. There are several reasons for the popularity of arbitration over normal judicial remedies, as a president of the American Arbitration Association (AAA) points out:

   Business firms prefer to have their disagreements decided by people who are experts. Arbitrators, unlike judges, can be chosen for their business experience. AAA panels include engineers, business consultants, and many other specialized experts, as well as attorneys.

   The simplicity of arbitration is also an inducement. No company wants to have its funds tied up for long periods. The arbitration process can move promptly, which is especially important in disputes between builders and contractors over performance payments or between business partners who cannot agree about the division of assets.

   Arbitration takes place in a private, informal atmosphere, one where business people feel comfortable. And there is less chance that trade secrets will be disclosed to competitors or that a firm's reputation will be placed in jeopardy. In arbitration, confidentiality is honored.

   Because the award is not subject to appeal, the arbitration process results in a final and binding decision. Many parties prefer that finality, rather than facing the prospect of extended appellate litigation. Again, most Americans want to stay out of court.

R. Coulson, Business Arbitration—What You Need to Know 7 (1980).

A. Missouri

In August 1980, Missouri’s version of the U.A.A. became effective. The language of the Missouri statute closely follows that of the uniform act, differing in only three aspects. The Missouri act (1) requires a boldface notice provision in the contract for an arbitration agreement to be enforceable, (2) restricts the application of the statute, and (3) fails to expressly repeal prior Missouri law that is inconsistent with the new statute.

An arbitration agreement is a voluntary agreement between two parties to a contract, who agree to forego the use of the judiciary to resolve disputes that may arise in the future. In adopting the new statute, the Missouri legislature was apparently concerned with protecting the volitional nature of arbitration agreements by requiring a boldface statement, above or adjacent to the space provided for signatures, which reads, "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES." Without this statement, an arbitration agreement subject to the provisions of the statute will not be enforced. There is no similar provision in the U.A.A.

Section 435.350 of the Missouri act limits the types of contracts subject to the statute. The U.A.A. has no corresponding provision. Contracts containing arbitration agreements generally are valid and enforceable in Missouri, “except contracts of insurance and contracts of adhesion,” but this exception does not include contracts that warrant against defects in construction. The policy behind the exception appears to be similar to that behind the section 435.460 notice provision—protecting the volitional nature of arbitration agreements. Adhesion contracts and insurance contracts are similar in that both are form contracts with standardized clauses. In both, the consumer has little or no choice due to the standardized terms offered by all competitors. This lack of consumer choice negates

6. Id. § 435.460.
7. Id. § 435.350.
11. Id.
12. Id. § 435.350.
13. Id.
the voluntary nature of arbitration agreements.\textsuperscript{16} 

Section 435.465\textsuperscript{17} provides that the statute applies only to "written agreements between commercial persons, or between such persons and those with whom they contract other than commercial persons," involving the submission of an existing controversy between the parties, or one arising thereafter, to arbitration. "Commercial persons" are "all persons and legal entities, excluding any government or governmental subdivision or agency."\textsuperscript{18} The Missouri statute does not contain the last sentence of section 1 of the U.A.A.: "This act also applies to arbitration agreements between employers and employees or between their respective representatives . . . ."\textsuperscript{19} 

On its face, the statute appears to exclude governmental units from coverage.\textsuperscript{20} But the statute applies to written contracts between commercial persons "and those with whom they contract other than commercial persons."\textsuperscript{21} Since "commercial persons" is a catch-all category, excluding only governmental units, the statute specifically applies when only one party is a governmental unit. Thus it only excludes agreements when both parties are governmental units.\textsuperscript{22} It is unclear whether the statute applies to employment contracts containing arbitration agreements between individual employees and governmental units.\textsuperscript{23} The Missouri statute does not specifically exclude such agreements, and a strong argument can be made that it applies to the extent that these agreements are not preempted by or inconsistent with state or federal law.\textsuperscript{24} 

The Missouri statute is also limited by section 435.445 to agreements made after the effective date of the act, August 13, 1980.\textsuperscript{25} Unlike the U.A.A.,\textsuperscript{26} the Missouri statute contains no provision repealing the prior arbitration laws contained in sections 435.010 to 435.280,\textsuperscript{27} although several provisions are inconsistent with the new statute.\textsuperscript{28} Section 435.010, for example, provides that an arbitration agreement is not a bar to suit,\textsuperscript{29} while the new statute provides that arbitration agreements are valid and enforceable and that any judicial action shall be stayed if an order or an applica-

\textsuperscript{16} Comment, supra note 14, at 636.
\textsuperscript{18} Id.
\textsuperscript{19} U.A.A. § 1 (1955).
\textsuperscript{20} Cronan, supra note 8, at 262.
\textsuperscript{22} Cronan, supra note 8, at 262.
\textsuperscript{23} Id.
\textsuperscript{24} Comment, supra note 14, at 629.
\textsuperscript{26} See U.A.A. § 24 (1955).
\textsuperscript{27} Mo. Rev. Stat. §§ 435.010-.280 (1978).
\textsuperscript{28} Comment, supra note 14, at 628.
\textsuperscript{29} Mo. Rev. Stat. § 435.010 (1978).
tion for arbitration has been entered or made.\textsuperscript{30} In addition, section 435.350 of the new statute states that it applies to written agreements to submit existing controversies or those arising thereafter to arbitration,\textsuperscript{31} while section 435.020 of the old statute only applies to existing controvers-
ies.\textsuperscript{32} If conflicts between the two statutes arise, the Missouri courts may find an implied repeal of the old law.\textsuperscript{33}

B. Pennsylvania

Pennsylvania's new arbitration statute\textsuperscript{34} became effective on December 4, 1980. While Missouri's new arbitration statute generally conforms to the U.A.A., Pennsylvania's is very different. In fact, one commentator has noted over one hundred differences between the Pennsylvania statute and the U.A.A.\textsuperscript{35} Most are minor, but others result in significant changes in the scope and application of the statute.

Twelve of the twenty sections in the Pennsylvania statute contain only minor wording changes, apparently for clarification.\textsuperscript{36} For example, headings for each sub-paragraph have been added where none existed in the U.A.A. In other cases, some words are deleted and others added to make the statute more organized and easier to read.\textsuperscript{37}

Six subsections of the Pennsylvania statute contain substantive variations.\textsuperscript{38} Section 7307(a)(1) provides that notice of the hearing must be served on all parties at least ten days before the hearing,\textsuperscript{39} while section 5 of the U.A.A. requires only five days' notice.\textsuperscript{40} Section 7309(c),\textsuperscript{41} unlike section 7 of the U.A.A.,\textsuperscript{42} expressly gives arbitrators the power to administer oaths. Section 7311(b) allows a party only ten days after delivery of the award to apply for a change of award,\textsuperscript{43} as contrasted with the twenty days allowed by section 9 of the U.A.A.\textsuperscript{44} Section 7314(a) omits the language of section 12(a) of the U.A.A. that provides for an award to be vacated if pro-

\begin{thebibliography}{99}
\bibitem{30} Id. § 435.355 (Cum. Supp. 1982); Cronan, \textit{supra} note 8, at 260.
\bibitem{32} Id. § 435.020 (1978).
\bibitem{33} Cronan, \textit{supra} note 8, at 260.
\bibitem{36} Id.
\bibitem{38} Sherman, \textit{supra} note 35, at 369.
\bibitem{40} U.A.A. § 5 (1955).
\bibitem{42} U.A.A. § 7 (1955).
\bibitem{44} U.A.A. § 9 (1955).
\end{thebibliography}
cured by fraud, corruption, or other undue means.\textsuperscript{45} Section 7214(b) changes the time limit for an application to vacate an award to thirty days from the ninety days under the U.A.A.\textsuperscript{46} Section 7315(a) changes from ninety to thirty days the time to apply for modification or correction of an award by the court.\textsuperscript{47} Finally, section 7317 provides that an application to the court shall be by petition rather than by motion as provided in section 16 of the U.A.A.\textsuperscript{48}

While the U.A.A. has twenty-five sections, Pennsylvania's statute has twenty. Pennsylvania omitted section 15 of the U.A.A., concerning judgment roll and docketing, apparently because the legislature deemed it unnecessary.\textsuperscript{49} Section 20 of the U.A.A., which provides that the act will not be applied retroactively,\textsuperscript{50} was omitted; another provision not contained in the arbitration statute itself gives the Pennsylvania statute retroactive effect in some circumstances.\textsuperscript{51} Section 21 of the U.A.A., dealing with uniformity of interpretation, was omitted,\textsuperscript{52} apparently because of the many differences between Pennsylvania's statute and the uniform act.\textsuperscript{53} Section 22 of the U.A.A., dealing with the constitutionality and severability of provisions,\textsuperscript{54} was omitted because the issue is already covered by Pennsylvania's Statutory Construction Act.\textsuperscript{55} Section 24 of the U.A.A., repealing prior inconsistent legislation,\textsuperscript{56} was also omitted although many Pennsylvania provisions are inconsistent with the new statute.\textsuperscript{57} Finally, section 25 of the U.A.A., dealing with its effective date,\textsuperscript{58} was omitted.

While most of Pennsylvania's variations are relatively minor, section 7302,\textsuperscript{59} dealing with the scope of the statute, differs significantly from the U.A.A. Section 7302 takes the place of the last sentence of section 1 of the U.A.A., which states that the act "applies to arbitration agreements between employers and employees or between their respective representa-

\textsuperscript{45} 42 PA. CONS. STAT. ANN. § 7314(a) (Purdon Supp. 1981); U.A.A. § 12(a) (1955).
\textsuperscript{46} 42 PA. CONS. STAT. ANN. § 7314(b) (Purdon Supp. 1981); U.A.A. § 12(b) (1955).
\textsuperscript{49} U.A.A. § 15 (1955); Sherman, supra note 35, at 370.
\textsuperscript{50} U.A.A. § 20 (1955).
\textsuperscript{52} U.A.A. § 21 (1955).
\textsuperscript{53} Sherman, supra note 35, at 371.
\textsuperscript{54} U.A.A. § 22 (1955).
\textsuperscript{56} U.A.A. § 24 (1955).
\textsuperscript{57} Sherman, supra note 35, at 372.
\textsuperscript{58} U.A.A. § 25 (1955).
tives.\textsuperscript{60} Section 7302(b) states that the statute shall apply to collective bargaining arbitration agreements only where the statute is consistent with any other statute regulating labor-management relations.\textsuperscript{61} Most collective bargaining arbitration agreements in the private sector are governed by the Taft-Hartley Act,\textsuperscript{62} and the state courts must apply federal labor law.\textsuperscript{63} It is unclear whether Pennsylvania cases not governed by the Taft-Hartley Act are governed by the new statute.\textsuperscript{64}

Section 7302(d)(2)\textsuperscript{65} allows a court to modify or correct an award where the award is such that a court could have entered a judgment n.o.v. This provision, however, is in direct conflict with the standards of review handed down by the United States Supreme Court in the Steelworkers Trilogy,\textsuperscript{66} which state that courts should not review the merits of an arbitration award.\textsuperscript{67} The Court felt that the federal policy of settling labor disputes by arbitration would be undermined if state or federal courts were allowed to review the merits of an award.\textsuperscript{68}

When a private person is a party to an arbitration agreement, section 7302(a) states that the agreement must expressly provide in writing that the statute shall apply.\textsuperscript{69} Section 7302(c) states that the same rule applies to written contracts to which a governmental unit is a party.\textsuperscript{70} There is an exception, however, when the "commonwealth government" is a party to an arbitration agreement, in which case the statute governs even without an express statement to that effect in the arbitration agreement.\textsuperscript{71} "Commonwealth government" is defined in the Pennsylvania Judicial Code as a subdivision of a governmental unit; it includes courts and other officers and agencies but excludes political subdivisions.\textsuperscript{72} It seems, therefore, that the general rule of section 7302(a) applies to arbitration agreements to which political subdivisions are parties. But since Pennsylvania's Public Employee Relations Act,\textsuperscript{73} which governs such agreements, is inconsistent with provisions of the new statute, an argument can be made that the statute

\textsuperscript{60} U.A.A. § 1 (1955).
\textsuperscript{61} 42 PA. CONS. STAT. ANN. § 7302(b) (Purdon Supp. 1981).
\textsuperscript{63} Sherman, supra note 35, at 377.
\textsuperscript{64} Id. at 378.
\textsuperscript{65} 42 PA. CONS. STAT. ANN. § 7302(d) (Purdon Supp. 1981).
\textsuperscript{68} Id. at 582.
\textsuperscript{69} 42 PA. CONS. STAT. ANN. § 7302(a) (Purdon Supp. 1981).
\textsuperscript{70} Id. § 7302(c).
\textsuperscript{71} Id.
\textsuperscript{72} Id. § 102. See also Sherman, supra note 35, at 383.
should not apply to agreements where a political subdivision is a party.\textsuperscript{74} It seems clear that Pennsylvania’s new statute will apply to arbitration in commercial and other non-labor agreements. It remains to be seen whether it will apply to collective bargaining agreements to which a political subdivision is a party.

C. Arkansas

Arkansas also recently adopted the U.A.A., amending its prior arbitration statute in 1981 to include the basic provisions of the uniform act.\textsuperscript{75} With minor exceptions, the statute is identical to the U.A.A. The most significant change is found in section 34-511, which corresponds to section 1 of the U.A.A. and provides that the act “shall have no application to personal injury or tort matters, employer-employee disputes, nor to any insured or beneficiary under any insurance policy or annuity contract.”\textsuperscript{76} Arkansas, like Pennsylvania, omitted section 22 of the U.A.A., which deals with the constitutionality and severability of the statute.\textsuperscript{77}

D. Arizona

Arizona’s recently adopted arbitration statute also basically conforms to the U.A.A.\textsuperscript{78} Section 12-1502 omits the last sentence of section 1 of the U.A.A., which states that it “also applies to arbitration agreements between employers and employees or between their respective representatives.”\textsuperscript{79} This sentence has been replaced by section 12-1517, which “has no application to arbitration agreements between employers and employees or their respective representatives.”\textsuperscript{80} Sections 12-1511 and 12-1512 differ slightly from sections 11 and 12 of the U.A.A., which deal with confirming and vacating awards. Section 12-1511 explains how to apply for confirmation of the award—a provision the U.A.A. lacks—and says that opposition to such an application must be filed within twenty days\textsuperscript{81} as opposed to ninety days under the U.A.A.\textsuperscript{82} Section 12-1516 incorporates and greatly simplifies sections 17 and 18 of the U.A.A., which deal with the proper court, jurisdiction, and venue for arbitration agreements.\textsuperscript{83} The most significant change is found in section 12-1518,\textsuperscript{84} which formerly provided for discretionary use

\textsuperscript{74} See Sherman, supra note 35, at 386.


\textsuperscript{76} Id. § 34-511. See U.A.A. § 1 (1955).

\textsuperscript{77} See U.A.A. § 22 (1955); Sherman, supra note 35, at 372.


\textsuperscript{81} Id. § 12-1511.

\textsuperscript{82} U.A.A. § 12 (1955).


of arbitration agreements in certain state government contracts. It was amended in 1982 to include two sections that provide for mandatory use of arbitration agreements in certain situations. Section 12-1518(B) requires the use of arbitration agreements in all contracts that fall under section 12-133, dealing with arbitration of claims in Arizona superior courts. Section 12-1518(C) mandates the use of arbitration agreements by the state government in all public works contracts if the amount in controversy is less than $100,000. There are no comparable provisions in the U.A.A.

II. VALIDITY OF AN ARBITRATION AGREEMENT

The U.A.A. provides that a written agreement to submit any present or future controversy to arbitration "is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." In adopting the U.A.A., state legislatures have tempered the enthusiasm of this provision. For example, Texas and South Carolina prohibit arbitration of workers' compensation claims. Three states require prominent notice of an arbitration clause's binding effect. Several states forbid arbitration agreements in insurance contracts, and many jurisdictions restrict arbitration agreements between employers and employees.

85. See id. (1979) (amended 1982). Such agreements had to be made at the time of entering into the contract or by subsequent written mutual agreement if prior to the filing of a civil action.
86. Id. § 12-1518 (1982).
87. Id. § 12-1518(B).
88. Id. § 12-133.
89. Id. § 12-1518(C).
90. U.A.A. § 1 (1955) provides:
A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration between employers and employees or between their respective representatives [unless otherwise provided in the agreement].
94. ALASKA STAT. § 09.43.010 (1973); ARK. STAT. ANN. § 34-511 (CUM. Supp. 1982); IDAHO CODE § 7-901 (1979); KAN. STAT. ANN. § 5-401 (1975); MICH. COMP. LAWS ANN. § 600.5001(3) (West 1968); N.C. GEN. STAT. § 1-567.2(b)(2) (Supp. 1979); OKLA. STAT. ANN. tit. 15, § 802A (West CUM. Supp. 1982-1983); TEX. REV. CIV. STAT. ANN. art. 224(a) (Vernon CUM. Supp. 1982-1983).
In addition to these statutory idiosyncracies, state courts have employed a variety of policies and preferences in their interpretations of the U.A.A. A survey of recent decisions suggests five considerations affecting the validity of an arbitration agreement: (1) the statute may be narrowly construed to avoid statutory exceptions; (2) the terms of the contract and the conditions surrounding its execution may dictate whether or not a provision is enforceable; (3) one party may be a member of a class that is not included in the statute or which requires special rules; (4) the state may have other public policies outside of the arbitration statute which restrict the ability to use an arbitration clause; and (5) particular state provisions may be superceded in interstate commerce by the Federal Arbitration Act.

A. Narrow Construction of the Statute

The U.A.A.'s provisions are normally construed broadly. Arbitration is looked upon with favor, and arbitration agreements generally are liberally construed with any doubts resolved in favor of arbitration.95

In National Camera, Inc. v. Love,96 the Colorado Court of Appeals considered the meaning of the U.A.A.'s exception to the general validity of arbitration agreements: they are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."97 The court held that a claim of fraud in the inducement to the underlying contract was not grounds for avoiding compulsory arbitration. Rather, it said, only fraud in inducing assent to the arbitration provision itself warrants revocation.98 The court, in keeping with the general policy favoring broad construction, construed the U.A.A.'s exception to arbitrability as narrowly as possible.

B. Terms of the Contract

A second category of cases concerning the validity of agreements involves the analysis of contractual language and relationships. It is apparent from a survey of the cases that the ordinary rules of contract interpretation are generally used in deciding on the validity of a particular provision.99

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98. 644 P.2d at 95. The court noted that the United States Supreme Court had come to the same conclusion in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).
In *State ex rel. Skinner v. Lombard Co.*,\(^{100}\) the Illinois Appellate Court resolved an apparent conflict in a construction contract between an arbitration clause and a reservation of remedies provision. The arbitration section provided that the "agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law," while the remedies provision stated that "the rights and remedies available [under this contract] shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law."\(^{101}\) The court held that the arbitration clause took precedence because of its explicit unequivocal language.\(^{102}\)

In *Skinner*, the petitioner raised an additional claim that the right to compel arbitration terminated upon completion of the work. The petitioner relied on a subsection of the arbitration agreement that stated, "The contractor shall carry on the Work and maintain the progress schedule during any arbitration proceedings."\(^{103}\) The court rejected this interpretation, finding that the provision was consistent with an intent to arbitrate disputes arising after completion.\(^{104}\)

In *Jaffa v. Shacket*,\(^{105}\) the Michigan Court of Appeals enforced an unusual agreement in accord with the manifest intent of the parties. In *Jaffa*, feuding partners executed an arbitration agreement after one partner filed a lawsuit alleging breach of fiduciary duty. The agreement gave the sole arbitrator all powers of a Michigan circuit judge and directed him to follow the substantive, procedural, and evidentiary law of Michigan.\(^{106}\) Another clause provided for expanded appellate review of the arbitrator's findings of fact and conclusions of law.\(^{107}\) The court honored the agreement as drafted, with one exception. It refused to review the arbitrator's findings of fact, explaining that a private agreement affects only the powers of the arbitrator, not those of a court of law.\(^{108}\) Because the arbitrator was constrained to apply Michigan law, his conclusions of law were reviewable. The arbitrator's findings of fact, like those of a circuit judge, were treated as final unless clearly erroneous. To hold otherwise, said the court, would result in an impermissible expansion of the appellate court's power.\(^{109}\)

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101. *Id.* at —, 436 N.E.2d at 567.

102. *Id.* at —, 436 N.E.2d at 568.

103. *Id.*

104. *Id.*


106. *Id.* at 633, 319 N.W.2d at 606.

107. *Id.* at 634, 319 N.W.2d at 607.

108. *Id.* at 635, 319 N.W.2d at 607.

109. *Id.*
Kessler, Merci & Lochner, Inc. v. Pioneer Bank & Trust Co. also involved analysis of contract terms but focused on the relationship of the parties rather than the language of the agreement. The issue was whether four beneficiaries of a land trust were bound by the arbitration agreement in an architectural services contract executed by their trustee. One of the beneficiaries had negotiated the contract. Three of the four had directed the trustee to sign it. The trustee stated in the contract that all representations were those of the beneficiaries only. The respondent brought an action against the trustee and the beneficiaries to compel arbitration. The Illinois Appellate Court held that the beneficiaries had exercised sufficient control to make the trustee their agent and were bound by the arbitration clause. In parallel litigation, the court also compelled arbitration of the beneficiaries’ counterclaim against the respondent. The court pointed out that “third-party beneficiaries of a contract have no greater rights than the party they wish to claim under.”

In Southern Spindle & Flyer Co. v. Miliken & Co., the North Carolina Court of Appeals considered whether an arbitration agreement existed between parties who had an oral contract under which the plaintiff was to provide rigging, loading, and transportation services to the defendant. After the plaintiff had substantially performed its services, it received an unsolicited purchase order from the defendant. The plaintiff acknowledged receipt of the document by letter and returned it to the defendant. The plaintiff's president testified that he did not intend to agree to any of the conditions in the purchase order. When sued for unpaid services, the defendant moved to stay the action and compel arbitration, arguing that a clause in the purchase order required arbitration. The plaintiff replied that it had never agreed to the terms of the purchase order. The court held that there was no agreement to arbitrate. It noted that “general contract law governs the issue of the existence” of an arbitration agreement and that “mere acknowledgement of receipt of the purchase order form did not constitute assent to its terms.”

111. Id. at 503, 428 N.E.2d at 609.
112. Id. at 504, 428 N.E.2d at 610.
113. Id. at 506, 428 N.E.2d at 611.
114. Id. at 508, 428 N.E.2d at 613.
116. Id. at 787, 281 S.E.2d at 736.
117. Id. The clause required any controversy regarding the contract to be settled by arbitration. The agreement was within the ambit of North Carolina's arbitration statute. See N.C. Gen. Stat. § 1-567 (Supp. 1979).
118. 53 N.C. App. at 788, 281 S.E.2d at 736. In finding that a contract did not exist, the court affirmed the denial of the defendant’s motion to stay the action and compel arbitration. Id.
C. Protected Classes

The third consideration affecting the validity of an arbitration agreement is whether one of the parties is a member of a protected class against whom the agreement is not enforceable. While the majority of these classes are specifically recognized in the various states' versions of the U.A.A., some have been identified only by the courts.120

1. Medical Patients

One such class may consist of medical patients who have agreed to submit malpractice claims to arbitration.121 Various panels of the Michigan Court of Appeals have disagreed on the constitutionality of the Michigan Medical Malpractice Arbitration Act.122 In Jackson v. Detroit Memorial Hospital,123 the court held that the Act violated the patient-plaintiff's right to a fair and impartial hearing by requiring that at least one member of the arbitration panel be a physician or hospital administrator.124 A contrary decision was rendered in Cushman v. Frankel,125 where the court expressed concern regarding the composition of the arbitration panel but deferred to the legislature and approved the provision.126

A third appellate panel never reached the due process issue. In Moore v. Fragatos,127 the court found that the patient did not waive his constitutional right of access to the courts by signing the arbitration agreement.128 The petitioner had signed the agreement when he was admitted to the hospital for surgery. The court held that the petitioner's assent to that provision was not a knowing, intelligent, and voluntary waiver of his fundamental right to court access.129 The court reasoned that if a criminal defendant must knowingly, intelligently, and voluntarily waive his constitutional rights, then "honest, law-abiding citizens should . . . be entitled to similar protections."130

In its decision, the Moore panel stressed the fragile psychological condition of medical patients and the disparity of bargaining power between pa-

119. See notes 91-94 and accompanying text supra.
121. For a discussion of medical malpractice arbitration, see part XV infra.
124. Id. at 205, 312 N.W.2d at 213.
126. Id. at 611, 314 N.W.2d at 708.
128. Id. at 188, 321 N.W.2d at 785.
129. Id. at 186-90, 321 N.W.2d at 785-91.
130. Id. at 186, 321 N.W.2d at 785.
patients and health care providers. The court announced a mandatory eight-step procedure for informing the patient of his options. The health care provider must show by clear and convincing evidence that the patient was so informed and that he understood this information. The health care provider also must establish by a preponderance of the evidence that the agreement was signed voluntarily.

This approach could incapacitate the Michigan Medical Malpractice Arbitration Act just as effectively as if the court declared it unconstitutional. It requires special rules for arbitration agreements that are otherwise enforceable. Moore illustrates the potential hostility of a court reviewing an arbitration agreement outside the sphere of business transactions.

2. Governmental Bodies

Another class—governmental bodies—was involved in Evans Electrical Construction Co. v. University of Kansas Medical Center, where the plaintiff tried to persuade the Kansas Supreme Court that arbitration agreements with governmental bodies are unenforceable. The plaintiff was a contractor hired by the Medical Center, a state institution. The work was done under a contract which provided that, unless mutually agreed, all disputes regarding the contract were to be settled by arbitration. After a dispute arose, the parties went to arbitration where the plaintiff lost. It subsequently filed suit to vacate the award, arguing that an arbitration agreement with a governmental body was unenforceable. The court held that an agreement existed between the parties and that the arbitration provision was valid. The court found "no legal reason why the state agencies in this case could not enter into a valid agreement for arbitration as a part of the construction contract." It noted that the Kansas version of the U.A.A. only provides two exceptions to the statute: insurance contracts and contracts between employers and employees or their representatives. By listing these exceptions, said the court, the legislature "did not deem it desirable to exempt the State and its political subdivisions from the statute."

131. Id. at 195-96 n.20, 321 N.W.2d at 789-90 n.20.
132. Id. at 199, 321 N.W.2d at 793.
133. Id.
136. 230 Kan. at 299-300, 634 P.2d at 1082.
137. Id. at 302, 634 P.2d at 1083.
138. Id. at 303, 634 P.2d at 1084.
139. KAN. STAT. ANN. § 5-401 (1975).
140. 230 Kan. at 303, 634 P.2d at 1084. The court acknowledged that the result might be different under current law. In 1979, the Kansas legislature passed a statute that prohibited arbitration clauses from being included in standard contracts.
A fourth consideration is that an otherwise valid arbitration agreement may be rendered unenforceable by a court’s policy favoring the litigation of certain statutory causes of action. In *State ex rel. Geil v. Corcoran*,¹⁴¹ customers contracted with a brokerage firm for the sale of securities. An arbitration agreement was included in the contract, which also provided that New York law would govern its enforcement. The customers filed a complaint against the brokerage house alleging a violation of the Missouri Blue Sky Law.¹⁴² The brokerage house moved to stay the proceedings and compel arbitration.¹⁴³

The Missouri Court of Appeals declared the arbitration agreement void. The court disregarded the contractual choice of New York law, explaining that “Missouri has a very strong policy in favor of providing a judicial forum for the claims of investors under the blue-sky laws.”¹⁴⁴ The court pointed out the relevant section of the blue sky statute: “[A]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this act . . . is void.”¹⁴⁵ Although the contract in *Geil* was executed prior to the enactment of Missouri’s arbitration statute, the court clearly signalled that its decision would be the same under the new act.¹⁴⁶

Identical results were reached in *Sandefer v. Reynolds Securities, Inc.*,¹⁴⁷ a Colorado case, and *Kiehne v. Purdy*,¹⁴⁸ a Minnesota case, both of which also involved state blue sky laws. Significantly, both the *Geil* and *Sandefer* courts relied on *Wilko v. Swan*,¹⁴⁹ in which the United States Supreme Court announced that a similar provision of the Securities Act of 1933renders compulsory customer-broker arbitration agreements invalid.¹⁵⁰

E. Federal Arbitration Act

The fifth and final consideration is the possibility that an agreement unenforceable under state law may be revived under the Federal Arbitration Act.¹⁵² The federal statute, in much the same language as the U.A.A.,

¹⁴¹ 623 S.W.2d 557 (Mo. App., E.D. 1981).
¹⁴² 623 S.W.2d 558.
¹⁴³ Id. at 559.
¹⁴⁴ Id. at 559.
¹⁴⁶ 623 S.W.2d at 559.
¹⁴⁸ 309 N.W.2d 60, 62 (Minn. 1981).
¹⁵¹ 346 U.S. at 438.
states that an arbitration agreement in any contract involving interstate commerce is "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."\textsuperscript{153}

The federal act usually must be applied in state courts as well as federal courts when the dispute involves a transaction in interstate commerce or maritime matters regardless of the forum in which it is brought.\textsuperscript{154} When the agreement does not involve interstate commerce or maritime transactions, its enforceability depends on state arbitration law, regardless of the forum.\textsuperscript{155} The phrase "involving interstate commerce" in the context of the Federal Arbitration Act relates not only to interstate shipments of goods but also to contracts with substantial interstate elements.\textsuperscript{156} Some courts have required several interstate elements before the federal act applies.\textsuperscript{157} Others look to whether there were substantial interstate elements in the contract itself.\textsuperscript{158}

In Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed,\textsuperscript{159} the Florida District Court of Appeal held that it was bound to apply the Federal Arbitration Act despite the invalidity of the agreement under Florida's version of the U.A.A.\textsuperscript{160} Melamed arose out of a cash management contract between the plaintiff and Merrill Lynch. The contract required the parties to submit all disputes to arbitration and also incorporated New York law. The plaintiff sued, and Merrill Lynch responded by moving to compel arbitration pursuant to the federal statute. The trial court denied the motion, relying on a non-uniform Florida provision that withholds enforcement from agreements that incorporate the law of foreign states.\textsuperscript{161} The appellate court reversed. The agreement involved interstate commerce, said the court, and so the federal act applied since it "is a national substantive law that supplants inconsistent state laws."\textsuperscript{162}

The significance of Melamed is increased by consideration of other con-

\textsuperscript{153} Id. § 2. See U.A.A. § 1 (1955).
\textsuperscript{157} See, e.g., Metro Indus. Painting Corp. v. Terminal Construction Co., 287 F.2d 382, 384 (2d Cir. 1961).
\textsuperscript{158} See, e.g., Burke County Public Schools v. Shaver Partnership, 303 N.C. 408, 413, 279 S.E.2d 816, 822 (1981).
\textsuperscript{159} 405 So. 2d 790 (Fla. Dist. Ct. App. 1981).
\textsuperscript{160} FLA. STAT. ANN. §§ 682.01-.22 (West Cum. Supp. 1983).
\textsuperscript{161} 405 So. 2d at 791. See FLA. STAT. ANN. § 682.02 (West Cum. Supp. 1983).
\textsuperscript{162} 405 So. 2d at 793. The court noted that unfair forum shopping would re-
tracts which might fall under the broad rubric of interstate commerce. Under the supercession doctrine, arbitration may be compelled despite a prohibitive state statute.

F. Summary

From this review of recent case law, it is apparent that the effect of the U.A.A. is to enhance the presumptive validity of arbitration agreements. The numerous exceptions to this basic policy, however, are still taking shape today, and it is difficult to predict what other judicially engrained exceptions to validity will be developed.

III. Waiver

There are no "bright line" rules as to when or how a party waives its right to arbitration. The right to arbitration is a contractual right and as such may be waived expressly or impliedly.163 In Brennan v. Kenwick,164 the Illinois Appellate Court noted that waiver is generally found when a party's conduct has been inconsistent with the arbitration clause, indicating that the right to arbitration has been abandoned.165 A party's conduct can also amount to waiver when, as the Florida District Court of Appeal found in Marthame Sanders & Co. v. 400 West Madison Corp.,166 he acknowledges the existence of an arbitration agreement while submitting arbitrable issues to a court of law.167 A lawsuit to enforce a contract usually amounts to a waiver of the plaintiff's right to arbitration.168 At what point the proceeding constitutes a waiver, however, is arguable. In Balboa Insurance Co. v. W.G. Mills, Inc.,169 the Florida District Court of Appeal noted that answering a complaint, filing reciprocal cross-claims, instituting legal action, and even pre-suit statements constituted conduct inconsistent with the right to arbitration.170

A. Dilatory Conduct

According to the New Mexico Supreme Court in Wood v. Millers Na-

165. Id. at 1042, 425 N.E.2d at 441.
167. Id. at 1145.
170. Id. at 150.


tional Insurance Co.,\textsuperscript{171} dilatory conduct by the party seeking arbitration, unaccompnained by prejudice to the opposing party, does not amount to waiver. An agreement may contain clauses that require the demand for arbitration to be made within a reasonable time, but the parties are not the ones who will determine whether the delay was reasonable. In \textit{Rinker Portland Cement Co. v. Seidel},\textsuperscript{172} the Florida District Court of Appeal held that the issue is to be resolved by the arbitrator or the trier of fact.\textsuperscript{173} While delay accompanied by participation in litigation or other specific conduct may lead to the conclusion that the right to arbitration has been waived, courts have been reluctant to deny a motion to compel arbitration \textit{solely} on the basis of a lapse of time.\textsuperscript{174} In \textit{Rolls v. Bliss & Nyitray, Inc.},\textsuperscript{175} the Florida District Court of Appeal held that the passage of eight months from the filing of a complaint before the responding party sought to compel arbitration, in combination with active participation in discovery and the filing of a counterclaim, did not constitute a waiver.\textsuperscript{176}

\hspace{1em} \textbf{B. Participating in the Judicial Process}

When discovery is had and the dispute docketed during the period prior to seeking arbitration, courts have been willing to find conduct inconsistent with the exercise of the right to arbitration and therefore have found waivers. Filing any motion in response to a complaint apparently affects the party's right to later seek arbitration—the type of response involved is the determinative factor.\textsuperscript{177} A pleading short of an answer does not appear to amount to a waiver.\textsuperscript{178} A motion for a change of venue, as an initial response to a complaint for breach of contract, may not waive the right to arbitration.\textsuperscript{179}

\hspace{1em} \textbf{1. Motions to Dismiss}

An inartfully drawn motion to dismiss can amount to inconsistent conduct which a court can use to find a waiver. According to \textit{Rinker Portland Cement Co. v. Seidel}.

\begin{itemize}
  \item \textsuperscript{171} 96 N.M. 525, 527, 632 P.2d 1163, 1165 (1981).
  \item \textsuperscript{172} 414 So. 2d 629 (Fla. Dist. Ct. App. 1982).
  \item \textsuperscript{173} \textit{Id.} at 630.
  \item \textsuperscript{174} \textit{See}, \textit{e.g.}, Brennan v. Kenwick, 97 Ill. App. 3d 1040, 1043, 425 N.E.2d 439, 442 (1981).
  \item \textsuperscript{175} 408 So. 2d 229 (Fla. Dist. Ct. App. 1982).
  \item \textsuperscript{176} \textit{Id.} at 238.
  \item \textsuperscript{179} \textit{Id.} at 1043, 425 N.E.2d at 441.
\end{itemize}
Cement, a motion to dismiss based on a contractual right to arbitration may not require an additional motion to compel arbitration in order to avoid a waiver since a motion drawn in this fashion is an assertion of the right to arbitration.\textsuperscript{180} The filing of a proof of claim in a bankruptcy proceeding, for example, joined by a motion to dismiss on the ground that the claim is subject to arbitration does not waive the right to arbitration.\textsuperscript{181}

In Balboa Insurance Co. v. W.C. Mills, Inc.,\textsuperscript{182} the Florida District Court of Appeal held that the words “Motion to Compel Arbitration” need not appear in the caption of the response in order to avoid waiver.\textsuperscript{183} If a motion to dismiss questions the court’s jurisdiction by raising the existence of the arbitration agreement in any way, waiver will not be found.\textsuperscript{184} Balboa Insurance recognizes the coupling of a motion to dismiss with a motion to compel arbitration as proper.\textsuperscript{185} A caption on a motion to dismiss lacking the terms “and motion to compel” is not a waiver of the right to arbitration as long as the motion to dismiss (the initial response to the complaint) contains an assertion of the existence of the arbitration agreement.\textsuperscript{186}

In Winter v. Arvida Corp.,\textsuperscript{187} the motion to dismiss, though based on the existence of the arbitration agreement, was not the initial response to the complaint; the Florida District Court of Appeal was more willing to find a waiver in that situation.\textsuperscript{188} When a party has, or reasonably should have, knowledge of the arbitration clause but then files an answer and proceeds with discovery prior to moving for dismissal, a waiver will be found. The Arvida court implied that proceeding with discovery after an initial response in the form of a motion to dismiss would also waive the right to arbitration.\textsuperscript{189}

Any consent to submit the controversy to a court supports a finding of waiver. The extent of the court’s involvement is important. When the “judicial waters” were sufficiently tested prior to a motion to compel arbitration, the New Mexico Supreme Court in Wood was willing to find a waiver.\textsuperscript{190} A motion to dismiss, not asserting the existence of the arbitration agreement, will effectively preclude the later demand to compel arbitration.\textsuperscript{191} But the mere instigation of legal action is not determinative. The


\textsuperscript{181} Id.

\textsuperscript{182} 403 So. 2d 1149 (Fla. Dist. Ct. App. 1982).

\textsuperscript{183} Id. at 1150-51.

\textsuperscript{184} Id. at 1150.

\textsuperscript{185} Id.

\textsuperscript{186} Id. at 1151.


\textsuperscript{188} Id. at 830.

\textsuperscript{189} Id.


\textsuperscript{191} Id., 632 P.2d at 1165-66.
point of no return, according to the Wood court, is when the discretionary power of the court is invoked prior to a demand for arbitration on a question other than the demand for arbitration. If the rule were otherwise, a party could resort to court action until an unfavorable result was reached and then elect to arbitrate. The timing of the motion to dismiss is not determinative. Active participation in litigation before or after the filing is inconsistent with the right to arbitration and will amount to a waiver.

2. Filing an Answer

The filing of an answer is "participation in inconsistent conduct" and usually constitutes waiver. In most instances, a complaint answered without demanding arbitration will constitute a waiver of the right. In Hansen v. Dean Witter Reynolds, Inc., waiver was found in an answer despite the assertion therein of arbitration as an affirmative defense. Although pleading may well be governed by its substance rather than its label or caption, it appears that courts may require stricter compliance when answers, rather than motions to dismiss, are involved.

A well-drawn answer may preserve the right to arbitration, while inadvertent exclusions may result in a waiver. An answer filed with a counterclaim may preserve the right to arbitration, while one merely pleading the arbitration agreement as an affirmative defense may be insufficient. In Kessler, Merci & Lochner, Inc. v. Pioneer Bank & Trust Co., the Illinois Appellate Court held that filing an answer and a counterclaim does not waive a defendant's right to arbitration where the answer sets up the arbitration agreement as an affirmative defense and the counterclaim is in the alternative. The court noted, however, that waiver will be found where the answer fails to assert the right to arbitration.

As noted above, conduct testing the judicial waters or generally associated with participation in litigation will usually result in a waiver of the right to arbitration. The bright line, however dim, appears to be the filing of an answer by a party or his availing himself of the discretionary power of the court. Participation in trial court proceedings such as discovery

192. Id. at 527-28, 632 P.2d at 1165.
198. Id. at 509, 428 N.E.2d at 613.
199. Id. at 508, 428 N.E.2d at 613.
without a prior demand for arbitration constitutes a waiver.\textsuperscript{201}

3. Lack of Knowledge

Filing an answer to a complaint without including a demand for arbitration amounts to abandonment of the right to arbitration and indicates consent to the submission of the controversy to the courts.\textsuperscript{202} The court in\textit{Marthame Sanders} stated that a party will not be allowed to assert that it was unaware of its right to arbitration.\textsuperscript{203} The arbitration provision is incorporated into the contract, so actual or constructive knowledge is assumed.\textsuperscript{204}

C. Other Considerations

1. Partial Waiver

There are other actions, not amounting to a waiver of the right to arbitration, which nonetheless result in similar consequences. In\textit{Ormsbee Development Co. v. Grace},\textsuperscript{205} the United States Court of Appeals for the Tenth Circuit held that failure to originally advance issues to arbitration may foreclose later arbitration of them, consistent with res judicata and principles of finality.\textsuperscript{206} When multiple arbitration requests and hearings are possible, the right to arbitrate issues set forth in subsequent arbitration demands may be waived to the extent that they were not addressed in the course of the first proceeding.\textsuperscript{207}

Limited arbitration on one issue does not waive or exclude judicial hearings on other issues in the same way that a judicial hearing will usually exclude arbitration. A limited arbitration clause does not explicitly bar consideration of questions other than those falling within the limited authority implied or expressed by the agreement.\textsuperscript{208} A party who consents to the inclusion of a limited arbitration clause in a contract does not waive his right to a judicial hearing on the merits of a dispute that is not within the scope of the clause.\textsuperscript{209}

2. Objections to Arbitration Proceedings

As the Illinois Appellate Court explained in\textit{Mid-America Regional Bargaining Association v. Modern Builders Industrial Concrete Co.},\textsuperscript{210} objections to

\begin{itemize}
\item \textsuperscript{201} Marthame Sanders & Co. v. 400 W. Madison Corp., 401 So. 2d 1145, 1145 (Fla. Dist. Ct. App. 1981).
\item \textsuperscript{202} Id. at 1146.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id. at 1145.
\item \textsuperscript{205} 668 F.2d 1140 (10th Cir. 1982).
\item \textsuperscript{206} Id. at 1153.
\item \textsuperscript{207} Id. at 1146-47.
\item \textsuperscript{208} Davis v. Chevy Chase Financial, Ltd., 667 F.2d 160, 165 (D.C. Cir. 1981).
\item \textsuperscript{209} Id.
\item \textsuperscript{210} 101 Ill. App. 3d 83, 427 N.E.2d 1011 (1981).
\end{itemize}
arbitration proceedings must be made within certain statutory limits or be considered waived.211 An objection that the award is invalid because the agreement was invalid must be made within ninety days of the delivery of a copy of the award.212

Denying the existence of the original contract containing the arbitration agreement will be seen as a waiver of the right to arbitration.213 A party impliedly waives its right to arbitration by denying the existence of an agreement or by failing to implement statutory procedures for requiring arbitration prior to a resolution of the dispute.214

3. Waiver of Waiver

The right to waive arbitration proceedings may itself be waived. Just as a delay in asserting the right to arbitration may waive that right, so a delay in asserting the right to waive arbitration may waive that right.215 Once arbitration has begun, the right to waive arbitration is waived. This usually occurs in instances where a plaintiff seeks to arbitrate and the defendant, who prefers to litigate, delays in refusing to arbitrate.216

IV. Arbitrability

Unless prohibited by statute or public policy, practically any dispute may be submitted to arbitration provided the parties have agreed to use arbitration to resolve their controversy and have manifested that intent in a contract or arbitration agreement.217

A. Scope of Contract Language

To resolve many questions of arbitrability, a determination of whether the dispute is within the scope of a contractual arbitration clause or agreement must be made.218 Since the right to arbitrate is governed by contract, parties may fashion any agreement they wish to limit the scope of the arbi-

211. Id. at 87-88, 427 N.E.2d at 1014.
212. Id. at 86, 427 N.E.2d at 1014-15. For a discussion of timeliness under the U.A.A., see Part XII infra.
214. Id. at 1024.
216. Id. at 1143.
tration proceedings. They are not required to arbitrate matters that they did not agree between themselves to arbitrate. Some courts have determined that the parties are only bound to arbitrate the issues which, by clear language, they have agreed to arbitrate; arbitration will not be extended by construction or implication. Other courts have held that agreements should be read as broadly as possible and all doubts should be resolved in favor of arbitrability.

The arbitrability of a given issue is controlled by the language of the arbitration agreement. Michigan courts, in a number of recent cases, have used a three-stage analysis to determine the arbitrability of contractual disputes. In *Middle East Transcontinental, Inc. v. Onion Crock, Inc.*, the plaintiff's claim of fraud in the inducement and breach of contract was dismissed for lack of subject matter jurisdiction because the contract contained an arbitration clause. After finding that the parties' principal contract contained a valid arbitration agreement, the Michigan Court of Appeals remanded for a determination of the arbitrability of the plaintiff's claim. The court stated that before a cause of action can be dismissed for lack of subject matter jurisdiction on the basis that the contract calls for arbitration, the trial court must first find that the claim is in fact arbitrable. The court set forth the three-stage analysis: "(1) whether there exists an arbitration agreement in a contract between the parties; (2) whether the dispute is arguably covered by the contract; and (3) whether the dispute is expressly exempted by the terms of the contract."

Michigan courts also follow the philosophy established by the United States Supreme Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.* when determining whether a dispute under a collective bargaining agreement is arbitrable. While courts are delegated the duty to

225. Id. at 60, 318 N.E.2d at 605.
226. Id.
determine whether a party has breached its promise to arbitrate, *Warrior & Gulf* holds that judicial inquiry must be strictly confined to the question of whether the party agreed to arbitrate the grievance.\(^{229}\) Applying this rule, the Michigan Court of Appeals held in *Southeastern Michigan Transportation Authority v. Amalgamated Transit Union Local 1564*\(^ {230}\) that a dispute under a collective bargaining agreement involving the discharge of probationary employees was nonarbitrable.\(^ {231}\) A clause in the bargaining agreement reserved the power to adjudge and dismiss probationary transit drivers to the employer without interference by the union. The court found that this clause made any dispute involving the dismissal of probationary drivers improper for arbitration. The court stated, however, that arbitration clauses generally are to be construed in favor of covering such disputes unless it can be conclusively demonstrated that a particular dispute was not an intended subject of arbitration.\(^ {232}\)

In *City of Pittsburg v. American Federation of State, County, and Municipal Employees Local No. 2719*,\(^ {233}\) the Pennsylvania Commonwealth Court held that a job qualification and application dispute by a city employee was a proper matter for arbitration under a collective bargaining agreement.\(^ {234}\) The court found that the agreement between the city and the union clearly set forth a procedure for filling vacancies in city jobs. The grievance and arbitration mechanism for resolution of such a dispute was held to be enforceable since the dispute definitely arose out of the terms of the contract.\(^ {235}\)

In *Kelso-Burnett Co. v. Zeus Development Corp.*,\(^ {236}\) the Illinois Appellate Court held that the matter of when an electrical subcontractor was to be paid for electrical work done was an arbitrable dispute arising out of its contract with the general contractor.\(^ {237}\) The contract provided for arbitration of all disputes and claims arising out of or relating to the subcontract agreement. The agreement stated that no payment was due the subcontractor until money was received from the owner and until all unsound, improper, or rejected work had been corrected.\(^ {238}\) The court held that the parties were bound to submit to arbitration only those issues that they had clearly agreed to arbitrate and that such agreements would not be extended by construction or implication.\(^ {239}\) The court went on to say that when a

\(^{229}\) *Id.* at 599.


\(^{231}\) *Id.* at 158, 321 N.W.2d at 878.

\(^{232}\) *Id.*

\(^{233}\) *107 Pa. Commw.* 34, 446 A.2d 1365 (1982).

\(^{234}\) *Id.* at —, 446 A.2d at 1367.

\(^{235}\) *Id.* at —, 446 A.2d at 1368.


\(^{237}\) *Id.* at —, 437 N.E.2d at 27.

\(^{238}\) *Id.* at —, 437 N.E.2d at 31.

\(^{239}\) *Id.* at —, 437 N.E.2d at 30.
party moves to dismiss a suit and compel arbitration, the issue of whether the dispute is within the scope of the arbitration agreement should be determined by judicial guidelines.240

In State ex rel. Skinner v. Lombard Co.,241 another panel of the court considered whether the arbitration clause of a contract for the construction of a community college compelled arbitration of only those disputes arising during actual construction. The contract contained a work stoppage clause requiring the contractor to continue work and to maintain a progress schedule during any arbitration proceeding.242 Relying on United States Fidelity & Guaranty Co. v. Bangor Area Joint School Authority,243 the Skinner court concluded that there was nothing in the work stoppage clause standing alone that was inconsistent with an intent that the arbitration clause remain enforceable after completion of the work.244 According to the court, since the claims for breach of contract and negligence in construction arose directly out of the construction contract and the parties had agreed to arbitrate any claims arising out of the contract, the parties were required to submit the dispute to arbitration even though it actually arose after work was completed and the contract contained a general reservation of remedies provision.245

In Northern Illinois Gas Co. v. Airco Industrial Cases, Inc.,246 the United States Court of Appeals for the Seventh Circuit held that whether or not a supplier was contractually entitled to stop delivery of gas to a buyer under a sales contract was an arbitrable issue.247 The contract provided for arbitration of all disputes arising out of the contract. The supplier argued that the dispute was not arbitrable because another section of the contract provided for a “sole remedy” in the event it failed to provide gas under the contract. That clause, said the supplier, constituted an agreement not to arbitrate disputes concerning such a contingency.248 The court concluded, however, that the supplier had confused the issue of what remedies were available with the issue of what forum would adjudicate the parties’ rights. Contractual provisions providing for sole remedies define the substantive rights of the parties, not the arbitrability of the claim.249

240. Id.
242. Id. at —, 436 N.E.2d at 567.
244. 106 Ill. App. 3d at —, 436 N.E.2d at 568.
245. Id.
246. 676 F.2d 270 (7th Cir. 1982).
247. Id. at 275.
248. Id. at 272.
249. Id. at 275.
B. Severability of Nonarbitrable Claims

The case of Sandefur v. District Court\(^{250}\) involved the severability of arbitrable and nonarbitrable claims arising from the same transaction. The petitioner, a securities buyer, had signed a "Customer Agreement" which stated that any controversy between the customer and the broker would be settled by arbitration.\(^{251}\) The buyer filed claims against the broker for breach of fiduciary duty, fraud, and violation of the Colorado Securities Act.\(^{252}\) The district court compelled arbitration. The Colorado Court of Appeals found that, since the applicable section of the Colorado Securities Act was virtually identical to the federal Securities Act of 1933,\(^{253}\) federal case law making compulsory customer-broker arbitration agreements unenforceable was controlling.\(^{254}\) The broker then moved to compel arbitration of the two common law claims and to stay the statutory securities claim.\(^{255}\) The court used the "intertwining doctrine" to determine whether the common law claims should be severed from the nonarbitrable statutory claim:

The intertwining doctrine involves an analysis of the legal and factual issues relative to each of the allegations in the complaint. . . . If the factual determinations and legal conclusions are inextricably intertwined, then the court must not sever the action. To hold otherwise would risk inconsistent determinations and could result in the arbitrator's infringing upon the court's duty to decide the securities claim.\(^{256}\)

The court stated that, even though arbitration is an efficient method of dispute resolution,\(^{257}\) the language and policy considerations of the securities regulations took precedence over the policy encouraging arbitration of

\(^{250}\) 635 P.2d 547 (Colo. 1981).

\(^{251}\) Id. at 548.


\(^{253}\) See 15 U.S.C. § 77n (1976). COLO. REV. STAT. § 11-51-125(7) (1973) states: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this article or any rule or order under this article is void."


\(^{255}\) 635 P.2d at 548. The motion was made pursuant to COLO. REV. STAT. § 13-22-204(4) (Cum. Supp. 1982):

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.

This provision is identical to U.A.A. § 2(d) (1955).


disputes.  

C. Arbitrability of Specific Claims

1. Constitutional Violations

Courts in several American jurisdictions have recently ruled on the arbitrability of a variety of contractual disputes. In Minnesota, arbitrators are without authority to decide issues of alleged constitutional violations no matter what the contract says. In McGrath v. State, arbitrators were disciplined for abuse of sick-leave privileges. They sued for violations of their constitutional rights. The trial court dismissed the suit because the dispute came within the scope of a collective bargaining agreement between the guards and the state, and it ordered the dispute to arbitration. The Minnesota Supreme Court reversed, holding that constitutional issues are not arbitrable. The court further stated that, if an otherwise arbitrable dispute contains general allegations of constitutional violations, the arbitrator could proceed on the arbitrable issues and the constitutional issues may be raised at the time of judicial review of the arbitration determination.

In a concurring opinion in McGrath, Judge Scott argued that arbitrators should be able to decide constitutional issues where the parties indicate a clear intent to arbitrate them. To hold otherwise, he said, would frustrate public policy which favors arbitration and speedy resolution of disputes without resort to litigation.

2. Domestic Relations

In Crutchley v. Crutchley, the North Carolina Court of Appeals determined that disputes concerning spousal support did not constitute a statutory or policy exception to arbitration. The plaintiff had argued that the arbitration award was subject to modification because it did not comply with the procedure in actions for alimony or alimony pendente lite. The court rejected that argument, holding that because the parties had agreed to arbitration, the statutory provisions did not apply. The court cited General Statutes of North Carolina section 1-567.2(a), which provides that parties “may agree in writing to submit to arbitration any controversy

259. 312 N.W.2d 438 (Minn. 1981).
260. Id. at 440-41.
261. Id. at 442.
262. Id.
263. Id. at 442-43 (Scott, J., concurring).
264. Id. at 443 (Scott, J., concurring).
266. 53 N.C. App. at 738, 281 S.E.2d at 747.
267. Id.
existing between them at the time of the agreement," and that the agreement "shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy."\textsuperscript{269} The court noted that the legislature had enacted two specific exceptions to the general rule,\textsuperscript{270} neither of which was applicable, and that the legislature could have declared domestic issues nonarbitrable.\textsuperscript{271} Since it did not, the court had to assume that a controversy concerning the amount of spousal support was arbitrable.\textsuperscript{272} In support of this position, the court noted that North Carolina allows spouses, upon the dissolution of a marriage, to enter into an agreement concerning the wife's rights to support or alimony and stated that if spouses could contract with regard to these issues, it seemed logical that they could contract to arbitrate their disputes.\textsuperscript{273}

\textit{Ormsbee Development Co. v. Grace}\textsuperscript{274} addressed the possible conflict with public policy that might occur if a person's community property interest in real property was terminated in an arbitration proceeding to which he was not made a party. The petitioner in \textit{Grace} had entered into a lease agreement with the respondent in which the parties agreed to submit any disputes to arbitration.\textsuperscript{275} At the respondent's request, a hearing was held and the arbitrator determined that the leases had expired on the termination dates defined in the leases. The respondent and his wife then filed separate appeals, contending that her property interest in the leases could not be terminated by arbitration because she was not a party to the contract.\textsuperscript{276} The Tenth Circuit found that, although the wife had not signed the agreement, she was "a party to the proceeding and represented by counsel throughout."\textsuperscript{277} The respondent's argument appeared to the court as an attempt to avoid the consequences of the arbitration upon which the parties had insisted.\textsuperscript{278}

The public policy question raised in \textit{Grace} was not answered. The court held that because the wife had in fact been an active participant in the arbitration hearings her claim was without merit. The court gave no indication of how the issue would be resolved if presented in a case in which a spouse neither signed the arbitration agreement nor played any role in the

\textsuperscript{269} N.C. GEN. STAT. § 1-567.2(a) (Supp. 1979).
\textsuperscript{270} Id. § 1-567.2(b). The statute excepts (1) agreements that specifically state that the law shall not apply and (2) collective bargaining agreements, unless they specify that the law applies. Id.
\textsuperscript{271} 53 N.C. App. at 737, 281 S.E.2d at 747.
\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} 668 F.2d 1140 (10th Cir. 1982).
\textsuperscript{275} Id. at 1143.
\textsuperscript{276} Id. at 1146.
\textsuperscript{277} Id. at 1147.
\textsuperscript{278} Id. at 1148.
arbitration proceedings.

D. Proper Forum for Determining Arbitrability

There are two aspects to arbitrability: the procedural issues and the substantive ones. In general, courts have agreed that while the court should make the initial determination of substantive arbitrability, procedural questions relevant to arbitrability are to be decided by the arbitrator.

In Village of Carpentersville v. Mayfair Construction Co., the Illinois Appellate Court considered, for the first time, whether questions concerning compliance with procedural requirements relative to arbitration are to be determined by the court or the arbitrator. The Village contended that Mayfair had not complied with the contract provisions for the initiation of arbitration.

It should be noted that the treatment of arbitrability of procedural disputes has not been uniform. Federal courts apply the rule, stated by the United States Supreme Court in John Wiley & Sons v. Livingston, that procedural questions are for the arbitrator. The Supreme Court reasoned that dividing disputes into substantive and procedural aspects, each decided in a different forum, would only encourage delay. The majority of state courts also relegate questions of procedure to the arbitrator.

The Mayfair Construction court employed the analysis used by the New York Court of Appeals in United Nations Development v. Norkin Plumbing and concluded that “the matters of timeliness and waiver and the other procedural matters in question should be decided by the arbitrator.” This approach requires the court to make an initial determination whether the conditions in the arbitration contract are statutory conditions precedent or contractual conditions precedent. Statutory conditions fall within the threshold jurisdiction of the court while contractual conditions require further analysis. At that point the inquiry turns to the nature of the arbitration agreement—whether its arbitration clause is broad or narrow. If the agreement contains a broad clause, compliance with contractual notice provisions and time requirements are questions to be considered by the arbitrator. But if the parties have withheld “full power” from the arbitrator, the court may maintain jurisdiction to determine whether there has been compliance with a condition precedent to submission of a claim to

279. Id.
281. Id. at 131, 426 N.E.2d at 561.
283. Id. at 558.
284. 100 Ill. App. at 132-33, 426 N.E.2d at 562.
286. 100 Ill. App. at 133, 426 N.E.2d at 562.
288. Id.
arbitration.\footnote{289}

In adopting this analysis, the court reasoned that procedural questions often must be resolved by construing the contract as a whole in the light of the customs and practices of the industry. This task is peculiarly one within the competence of the arbitrator.\footnote{290}

The Minnesota Supreme Court agreed with the Mayfair Construction court in \textit{Minnesota Federation of Teachers Local 331 v. Independent School District}.\footnote{291} The school board in the case adopted a proposal increasing the assignments of teachers by increasing student contact time. The union moved to compel arbitration of the decision. The board contended that its action was a matter of inherent managerial policy and hence was not subject to arbitration.\footnote{292} The union argued that the increase in student contact time was in effect an increase in the teachers' hours of employment which affected their rate of compensation and thus the economic aspects of their positions. Both "hours of employment" and "economic aspects" were included in the arbitration agreement.\footnote{293} The agreement, however, was subject to school board policies, one of which was that the teachers' daily teaching load would be assigned according to the needs of the buildings and would not necessarily be uniform.\footnote{294}

The court stated that the critical determination was whether the increase in student contact time was a "term and condition of employment" or an "educational policy of the school district" and held that this determination should be made initially by the arbitrator.\footnote{295} The court noted that arbitrability was to be determined by "ascertaining the intent of the parties from the language of the agreement itself,"\footnote{296} but if the intent was reasonably debatable, the issue should be determined by the arbitrator subject to vacation of the award if the arbitrator exceeded his powers.\footnote{297}

\begin{thebibliography}{99}
\footnotesize
\item 291. 310 N.W.2d 482 (Minn. 1981).
\item 292. \textit{Id.} at 483.
\item 293. \textit{Id.}
\item 294. \textit{Id.} at 484.
\item 295. \textit{Id.}
\item 296. \textit{Id. See} State v. Berthiaume, 259 N.W.2d 904, 909 (Minn. 1977).
\item 297. 310 N.W.2d at 484. \textit{See} Atnas v. Credit Clearing Corp. of Am., 292 Minn. 334, 341, 197 N.W.2d 448, 452 (1972). A court may vacate an award where the arbitrator has exceeded his powers or where there was no arbitration agreement, the issue was not adversely determined in other proceedings, and the party did not participate without objection in the arbitration hearing. MINN. STAT. ANN. § 572.19(1)(3), (5) (West Cum. Supp. 1983). This section is the same as U.A.A. § 12(a)(3), (5).
\end{thebibliography}
In *Department of Educational & Cultural Services v. Maine State Employees Association*, the issue of which forum should make the initial determination of substantive arbitrability was raised. The collective bargaining agreement between the parties provided that the arbitrator would make a preliminary determination regarding whether an issue was arbitrable. The Department contended that the arbitrator should make this preliminary decision only if the issue had first been raised before the arbitrator, not the court. The Maine Supreme Judicial Court rejected this interpretation, holding that the parties had stipulated that in the first instance the arbitrator would decide the issue of arbitrability. To hold otherwise, said the court, would render the clause meaningless, put a “premium on winning a race to the courthouse and make the outcome turn on fortuities of timing and forum.” The court went on to say that, although the parties to a collective bargaining agreement may stipulate that the arbitrator make the initial decision, the final determination of substantive arbitrability was a function of the court, not the arbitrator. The only time a court could be excluded from this determination would be in a case where the parties clearly demonstrated their intent to make the arbitrator’s determination of substantive arbitrability final.

In *Mid-America Regional Bargaining Association v. Modern Builders Industrial Concrete Co.*, the Illinois Appellate Court confronted the questions of (1) when disputes concerning arbitrability may be raised and (2) who determines the arbitrability of an issue. The defendant had not appeared at the arbitration hearing and had refused to pay the award. It first raised its objection to the validity of the agreement when the plaintiff sought to have the award confirmed.

The defendant’s claim that it was not a party to the agreement, said the court, would be a defense only if timely raised. The defendant argued that the issue of whether an arbitration agreement existed could only be adjudicated by the court prior to arbitration in a proceeding to compel arbitration. The plaintiff’s attempt to confirm the award, said the defendant, was really a proceeding to compel arbitration, and therefore the

299. Id. at 418.
300. Id. at 419.
301. Id.
302. Id. See Westbrook School Comm. v. Westbrook Teachers Ass’n, 404 A.2d 204, 207 n.5 (Me. 1979).
303. 433 A.2d at 419 n.2.
305. Id. at 86, 427 N.E.2d at 1013.
307. 101 Ill. App. 3d at 86, 427 N.E.2d at 1013.
objection had been made at the proper time. The court agreed that in Illinois "the question of arbitrability is determined not by the arbitrator but by the court" but rejected the argument that the arbitrability of the dispute must be determined prior to arbitration. While the question may be determined before the hearing in an action to compel or stay arbitration, it need not be. Citing the U.A.A.'s section on vacating awards, the court declared that it was clear that the question of arbitrability can be raised after an award is granted if it was not raised before or during the hearing. The consequence of a failure to timely file a motion to vacate an award is the confirmation of the award by the court. The party will be bound by it even if the matter should never have gone to arbitration.

E. Summary

In order to determine arbitrability, courts have had to go beyond the question of whether a dispute falls within the scope of a contractual arbitration agreement. In some cases, for example, the conflict between statutory and public policy considerations and the policy favoring arbitration had to be resolved. In other cases, the courts had to address the issue of what role the arbitrator should play in relation to the court in determining compliance with procedural requirements as well as issues of substantive arbitrability. In all cases, the intent of the parties was a major consideration and was given considerable weight in resolving the issue.

V. PROCEEDINGS TO COMPEL OR STAY ARBITRATION

Courts may stay arbitration proceedings on application of a party. Generally, the sole issue in a stay proceeding is whether the dispute is sub-

308. Id. at 87, 427 N.E.2d at 1014.
309. Id. See Board of Trustees v. Cook County College Teachers Union Local 1600, 87 Ill. App. 3d 246, 252, 408 N.E.2d 1026, 1031 (1980).
310. 101 Ill. App. 3d at 87, 427 N.E.2d at 1014.
311. ILL. ANN. STAT. ch. 10, § 102(a) (Smith-Hurd 1975).
312. Id. § 102(b).
313. 101 Ill. App. 3d at 87, 427 N.E.2d at 1014.
315. 101 Ill. App. 3d at 87, 427 N.E.2d at 1014.
317. Proceedings to compel or stay arbitration are governed by U.A.A. § 2 (1955), which provides:

(a) On application of a party showing an agreement described in Section 1, 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 arbi-
ject to arbitration.\textsuperscript{318} If it is, the court will order the parties to proceed to arbitration.\textsuperscript{319} When an agreement subjects all contract disputes to arbitration, the court may summarily determine that arbitration is required.\textsuperscript{320} Two recent opinions involving multiple parties, \textit{Stillwater Leased Housing Associates v. Kraus Anderson Construction Co.} \textsuperscript{321} and \textit{J.F. Inc. v. Vicik}, \textsuperscript{322} applied similar logic to analogous situations but reached different conclusions regarding the stay of arbitration proceedings.

\textit{Stillwater} involved an appeal from a stay of arbitration proceedings. The owner had hired a contractor to construct a building using the designs and plans prepared by an architect under contract to the owner. Both contracts contained arbitration clauses. The owner had also hired an engineer to perform soil tests, the results of which were incorporated into the architect’s plans and specifications given to the contractor. The owner’s contract with the engineer did not contain an arbitration clause.\textsuperscript{323} The contractor filed a demand for arbitration and the owner moved to stay the arbitration if found for the moving party, otherwise, the application shall be denied.

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

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this Section, the application shall be made therein. Otherwise and subject to Section 18, the application may be made in any court of competent jurisdiction.

(d) 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.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.


\textsuperscript{319} For a discussion of arbitrability of claims, see Part IV \textit{supra}.

\textsuperscript{320} Northern Ill. Gas Co. v. Airco Indus. Gases, 676 F.2d 270, 275 (7th Cir. 1982); Lester Witte & Co. v. Lundy, 98 Ill. App. 3d 1100, 1104, 425 N.E.2d 1, 3 (1981).

\textsuperscript{321} 319 N.W.2d 424 (Minn. 1982).


\textsuperscript{323} 319 N.W.2d at 425.
proceedings. The trial court granted the stay based on the owner's argument that the court had discretion to stay arbitration proceedings in order to consolidate related claims. On appeal to the Minnesota Supreme Court, the owner argued that the provisions of section 2 of the U.A.A. were mandatory and permitted a court to look only for the existence of an agreement to arbitrate in deciding whether to order or stay proceedings.

The court, however, stressed that judicial discretion and the balancing of other considerations affected the application of U.A.A. provisions. Specifically, the court referred to an earlier Minnesota case, Prestressed Concrete, Inc. v. Adolfson & Peterson, Inc., which announced a balancing test for use in determining whether to order arbitration. The test weighs the interests of the parties to the arbitration agreement and the policy supporting arbitration against the interests of the other parties and the policies supporting joinder of parties and claims. The Stillwater court did not expressly apply the test; it held simply that the arbitration proceedings should continue because three out of the four parties involved in the dispute were parties to arbitration agreements and because arbitration would decrease delay, complexity, and costs.

This balancing approach was similarly used in J.F. Inc. v. Vicik, which also concerned a construction dispute between multiple parties. A contractor agreed to build a house for the owners. The contract contained a clause subjecting all disputes to arbitration unless the parties agreed otherwise. A dispute involving the contract developed, and the parties at-
tempted to negotiate their differences. Meanwhile, subcontractors who were not parties to the arbitration agreement brought suits to foreclose mechanic’s liens against the owners and the contractor.\textsuperscript{332} Negotiations between the owners and the contractor broke down, and the contractor demanded arbitration. The owners moved to consolidate the foreclosure suits and requested that arbitration proceedings be stayed pending judicial resolution.\textsuperscript{333}

The trial court granted the motion to consolidate and denied the motion to stay. The Illinois Appellate Court reversed.\textsuperscript{334} The contractor contended that the court had the power to stay an arbitration proceeding "only upon a showing that there is no agreement to arbitrate."\textsuperscript{335} Although the general rule in Illinois is that "agreements to arbitrate will be enforced despite pending multi-party litigation," the court noted that the outcome may be different where the claims of multiple parties are more intermingled and dependent.\textsuperscript{336} It held that the \textit{Prestressed Concrete} balancing test controlled and said that in limited circumstances an arbitration proceeding may be stayed if all parties to it are not bound by the arbitration agreement.\textsuperscript{337} In determining whether the policies favoring joinder of claims outweigh those favoring arbitration, the important factors include: (1) whether arbitration would increase delay, complexity, and costs because it could not include all parties; (2) whether the issues and relationships among the parties are closely intermingled; and (3) the possibility that the judicial and arbitration forums will reach inconsistent results.\textsuperscript{338}

Applying this analysis to the facts at hand, the court decided that in \textit{Vieik}, unlike \textit{Stillwater}, the policies supporting joinder of claims outweighed those favoring arbitration.\textsuperscript{339} It concluded that section 2 of the U.A.A. did not provide the exclusive ground for a stay of arbitration.\textsuperscript{340}

The significance of \textit{Vieik} is highlighted by another Illinois decision, \textit{Kelso-Burnett Co. v. Zeus Development Corp.},\textsuperscript{341} which involved a contract that

\begin{itemize}
  \item \textsuperscript{332} \textit{Id.} at 816, 426 N.E.2d at 258.
  \item \textsuperscript{333} \textit{Id.} at 817, 426 N.E.2d at 259.
  \item \textsuperscript{334} \textit{Id.} at 819, 426 N.E.2d at 262.
  \item \textsuperscript{335} \textit{Id.} at 817, 426 N.E.2d at 259.
  \item \textsuperscript{336} \textit{Id.} at 818, 426 N.E.2d at 260 (citing Iser Elec. Co. v. Fossier Builders, Ltd., 84 Ill. App. 3d 161, 405 N.E.2d 439 (1980)).
  \item \textsuperscript{337} 99 Ill. App. 3d at 819-20, 426 N.E.2d at 261. Usually, a party bound by an arbitration agreement has no right to choose between judicial and arbitral forums. The court noted, however, that the owners did not try to avoid arbitration until third party suits complicated the matter, nor were the owners responsible for the multiplicity problem. \textit{Id.} at 820, 426 N.E.2d at 261. The court might have reached a different result had it appeared that the owners were trying to subvert the arbitration agreement.
  \item \textsuperscript{338} \textit{Id.} at 820, 426 N.E.2d at 261.
  \item \textsuperscript{339} \textit{Id.}
  \item \textsuperscript{340} \textit{Id.} at 821, 426 N.E.2d at 261-62.
  \item \textsuperscript{341} 107 Ill. App. 3d 34, 437 N.E.2d 26 (1982).
\end{itemize}
subjected all disputes to arbitration. Kelso-Burnett defaulted because it 
had not been paid, and Zeus terminated the contract. Kelso-Burnett 
commenced an action in circuit court. Zeus moved to stay judicial 
proceedings and compel arbitration. The court denied the motion to stay and refused 
to compel arbitration. The Illinois Appellate Court reversed, holding that 
the lower court had abused its discretion in not compelling arbitration. The Illinois arbitration act 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.

Kelso-Burnett's payment was a matter arising out of the contract, and it therefore was subject to the arbitration clause.

Once the court finds an issue is arbitrable, the U.A.A. offers two ways to treat the judicial action. Pending arbitration, the court may stay the entire proceeding or stay only those arbitrable claims that are severable. The appellate court found that the trial court would have been required to choose one of those two alternatives. Kelso-Burnett, however, argued a third option. Relying on Vicik, it asserted that the lower court had properly stayed the arbitration proceedings despite the valid agreement to arbitrate. The court, rejecting this argument, distinguished Vicik on the grounds that neither of the parties in Vicik had instituted multiple proceedings to avoid arbitration and the claims not subject to arbitration were closely intermingled with those that were. The court found that Kelso-Burnett had itself created the multiplicity problem by initiating an action in circuit court prior to arbitration and saw no nonarbitrable issues closely intermingled with arbitrable issues. The court concluded that Vicik did not compel a stay.

*Kelso-Burnett* illustrates the problems created by engraving a factor test onto section 2(d) of the U.A.A. The section plainly limits stays to cases where there is no agreement to arbitrate. The factor test precludes summary determination because it forces the court to weigh the policies favor-

343. *Id.* at —, 437 N.E.2d at 32.
344. ILL. ANN. STAT. ch. 10, § 102(d) (Smith-Hurd 1975); U.A.A. § 2(d) (1955).
345. 107 Ill. App. 3d at —, 437 N.E.2d at 32.
346. *See* U.A.A. § 2 (1955). For the text of this section, see note 317 *supra*.
349. *Id.* at —, 437 N.E.2d at 29.
350. *Id.* at —, 437 N.E.2d at 32.
351. *Id.*
352. *Id.*
ing arbitration against those favoring joinder of claims. This complicates the stay proceeding and provides a springboard for parties determined to avoid arbitration. *Vicik* and *Stillwater* undermine the force of arbitration agreements and invite delay in dispute resolution.

VI. AWARDS

Six sections of the U.A.A. deal specifically with awards.\(^{354}\) Generally, an award must be in writing, signed by the arbitrators, and delivered to the parties within a fixed period of time.\(^ {355}\) The arbitrators may, on motion by the parties, modify an award within a fixed period after it has been made if there is a miscalculation, a mistaken description of a person or thing referred to in the award, or some other imperfection that does not affect the merits of the controversy.\(^ {356}\) Any party may ask the appropriate court to confirm, vacate, or modify an award if the request is made within the specified time limits.\(^ {357}\) Once the court enters its order, the award has the same effect as any other judgment or judicial decree and may be enforced in the same manner.\(^ {358}\) In applying the U.A.A. to arbitral awards, recent cases have dealt with (1) the grounds for attacking an award; (2) the effect of an arbitrator’s attempt to modify an award; (3) the binding effect of the award; and (4) the reasons given by the arbitrator for his decision.

A. Grounds for Attacking Awards

1. Lack of Arbitral Authority

In recent litigation, the most common ground for attacking an arbitrator’s award is that he exceeded his authority.\(^ {359}\) Courts usually say that the U.A.A. should be liberally interpreted and applied, noting that its basic functions are to discourage litigation and provide a speedy and relatively inexpensive forum for the resolution of disputes.\(^ {360}\) A narrow interpretation of the arbitrator’s power under the U.A.A. would simply convert an arbitration proceeding into a court of original jurisdiction. In that event, an arbi-

\(^{354}\) *Id.* §§ 8, 9, 11, 12, 13, 14.

\(^{355}\) *Id.* § 8.

\(^{356}\) *Id.* §§ 9, 13. An award may be vacated if it was gained by corruption or fraud, if there was partiality by an arbitrator, if the arbitrators exceeded their powers, if the arbitrators refused to hear evidence, or if there was no arbitration agreement. An award may be modified if there was a miscalculation or mistaken description of a person or thing referred to in the award, if the arbitrators made the award based on an issue not submitted to them, or if there was some other imperfection not affecting the merits of the controversy. *Id.* §§ 12, 13.

\(^{357}\) *Id.* § 11. For a discussion of timeliness under the U.A.A., see Part XII *infra*.


\(^{359}\) For a discussion of confirmation and vacation of awards, see Part VII *infra*. For a discussion of judicial review of such awards, see Part XI *infra*.

\(^{360}\) *See*, e.g., Dunshee v. State Farm Mutual Auto Ins. Co., 303 Minn. 473, 481, 228 N.W.2d 567, 572 (1975).
tration award would be appealable in the same manner as a judgment of any court and many of the advantages of arbitration would be lost.

The U.A.A. provides that the court shall vacate an award when the arbitrators have exceeded their powers,361 but courts have liberally construed those powers. The arbitrator is considered to be the final judge of law and fact in the absence of an agreement limiting his authority.362 Policy considerations, however, are independent of the arbitration agreement and courts may review the merits of an award when the arbitrator has based that award on public policy.363 In deciding whether an arbitrator has exceeded his power, a court must first determine the extent of that power by inquiring into the source of the arbitrator's authority.

In Ramsey County v. American Federation of State, County and Municipal Employees,364 the Minnesota Supreme Court was faced with a situation in which the past practice of the parties, as well as their communications during negotiations on the agreement, conflicted with the unambiguous language of the agreement. The plaintiff challenged the award on the ground that the arbitrator had exceeded his powers by issuing an award based on past conduct and not on the clear language of the agreement.365

The court first noted that the scope of an arbitrator's power is a matter of contract to be determined from the parties' agreement366 but pointed out that this proposition does not clearly define the limits of arbitral authority. The court used the analysis set forth by the United States Supreme Court in the Steelworkers' Trilogy.367 The Court in those cases formulated what has come to be called the "essence" test: "[A]n arbitrator is confined to interpretation and application of the . . . arbitration agreement. . . . He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the . . . agreement."368 In determining whether the award in Ramsey County met this standard, the Michigan court relied on federal case law. An award, said the court, draws its essence from the agreement.

363. Amalgamated Meat Cutters & Butcher Workmen v. Jones Dairy Farm, 680 F.2d 1142, 1144 (7th Cir. 1982).
364. 309 N.W.2d 785 (Minn. 1981).
365. Id. at 786.
so long as the interpretation can in some rational manner be derived from the agreement, "viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award."369

In applying these principles, the court ruled that it was permissible for the arbitrator to draw on evidence other than the agreement in determining the parties' intent. Accordingly, the court upheld the award even though it was inconsistent with the unambiguous language of the agreement.370

In *City National Bank v. Westlund Towers Apartments*,371 the Michigan Court of Appeals limited the arbitrator's power to interpret the agreement. The case involved a request by an attorney for $9,020 in fees; the opposing parties denied that he was their attorney. The $9,020 was placed in escrow. After the proceedings, the arbitrator awarded the attorney $33,000.372 The award was challenged on the ground that the arbitrator had exceeded his authority. After acknowledging that the limits of arbitral authority are set by the agreement, the court found that the arbitrator had erred in interpreting the parties' intent.373 The court thought it obvious that the parties had intended to limit the award to the amount held in escrow.374

The Michigan court's decision in *Westlund Towers* seems to be at odds with that of the Minnesota court in *Ramsey County*. In *Ramsey County*, the court allowed the arbitrator broad discretion in going outside the unambiguous language of the agreement to find intent; in *Westlund Towers*, the language was ambiguous, yet the court limited the arbitrator to what the court felt to be the parties' obvious intent. The Michigan decision implies that there are limits of reasonableness beyond which an arbitrator may not go in interpreting the intent of the parties.

369. 309 N.W.2d at 792 (citing Amoco Oil Co. v. Oil, Chemical & Atomic Workers, 548 F.2d 1288 (7th Cir.), cert. denied, 431 U.S. 905 (1977)).
370. 309 N.W.2d at 793. The majority opinion in *Ramsey County* reasoned that the parties had bargained for the arbitrator's interpretation of their agreement, not that of the court. In dissent, Justice Peterson believed that the court extended the arbitrator's power too far. There was explicit language in the agreement that the arbitrator would have no right to modify any of the contract terms, which the justice felt further indicated the express intent of the parties that the arbitrator base his decision on the unambiguous terms of the agreement. *Id.* at 795 (Peterson, J., dissenting). He would hold that where it is clear from the agreement that the parties' intent was to limit the arbitrator's power, the court must hold the arbitrator within those limits. *Id.*
372. *Id.* at 217, 309 N.W.2d at 210.
373. *Id.* at 234, 309 N.W.2d at 219.
374. *Id.*
2. Jurisdiction

Arbitral power and authority have been limited most significantly in a jurisdictional sense, and it is the arbitration agreement that defines their boundaries.\(^{375}\) The agreement sets out those issues that the parties intend to arbitrate, and it is the agreement that effectively grants the arbitrator the jurisdiction to resolve certain enumerated issues.

In *International Brotherhood of Electrical Workers Local 1400 v. Citizens Gas & Coke Utility*,\(^{376}\) the arbitrator was deciding on the qualifications of a job applicant. The arbitrator explicitly acknowledged that a high school degree was a requirement for the job in question, and he also found that the applicant did not meet that requirement.\(^{377}\) Nevertheless, he awarded the position to the applicant because the requirement was unreasonable.\(^{378}\) The Indiana Court of Appeals held that the arbitrator exceeded his authority by examining the reasonableness of the requirement.\(^{379}\) The dispute submitted by the parties was whether the applicant met the job requirements, not whether those requirements were reasonable. The court carefully limited its holding to the jurisdiction of the arbitrator, pointing out that it did not intend to limit the discretion and power of an arbitrator to whom a dispute had been submitted.\(^{380}\)

A recent Minnesota Supreme Court decision, *State v. Minnesota Teamsters Public & Law Enforcement Employees Union*,\(^{381}\) also demonstrates the jurisdiction-granting aspect of an arbitration agreement. The administrators of a prison suspended a guard for disciplinary reasons. The parties to the arbitration agreement stipulated that the arbitrator was to decide whether "just cause" existed for the discipline.\(^{382}\) The Minnesota Supreme Court found that the agreement gave the arbitrator the authority to make the just cause determination.\(^{383}\) By failing to define specifically what acts constituted just cause, the parties left the decision to the arbitrator. If the collective bargaining agreement had specified that certain acts would constitute just cause, the arbitrator would have had only the authority to determine whether those acts had been committed.\(^{384}\)

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\(^{377}\) Id. at —, 428 N.E.2d at 1328.

\(^{378}\) Id. at —, 428 N.E.2d at 1323.

\(^{379}\) Id. at —, 428 N.E.2d at 1326.

\(^{380}\) Id. at —, 428 N.E.2d at 1325.

\(^{381}\) 316 N.W.2d 542 (Minn. 1982).

\(^{382}\) Id. at 544.

\(^{383}\) Id. at 545.

\(^{384}\) Id. at 544-45.
3. Awards Inconsistent with Law

In Board of Education v. Chicago Teachers Union, the Board challenged the arbitrator's award on the ground that the arbitrator had exceeded his power by granting an award inconsistent with the law. A teacher was assaulted in a classroom and was unable to return to work for twenty-nine months. The Board paid her salary for the remainder of the school year but refused to continue payments for the subsequent two years. The issue was submitted to arbitration. Meanwhile, the teacher filed for and received workers' compensation. The arbitrator subsequently awarded the teacher her salary for the full period. The Board argued that the award was inconsistent with the workers' compensation statute, which limited recovery of compensation outside the statute.

The Illinois Supreme Court ruled that the arbitrator's award was consistent with the law. The court indicated that the arbitrator's power does not depend on his correct interpretation of the law. While a case must be decided according to the law, the arbitrator is to be his own judge as to what the law is because what the parties have bargained for is his interpretation, not that of a court. Where the interpretation of the law is by agreement in the hands of the arbitrator, a mistake of law is not a ground for vacating an award.

4. Defects in the Award

In Risman v. Granader, the plaintiffs, the defendant, and a third party were all involved in a joint venture. The defendants had refused to make certain capital contributions as required by the agreement. The plaintiffs, acting as managing partners, sought arbitration as provided in the agreement. The arbitrator required both the plaintiffs and the defendant to make payments into the joint venture, which inured to the benefit of the third party. The award was attacked on the ground that the arbitrator had exceeded his power because (1) the award was to the benefit of the third party and the project, rather than to one of the parties to the arbitration; and (2) he issued a blanket award covering all claims, rather than a specific award for each claim.

In addressing the first issue, the Michigan Court of Appeals said that because all of the parties to the joint venture agreement were parties to the

386. Id. at 473, 427 N.E.2d at 1200.
387. Id.
388. Id. at 477, 427 N.E.2d at 1202.
389. Id. (citing White Star Mining Co. v. Hultberg, 220 Ill. 578, 77 N.E.2d 327 (1940)).
390. 86 Ill. 2d at 477, 427 N.E.2d at 1202.
392. Id. at 455, 309 N.W.2d at 562-63.
arbitration agreement, all were entitled to benefit from any arbitration. 393 An award will be valid as long as those benefited by it are parties to the agreement, whether or not they are parties to the dispute. Regarding the second issue, the court indicated that, while it might be preferable for arbitrators to issue awards addressed to specific claims, 394 that procedure is not required in most instances. 395 The court implied, however, that a situation may arise where the arbitrator must address his award to specific issues. The court seemed to suggest that where the arbitrator has been required by the court to make specific findings, the award must address itself to those findings. 396

In Mid-America Regional Bargaining Association v. Modern Business Industrial Concrete Co., 397 the defendant was a member of the bargaining association and had agreed to certain lockout provisions in case of isolated strike actions. It failed to comply with these provisions and the association, in arbitration, was awarded $100 a day for each employee at work at the defendant's business during the lockout. 398 The defendant asserted that the arbitrator had exceeded his authority in that the agreement required the arbitrator to determine total damages and that the award was not sufficiently specific to meet that requirement. 399 The Illinois Appellate Court rejected that argument, holding that an award is valid even though the actual amount of the award remains to be computed so long as the calculation is a mechanical duty that can be performed according to a formula. 400

B. Modification of Awards by Arbitrators

Section 9 of the U.A.A. provides that, on application of a party or on submission by a court, the arbitrator may modify an award if there was a miscalculation or mistake in description of any person referred to in the award or if there was some other imperfection that did not affect the merits of the controversy. 401 Section 9, however, leaves unresolved the question of whether an arbitrator may modify an award on his own initiative.

The problem was addressed in Chaco Energy Co. v. Thercol Energy Co., 402 in which the New Mexico Supreme Court held that an arbitrator may not

393. Id., 309 N.W.2d at 562.
396. Id., 309 N.W.2d at 564.
398. Id. at 87, 427 N.E.2d at 1014.
399. Id.
modify his award on his own initiative once it becomes final. The arbitration agreement in Chaco Energy required that the award be made by June 12. The arbitrators reached a decision on June 10, informed the parties by telephone, and mailed signed copies by express mail. Chaco received its copy on June 11 and Thercol received its on June 12. Meanwhile, the arbitrators decided that they had made an error in a portion of their decision. Without reopening proceedings, an amended decision dated June 11 was prepared and delivered to the parties on June 12. The lower court affirmed both actions, finding that (1) the first award was incomplete and thus left the arbitrators with the power to complete the award; (2) the arbitrators had complete authority to modify their award until June 12; and (3) the first award had not been delivered to the parties until after the arbitrators had issued the amended award and an award must be delivered to be final.

In striking down the amended portion of the award, the supreme court first noted the since the arbitrators had addressed all the issues presented to them in their June 10 decision, it was complete. The question then became whether the arbitrators had the power to modify that award. The court, relying on the general rule that once an arbitrator has issued a binding award he has no power to proceed further, said that the amended decision was void because it was not issued for any of the reasons set forth in section 9. With regard to the argument that the arbitrators had until June 12 to make their decision and that it was therefore not final, the court pointed out that June 12 was a limit to their authority, but that any decision made prior to that date would still bring the arbitrators under the general rule. The court stated that an agreement does not have to be delivered to be final, interpreting section 8 to mean that an award is final when there is a signed writing and valid if delivered within the time required by the agreement.

While the court’s interpretation of section 8 is logical, it can also be argued that section 8, taken as a whole, requires that the award be delivered before it is final. The section does not directly address that issue, but it does provide that a signed writing must be delivered to the parties. If the section is interpreted to mean that the award must be delivered before it is final, the outcome of the case may have been different. A finding that the

403. Id. at 130, 637 P.2d at 560.
404. Id. at 129, 637 P.2d at 559.
405. Id.
406. Id. at 130, 637 P.2d at 560.
407. Id. (citing Bayne v. Morris, 68 U.S. 97 (1863); La Vale Plaza, Inc. v. R.S. Noonan, Inc., 378 F.2d 569 (3d Cir. 1967)).
408. 97 N.M. at 130, 637 P.2d at 560.
409. Id. at 132, 637 P.2d at 561.
410. Id. N.M. STAT. ANN. § 44-7-8(A) (1978) is patterned after U.A.A. § 8 (1955).
award was not final would take the arbitrators out of the general rule that a final award divests the arbitrator of his power and would allow them to modify the award.

C. Binding Effect of an Award

The Colorado case of Judd Construction Co. v. Evans Joint Venture\(^411\) illustrates the effect of section 14 of the U.A.A.\(^412\) The case involved a proceeding to confirm an arbitrator’s award which was consolidated with another civil action containing several claims, counterclaims, and cross-claims. The issue was whether it was proper to confirm an arbitrator’s award prior to a decision on the other claims in a consolidated action.\(^413\)

The Colorado Supreme Court discussed the policies behind the U.A.A. and noted that the purpose of arbitration is to provide for voluntary enforcement without undue delay or judicial interference.\(^414\) Section 11 provides that the court shall confirm an award unless grounds exist for vacating that award as provided in sections 12 and 13.\(^415\) The existence of unrelated claims in a suit was not such a ground, so the court considered itself bound to confirm the award regardless of the pending claims.\(^416\) By interpreting these provisions literally, the court supported the proposition that arbitration is a distinct action which best serves its purpose with a minimum of judicial interference.

D. Reasons for Awards

Nowhere does section 8 of the U.A.A. require arbitrators to give reasons for their awards.\(^417\) Illinois has adopted section 8 verbatim.\(^418\) In Meharry v. Midwestern Gas Transmission Co.,\(^419\) the plaintiff sought damages for lost crops pursuant to a right-of-way agreement. The dispute was submitted to arbitration and the arbitrators found for the plaintiff. The defendants appealed, challenging the adequacy of the award. The Illinois Supreme Court held that an arbitrator must only announce the award; he is not required to set out reasons or justification for it.\(^420\) While this is suffi-

\(^{411}\) 642 P.2d 922 (Colo. 1982).
\(^{413}\) 642 P.2d at 924.
\(^{414}\) Id.
\(^{415}\) U.A.A. § 11 (1955). Those grounds include fraud, corruption, partiality, refusal by the arbitrator to hear evidence, lack of an arbitration agreement, and decisions by the arbitrator outside the scope of his authority.
\(^{416}\) 642 P.2d at 925.
\(^{418}\) ILL. ANN. STAT. ch. 10, § 108 (Smith-Hurd 1975).
\(^{419}\) 103 Ill. App. 3d 144, 430 N.E.2d 1138 (1981).
\(^{420}\) Id. at 146, 430 N.E.2d at 1140. The arbitrator is, however, bound by the conditions, limitations, and restrictions set out in the arbitration agreement. Pillott v. Allstate Ins. Co., 48 Ill. App. 3d 1043, 1048, 363 N.E.2d 460, 464 (1977).
cient to sustain an award in the absence of an agreement to the contrary, the court pointed out that the parties could have required in their agreement that the arbitrator give his reasons. In Meharry, the parties had agreed to require a statement of facts in the award. The court found that although the facts given were sketchy, the arbitrators had complied with the requirement.

In Maine State Employees Association v. State Department of Defense, a dispute arose between the department and the union. The union claimed that the department had violated the collective bargaining agreement by hiring an applicant who was not a member of the bargaining unit, when qualified members had applied. The dispute went to arbitration and the arbitrators found for the department. On appeal, the Maine Supreme Judicial Court noted that its role was "to review the award of the arbitrator and not, necessarily, to search the arbitrator's opinion for faulty reasoning." Thus, an award may be sustained if made to the proper party even if the reasoning was faulty. Quoting from Enterprise Wheel, the court went on to say that an arbitrator is not required to give his reasons for the award, and if he does, they are not required to be unambiguous. This position is grounded in the court's concern that if opinions given must be clear, arbitrators would be encouraged to "play it safe" and not write supporting opinions. The court pointed out that opinions are valuable in construing the agreement and in bolstering "confidence in the integrity of the process." In another case, Lisbon School Committee v. Lisbon Educational Association, the same court emphasized that it is not necessary for an arbitrator to explain his reasoning with respect to his selection of remedy.

VII. FEES AND EXPENSES

Under the U.A.A., attorneys' fees incurred in the arbitration of a dispute cannot be granted in the award unless the parties specifically provided for them in the arbitration agreement. In certain circumstances, how-

421. 103 Ill. App. 3d at 147, 430 N.E.2d at 1140.
422. Id.
424. Id. at 395.
427. 436 A.2d at 398 n.3.
428. Id.
429. Id.
431. Id. at 244.
432. "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in
ever, courts may allow such fees.

In *Sullivan v. Pennsylvania Department of Labor*, the United States Court of Appeals for the Third Circuit held that the plaintiff could recover attorneys' fees for the arbitration of her sex discrimination claim. She had a claim under Title VII of the Civil Rights Act of 1964 which she had decided not to pursue after she received a favorable arbitration award. Although the plaintiff was represented at the arbitration hearing by her union's counsel under a provision of the collective bargaining agreement, she sought remuneration for her private counsel, who had prepared the case. That it was her private counsel's efforts in preparing the Title VII action that served as a prod to the union to carry the plaintiff's grievance to arbitration was not contested. In justifying its award of fees, the court stated:

We are satisfied that if attorneys' fees compensating counsel for Title VII activities are to be awarded when Title VII rights are vindicated after a full trial in the district court, such fees for the same activities should similarly be awarded when Title VII rights are vindicated through other means, such as, in this case, arbitration.

The *Sullivan* court set out two requirements for allowing attorneys' fees in Title VII arbitration cases. First, the plaintiff must obtain the relief sought on the merits. Second, the circumstances under which the plaintiff obtained the desired relief must be "causally linked" to the prosecution of the Title VII action. A plaintiff's obtaining relief in a contemporaneous arbitration proceeding, or a mere consultation between an attorney handling the Title VII case and the attorney in charge of the arbitration, would not, without more, justify an award of fees.

The court's decision should encourage a higher degree of cooperation between the attorney bringing the Title VII action and the attorney processing the dispute through arbitration. A contrary decision would have given private attorneys little economic incentive to assist the union attorney in handling the arbitration.

Fees and costs can also be recovered for proceedings subsequent to the

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the conduct of the arbitration, shall be paid as provided in the award." U.A.A. § 10 (1955) (emphasis added).

436. 663 F.2d at 451.
437. *Id.*
438. *Id.* at 452.
439. *Id.* A dissenting judge argued that the causal link between the Title VII action and the arbitration proceeding was too attenuated for the court to award attorneys' fees. *Id.* at 456 (Adams, J., dissenting).
granting of an award. In *McDaniel v. Berhalter*, the prevailing party in an arbitration proceeding was awarded attorneys' fees for expenses relating to, but not directly involved with, the proceeding. In a construction contract dispute, McDaniel, in accordance with Florida law, filed a mechanic's lien on Berhalter's property. Since the contract had a mandatory arbitration provision, Berhalter moved to compel arbitration. After the proceedings were finished, the arbitrator entered an award in McDaniel's favor. Two months later, McDaniel requested the entry of a final judgment based on the arbitration award. At the hearing, the court entered a final judgment. It awarded McDaniel the costs of arbitration with interest but not attorneys' fees. At the hearing, Berhalter tendered the amount of the award but did not pay the interest. The trial court imposed a mechanic's lien on Berhalter's property to enforce the full award.

On appeal, McDaniel contended that the trial court had improperly denied his request for attorneys' fees relating to both the arbitration proceeding and the subsequent lien. The Florida District Court of Appeal held that since Berhalter did not tender the interest that accrued after entry of the award, his tender was no good. The trial court was correct in imposing the lien, and, under Florida law, McDaniel was entitled to attorneys' fees for those services directly related to enforcement of the award.

The court upheld the denial of attorneys' fees for expenses incurred during arbitration, relying on section 10 of the U.A.A. But the court determined that McDaniel, in addition to recovering attorneys' fees for the enforcement of the arbitration award, could recover costs incurred in the proceeding brought to seek judicial confirmation of the arbitration award. The court relied on section 14 of the U.A.A., which permits costs of the application to the court "and proceedings subsequent thereto" to be awarded when the court confirms, modifies, or corrects an award.

**VIII. Confirmation and Vacation of Awards**

Confirmation and vacation of arbitration awards are two sides of the same coin. When one party objects to an award, the other may have to go to court to have the award confirmed. The objecting party likely will peti-
tion the court to vacate the award. The focus in each case is on whether the award is proper.

A. Confirmation

The U.A.A. provides that, upon application by a party, an arbitration award shall be confirmed by the court unless a party presents grounds for vacating or modifying the award.\footnote{449} Once the court grants an order confirming the arbitration award, the act provides that a judgment shall be issued in conformity with the order and it shall be enforced in the same manner as any other judgment or decree.\footnote{450}

Courts ordinarily will not disturb an award based on an issue properly submitted to arbitration.\footnote{451} The award must be rationally derived from the arbitration agreement and may be overturned where the arbitrator exhibits a manifest disregard of the agreement.\footnote{452} Other courts hold that the test for an improper award is whether all reasonable minds would agree that the award was impossible under a fair interpretation of the agreement.\footnote{453}

Recent decisions indicate strict judicial adherence to the confirmation and judgment provisions of the U.A.A. and an unwillingness to become involved in overruling arbitrators on the merits.\footnote{454} In \textit{Judd Construction Co. v. Evans Joint Venture},\footnote{455} the Colorado Supreme Court emphasized the limited role of a court in considering an arbitrator’s award:

\begin{quote}
[T]he issues before a court in a confirmation proceeding are lim-
\end{quote}

\footnote{449} "Upon application of a party, the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13." U.A.A. § 11 (1955).

\footnote{450} \textit{Id.} § 14.


\footnote{452} \textit{See, e.g.,} Maine School Adm'rs Dist. No. 52 v. Tri Town Teachers' Ass'n, 412 A.2d 990, 994 (Me. 1980).

\footnote{453} \textit{See, e.g.,} Maine State Employees Ass'n v. State Department of Defense, 436 A.2d 394, 398 (Me. 1981); Westbrook School Comm. v. Westbrook Teachers' Ass'n, 404 A.2d 204, 209 (Me. 1979).

\footnote{454} In reviewing arbitration proceedings, courts have drawn a distinction between arbitration of commercial and labor disputes:

In the commercial case, arbitration is the substitute for litigation. Here [a labor dispute] arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.


\footnote{455} 642 P.2d 922 (Colo. 1982).
itted to a consideration of whether grounds exist to vacate, modify, or correct the award under the provisions of the Arbitration Act. In the absence of such grounds, the language of the Arbitration Act is mandatory: "the court shall confirm" the award.\textsuperscript{456}

The arbitrator's decision was a final decision on the merits. "An arbitration award is tantamount to a judgment," said the court, "and the arbitrator is the final judge of both fact and law."\textsuperscript{457}

Similarly, the Michigan Court of Appeals upheld the finality of an arbitrator's award in \textit{Simmons v. Golf Course Specialists, Inc.}\textsuperscript{458} The contracting parties had specified that, on all claims submitted to arbitration, the decision of the arbitrator would be a condition precedent to any right to legal action. The parties submitted a dispute to arbitration, and the defendant won. The plaintiff then filed suit against the defendant.\textsuperscript{459} The trial court confirmed the arbitration award and entered summary judgment for the defendant in the amount of the award. The supreme court affirmed.\textsuperscript{460}

The court relied on the Michigan Supreme Court's prior holding in \textit{F.J. Siller & Co. v. City of Hart},\textsuperscript{461} which involved an arbitration clause similar to that in \textit{Simmons}. The \textit{Siller} court had interpreted the condition precedent language to preclude court action regarding disputes within the scope of the arbitration clause but independent of the award.\textsuperscript{462} The court held that "[h]aving agreed to arbitrate, plaintiff's remedy, if any, is limited to a challenge to the validity of the arbitration award; it may not contest \textit{ab initio} in a court the merits of a contract dispute."\textsuperscript{463}

The North Carolina Court of Appeals reached a similar conclusion in a divorce case. The court, in \textit{Crutchley v. Crutchley},\textsuperscript{464} held that a valid agreement to arbitrate the issue of spousal support should be given the same effect as an agreement between the spouses setting forth the amount of such support.\textsuperscript{465} The court noted that in North Carolina a valid separation agreement will bar a subsequent action for alimony\textsuperscript{466} and decided that an arbitrator's award of spousal support should achieve the same finality as a separation agreement.\textsuperscript{467}

\textsuperscript{456} \textit{Id.} at 925 (quoting U.A.A. § 11 (1955)) (emphasis added by the court). The text of § 11 is reprinted in note 449 \textit{supra}.

\textsuperscript{457} 642 P.2d at 925.


\textsuperscript{459} \textit{Id.} at 11, 310 N.W.2d at 892.

\textsuperscript{460} \textit{Id.} at 14, 310 N.W.2d at 893.

\textsuperscript{461} 400 Mich. 578, 255 N.W.2d 347 (1977).

\textsuperscript{462} \textit{Id.} at 582, 255 N.W.2d at 351.

\textsuperscript{463} \textit{Id.}


\textsuperscript{465} \textit{Id.} at 740, 281 S.E.2d at 748.

\textsuperscript{466} \textit{See} N.C. GEN. STAT. § 50-16.6(b) (1976).

\textsuperscript{467} 53 N.C. App. at 740, 281 S.E.2d at 748.
These cases illustrate the usual strict construction of the confirmation and judgment sections of the U.A.A. They emphasize the finality of the arbitrator's award and the reduced role of the trial court when an issue is submitted to arbitration.

B. Vacation

A party who is dissatisfied with an arbitration award may ask the court to set it aside. The U.A.A. lists five grounds for vacating awards. Much of the current case law indicates that those five grounds will be construed narrowly, although the grounds for vacating an award can be expanded if the agreement so provides. The substantive merit of a claim, however, does not guarantee that a court will vacate the award. There are procedural rules that must be complied with, and failure to do so can result in the waiver of the claim.

1. Exceeding the Arbitrator's Authority

In International Brotherhood of Electrical Workers Local 1400 v. Citizens Gas & Coke Utility, a job description in the parties' contract required that applicants for certain positions have high school diplomas. An applicant passed over because he lacked a diploma filed a grievance that the union took to arbitration. During the proceedings, the union did not challenge the diploma requirement; it claimed instead that the utility had violated the collective bargaining agreement by not filling a job vacancy with a qualified senior applicant. Nevertheless, the arbitrator found that the diploma requirement was unreasonable and ordered the utility to give the job

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468. The grounds are specified in U.A.A. § 12 (1955):
   (a) Upon application of a party, the court shall vacate an award where:
      (1) The award was procured by corruption, fraud or other undue means;
      (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
      (3) The arbitrators exceeded their powers;
      (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise 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.


470. Id. at — 428 N.E.2d at 1321-22.
to the applicant. The trial court granted the utility's motion to vacate the award, and the Indiana Court of Appeals affirmed.

The appellate court explained that a court cannot vacate an award on the sole ground that the award was arbitrary, capricious, or against the weight of the evidence. The issue is whether the arbitrator exceeded his discretion. Indiana's version of the U.A.A. provides that "the court shall vacate an award where . . . the arbitrators . . . [exceeded] their powers and the award cannot be corrected without affecting the merits of the decision." The arbitrator's powers are determined by the arbitration agreement, however, so an award that does not conform to the agreement may be set aside. The court held that the arbitrator exceeded his discretion by not following the collective bargaining agreement's job requirements. Since the union did not challenge the diploma requirement, the only issue before the arbitrator was whether the grievant had a diploma. Since the grievant did not, he was not qualified for the job, and the arbitrator abused his discretion in awarding it to him.

2. Refusal to Hear Evidence

Parties may also challenge awards on the ground that the arbitrators refused to hear material evidence. In Malibu Pools of New Mexico, Inc. v. Harvard, a contractor moved to vacate an arbitration award because the arbitrator had refused to hear evidence material to the dispute. The trial court decided the case on a procedural ground and refused to address the merits. In reversing the lower court on the procedural issue, the New Mexico Supreme Court noted in passing that in setting aside an award a court may consider extrinsic evidence that is relevant and material to the dispute. If the arbitrator failed to consider the extrinsic evidence, the award may be vacated.

3. Bias and Prejudice

In Evans Electrical Construction Co. v. University of Kansas Medical Center, the Kansas Supreme Court refused to vacate an arbitration award where

471. Id. at —, 428 N.E.2d at 1323.
472. Id. at —, 428 N.E.2d at 1327.
473. Id. at —, 428 N.E.2d at 1326.
475. — Ind. App. at —, 428 N.E.2d at 1326.
476. Id. at —, 428 N.E.2d at 1327.
477. Id.
480. Id. at 107, 637 P.2d at 537-38. For a discussion of the procedural issue in the case, see Part IX.A infra.
481. 97 N.M. at 106, 637 P.2d at 538-39.
the aggrieved party, a contractor, contended that the disparity between the amount claimed and the amount awarded indicated that the arbitrators were guilty as a matter of law of fraud, bias, partiality, and prejudice. 483 The contractor and the state entered into a contract which provided that the contractor would perform electrical work on a new building. The contract stated that all disputes arising out of the contract were to be resolved by arbitration. A dispute arose, and the contractor filed a claim alleging that it was owed an extra $333,396 above the contract price for additional work performed. Following a hearing, the arbitrators awarded the contractor $24,342. 484

The contractor filed an action to vacate the award, 485 arguing that the gross inadequacy of the award was intrinsic evidence of fraud, bias, partiality, and prejudice. The supreme court rejected that claim because the contractor provided no other evidence that the arbitrators were biased or prejudiced. 486 The court concluded that a mere disparity between the amount claimed and the amount awarded provides no basis for setting aside an arbitrator’s award. 487

In Ormsbee Development Co. v. Grace, 488 the United States Court of Appeals for the Tenth Circuit held that the similarity of clients between a neutral arbitrator and a law firm representing one of the parties to the arbitration was not enough to vacate the award on the ground of partiality. 489 Grace had entered into a series of leases with Santa Fe. Each lease provided that any disputes between the parties were to be referred to arbitration, each party selecting one arbitrator and the American Arbitration Association selecting a neutral third arbitrator. A dispute arose, and the arbitration panel entered an award in favor of Santa Fe. 490

Grace filed an action to vacate the arbitration award, 491 contending that the neutral arbitrator was partial to Santa Fe since he and the law firm representing Santa Fe had similar clients. 492 The court denied the claim, stating that to set aside an arbitration award, evidence of bias must be direct, definite, and capable of demonstration. 493 The court concluded that

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483. Id. at 299, 634 P.2d at 1081.
484. Id. at 302, 634 P.2d at 1083.
485. The motion was brought under KAN. STAT. ANN. § 5-412 (Cum. Supp. 1982), which is identical to U.A.A § 12 (1955). For the text of this provision, see note 468 supra.
486. 230 Kan. at 306, 634 P.2d at 1087.
487. Id.
488. 668 F.2d 1140 (10th Cir. 1982).
489. Id. at 1150-51.
490. Id. at 1144.
491. The motion was brought under N.M. STAT. ANN. § 44-7-12(A)(2) (1978), which is identical to U.A.A. § 12(a)(2) (1955). For the text of this provision, see note 468 supra.
492. 668 F.2d at 1149-50.
493. Id. at 1150.
potential neutral arbitrators cannot be expected to cut all ties with the business world and the law does not require them to do so.\textsuperscript{494}

In \textit{Commonwealth v. Holt Hauling and Warehousing Systems},\textsuperscript{495} the Pennsylvania Commonwealth Court held that an arbitration award was properly vacated where the arbitrator previously had been involved with a party to the arbitration hearing.\textsuperscript{496} The Pennsylvania Liquor Control Board had entered into a contract with Holt which provided that Holt would perform certain services for the Board. A dispute arose and was referred to an arbitrator, the deputy attorney general. The arbitrator found in favor of the Board and Holt brought an action under the Arbitration Act of 1927\textsuperscript{497} to vacate the award on the ground of partiality.

Holt claimed that since the deputy attorney general appointed as arbitrator had approved the contract at issue in his capacity as counsel for the Board, the award should be vacated.\textsuperscript{498} "The court upheld the lower court's vacation of the award, stating that a party to an arbitration proceeding is entitled to a full and fair hearing, conducted by an arbitrator who is not involved with a party to the proceeding."\textsuperscript{499}

C. \textit{Procedural Problems}

A motion to vacate an award may be denied even if it has substantive merit. The U.A.A. limits not only the grounds for setting aside awards, but the manner in which the claim can be asserted.\textsuperscript{500}

\textsuperscript{494} \textit{Id.} at 1150-51.
\textsuperscript{496} \textit{Id.} at —, 440 A.2d at 708.
\textsuperscript{497} PA. STAT. ANN. tit. 5, § 170(b) (Purdon 1963), provided that "the court shall make an order vacating the award upon the application of any party to the arbitration . . . where there was evident partiality or corruption on the part of the arbitrators, or any of them." Pennsylvania adopted the U.A.A. in 1980. \textit{See Part I.B supra.}
\textsuperscript{498} — Pa. Commw. at —, 440 A.2d at 708.
\textsuperscript{499} \textit{Id.}
\textsuperscript{500} U.A.A. § 12(c) (1955) provides:

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.

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 re-
1. Untimely Motions

In Monmouth School Committee v. Huston, the parties submitted a labor dispute to arbitration. The arbitrator did not send notice of the award until forty-four months after the hearing was completed. The plaintiff moved to vacate the award on the ground that it was untimely. The Maine Court of Appeals held that the plaintiff had waived its objection to the lateness of the award by failing to make a claim in writing before the delivery of the award, and the Maine Supreme Judicial Court affirmed.

Maine's arbitration act provides that a court "shall vacate an award where . . . [t]he award was not made within the time fixed therefor by the agreement . . . and the party has not waived the objection." The arbitration agreement in Huston required that the award be made within thirty days after the hearing. Nonetheless, the court held that even a late award may not be set aside unless it is objected to in a timely fashion. The statute provided that a party waives his objection to the delay "unless he notifies the arbitrators of his objection prior to the delivery of the award to him." The actual arbitration agreement in Huston, in fact, went even further: it required a written objection. Based on this provision, the court upheld the finding of waiver. A party who fails to comply with the waiver rules waives what otherwise may be a valid claim. The rules, said the court, discourage delay because otherwise a party might not object to the delay until he learned that the award was unfavorable.

An objection framed as a request for clarification rather than a motion to vacate will not circumvent the time limits for setting aside awards. In Downing v. Allstate Insurance Co., the plaintiff submitted an insurance claim to arbitration. The claim was denied on April 26. The plaintiff requested a clarification of the award nineteen days later. The arbitrators clarified the award on August 23, stating that the plaintiff had failed to present sufficient evidence. The plaintiff requested that the arbitrators reopen the proofs and then filed a similar request in the circuit court. The

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quires the award to be made is applicable to the rehearing and

commences from the date of the order.

See also id. § 8(b).

502. Id. at 622.
503. Id. at 623.
505. 437 A.2d at 623.
507. 437 A.2d at 623.
508. Id.
510. Id. at 99, 317 N.W.2d at 304. Michigan General Court Rule 769.9(2) provides that an application to vacate an arbitration award must be filed with the court within 20 days after "delivery of a copy of the award to the plaintiff." Mich.
court treated the request as a motion to set aside the award and denied it as untimely. The Michigan Court of Appeals affirmed, noting that since the U.A.A. does not authorize requests for clarification of awards, such requests cannot toll the filing deadline. The court noted in dicta that motions for confirmation filed by the victorious party also do not extend the deadline for the aggrieved party to file a motion to set aside the award.

2. Failure to Make a Record of the Hearing

The New Mexico Supreme Court, in Malibu Pools of New Mexico, Inc. v. Harvard, held that a party's waiver of the right to have a record made of the arbitration hearing does not preclude that party from attacking the decision. Malibu performed certain services in the construction of a swimming pool and garden room at the Harvard residence. A dispute between the parties arose and Malibu filed a claim which was referred to arbitration. The arbitrators found in favor of the Harvards. Neither party had requested that a record be made. Malibu filed an action to vacate the award. The lower court denied the claim on the ground that no record was made of the hearing. The supreme court reversed, basing its decision on the fact that there were no provisions in the New Mexico arbitration act that expressly precluded a party from asserting a claim where no record of the hearing was made. The court concluded that the case should be remanded to the trial court to determine whether the award should be vacated on the ground that the arbitrator failed to hear material evidence.

IX. Appeals

Since one of the purposes of arbitration is to minimize the time and expense of adjudicating a dispute, appeals are generally not favored by courts. The U.A.A. does allow appeals in certain circumstances, however. Not surprisingly, the right to appeal in arbitration is often narrower than the corresponding right to appeal from court judgments. Yet

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GEN. CT. R. 769.9(2) (1963). Although the plaintiff admitted her motion was not timely, she contended that her request for clarification tolled the twenty day limit. 113 Mich. App. at 99, 317 N.W.2d at 304.

511. 113 Mich. App. at 100, 317 N.W.2d at 305.

512. Id. at 101, 317 N.W.2d at 306.


514. Id. at —, 637 P.2d at 538.

515. Id. The motion was filed under N.M. STAT. ANN. § 44-7-12(A)(4) (1978), which is identical to U.A.A. § 12(a)(4) (1955). For the text of this provision, see note 468 supra.

516. 97 N.M. at —, 637 P.2d at 538.

517. Id. at —, 637 P.2d at 539.


519. U.A.A. § 19 (1955) provides:
recent cases also have held that under the U.A.A. the right to appeal can be even broader than it is when a judgment is involved.

A. Timing and Procedure for Appeals

Some recent decisions indicate that an appeal from arbitration requires fewer procedural formalities than an appeal from a judicial proceeding. New Mexico courts, for example, have held that a trial transcript is a prerequisite to an appeal from any judicial act that the transcript would have reflected. But there is a different rule for arbitration cases. In Malibu Pools of New Mexico, Inc. v. Harvard, the New Mexico Supreme Court reasoned that a record is discretionary in the arbitral proceeding; the U.A.A. provisions that govern appeals do not specifically mention a record as a prerequisite to an appeal. Accordingly, the court held that failure to present a transcript to the court does not affect the right to appeal.

The stage of the proceedings from which an appeal can be taken is restricted. While a final judgment is usually required for appeals from judicial proceedings, the U.A.A. allows appeals in certain situations even though the arbitrator is required to proceed further. The Florida District Court of Appeal, in School Board v. Cornelison, held that an appeal is proper from an arbitral decision that reserved calculation of back pay for a later date. The court allowed the appeal even though the arbitrator arguably had not fully disposed of the case, relying on an earlier Florida case, State v. Pearson, which authorized appeals under the U.A.A. from any

(a) An appeal may be taken from:

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

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

522. Id. at —, 637 P.2d at 538. See U.A.A. § 19 (1955). For the text of this provision, see note 519 supra.
523. 97 N.M. at —, 637 P.2d at 538 (citing Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 220, 405 A.2d 393, 399 (1979)).
524. U.A.A. § 19 (1955). For the text of this provision, see note 519 supra.
526. Id. at 485.
527. 154 So. 2d 833 (Fla. 1963).
order made by the arbitrator.\textsuperscript{528} The \textit{Pearson} court reasoned that the ordinary final judgment rule does not apply because the avenue of appeal in arbitration proceedings is created by statute.\textsuperscript{529}

In \textit{Maine Central Railroad v. Bangor \& Aroostook Railroad},\textsuperscript{530} the Maine Supreme Judicial Court reached a similar conclusion. The arbitrator in that case had found against the plaintiff on the merits after it refused to submit to arbitration. The plaintiff sued the defendant in state court based on a claim related to the arbitration. The defendant moved to confirm the original arbitration award and subsequently appealed the court’s non-confirmation order under a Maine statute that allowed appeals from “an order confirming or denying an award.”\textsuperscript{531} The plaintiff argued that the refusal to confirm could not be appealed because the arbitrator’s order was not final, in that the plaintiff’s suit was still pending.\textsuperscript{532}

The court acknowledged that denial of confirmation of an award is not a final judgment. Drawing on cases from other jurisdictions which have adopted the U.A.A., the court found an immediate right to appeal from an arbitral order “irrespective of the interlocutory nature of the decree.”\textsuperscript{533} The court based its ruling in part on the absence of any statute purporting to encompass all exceptions to the final judgment rule.\textsuperscript{534}

\section*{B. Standard of Review}

Assuming that an appeal is proper, the issue becomes what standard the court should apply in determining whether the arbitrator acted properly. The scope of review permitted an appellate court is usually even more restricted than that given to the trial court; it is limited to determining whether the trial court abused its discretion.\textsuperscript{535}

In \textit{Ormsbee Development Co. v. Grace},\textsuperscript{536} the arbitrator found that Grace had forfeited his lease interests to Santa Fe. Grace moved to have the decision vacated on the grounds of refusal to hear evidence and partiality.\textsuperscript{537}

\begin{thebibliography}{99}
\bibitem{528} Id. at 835.
\bibitem{529} Id. at 836.
\bibitem{530} 395 A.2d 1107 (Me. 1978).
\bibitem{531} \textit{See} U.A.A. § 19(a)(3) (1955).
\bibitem{532} 395 A.2d at 1113.
\bibitem{534} 395 A.2d at 1113.
\bibitem{536} 668 F.2d 1140 (10th Cir. 1982).
\bibitem{537} Id. at 1144.
\end{thebibliography}
The United States Court of Appeals for the Tenth Circuit deferred to the arbitrator's judgment: "Courts are, expectedly; justified in exercising great caution when asked to set aside an arbitration award, which is the product of the theoretically informal, speedy, and inexpensive process of arbitration, freely chosen by the parties."

A recent Maine case also advocates a narrow scope of review. In *Maine State Employees Association v. State,* the state and the union had entered into a collective bargaining agreement providing preference to existing employees for new positions. When the state passed over an existing employee for a job, the union sought arbitration. The arbitrator found that the agreement did not require that current employees be hired for new positions. The union moved to vacate the award on the theory that, properly construed, the agreement did require the hiring of current employees. On appeal, the Maine Supreme Judicial Court sustained the award, stressing that a very limited standard of review is appropriate. An arbitral decision should be upheld, said the court, so long as a rational arbitrator could construe the contract to support the award. The court found that the facts supported this "rationally grounded" standard of review.

X. THE COURT'S AUTHORITY

A. Jurisdiction

According to the U.A.A., making an agreement that provides for arbitration confers jurisdiction on the courts of that state to enforce the agreement and to enter judgment on an arbitration award. Courts may also exercise authority in certain other situations such as proceedings to compel or stay arbitration, the appointment of arbitrators, the confirmation of an award, and the vacation, modification, or correction of an award.

Arbitration agreements can limit the court's authority because the object of arbitration is to avoid the formalities, delays, and expense of litigation. Although the U.A.A. approach seems straightforward, case law has interpreted the courts' jurisdiction both narrowly and expansively.

In *Dawn v. Mecom,* a Colorado federal district court gave a broad

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538. *Id.* at 1147.
539. 436 A.2d 394 (Me. 1981).
540. *Id.* at 396.
541. *Id.* at 397.
542. *Id.*
544. *Id.* § 2.
545. *Id.* § 3.
546. *Id.* § 11.
547. *Id.* §§ 12, 13.
reading to its jurisdictional authority. The issue was whether federal court jurisdiction in a diversity action to confirm an arbitration award was precluded by a previous declaratory judgment action filed by one of the parties in state court. The defendant contended that the federal court's jurisdiction was precluded by the state court's previous assumption of jurisdiction.

The federal court characterized its jurisdiction as concurrent with the state court and stated that neither res judicata nor abstention barred resolution of the action. After weighing the desirability of avoiding piecemeal litigation, the stage to which the state proceedings had progressed, and the potential prejudice to the parties, the court felt a "virtually unflagging obligation" to exercise its jurisdiction. It determined that the defendant's motion for a temporary restraining order against the arbitration proceedings did not give the state court jurisdiction, noting that under Colorado law a valid and unwaived arbitration clause deprives the court of subject matter jurisdiction until the matter is submitted to arbitration.

Interestingly, the Dawn court determined that it had jurisdiction to confirm the arbitration award without a single reference to the U.A.A. The case suggests that if a suit contains an arbitration issue a court will not acquire jurisdiction over the issue until it passes on the merits of a dispute related to the arbitration. At least where diversity jurisdiction requirements are met, federal courts have concurrent jurisdiction with state courts in arbitration proceedings.

The Illinois Supreme Court, in Stephanie's v. Ultracashmere House, Ltd., was faced with a similar jurisdictional question and based its decision squarely on the provisions of the U.A.A. The case involved an appeal from an Illinois circuit court order vacating an arbitration award entered in

550. The matter was before the court on the defendant's motion to dismiss for lack of subject matter jurisdiction. Id. at 1195. The defendant had originally filed a complaint in state court seeking a declaratory judgment to construe an arbitration agreement and a temporary restraining order against the plaintiff's arbitration proceeding. The state court denied the motion for a temporary restraining order and stayed further judicial proceedings pending arbitration. Id. at 1196. When the arbitration panel issued its award, the plaintiff filed in federal district court for confirmation of the award and for a declaratory judgment of dissolution, accounting, and winding up a joint venture. Id.

551. Id.

552. Id.

553. Id. at 1196-97.

554. Id. at 1197-98. The conclusion was based on a finding that the state court did not have the proceedings sub judice at the time of the plaintiff's petition to confirm the arbitration award since the state court had not actually passed on the merits of a dispute relating to arbitration.


556. Id. at 656, 424 N.E.2d at 980.
New York under the New York arbitration statute. The supreme court held that the trial court lacked jurisdiction under the U.A.A. to determine the merits of the petition and vacate the unconfirmed New York award.

The court found that the U.A.A. "confers upon Illinois courts the power to enter a judgment on an award under the Act" but reasoned that because no award was made under the Illinois statute, the trial court did not acquire jurisdiction to act on the New York award. The court in Stephanie's found no obligation to give full faith and credit to the award because it had not been confirmed by a New York court. Under the Illinois Supreme Court's interpretation, the extent of a court's jurisdiction should be determined solely by looking at the U.A.A.

B. Injunctions and Stays of Arbitration

In *Lester Witte & Co. v. Lundy*, the Illinois Appellate Court faced the issue of the trial court's authority to enter a temporary restraining order to enjoin an arbitration proceeding. The plaintiff in *Lundy* moved to stay arbitration proceedings brought by the defendant on the ground that the defendant's demand for arbitration did not state an arbitrable claim. The trial court entered a temporary restraining order to enjoin the proceedings and scheduled a preliminary hearing to determine the arbitrability of the dispute.

The appellate court held that a court does not have the authority to issue a temporary restraining order and provide for a preliminary hearing where the arbitration agreement is clear in its requirement for arbitration of the dispute. The court cited section 2(b) of the U.A.A., which provides:

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

Because there was no substantial and bona fide dispute as to the arbitration

557. N.Y. CIV. PRAC. LAW §§ 7501-7514 (McKinney 1980). Confirmation of the award was pending before a New York trial court at the time the Illinois circuit case was filed.


559. 98 Ill. App. 3d at 655-56, 424 N.E.2d at 980.

560. Id. at 656, 424 N.E.2d at 980.

561. Id.


563. Id. at 1102, 425 N.E.2d at 2.

564. Id. at 1104, 425 N.E.2d at 4.

agreement, the court held that the lower court had no authority to grant the temporary restraining order or to schedule any hearings on the issue.\textsuperscript{566}

In \textit{City of Hot Springs v. Gunderson's, Inc.},\textsuperscript{567} the South Dakota Supreme Court considered the authority of a court to stay an arbitration proceeding when one co-defendant is subject to an arbitration agreement but the other co-defendant is not. The plaintiff had hired Phelps-Benz to design a golf course and had contracted with Gunderson's to construct it. The plaintiff's contract with Gunderson called for compulsory arbitration of disputes, while the contract with Phelps-Benz did not.\textsuperscript{568} After a dispute arose, the plaintiff sued both Gunderson and Phelps-Benz, alleging that they were jointly and severally liable for negligent design and construction of the irrigation system. Gunderson moved to compel arbitration. The trial court denied the motion on the ground that Phelps-Benz was not a party and there would be a duplication if arbitration and judicial proceedings were going on at the same time on the same issues.\textsuperscript{569}

The supreme court reversed, basing its decision on section 2 of the U.A.A., which the court said required the trial court to consider severing the claim against Gunderson from the claim against Phelps-Benz.\textsuperscript{570} Since the trial court did not consider separating the claims and based its decision on the fear of multiple suits, it had no authority to deny the motion to compel arbitration.\textsuperscript{571}

\textbf{C. Award of Costs and Attorneys' Fees}

The issue in \textit{Heyman v. Vonelli}\textsuperscript{572} was whether the trial court could in-

\begin{itemize}
  \item \textsuperscript{566} 98 Ill. App. 3d at 1104, 425 N.E.2d at 3-4.
  \item \textsuperscript{567} 322 N.W.2d 8 (S.D. 1982).
  \item \textsuperscript{568} \textit{Id.} at 9.
  \item \textsuperscript{569} \textit{Id.}
  \item \textsuperscript{570} \textit{Id.} at 11. The relevant portions of U.A.A. § 2 (1955) provide:
    \begin{itemize}
      \item \paragraph{(a)} On application of a party showing an agreement described in Section 1, 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.
      \paragraph{(d)} 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, \textit{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.
    \end{itemize}
  \item \textsuperscript{571} 322 N.W.2d at 11.
  \item \textsuperscript{572} 413 So. 2d 1254 (Fla. Dist. Ct. App. 1982).
\end{itemize}
crease the amount of costs awarded in arbitration and assess attorneys' fees. The plaintiff had made the demand for arbitration, alleging breach of a construction contract which contained an arbitration clause. The arbitrator found in the defendant's favor and an order was entered assessing arbitration costs against the plaintiff. On the defendant's motion to confirm the award, the court entered an order confirming the award and granting attorneys' fees and costs for the circuit court litigation. The Florida District Court of Appeal held that the trial court's award of attorneys' fees and costs was improper based on Florida's version of the U.A.A. Under Florida law, a court, upon application to confirm an award, is without authority to vacate, modify, or correct an arbitration award unless it was procured by undue means or mistake.

The statements of the Florida court in *Heyman* should be contrasted with the holding of another panel of the Florida District Court of Appeal in *McDaniel v. Berhalter*, a case that involved the enforcement of an arbitration award. The questions before the court were whether a party could shift the burden of attorneys' fees in arbitration by filing a mechanic's lien foreclosure action and whether the trial court could add arbitration costs and pre-award interest to an arbitration award. The *McDaniel* court cited an earlier Florida case, *Mills v. Robert W. Gottfried, Inc.*, which held that an arbitration award could be enforced by means of a mechanic's lien. However, the *McDaniel* court observed that the mere institution of a mechanic's lien foreclosure action does not operate to change a party's rights under the U.A.A. According to *McDaniel*, the use of a mechanic's lien to enforce an arbitration award does not avoid the Florida rule that attorneys' fees associated with arbitration proceedings are not recoverable in the absence of an agreement between the parties. The prevailing party could not recover attorneys' fees for services in arbitration.

573. *Id.* at 1255.
574. *Id.* See *FLA. STAT. ANN.* §§ 682.01-.22 (West Cum. Supp. 1983).
575. *FLA. STAT. ANN.* §§ 682.13-.14 (West Cum. Supp. 1983); U.A.A. §§ 12, 13 (1955). The court also cited the provision that specifically excludes attorneys' fees as recoverable costs. *FLA. STAT. ANN.* § 682.11 (West Cum. Supp. 1983); U.A.A. § 10 (1955). The defendant, however, sought to recover his attorneys' fees and costs under the mechanic's lien statute, not the U.A.A. The court rejected the claim because an award for costs and fees cannot be based on proceedings in two forums. 413 So. 2d at 1255. The court decided that "a party who enters into a contract requiring arbitration may not file a complaint of foreclosure and demand an attorney's fee." *Id.*
577. *Id.* at 1028.
579. *Id.* at 839.
580. 405 So. 2d at 1029.
581. *Id.* at 1029-30.
582. *Id.* at 1030. The court in *McDaniel* concluded it was proper for the trial
The plaintiff had also argued that the trial court's interest award should be considered as a permissible modification of the arbitrator's award. The appellate court dismissed this argument since the trial record did not reveal that the plaintiff had sought a modification and no facts in the record supported a modification. The court emphasized that modification is proper under the U.A.A. only when there is an evident miscalculation of figures, an evident mistake in description, or the award is imperfect as a matter of form. Since the arbitrator could have awarded costs but did not, the court held that the lump sum award barred the plaintiff from seeking arbitration costs in addition to the award.

D. Remand to Original Arbitrators

In *Meharry v. Midwestern Gas Transmission Co.*, the Appellate Court of Illinois was presented with the issue of a court's authority to remand a dispute to the same panel of arbitrators whose original award was vacated by the court. The lower court vacated the original award because the panel had made a gross mistake of fact and had exceeded its authority in making the award and remanded the case to the original arbitrators. This remand was appealed on the ground that the lower court lacked authority to do so.

The appellate court relied on section 12(c) of the U.A.A., which permits submission of the dispute to a new panel of arbitrators in certain circumstances. The court found that section 12(c) does not require the court to appoint new arbitrators, and so the lower court was within its authority to impose a lien on the defendant's property and that the plaintiff could recover attorneys' fees related to enforcing the arbitration award. *Id.* This followed because the defendant failed to pay interest when he paid the award, and "[s]ince the tender was not the full amount due, it was not a good tender." *Id.*

583. *Id.*
585. 405 So. 2d at 1031. The bar did not extend to the costs of seeking judicial confirmation of the award because those are specifically recoverable under FLA. STAT. ANN. § 682.15 (West Cum. Supp. 1983). The section is the same as U.A.A. § 14 (1955).
587. *Id.* at 145, 430 N.E.2d at 1139.
588. U.A.A. § 12(c) (1955) provides:

In vacating the award on grounds other than . . . [that there was no arbitration agreement] the court may order a rehearing before new arbitrators . . . , or if the award is vacated on the grounds . . . [that the arbitrators exceeded their authority or refused to hear relevant evidence] the court may order a rehearing before the arbitrators who made the award or their successors . . . .

to remand the case back to the original panel.\textsuperscript{589} A new panel must be appointed only when the grounds for vacating the original order were fraud, corruption, partiality, undue means, or any other grounds specifically listed in section 12(c).\textsuperscript{590}

E. Consolidation and Separation of Proceedings

A recent Maryland decision, \textit{Litton Bionetics v. Glen Construction Co.},\textsuperscript{591} considered a court's power to order consolidation of arbitration proceedings. A contractor filed a demand for arbitration against the owner of a newly constructed building. The owner counterclaimed and filed a demand for arbitration against the architect alleging negligence. The contractor refused to consolidate the arbitration proceedings and the owner sought a declaratory judgment that they be consolidated. The judgment was denied and the owner appealed.\textsuperscript{592}

In addressing the power to order consolidation, the Maryland Court of Appeals first described the problem:

Inasmuch as arbitration is a matter of agreement between the parties, the problem of power . . . arises only when the parties have not provided in their agreements whether consolidation is or is not authorized. The problem arises when there is a common party to two or more agreements and there is a commonality of subject matter of the dispute under the different agreements.\textsuperscript{593}

The court observed that those courts which recognize the power to order consolidation believe that the power to enforce an arbitration agreement includes the power to order that the arbitration be done in conjunction with a sufficiently related arbitration.\textsuperscript{594} This minimizes the danger of inconsistent results and provides convenience and economy by settling disputes arising out of common facts and occurrences in one proceeding.\textsuperscript{595} The court contrasted this view with that of courts which have found no power to compel consolidation. These courts have stressed "that a court cannot rewrite the agreement of the parties,"\textsuperscript{596} but they use the term "rewrite" in two senses. First, the court may feel it can do no more than enforce what the parties have expressed in their agreement, and the agreement is silent regarding consolidation. Second, the mechanics of meshing an arbitration proceeding under one contract with the procedure specified in another may not be possible without affecting the rights of one

\textsuperscript{589} 103 Ill. App. 3d at 148, 430 N.E.2d at 1141.
\textsuperscript{590} Id.
\textsuperscript{591} 292 Md. 34, 437 A.2d 208 (1981).
\textsuperscript{592} Id. at --, 437 A.2d at 209-211.
\textsuperscript{593} Id. at --, 437 A.2d at 213.
\textsuperscript{594} Id.
\textsuperscript{595} Id.
\textsuperscript{596} Id.
or more of the parties.\footnote{597}

After weighing the conflicting rules, the Maryland court stated that if the contract is silent, consolidation of arbitration proceedings can be ordered if the issues are substantially the same and no substantial rights are prejudiced.\footnote{598} The court decided that "the better analysis is presented in those decisions which conclude that the power to order consolidation exists as an incident of the jurisdiction statutorily conferred on a court generally to enforce arbitration agreements."\footnote{599} The court noted that, while a court might be unable to exercise its power to order consolidation if it would alter a party's contract rights, the power still exists. It emphasized that if consolidation deprived a party of a contractual right under the arbitration agreement, the exercise of the power to consolidate would be improper.\footnote{600} The actual considerations that determine whether a court should exercise its authority to order consolidation of arbitration proceedings are: (1) the effect of consolidation on the parties' contractual rights, and (2) the degree to which the factual issues are substantially the same.\footnote{601}

\section{XI. Judicial Review}

The power of a court to review an arbitration decision is limited.\footnote{602} Allowing review of arbitration decisions turns arbitrators into courts of original jurisdiction and makes the road to final judgment longer and more costly.\footnote{603} Judicial review is thus limited to a determination of whether the

\footnote{597} Id. at \textemdash, 437 A.2d at 214 (citing M. DOMKE, supra note 9, at 272, 274).
\footnote{598} 292 Md. at \textemdash, 437 A.2d at 217.
\footnote{599} Id.
\footnote{600} Id. at \textemdash, 437 A.2d at 218. To guide the lower court on remand, the court stated that the same factors used in determining whether to consolidate equity actions should be used to determine whether to order consolidation of arbitration proceedings. Id. at \textemdash, 437 A.2d at 219. The court also noted that the case might be subject to the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1976). The court, however, found there would be no difference in result between the federal statute and the U.A.A. 292 Md. at \textemdash, 437 A.2d at 219-20.
\footnote{601} 292 Md. at \textemdash, 437 A.2d at 217.
\footnote{603} The United States Supreme Court, in a trio of cases known as the Steelworkers' Trilogy, articulated another line of reasoning for judicial deference to arbitral decisions. Parties bargain for recourse to an arbitrator in the event of disagreement, expressing a preference for an arbitrator's judgment. Under general rules of contract law the court upholds the intent of the parties and gives them what they bargained for. Therefore, while a reviewing court may disagree with the decision, it should not substitute its judgment for that of the arbitrator. See United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960). Courts have used the same reasoning under the U.A.A. to circumscribe the scope of review. See School Dist. v. Erie Educ.
arbitrator acted within the authority granted him by the agreement.604

Courts consistently uphold a reviewing court's authority to determine whether the subject matter of the dispute is within the terms of the agreement to arbitrate.605 This analysis, called the "essence" test, was developed by the United States Supreme Court in United Steelworkers v. Enterprise Wheel & Car Corp.,606 a labor arbitration case. Recent cases—many of them from Pennsylvania—have held that an arbitrator's decision meets the test if it is rationally derived from the agreement in light of its language, context, and other indicia of the parties' intent.

In School District v. Erie Education Association,607 the Pennsylvania Commonwealth Court held that the adoption of the U.A.A. did not change the use of the essence test.608 In Erie Education, the arbitrator had decided that a revision by the school district of its sabbatical leave policy violated the collective bargaining agreement. The district's revision placed more restrictions on sabbaticals and limited the number that could be taken. The collective bargaining agreement stated only that "[s]abbatical leaves shall be granted to teachers in accordance with the School Code."609 The School Code left to the district the right to "make such regulations as they may deem necessary to make sure that employees on leave shall utilize such leave properly for the purpose for which it was granted."610 The lower court reversed the arbitrator on the ground that the decision could not have been drawn from the essence of the contract. The appellate court held that the award was consistent with the essence of the agreement and reinstated it.611 The court noted that broad judicial deference should be given to arbitrators.612 So long as the subject matter—sabbaticals in this case—is included in the collective bargaining agreement, "the validity of the arbitrator's interpretation is not a matter of concern to the court."613


606. 363 U.S. 593, 597 (1960). Enterprise Wheel is one of the three cases known as the Steelworkers' Trilogy. See note 603 supra.


608. Id. at —, 447 A.2d at 690.

609. Id. at —, 447 A.2d at 687.


611. — Pa. Commw. at —, 447 A.2d at 690.

612. Id. at —, 447 A.2d at 689 (quoting Scranton Fed'n of Teachers, Local 1147 v. Scranton School Dist., — Pa. —, —, 444 A.2d 1144, 1147 (1982)).

The same court discussed the same test in *Board of Education v. American Federation of State, County & Municipal Employees*. Several members of the union had been terminated by the school district in a complicated plan to transfer collection of taxes to the city. The union filed a grievance, and the arbitrator found that the termination was in violation of the collective bargaining agreement. The court held that the award was within the essence of the agreement and that the interpretation was not subject to review.

In *Jaffa v. Shacket*, the Michigan Court of Appeals reiterated the general rule that errors of fact or misinterpretations of law are not grounds for vacating an arbitrator’s award. The court pointed out, however, that if the parties agreed to be subject to a particular law or set of laws the court could examine that law to determine if it was followed. The court explained that this seemingly broader scope of review was really the traditional examination of the award to determine if it complied with the terms of the agreement.

In *Chirico v. Board of Supervisors*, the Pennsylvania Commonwealth Court closed one avenue of an expanded scope of review by holding that a vaguely worded award would not be interpreted by the courts but must be returned to arbitration. The police in *Chirico* brought an action to compel implementation of certain provisions of an arbitrator’s award, which had dealt with vacation weeks. The police argued that they should be allowed to take vacations during weeks in which they were scheduled to work six days. The term “vacation week” was not defined in the award. The court held that the lower court had no jurisdiction to interpret this term and instructed it to remand the case to the arbitrator for interpretation. The court felt that allowing interpretation of arbitral awards would result in judicial determination of issues properly belonging in the arbitration process.

In *Hughes v. Yellow Freight System*, a grievance committee rendered a decision against Hughes. He filed suit in court and, in order to avoid the limitations placed on review of such decisions, contended that he was not seeking review of the decision but was asking for relief for breach of contract. He based the argument on the fact that Yellow Freight had deducted

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615. *Id.* at —, 444 A.2d at 817.
617. *Id.* at 635, 319 N.W.2d at 607. The court was considering the provisions of the Uniform Commercial Code.
620. *Id.* at —, 439 A.2d at 1284-85.
621. *Id.* at —, 439 A.2d at 1284.
622. *Id.* at —, 439 A.2d at 1285.
623. *Id.* at —, 439 A.2d at 1284-85.
money from his salary to cover damages he had caused prior to the grievance committee decision.625 The Pennsylvania Superior Court rejected this contention, finding that "[a] labor arbitration award that is properly based on the applicable collective bargaining agreement . . . is entitled to finality and is not subject to review on the merits."626

Another Pennsylvania case addressed the standard of review to be applied to an arbitrator's interpretation of a collective bargaining agreement. In Aliquippa Education Association v. School District,627 the arbitrator found that the district had violated a savings clause in the collective bargaining agreement by failing to grant a sabbatical leave to a teacher. The lower court held that the arbitrator exceeded his powers in finding that the parties intended to incorporate sabbatical rights into the contract.628 The Pennsylvania Commonwealth Court reversed, holding that "[w]here an arbitrator's interpretation of a collective bargaining agreement can be in any way rationally derived from that agreement, the arbitrator's decision draws its essence from the agreement and shall not be disturbed by a reviewing court."629 The court stated that a reviewing court may disturb the award only where there is apparent disregard of the agreement, completely unsupported by principles of contract construction.630

In summary, in the absence of special authority granted in the agreement, the powers of a court to review an award are usually limited to determining whether the award was within the scope of the contract. The court will not determine whether that decision was right or wrong, only whether it could rationally be derived from the agreement.

XII. TIMELINESS

The substantive rights of a party under an arbitration agreement may be lost if they are not asserted in a timely fashion. Certain claims and defenses must be asserted within the proper time period, whether that period is set by statute or in the arbitration agreement.

A. Demand for Arbitration

The timeliness of a demand to arbitrate is not regulated by statute but is usually provided for in the agreement between the parties. The contract usually provides for a demand to arbitrate within a reasonable time after a claim, dispute, or other matter in question has arisen.

In Public Health Trust v. M.R. Harrison Construction Corp.,631 the county

625. Id. at —, 439 A.2d at 185.
626. Id.
628. Id. at —, 437 A.2d at 1039-40.
629. Id. at —, 437 A.2d at 1040-41.
630. Id. at —, 437 A.2d at 1040.
631. 415 So. 2d 756 (Fla. 1982).
public health trust appealed from a trial court order denying its motion to stay arbitration proceedings. The county contended that Harrison had not demanded arbitration within a reasonable time after the dispute arose as required by the contract. The Florida Supreme Court concluded that the arbitrator, not the court, should decide whether the demand for arbitration was timely.\(^{632}\) The court indicated that the timeliness of a demand is not a condition precedent to arbitration but is simply a procedural stipulation agreed to by the parties.\(^{633}\)

The same court reached the same conclusion in *Rinker Portland Cement Co. v. Steidel*,\(^{634}\) where the contract in question contained no language requiring a demand for arbitration or specifying that the demand be filed within a reasonable time. The court indicated that, while the contract might be construed to require a demand within a reasonable time, that issue was one for the arbitrator.\(^{635}\)

The timeliness of a demand for arbitration was decided by a federal district court—not the arbitrator—in *E.C. Ernst, Inc. v. City of Tallahassee*.\(^{636}\) The plaintiff sued for contractual violations. The defendant moved for an order compelling the plaintiff to arbitrate. Fifty-one days after arbitration was ordered, the defendant attempted to waive the contractual right to arbitration it had already asserted. The plaintiff responded by asserting its own right to arbitration.\(^{637}\) Normally, the filing of a lawsuit to enforce a contract is a waiver of the plaintiff’s right to arbitrate, but where a defendant offers to arbitrate, the plaintiff has a right to accept the arbitration offer.\(^{638}\) In *Ernst*, however, the defendant withdrew its offer to arbitrate before the plaintiff indicated its desire to do so. The court held that the plaintiff’s decision to arbitrate was timely because (1) arbitration proceedings had already begun and so there was no need to make the demand, and (2) the plaintiff gave prompt notice of its decision to arbitrate after learning of the defendant’s waiver.\(^{639}\)

B. Appeal from an Award

An appeal from an arbitrator’s award is to be taken in the same man-

\(^{632}\) Id. at 757-58.
\(^{633}\) Id. at 758.
\(^{634}\) 414 So. 2d 629 (Fla. 1982).
\(^{635}\) Id. at 630.
\(^{637}\) Id. at 1142.
\(^{638}\) Krauss Bros. Lumber Co. v. Louis Bossert & Sons, 62 F.2d 1004, 1006 (2d Cir. 1933).
\(^{639}\) 527 F. Supp. at 1143. The court may have had yet another reason: arbitration would be the best way of handling the case. The court noted that “this case is particularly suited for arbitration. All the parties know much more about adequacy of blueprints, sufficiency of electric cable, and the other myriad of technical subjects involved in this complex lawsuit than I know.” Id. at 1144.
ner and to the same extent as from orders of judgment in a civil action.\textsuperscript{640} Each state's rules of appellate procedure apply. In \textit{Pugar v. Greco},\textsuperscript{641} the plaintiff and one of the two defendants filed a motion to appeal, without payment of additional costs, from a compulsory arbitration award. They filed the motion within twenty days after the docketing of the award, and it was denied twenty-one days after the docketing.\textsuperscript{642} The Pennsylvania Supreme Court affirmed denial of the motion.\textsuperscript{643}

Then, within twenty days of the supreme court's decision, the parties paid the additional appellate costs and perfected their appeal from the arbitrator's award. A motion was made to quash the appeal as untimely under the general rule that requesting reconsideration or some other form of relief does not provide additional time for perfecting an appeal. The Pennsylvania Superior Court ruled that the appeal was timely because the supreme court's opinion denying the motion indicated that the parties could proceed to perfect their appeal.\textsuperscript{644} The court further concluded that the general rule of not allowing additional time was not applicable since the appealing parties did not challenge an order of the lower court per se but instead challenged the appeal procedure itself.\textsuperscript{645} The parties reasonably believed that by paying the additional costs they would lose their ability to challenge the constitutionality of the requirement. The motion to appeal from the arbitrator's award without the payment of additional costs, made within twenty days of the award, was timely.\textsuperscript{646}

C. \textit{Motion to Vacate or Modify an Award}

The timeliness of a motion to vacate or modify an arbitration award is controlled by statute. Under the U.A.A., an application to vacate or modify must generally be made within ninety days after delivery of a copy of the award to the applicant.\textsuperscript{647} States adopting the U.A.A. have established

\textsuperscript{640} U.A.A. § 19(b) (1955).
\textsuperscript{642} \textit{Id.} at —, 436 A.2d at 219.
\textsuperscript{643} Pugar v. Greco, 483 Pa. 68, 75, 394 A.2d 542, 546 (1978).
\textsuperscript{644} 291 Pa. Super. at —, 436 A.2d at 219.
\textsuperscript{645} \textit{Id.} at —, 436 A.2d at 217.
\textsuperscript{646} \textit{Id.} The dissent in \textit{Pugar} pointed out that the Pennsylvania Supreme Court had previously stated that statutes limiting the time under which appeals may be taken from judicial proceedings are mandatory. The time for appeal is not extended by post-judgment requests for relief or other proceedings by a party who thereafter seeks to file an untimely appeal. \textit{Id.} at —, 436 A.2d at 219 (Montgomery, J., dissenting). \textit{See In re Hanna's Estate}, 367 Pa. 337, 339, 80 A.2d 740, 741 (1951).
\textsuperscript{647} U.A.A. §§ 12(b), 13(a) (1955). Section 12, which governs vacation of awards, provides:

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.
the same basic requirement, but the time periods may vary.

In Downing v. Allstate Insurance Co.,\textsuperscript{648} the Michigan Court of Appeals denied as untimely a motion to vacate an arbitration award.\textsuperscript{649} The award was issued on April 26. The plaintiff requested clarification of the award on May 14, and clarification was issued on August 13. On August 24, the plaintiff asked the arbitrators to reopen the proofs. The court treated this as a motion to vacate the award.\textsuperscript{650} The Michigan rule provides that an application to vacate the award must be made within twenty days after delivery of the award to the applicant.\textsuperscript{651} There is no rule requiring clarification or reconsideration of an award by arbitrators. Since there was no statutory authorization for the clarification, it could not toll the twenty-day limit.\textsuperscript{652} The limit, said the court, was a form of post-trial relief and was therefore reasonable.\textsuperscript{653}

The court also found that the time limit did not violate the equal protection clause because it applies equally to both parties. The court noted that regardless of another party's attempt to confirm an award, objections to the award must be made within the twenty day limit.\textsuperscript{654}

In Kress Corp. v. Eduv. C. Levy Co.,\textsuperscript{655} the Illinois Appellate Court affirmed an order confirming an award and denying a motion to dismiss the confirmation application.\textsuperscript{656} An arbitrator's award notice was mailed on June 9. On September 17, Kress filed an action to confirm the award. Levy filed its objections and a motion to dismiss on December 5. Levy's defenses were thus raised nearly six months after delivery of the notice of award.\textsuperscript{657} The Illinois act requires that an application be made within ninety days after delivery of a copy of the award to the applicant.\textsuperscript{658} The trial court denied Levy's motion to dismiss and confirmed the award. The appellate court held that after ninety days a party is barred from asserting statutory grounds for vacation, regardless of whether the grounds are raised by independent motion to vacate or in the defense of a motion for confirmation.\textsuperscript{659} In rejecting the federal rule on the subject,\textsuperscript{660} the court stated that

\textit{Id.} \S 12(b). Section 13 provides that the court "shall modify or correct the award" if required, provided that the application is made within 90 days. \textit{Id.} \S 13(b).

\begin{itemize}
  \item 649. \textit{Id.} at 100, 317 N.W.2d at 304.
  \item 650. \textit{Id.} at 99, 317 N.W.2d at 304.
  \item 652. 113 Mich. App. at 102, 317 N.W.2d at 305.
  \item 653. \textit{Id.} at 101, 317 N.W.2d at 305.
  \item 654. \textit{Id.}
  \item 655. 102 Ill. App. 3d 264, 430 N.E.2d 593 (1981).
  \item 656. \textit{Id.} at 270, 430 N.E.2d at 597.
  \item 657. \textit{Id.} at 267, 430 N.E.2d at 594.
  \item 659. 102 Ill. App. 3d at 269, 430 N.E.2d at 596.
  \item 660. \textit{See} The Hartbridge, 57 F.2d 672, 673 (2d Cir. 1932), \textit{cert. denied sub nom. Munson Steamship Line v. North England Steamship Co.}, 288 U.S. 601 (1933);
\end{itemize}
the purpose of the rule is to promote the speedy and final resolution of disputes between parties and enhance the value of the arbitration process.\textsuperscript{661}

In \textit{McDonald v. Allstate Insurance Co.},\textsuperscript{662} the plaintiff sought confirmation of the arbitration award against the insurer. The insurer claimed that the arbitrators exceeded their powers by requiring it to pay more than the policy limits. The plaintiff insisted that the court was required to confirm the award unless grounds for vacation or modification were alleged within the applicable time limit.\textsuperscript{663} The Florida Supreme Court noted that its arbitration act provides for a ninety-day time limit\textsuperscript{664} but held that the limit does not apply to nonstatutory defenses such as accord and satisfaction.\textsuperscript{665} The court reasoned that these defenses should be permitted because they are based on extrinsic circumstances collateral to the arbitration award.\textsuperscript{666}

The case of \textit{Crutchley v. Crutchley}\textsuperscript{667} involved the consent of a husband and wife to arbitrate the issue of spousal support. An arbitrator's award was entered and confirmed on December 1, 1977. Neither the arbitrator nor the confirming court had made findings of fact. On November 30, 1978, the wife moved to modify the award to increase alimony and child support payments. She alleged that because the arbitrator's award and its confirmation contained no findings of fact, the award should be modified.\textsuperscript{668} The motion was denied and an appeal was taken to the North Carolina Court of Appeals two and a half years after entry of the order confirming the award. North Carolina provides a ninety-day limit for filing applications for modification.\textsuperscript{669} The court held that the appeal was untimely and ruled that because the wife did not seek judicial modification within ninety days after delivery of the award, she had waived her claim regarding the improper form of the award.\textsuperscript{670}

In \textit{Pessolano v. George R. Price \& Associates},\textsuperscript{671} an arbitration award was entered in favor of Price. On November 25, the trial court confirmed the award. On December 15, Pessolano filed motions to set aside the judgment and to modify and vacate the award. While these motions were pending, Pessolano filed a notice of appeal on December 17.\textsuperscript{672} The Georgia Court


\textsuperscript{661} 102 Ill. App. 3d at 269, 430 N.E.2d at 596.

\textsuperscript{662} 408 So. 2d 580 (Fla. 1981).

\textsuperscript{663} \textit{Id}. at 582.


\textsuperscript{665} 408 So. 2d at 582.

\textsuperscript{666} \textit{Id}.


\textsuperscript{668} \textit{Id}. at 735-36, 281 S.E.2d at 746.

\textsuperscript{669} \textit{N.C. GEN. STAT.} § 1-567.14 (Supp. 1979).

\textsuperscript{670} 53 N.C. App. at 738-39, 281 S.E.2d at 748.


\textsuperscript{672} \textit{Id}. at 341, 283 S.E.2d at 318.
of Appeals held that Pessolano's motions were an attack on the confirmation judgment and as such were the same as a motion for a new trial. The notice of appeal filed two days after the filing of the motions to vacate and modify was therefore premature. The court held that since a timely notice of appeal was required to establish jurisdiction in the appellate court, the appeal should be dismissed.

While the appeal was pending, the trial court denied Pessolano's motions on January 30. The appellate court indicated, however, that the subsequent overruling of the motions in the trial court did not perfect a notice of appeal filed before a final judgment was entered.

D. Summary

These recent cases indicate that the timeliness of an appeal or a motion to vacate or modify an award will be strictly construed in most cases, although an assertion of nonstatutory defenses may be proper even after the applicable time limit. The issue of whether a demand for arbitration was made within a reasonable time, not governed by statute, is a question for the arbitrator, not the courts.

XIII. Applicability of the U.A.A.

The U.A.A. permits parties to lawfully enter into a valid contract for compulsory arbitration of commercial disputes unless it is specifically prohibited by statute. The facts of a given case may raise a legal question regarding the applicability of all or part of the U.A.A.

A. Retroactive Effect

In Evans Electrical Construction Co. v. University of Kansas Medical Center, a construction contract between Evans and the state provided that all claims and disputes arising out of the contract would be submitted to arbitration. As originally passed, the Kansas arbitration act did not specifically exempt the state and its political subdivisions from its provisions. After the contract was made, and after the dispute arose and suit was brought on it, the Kansas legislature prohibited compulsory arbitration contracts entered into by the state. The state could thus lawfully enter into an arbitration provision at the time the contract was formed and the time the case was filed but not at the time the Kansas Supreme Court received the

673. Id.
674. Id.
675. Id., 283 S.E.2d at 319.
678. KAN. STAT. ANN. § 5-401 (1975).
case. The court was faced with the issue of whether the state exemption should have retroactive application. The court held that the exemption should not be applied retroactively because the parties had entered into the contract with the understanding that they would submit their disputes to arbitration and that the U.A.A. would apply.

B. Choice of Law

In Kress Corp. v. Edw. C. Levy Co., both parties submitted a written arbitration agreement to the American Arbitration Association in Chicago. The agreement did not state whether the U.A.A. or the Federal Arbitration Act should apply. The Illinois Court of Appeals found that in petitioning for confirmation and moving to dismiss pursuant to the Illinois version of the U.A.A., and in bringing the case in an Illinois court, the parties had impliedly agreed to submit their dispute to Illinois law. The court applied the U.A.A.

C. Domestic Relations

In Crutchley v. Crutchley, a husband and wife were involved in a dissolution proceeding. Both parties agreed to submit their disputes over child custody, marital property, and alimony to binding arbitration. The North Carolina trial court entered an order, which both parties signed, approving the parties' consent to arbitration and appointing an arbitrator. The North Carolina Court of Appeals said that the consent order "was a written agreement between the plaintiff and the defendant to arbitrate." The court applied a section of the U.A.A. adopted in North Carolina, which states that "[t]wo or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement," and held that the domestic issues were arbitrable. Since, according to the court, the arbitration agreement did not contain a written stipulation that the U.A.A. was inapplicable, the U.A.A. would govern the court's determination of the validity of the agreement.

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680. 230 Kan. at 304, 634 P.2d at 1079.
681. Id. at 305, 634 P.2d at 1084.
684. 102 Ill. App. 3d 266, 430 N.E.2d at 595.
686. 53 N.C. App. at 732, 281 S.E.2d at 744.
687. Id.
689. 53 N.C. App. at 736, 281 S.E.2d at 747.
690. Id.
XIV. CONSTITUTIONALITY OF THE U.A.A.

Various provisions of the U.A.A. have withstood constitutional challenges in several jurisdictions. These challenges have raised several issues, none of which has been successful. The party challenging the constitutionality of any section of the U.A.A. has the burden of proving the constitutional violation, and this burden of proof has proved difficult to satisfy. If the statute can be construed in a manner consistent with the Constitution, the court will uphold it. The U.A.A. contains the usual provision that protects the act in its entirety from being held unconstitutional.

Section 1 of the U.A.A. governs the validity of an arbitration agreement. By signing such an agreement, a party relinquishes his constitutional right to a trial before a court of law. Michigan courts have unanimously agreed that this aspect of the U.A.A., as embodied in the state's Medical Malpractice Arbitration Act, is not unconstitutional. Although a party may waive his right to a trial by entering into an arbitration agreement, Michigan has held that such a waiver must be knowing and voluntary.

693. U.A.A. § 22 (1955) 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.
694. Id. § 1.
697. Although Michigan courts agree that waiver of the right of access to the courts by entering into an agreement with a hospital or doctor to arbitrate all claims is not unconstitutional, they are sharply divided as to whether the inclusion of a physician on the three-member arbitration board violates the patient's due process rights to an impartial hearing. See Part XV infra.
698. Morris v. Metriyakool, 107 Mich. App. 110, 114, 309 N.W.2d 910, 911 (1981); Brown v. Siang, 107 Mich. App. 91, 106, 309 N.W.2d 575, 590 (1981). The knowing and voluntary waiver standard is also responsible for the divided opinions of Michigan courts as to the validity of medical malpractice agreements. The arbitration agreement form mandated for use by the Michigan statute does not inform the patient that one member of the board will be a physician. That information is included in an accompanying booklet that the patient is not required to read. Two Michigan decisions, therefore, clearly indicate that signing the arbitration agreement does not, without more, constitute a knowing and voluntary waiver of the patient's right to trial. Jackson v. Detroit Memorial Hospital, 110 Mich. App. 202,
The provisions of various state arbitration statutes relating to time limits for applications to vacate arbitration awards have been attacked as violations of due process in that the periods are so short that they effectively bar judicial relief.\(^\text{699}\) Challenges have recently been made to Maryland's thirty day\(^\text{700}\) and Michigan's twenty day\(^\text{701}\) time periods. Both were upheld as constitutional.\(^\text{702}\) The U.A.A. statutory time limit for filing an application to vacate an arbitration award is ninety days.\(^\text{703}\) Since this is a considerably longer period than those provided by Maryland and Michigan, it is likely that it too will withstand constitutional challenge.

To date, no constitutional attack on the U.A.A. itself has been successful. Constitutional challenges to some state provisions which, though modeled after the U.A.A., are more restrictive have been similarly unsuccessful. State arbitration statutes that omit specific provisions of the U.A.A. have been called into question but have also been upheld as constitutional. In *Morris v. Metriyakool*\(^\text{704}\) and *Brown v. Siang*,\(^\text{705}\) the Michigan Court of Appeals considered the Michigan Medical Malpractice Arbitration Act.\(^\text{706}\) The courts pointed out that, unlike section 9 of the U.A.A. which allows appeals from arbitral awards,\(^\text{707}\) the Medical Malpractice statute severely limited a party's right to appeal from an award.\(^\text{708}\) However, the decisions upheld the statute, emphasizing (1) the voluntary nature of the arbitration agreement, and (2) the Michigan constitution, which does not extend the right to appeal even in civil litigation.\(^\text{709}\)


\(^{703}\) U.A.A. § 12(b) (1955).


XV. ARBITRATION OF MEDICAL MALPRACTICE CLAIMS

Although the U.A.A. is broad enough to include medical malpractice claims,710 several states that have adopted it have amended their versions to specifically exclude such claims from its coverage.711 Other states have imposed the requirement that claims be reviewed by a malpractice screening committee before arbitration can commence.712

In contrast, several states that adopted the U.A.A. amended their versions to specifically provide for the arbitration of medical malpractice claims.713 Michigan is one such state, and it has already developed a significant body of law—much of it inconsistent—on the issue. In 1975, the state legislature enacted the R. Hood-McNeely-Geake Malpractice Act,714 a legislative attempt to combat spiralling health care costs caused by increased malpractice litigation.715 The Malpractice Act establishes a procedure under which any individual may voluntarily agree to submit to arbitration any claim arising from treatment or care that he may later assert against a health care provider or hospital.716 It provides standards against which arbitration agreements are to be measured and creates mandatory procedures that control the arbitration process.717

710. See U.A.A. § 1 (1955) ("any existing controversy").
716. The statute applies to:
   arbitration of a dispute, controversy, or issue arising out of or resulting from injury to, or the death of, a person caused by an error, omission, or negligence in the performance of professional services by a health care provider, hospital, or their agent, or based on a claimed performance of such services without consent, in breach of warranty, or in violation of contract.
MICH. COMP. LAWS ANN. § 600.5040 (West Cum. Supp. 1982-1983). A health care provider is defined as a "person, partnership, or corporation lawfully engaged in the practice of medicine, surgery, dentistry, podiatry, optometry, chiropractic, nursing, or a person dispensing drugs or medicines." Id. A hospital is defined as a "person, partnership, or corporation lawfully engaged in the operation of a hospital, clinic, health maintenance organization, or a sanitarium." Id.
717. Id. §§ 600.5041-.5042.
The arbitration agreement offered to a patient must state that execution of the agreement is not a prerequisite to care or treatment and that the patient may revoke the agreement by notifying the doctor within sixty days after execution of the agreement or notifying the hospital within sixty days after discharge. At the time the agreement is signed, the patient must be given a booklet that clearly explains the agreement and the revocation procedure. The Malpractice Act requires that all claims go to an arbitration panel made up of one physician or hospital administrator, one lawyer, and one other person who cannot be a lawyer, physician, hospital representative, or insurance agent. If the arbitration agreement conforms to the statute, is properly executed by the patient, and is not revoked within the sixty-day period, the claim must go to arbitration.

A. Constitutionality

Several recent cases have tested the constitutionality of the Michigan act and have come to different conclusions. In Brown v. Siang, a doctor performed a liver biopsy on the plaintiff's decedent. The plaintiff filed a malpractice suit against the hospital. The hospital moved to submit the dispute to arbitration based on the agreement signed by the decedent

718. Id. §§ 600.5048-.5052.
719. Id. § 600.5041.
720. The physician panelist is preferably, but not necessarily, from the medical specialty involved in the claim unless the claim involves a health care provider other than a physician; in that case a licensee of the health profession involved may be substituted for a physician. Id. § 600.5044.
721. Id. The panel is normally selected by the parties from a list prepared by the American Arbitration Association. By agreement of all the parties, however, an unlisted panelist for one of the designated categories may serve at the hearing. If the parties cannot select a panel by mutual agreement, the Association must appoint the remainder of the panel. An appointed arbitrator may be challenged for cause by any party. "Cause" means a challenge which alleges facts establishing that "unusual community or professional pressures will unreasonably influence the objectivity of the panelist." Id. Parties at the hearing may be represented by counsel, present evidence, and cross-examine witnesses. The prevailing standard of duty, practice, or care applicable in a civil action is used at the hearing, and damages or other remedies are not limited except by other applicable laws. Id. § 600.5043. The procedures to be followed at the hearing, as well as the rules of evidence and discovery, are thoroughly detailed. Id. §§ 600.5048-.5052. A majority of the panel has the power to grant "any relief deemed just, including money damages, provision for hospitalization, medical or rehabilitative procedures, support, or any combination thereof." Id. § 600.5054. An appeal from an arbitration award must qualify under the general arbitration statute and the applicable court rules. Id. § 600.5067. The Malpractice Act governs conflicts arising between its sections and those of the general arbitration statute. Id. § 600.5058.
before his operation. The trial court granted the motion.\(^\text{724}\)

On appeal, the plaintiff argued that the Malpractice Act failed to ensure an impartial tribunal by requiring that a physician or hospital administrator be on the panel and therefore violated due process.\(^\text{725}\) The Michigan Court of Appeals disagreed, reasoning that (1) no one arbitrator can control a decision under the Malpractice Act, (2) policy considerations support the presence of an expert on the panel, and (3) all of the arbitrators must be screened for bias under the statute.\(^\text{726}\) The plaintiff next argued that the decedent did not knowingly waive her right to trial. The court stated that the agreement was voluntarily signed by the decedent, and it contained a clear explanation of its effect as a waiver.\(^\text{727}\) The court also rejected an argument that the arbitration agreement was an adhesion contract, noting that the agreement was not a prerequisite to care, the patient had sixty days to revoke it, and the patient received a booklet explaining the agreement and the revocation procedure at the time the contract was executed.\(^\text{728}\)

The same three issues came before another panel of the Michigan Court of Appeals in Morris v. Metriyakool,\(^\text{729}\) a case decided the same day as Brown. The majority in Morris reached the same result as the Brown court but added that "whether the system will be workable remains to be seen."\(^\text{730}\) The dissent believed that the composition of the arbitration panel was unconstitutional. A litigant, it noted, does not have to prove actual prejudice on the part of a tribunal, only that the risk of bias is "too great."\(^\text{731}\) The dissent argued that a substantial number of physicians are biased against malpractice plaintiffs, and, therefore, a physician on the arbitration panel often will be prejudiced.\(^\text{732}\) The dissent would have invalidated the entire Malpractice Act because of that provision, arguing that the legislature would not have passed the Act without requiring that a health care provider be a member of the panel and thus that provision was not severable.\(^\text{733}\)

The dissent's arguments in Morris were reflected in Jackson v. Detroit Memorial Hospital,\(^\text{734}\) in which the Malpractice Act was declared unconstitutional by a unanimous panel of the Michigan Court of Appeals. The plaintiff in Jackson, after signing an arbitration agreement, was treated by a

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\(^{724}\) Id. at 95, 309 N.W.2d at 576.

\(^{725}\) Id. at 99, 309 N.W.2d at 578.

\(^{726}\) Id. at 103-04, 309 N.W.2d at 580-81.

\(^{727}\) Id. at 104-06, 309 N.W.2d at 581.

\(^{728}\) Id. at 108, 309 N.W.2d at 582.


\(^{730}\) Id. at 120, 309 N.W.2d at 913.

\(^{731}\) Id. at 122, 309 N.W.2d at 914 (Bronson, J., concurring and dissenting).

\(^{732}\) Id. at 128, 309 N.W.2d at 917 (Bronson, J., concurring and dissenting).

\(^{733}\) Id. at 134-35, 309 N.W.2d at 920 (Bronson, J., concurring and dissenting).

dentist at a hospital. She did not revoke the agreement within the time provided, but she filed a civil suit rather than submit her claim to arbitration. The court rejected her argument that the agreement was an adhesion contract. But, unlike the Brown and Morris courts, this court held that the Malpractice Act was unconstitutional because it required a panel of arbitrators so composed that "the probability of actual bias on the part of the . . . decisionmaker is too high to be constitutionally tolerable." The court noted that the failure of the Malpractice Act to provide a mechanism for relief from arbitration after the sixty-day revocation period when the patient did not know about the panel's composition was an important factor in its decision.

The constitutional waters were further muddied by the decision in Cushman v. Frankel. Cushman, though decided after Jackson, chose to follow Brown instead. This panel of the court of appeals reasoned that the procedures in the Malpractice Act to prevent panel bias were sufficient to protect claimants. The court said, "To conclude otherwise would imply an inherent prejudice within the medical professions so deeply held as to preclude members from ever standing in judgment of their colleagues."

B. Revocation Period

While the constitutionality of the arbitration panel has not yet been settled, recent litigation has clarified the construction of some ambiguous terms in the Malpractice Act.

In DiPonio v. Henry Ford Hospital, the plaintiffs' decedent died during a heart operation after executing an arbitration agreement. Shortly thereafter, the plaintiffs requested copies of all of the decedent's hospital records. No copy of the arbitration agreement was given to the plaintiffs. Eleven months after the death, the plaintiffs filed a malpractice suit against the hospital. The hospital moved to compel arbitration based on the agreement. The plaintiffs argued that they had no knowledge of the agreement until the hospital filed its motion. The trial court denied the motion, giving the plaintiffs sixty days from the date of discovery to revoke it. The plaintiffs revoked the agreement.

The question on appeal was whether the agreement was revoked in a

735. Id. at 205-06, 312 N.W.2d at 214.
736. Id. at 204, 312 N.W.2d at 213 (quoting Crampton v. Department of State, 395 Mich. 347, 356, 235 N.W.2d 352, 356 (1975)).
737. 110 Mich. App. at 205, 312 N.W.2d at 214. The defendants were granted leave to appeal on December 1, 1981, but the Michigan Supreme Court had not decided the case at the time of this publication.
739. Id. at 608-09, 314 N.W.2d at 707.
740. Id. at 610, 314 N.W.2d at 708.
742. Id. at 245-46, 311 N.W.2d at 755.
timely fashion. The Malpractice Act provides that a person receiving care from a hospital may revoke within sixty days after his discharge. The Michigan Court of Appeals held that when a patient dies in a hospital the sixty-day period does not begin running until a personal representative of the decedent is appointed, if the representative was aware of the agreement when appointed, or until the representative learns or should have learned of the agreement, if he was unaware of the agreement. The court reasoned that prior court decisions had recognized that the revocation period should be tolled when a patient is mentally or physically unable to communicate his revocation or authorize his legal representative to do so. The decedent’s death put him in that category of patients until his personal representative discovered the existence of the agreement. The court therefore ruled that the plaintiffs had timely revoked the agreement.

A similar issue was raised in Boiko v. Henry Ford Hospital, but a variation in facts led to a different result. The facts in Boiko were similar to those in DiPonio, except that the plaintiff did not argue lack of knowledge of the agreement. The trial court had held the agreement unenforceable, reasoning that the agreement never came into effect because the decedent was never “discharged” from the hospital as required by the statute. On appeal, the court found that the Malpractice Act was intended to cover disputes involving the death of a patient. Since the plaintiff knew of the agreement, the sixty-day period began to run when he was appointed. Since he did not revoke it, the arbitration agreement was binding.

C. Parties Bound by the Agreement

In Brown v. Considine, a different issue was presented for review. The plaintiff and her husband filed a malpractice suit against a hospital and a doctor. The plaintiff had executed an arbitration agreement with the hospital before treatment, but the doctor did not sign an agreement to submit to arbitration until after the treatment was completed. The plaintiff contended that the doctor was not included in the arbitration agreement, even if the agreement with the hospital was valid. The Michigan Court of Appeals held that the agreement with the hospital did not extend to the doctor. The court construed the Malpractice Act to exclude past acts of

745. Id. at 252-53, 311 N.W.2d at 758.
746. Id. at 253, 311 N.W.2d at 758.
748. Id. at 516, 313 N.W.2d at 345.
749. Id. at 517-18, 313 N.W.2d at 345.
750. Id. at 520-21, 313 N.W.2d at 347.
752. Id. at 505-07, 310 N.W.2d at 442-43.
malpractice.\textsuperscript{753}

In Bowes \textit{v.} International Pharmakon Laboratories,\textsuperscript{754} the Michigan Court of Appeals faced the issue of whether procedural rules relating to the joinder of parties may expand the jurisdiction of a circuit court to join, as a party to a malpractice suit, a person who has signed an arbitration agreement with the opposing party. The plaintiff in Bowes contracted meningitis, which she claimed was caused by a contaminant in an antiseptic applied to her skin by a doctor. She initially sued the manufacturer on a products liability theory but later added the doctor as a party defendant. The plaintiff had signed an arbitration agreement with the doctor but not with the other defendants. The doctor moved to compel arbitration, but the trial court denied his request.\textsuperscript{755}

On appeal, the plaintiff argued that the trial court's order was proper because the joinder of parties rule allowed the joining of the doctor to the civil action.\textsuperscript{756} The court held that the lower court should have compelled arbitration, reasoning that the Malpractice Act restricts subject matter jurisdiction over malpractice claims to an arbitration panel once a valid agreement exists.\textsuperscript{757} Consequently, the joinder rules normally applicable in courts of original jurisdiction are not applicable.\textsuperscript{758}

\textsuperscript{753} \textit{Id.} at 508, 310 N.W.2d at 443-44.
\textsuperscript{755} \textit{Id.} at 412, 314 N.W.2d at 642.
\textsuperscript{756} \textit{Id.} at 411-12, 314 N.W.2d at 643.
\textsuperscript{757} \textit{Id.} at 417, 314 N.W.2d at 644-45.
\textsuperscript{758} \textit{Id.} at 413-15, 314 N.W.2d at 644.