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# THE INTERSECTION OF ARBITRATION AND LITIGATION

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Arbitration is a private forum for resolution of disputes without the necessity of court involvement. However, the court is often involved in many ways. This paper attempts to address situations where the private process of arbitration intersects with court proceedings. The first section addresses arbitration agreements and how these agreements set the stage for what should be and is arbitrated. The second and third sections address how to force arbitration on a party who refuses to participate and the defenses for a party who would rather not arbitrate. The fourth section addresses problems presented in arbitration including injunctive relief, dispositive motions, compelling discovery, and third party practice. Finally, the last section addresses what happens in court after the arbitration is over.

## PART ONE: KEY FEATURES OF ARBITRATION

### I. Introduction

Prior to the passage of the Federal Arbitration Act (FAA), American courts were generally hostile to arbitration and routinely refused to enforce agreements to arbitrate. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 593 (2008). By the first quarter of the twentieth century, however, arbitration began to be viewed as a quicker, less expensive process for adjudicating commercial disputes. In 1925, Congress enacted the United States Arbitration Act, which was later renamed the Federal Arbitration Act. James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & Bus. 745, 754 (2009). Importantly, the FAA's passage marked a sea change in the willingness of state and federal courts to enforce agreements to arbitrate and arbitration awards. The FAA has an expansive scope – it applies to all maritime transactions and interstate commerce. "Interstate commerce" has been interpreted very broadly and, therefore, the FAA applies to the overwhelming majority of modern-day arbitrations. Whether arbitration remains a quicker, less expensive process for adjudicating disputes is a matter of some controversy.

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## II. Scope of Arbitration Agreements

Arbitration is a creature of contract law. *See, e.g.*, *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986). For this reason, the words used in an arbitration agreement determine the arbitration-related rights of the parties to that agreement. *See* Joseph M. Cox, *Clause and Effect: A Few Helpful Tips on Scope, Rules of Evidence, and Other Things You Should Know about Arbitration*, 77 Tex. B.J. 292 (2014). Indeed, when parties agree to arbitrate, they give up their rights to a judicial dispute resolution forum (containing a variety of procedural benefits, including comprehensive appellate review) in favor of an expeditious and more affordable resolution process. *See, e.g.*, *Sharp v. Downey*, 13 A.3d 1, 22 (Md.Ct.Spec.App. 2010), *vacated on other grounds*, 51 A.3d 573 (Md.Ct.App. 2012).

Should parties choose a governing law other than the FAA, they must clearly state their intent and desire to do so and may not rely solely on "a generic choice-of-law provision..."

Key provisions to consider in an arbitration agreement include choice of law, the scope of permissible discovery, location of the arbitration, the breadth of the arbitration clause, and costs of arbitration, including attorneys' fees.

### A. What Law Governs an Arbitration Agreement?

Drafters of arbitration agreements should determine and specify what substantive law will govern in any dispute between the parties. Interestingly, much of the case law concerning choice-of-law provisions in the context of arbitration does not address "the applicability of substantive law. Rather, the jurisprudence deals with whether a state or federal arbitration act determines the procedural law...." Matthew Savare, *Clauses in Conflict: Can an Arbitration Provision Eviscerate A Choice-of-Law Clause?*, 35 Seton Hall L. Rev. 597, 602 (2005). As one commentator explained:

> In arbitration, arbitrators may be, but usually are not, directed to establish their decision on principles of substantive law, and typical arbitration awards are not subject to appellate review. Thus, the extent to which arbitrators should and do apply substantive law in deciding cases is less clear.

Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 Am. Bus. L. J. 105, 106–07 (1997). To ensure that the parties' choice-of-substantive-law provision is applied, the General Counsel of the American Arbitration Association gave the following recommendations:

- The choice-of-substantive-law language should be included in the arbitration clause itself.
- The arbitration clause "should stipulate that the arbitrator is bound to decide the arbitration in accordance with the substantive law of the specified state."
- The arbitration clause should prohibit the arbitrator from making an award in equity.
- Depending on the jurisdiction, the arbitration clause should allow a party to move to vacate the arbitrator's award for the arbitrator's failure to apply the specified substantive law.

Savare, *supra.* at 609–10.

With regard to procedural rules:

> [T]he FAA does not necessarily dictate the procedural rules governing how arbitration itself is conducted. Rather, the parties to a contract are free to elect whether the FAA, state law, or other rules—such as those promulgated by an independent ADR provider—will govern their arbitration.

Stephen Smerek and Daniel Whang, *Preemption and the Federal Arbitration Act: What Law Will Govern Your Agreement to Arbitrate?*, American Bar Association, http://apps.americanbar.org/buslaw/newsletter/0051/materials/pp7.pdf. In other words, "... parties dictate the terms of their own contracts, and the FAA does no more than ensure that those terms are enforced." Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 Harv. L. Rev. 2250, 2250 (2002). Numerous states have adopted some version of the Uniform Arbitration Act (UAA), which was initially promulgated in 1955. Of the forty-nine (49) jurisdictions that have arbitration statutes, thirty-five (35) have adopted the UAA and fourteen (14) have adopted substantially similar legislation. The 2000 Revised Uniform Arbitration Act (RUAA) has been adopted by eighteen (18) states.

The United States Supreme Court explained in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989), that "[i]nterpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration" is perfectly in line with the purposes of the FAA. Should parties choose a governing law other than the FAA, they must clearly state their intent and desire to do so and may not rely solely on "a generic choice-of-law provision...." *Oberwager v. McKechnie Ltd.*, 351 Fed.Appx. 708, 710 (3d Cir. 2009). While there are similarities between the UAA and the FAA, parties should consider carefully which law they wish to apply. Though each option has its relative advantages and disadvantages, Munro and Cockrell recommend that every arbitration agreement "expressly adopt the

FAA as the governing law for its provisions." Nicole F. Munro & Peter L. Cockrell, *Drafting Arbitration Agreements: A Practitioner's Guide for Consumer Credit Contracts*, 8 J. Bus. & Tech. L. 363, 381 (2013). Doing so increases the likelihood that "where the language of the [arbitration] clause leaves gaps that must be filled or explained, those gaps will be filled or explained by the FAA…." *Id*.

Regardless of the law to be applied, courts generally resolve ambiguities in favor of arbitration:

> ... as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or a like defense to arbitrability.

> [W]e are mindful of the Supreme Court's teaching that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or a like defense to arbitrability."

*Ferro Corp. v. Garrison Industries, Inc.*, 142 F.3d 926, 932 (6th Cir. 1998) (quoting *Moses H. Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983)). Of course, drafters of arbitration clauses should ensure that the terms are consistent with the rest of the contractual agreement. *See Matter of Arbitration Between Mitsubishi Corp. of Tokyo & Guinomar Conakry, Guinomar Int'l, as Agents for Guinomar Conakry*, 1995 WL 152543 (S.D.N.Y. 1995) (involving a dispute over an arbitration agreement that identified both New York and London as the location for arbitration).

### B. What Discovery Is Allowed in Arbitration?

The FAA does not provide for discovery in arbitration proceedings. This makes sense. Congress, after all, enacted the FAA to provide parties with a streamlined alternative to the court system. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006). Although the FAA does not provide for discovery, parties can nonetheless agree to use discovery procedures in an arbitration. *See Guyden v. Aetna, Inc.*, 544 F.3d 376, 386 (2d Cir. 2008). Agreeing to use full-blown discovery, of course, would defeat arbitration's core purposes. (Discovery from parties and third parties in arbitration is discussed in greater detail in Part Four.)

### C. Where Can the Arbitration Be Held?

Any agreement to arbitrate should specify the arbitration's location. According to some courts, if the choice of forum is an integral part of the agreement (and not just an "ancillary logistical concern"), then the failure to choose a forum will void the arbitration agreement entirely. *See Inetianbor v. CashCall, Inc.*, 768 F.3d. 1346, 1350 (11th Cir. 2014). The question of whether a forum selection clause is integral to the arbitration agreement is based on the parties' intent as evidenced by the terms and provisions of the contractual agreement. *Id.* How, then, should parties decide where to arbitrate? Convenience to witnesses should play a role – as should selecting the court to which the parties will apply to confirm, enforce, modify or vacate an award.

Generally, the contractual provision designating where an arbitration proceeding takes place determines the jurisdiction of courts to enforce an arbitration award. Under the FAA, unless the agreement specifies otherwise, applications to courts to enter judgment upon an arbitration award are made to a court in the district within which the award was made. 9 U.S.C.A. § 9. Where the UAA applies and the arbitration agreement provides that arbitration occur in a specific state, a court will not have jurisdiction over claims arising from arbitration proceedings unless the arbitration took place in the same state as the court. *See* William C. Cleveland, *Deciding Where to Arbitrate Creates Significant Jurisdictional Issues with Respect to the Enforcement or Attack of an Arbitration Award*, 75 Def. Couns. J. 402, 402–03 (2008). To avoid claims of substantive unconscionability, the party with greater bargaining power should consider a venue convenient to the other party and specify that arbitration occur in that party's county or state of residence. *See* Munro and Cockrell, *supra.* at 380 (also noting that venue provisions may be subject to relevant state limitations on venue).

### D. Should an Arbitration Clause be Broad or Narrow?

Arbitration agreements are generally considered to be either broad or narrow in scope. *Chelsea Family Pharmacy, PLLC v. Medco Health Solutions, Inc.*, 567 F.3d 1191, 1196 (10th Cir. 2009). "Broad arbitration provisions are generally defined as those that apply to any dispute arising from an agreement." *Compucom Systems, Inc. v. Getronics Finance Holdings B.V.*, 635 F.Supp.2d 371, 378 (D. Del. 2009). Narrow agreements, in contrast, reflect the parties' intent to limit arbitration to specific issues or claims. *Chelsea Family Pharmacy*, 567 F.3d at 1196. Even narrow arbitration clauses, however, are liberally construed to favor arbitration. *Id*. at 1197.

For example, where the terms of an arbitration clause stated that the arbitrator "shall...limit its review to whether the Proposed Purchase Price Calculation contained mathematical errors or whether the Proposed Purchase Price Calculation was calculated in accordance with this Agreement…," a federal court held that the clause was narrow. *Compucom Systems,* 635 F.Supp.2d at 378. In contrast, an arbitration clause that, by its own terms, encompassed "any difference . . . between

the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence" was considered broad. *International Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders, Inc.*, 406 U.S. 487, 488 (1972).

### *E. How Much Does Arbitration Cost?*

Arbitration is not free. Depending on the size and nature of the claim, standard initial filing fees may range from $775 to $65,000. *See American Arbitration Association's Administrative Fee Schedules (Standard and Flexible Fee)* available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2031504. In addition, arbitrators themselves may charge hourly rates of between $300 and $600 per hour, though rates and fee structures vary considerably. *See* Ali Assareh, *Forum Shopping and the Cost of Access to Justice Cost and Certainty in International Commercial Litigation and Arbitration*, 31 J.L. & Com. 1, 24 (2012-2013). Arbitration is generally considered to be more cost-effective than traditional litigation, but this is not always the case. *See* Cox, *supra.*. If, for example, the arbitration agreement does not limit discovery or provides for discovery per the Federal Rules of Civil Procedure, then parties may incur significant discovery costs in addition to arbitration fees. *Id*.

Parties to arbitration should consider whether they want to allow an award of attorneys' fees, and should explicitly permit or prohibit such an award in the arbitration clause. Parties should also examine the proposed governing law to determine whether it permits recovery of attorneys' fees.

A party may seek to invalidate an arbitration agreement on the basis that arbitration would be prohibitively expensive. *See GreenTree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000). The party seeking to invalidate the agreement on these grounds "bears the burden of showing the likelihood of incurring such costs." *Id*. In evaluating the enforceability of cost allocation provisions, some courts have held that it is appropriate to consider, on a case-by-case basis, "…the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims." *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 (4th Cir. 2001).

An arbitrator may award attorneys' fees if the arbitration clause allows. *See Netknowledge Technologies LLC v. Rapid Transmit Technologies*, 269 Fed.Appx. 443, 444 (5th Cir. 2008). Similarly, if the parties have agreed that the arbitration is to be governed by rules that allow for "costs and expenses," then it is within the arbitrator's authority to award attorneys' fees. *Prudential-Bache Securities, Inc. v. Tanner*, 72 F.3d 234, 242-243 (1st Cir. 1995). Parties to arbitration should consider whether they want to allow an award of attorneys' fees, and should explicitly permit or prohibit such an award in the arbitration clause. Parties should also examine the proposed governing law to determine whether it permits recovery of attorneys' fees.

### *F. Injunctive Relief and Other Equitable Remedies.*

Where the contract is not explicit concerning the proper relief and remedies, "the arbitrator is given wide latitude in fashioning an appropriate remedy." *United Elec., Radio & Mach. Workers of America v. Honeywell Inc.*, 522 F.2d 1221, 1226 (7th Cir. 1975)(quoting *Mogge v. District 8, International Association of Machinists*, 454 F.2d 510, 514 (7th Cir. 1971)). Arbitration agreements may provide for equitable relief. *See Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 937 (9th Cir. 2013) ("[A]n arbitrator generally has the authority to enter injunctive relief against a party that has entered into an arbitration agreement" provided the agreement permits such relief).

Like so much else in arbitration, the arbitrator's authority to grant equitable relief stems from the parties' contractual agreement. *Id*. Whether injunctive relief is available through arbitration depends on the terms of the arbitration clause. *See Lewis v. UBS Financial Services, Inc.*, 818 F.Supp.2d 1161, 1168 (N.D. Cal. 2011). Similarly, declaratory relief is available in arbitration where the parties' agreement so provides. *See Honeywell*, 522 F.2d at 1226. In fact, arbitrators have awarded equitable relief in many varieties, including the following:

> …[requiring parties] to establish a new system for filling job vacancies where improper methods were used previously and return employees to their former positions; to reclassify employees who were improperly classified; to engage in bargaining; and to post a performance bond. And an arbitrator has ordered a union to undertake immediately to bring into its membership 100 new journeymen and take other steps to meet the critical manpower shortage, as well as to instruct members by letter that they must work overtime.

*Id.* at 1226–27 (citations omitted). Where state law exempts claims for equitable relief from arbitration, the law is preempted by the FAA. *See Ferguson*, 733 F.3d at 934. (Injunctive relief and equitable remedies in arbitration proceedings are discussed in more detail in Section I of Part Four)

## PART TWO: MOVING TO COMPEL ARBITRATION

When a dispute arises between parties who have agreed to arbitrate, one party often sees arbitration as advantageous, while the other party prefers to avoid arbitration if possible. Plaintiffs commonly prefer a

jury to an arbitrator due to differences—perceived or actual—between achievable damages awards. In opposing resistance to arbitration, defense counsel should be familiar with the procedural and substantive weapons available to force a claimant into arbitration.

## I. The FAA Preempts State Arbitration Law

The FAA preempts any state statute that would require a court to decide a matter that would have been arbitrable under the FAA. *Southland Corp. v. Keating,* 465 U.S. 1, 16 (1984). FAA preemption is part of the strong federal policy in favor of arbitration announced in *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 25 (1983). The FAA's preemptive power is not based on any express preemption clause in the statute itself, but instead on the doctrine of conflict preemption, which subjugates state law to federal law if and when they conflict with each other. *See* 9 U.S.C.A. § 2, *et. seq.*; *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) ("The FAA's displacement of conflicting state law is 'now well-established' … and has been repeatedly reaffirmed." (internal citations omitted)).

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Because the federal standard for arbitrability is so inclusive, federal preemption is an important arrow in the quiver of counsel seeking to compel arbitration. If faced with an argument against arbitration on the grounds of an applicable state arbitration statute, the lawyer seeking to force arbitration should argue preemption in order to take advantage of the FAA's broad applicability. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 271-273 (1995). Finally, as a practical matter, federal preemption is crucial in allowing arbitrability issues to be decided under one test rather than under fifty different state jurisdictional standards.

## II. What Procedures Are Used to Compel Arbitration?

The appropriate procedure for compelling arbitration will depend on whether the dispute is already in litigation and whether the litigation is in state or federal court. If there is already a federal case pending, the proper procedure will further depend on whether the arbitration agreement requires arbitration in a forum outside the circuit.

### *A. Moving to Compel When Litigation Is Not Pending*

If no litigation is pending, a claimant may often try to enforce his arbitration right under Section 4 of the FAA. This section provides a procedural vehicle for compelling arbitration which may be used by any "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration[.]" 9 U.S.C.A. § 4. The special cause of action created by Section 4, however, does not carry its own federal question jurisdiction. Instead, a federal court must have independent subject matter jurisdiction over the controversy in order to compel arbitration under Section 4.

In addition, the FAA's impact is not limited to signatories of the contracts containing arbitration agreements. A non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate based on equitable estoppel or other traditional state contract law theories. *See, e.g.*, *Crawford Professional Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 260-61 (5th Cir. 2014) (affirming trial court's holding that signatories were equitably estopped from refusing to arbitrate with non-signatories where the signatories' claims against the non-signatories were founded in and inextricably bound up with the obligations imposed by the contract containing the arbitration clause).

### *B. Moving to Compel When Litigation Is Pending*

If litigation is already pending in state court, then state court statutes and rules will govern the proper procedure for compelling arbitration. If litigation is already pending in federal court, the party seeking arbitration may often simply file a motion to compel. However, when the pending litigation is in a district different from the arbitration venue in the parties' arbitration agreement, the circuits are split on whether the district court in which the litigation is pending has authority to compel arbitration.

Some circuits, including the Third Circuit, have held that a district court may compel arbitration only within its own jurisdiction, regardless of the forum selected in the parties' arbitration agreement. *See Econo-Car International, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391, 1394 (3d Cir. 1974). In contrast, the Fifth Circuit has held that a district court may order the parties to arbitrate in the forum specified in the agreement even if arbitration would take place outside of the court's own district and jurisdiction. *Dupuy-Busching General Agency, Inc. v. Ambassador Ins. Co.*, 524 F.2d 1275, 1277-78 (5th Cir. 1975). A third approach, which has been adopted by the Tenth, Sixth, and Seventh Circuits, recognizes that Section 4 of the FAA expressly prohibits district courts from ordering arbitration outside of their own jurisdiction and, at the same time, requires district courts to compel arbitration in accordance with the parties' agreement. *Ansari v. Qwest Communications Corp.*, 414 F.3d 1214, 1219-20 (10th Cir. 2005); *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1018 (6th Cir. 2003); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995). In these circuits, the proper procedure for com-

pelling arbitration would be to stay the litigation and file a separate federal court action in the arbitral forum under Section 4 of the FAA.

### C. Seeking a Stay of Court Proceedings

When litigation is pending at the time a party seeks to compel arbitration, the moving party should also seek to stay the litigation pending resolution of the arbitration, at least as to the arbitrable issues. Once a state or federal court determines that an issue identified in a motion for stay should be referred to arbitration pursuant to the parties' agreement and that the moving party is not in default in proceeding with the arbitration, the court must stay litigation of the arbitrable issues. 9 U.S.C.A. § 3.

Factors for a trial court to consider in determining whether to stay all proceedings until arbitration occurs include the risk of inconsistent rulings, the extent to which the parties to the non-arbitrable claims will be bound by the arbitrator's decision, and any prejudice that may result from delays.

## III. What If Fewer Than All Issues Are Arbitrable?

When all issues before a trial court should be referred to arbitration and a party moves to compel arbitration and stay the litigation, the court's decision making about what to do next is simple: the court orders arbitration and does nothing else until the arbitration is concluded. *See* 9 U.S.C.A. §§ 2, 3 (Arbitration of arbitrable claims and stay of court proceedings respecting arbitrable claims are both mandatory). But where only some claims in the litigation are arbitrable, the court must decide whether to allow the non-arbitrable claims to proceed in parallel with the arbitration or to stay all proceedings pending resolution of the arbitration. *See, e.g.*, *Cardiomed, Inc. v. Kardiothor, Inc.*, 947 F.2d 953 (10th Cir. 1991) (unpublished)(reversing and remanding to district court with instructions to address whether the arbitrable claim should be severed from non-arbitrable claims or whether proceedings should be stayed as to all claims pending arbitration).

The court has broad discretion in making this determination. *Id.*; *See also Branch v. Ottinger*, 477 Fed.Appx. 718, 722 (11th Cir. 2012) (unpublished).A court may abuse its discretion, however, if it refuses to stay non-arbitrable claims where those claims are based on the same operative facts, are inherently inseparable from the arbitrable claims, and would undermine the parallel arbitration if allowed to go forward. *See, e.g.*, *Hill v. GE Power Systems, Inc.*, 282 F.3d 343, 347 (5th Cir. 2002). Blanket stay orders are particularly appropriate when the arbitrable claims dominate the lawsuit and the merit of non-arbitrable claims is suspect. *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 856 (2d. Cir. 1987). Factors for a trial court to consider in determining whether to stay all proceedings until arbitration occurs include the risk of inconsistent rulings, the extent to which the parties to the non-arbitrable claims will be bound by the arbitrator's decision, and any prejudice that may result from delays. *Volkswagen of America, Inc. v. Sud's of Peoria, Inc.*, 474 F.3d 966, 972 (7th Cir. 2007).

## IV. Can Non-Signatories be Compelled to Arbitrate?

Arbitration agreements may be enforced by or against non-signatories under "traditional state law principles" of contract law. *Arthur Andersen, LLP v. Carlisle*, 556 U.S. 624, 631 (2009).The most important of these non-signatory enforcement theories are third-party beneficiary theory, equitable estoppel theory, and agency theory. Absent an applicable and enforceable choice-of-law provision in the parties' arbitration agreement, the forum state's substantive law often governs these issues.

### A. Third-Party Beneficiary Theory

Generally, one's ability to enforce an arbitration agreement under a third-party beneficiary theory depends on what the contract says, rather than the conduct of the parties. An arbitration agreement may create rights or obligations for third parties by specifically naming them or by implicating a category of non-signatory third parties without specifically identifying each potential member. For example, an employee may sign an agreement with his employer which obligates the employee to arbitrate all claims arising out of his employment, including any claims the employee may have against owners of premises where the employee performs work for the employer. In that scenario, if the employee is injured while working for the employer on a third party owner's property, the non-signatory property owner may enforce the arbitration agreement against the employee and require the employee to arbitrate any resulting personal injury claim against the owner.

### B. Equitable Estoppel Theory

Enforceability of an arbitration agreement under an equitable estoppel theory depends on the parties' conduct *after* the contract is entered. Equitable estoppel prevents a non-signatory from avoiding arbitration when the non-signatory accepts benefits or pursues relief arising from a contract containing an arbitration clause. For example, in *In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex. 2005), a non-signatory claimant was required to arbitrate her personal injury claims for asthma, which she allegedly developed as a result of negligence on the part of the seller/builder of her home, even though she had not signed the purchase agreement containing the arbitration clause. The claimant's father bought the home by signing the purchase agreement,

and then immediately transferred the realty into a trust benefitting the claimant. *Id*. at 129. The Texas Supreme Court held the claimant was equitably estopped from avoiding arbitration, even as to her personal injury claim, because she had "embraced the contract." *Id*. at 134-35. In particular, the claimant had exercised certain contractual rights and pursued certain benefits under the contract by giving instructions on construction, demanding repairs, and demanding and receiving reimbursement for expenses incurred while those repairs were made. *Id.* at 133.

In analyzing third-party beneficiary issues, the key concern is whether the contract's language reflects the parties' intent to create rights and/or obligations in non-signatories.

### *C. Agency Theory*

Another common issue in non-signatory cases is whether an affiliate or agent's agreement to arbitrate binds the principal and/or allows the agent to enforce the agreement. A principal and its non-signatory agent may be bound by the terms and provisions of the principal's arbitration agreement. *See In re Oil Spill by Amoco Cadiz Off the Coast of France March 16, 1978*, 659 F.2d 789, 795-96 (7th Cir. 1981). Similarly, an agent can bind its non-signatory principal to an arbitration agreement. However, "…the requirements for such vicarious responsibility are exacting." An agency arrangement must not only exist, but the agency arrangement must also be relevant to the legal obligation in dispute. *InterGen N.V. v. Grina*, 344 F.3d 134, 147-48 (1st Cir. 2003).

The circuits are split on whether an agent has standing to compel arbitration by virtue of his agency relationship to a principal/signatory. In *Westmoreland v. Sadoux*, 299 F.3d 462, 466-67 (5th Cir. 2002), the Fifth Circuit approved the rule forwarded and applied by the First and Ninth Circuits that "a nonsignatory cannot compel arbitration merely because he is an agent of one of the signatories." *Id*. The Third Circuit, on the other hand, has held that a non-signatory agent may enforce an arbitration agreement because under "traditional agency theory, [the agent] is subject to contractual provisions to which [the principal] is bound," and that is enough to allow the signatory's agents, employees, and representatives to enforce the arbitration provisions. *Pritzker v. Merrill Lynch*, 7 F.3d 1110, 1111 (3d Cir. 1993).

In analyzing third-party beneficiary issues, the key concern is whether the contract's language reflects the parties' intent to create rights and/or obligations in non-signatories. For equitable estoppel questions, the most important consideration is whether the non-signatory has accepted benefits or pursued relief under the contract. When an agency relationship is relevant to the legal obligation at issue, the agent can likely bind its non-signatory principal to an arbitration agreement. In most circuits, an agent may not enforce an arbitration agreement unless the agreement clearly indicates the parties' intent to cover claims by or against the agent individually. However, in the Third Circuit, the agency relationship itself is enough to allow the agent to compel arbitration in certain circumstances.

## V. Can Arbitration be Compelled During Bankruptcy?

Moving to compel arbitration of a claim against a debtor in bankruptcy proceedings is a violation of the automatic stay provision of the U.S. Bankruptcy Code. *See, e.g.*, *In re Kaiser Aluminum Corp*., 303 B.R. 299, 303 (D. Del. 2003). On the other hand, a bankruptcy debtor may move to compel arbitration of a dispute with a creditor. *Id.* In addition, a Bankruptcy Court has authority to compel arbitration pursuant to an enforceable agreement. *In re Interactive Video Resources, Inc.*, 170 B.R. 716, 721 (S.D. Fla. 1994).

# PART THREE: RESISTING ARBITRATION

The availability and applicability of grounds for avoiding an arbitration agreement are determined under state substantive law. *See* 9 U.S.C.A. § 2. Again, the FAA's strong policy in favor of arbitration requires that any doubt concerning a defense to enforcing an arbitration agreement under state substantive law should be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp*., 460 U.S. at 24-25. Among the avoidance theories often argued are waiver, adhesion contract theory, lack of assent and lack of consideration.

## I. Waiver

### *A. In general*

When considering whether to pursue litigation prior to compelling arbitration, counsel must know the nature, type, and amount of litigation activity in which he/she may participate without waiving his/her client's opportunity to arbitrate. Since the U.S. Supreme Court has not defined "waiver," the right to arbitrate may be waived under varying definitions and standards across jurisdictions.

### *B. Waiver as Defined by Federal Circuit Courts*

**Second Circuit.** The Second Circuit admits there is no bright-line rule for determining when a party has waived its right to arbitration. Factors to be considered include: (1) the time elapsed from commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice. *Technology in Partnership, Inc. v. Rudin*, 538 Fed.Appx. 38,

39 (2d Cir. 2013). In *Rudin*, the court held that arbitration was waived based on a fifteen (15) month delay between filing the complaint and moving for arbitration, during which time the non-moving party had defended against two substantive motions to dismiss, produced a key witness for deposition, and complied with extensive discovery requests. Under *Rudin*, the key factor in a waiver analysis is prejudice to the non-moving party. *Id*.

> ... the key factor in a waiver analysis is prejudice to the non-moving party.

**Third Circuit.** The Third Circuit enumerates six factors (a non-exhaustive list) for consideration in determining a waiver question and, more particularly, whether prejudice exists: (1) timeliness of the motion to compel arbitration; (2) the degree to which the party seeking to compel arbitration has contested the merits of its opponent's claims; (3) whether the moving party provided sufficient notice to the non-moving party of its intention to seek arbitration; (4) the extent of the moving party's non-merits motion practice; (5) whether the moving party has assented to the court's pre-trial orders; and (6) the degree of discovery engaged in by the party. *SuperMedia v. Affordable Electric, Inc.*, 565 Fed.Appx. 144, 147 (3d Cir. 2014). These factors were first announced in *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 926-27 (3d Cir. 1992), and are known as the *Hoxworth* factors.

In *SuperMedia*, one of the parties seeking to compel arbitration had argued, in a related state-court proceeding, that the arbitration provision was unenforceable and had engaged in significant discovery activity. 565 Fed.Appx. at 146-148. The court found this conduct resulted in the waiver of any right to arbitrate. *Id*. Another party to the lawsuit filed his motion to compel arbitration just over two months after filing the complaint and did not engage in significant discovery. *Id*. at 148. Nevertheless, the court held that he had waived his right to arbitration because he elected to engage in the litigation by filing a third-party complaint prior to filing his motion to compel arbitration, complying with pretrial orders, engaging in activities inconsistent with the intent to arbitrate, and taking a contrary position in his pleadings (in which he expressly denied that there was a contract or any binding agreement to arbitrate issues.) *Id*.

In *In re Pharmacy Benefit Managers Antitrust Litigation*, 700 F.3d 109, 118 (3d Cir. 2012), the court surveyed prior cases that discussed and applied the *Hoxworth* factors to determine whether there had been a waiver of arbitration rights by virtue of the parties' litigation conduct. With respect to the first factor—timeliness of the motion to compel arbitration—*In re Pharmacy* observed that delays of thirty-eight (38) days, two months, one-and-a-half months, and "immediately" after removal to federal court had not resulted in waiver. *Id*. On the other hand, delays of ten months, eleven months, and four years had resulted in waiver. *Id*. (internal citations omitted).

Under the second factor—the degree to which the party seeking to compel arbitration has contested the merits of its opponent's claims—the court observed that it had found waiver in each of the following scenarios: (1) the party seeking to compel arbitration filed a motion for summary judgment; (2) the party seeking to compel arbitration filed a motion to dismiss for failure to state a claim and opposed a motion for class certification; and (3) the party seeking to compel arbitration filed a motion for preliminary injunction which included argument at an evidentiary hearing and opposed motions to dismiss. *Id*. at 118 (internal citations omitted).

Under the third factor—whether the moving party provided sufficient notice to the non-moving party of its intention to seek arbitration before filing its motion to compel—the court observed that it had found *no* waiver in cases where the moving party acted in the following manner: (1) requesting arbitration before filing a motion to compel; (2) objecting that the claims were subject to arbitration twenty-one (21) days after the plaintiff filed his state court complaint; and (3) raising arbitration in the joint discovery plan before bringing a motion to compel. However, the court also identified cases in which it had found waiver based on this third *Hoxworth* factor where (1) the movant provided no advanced notice of its intent to compel arbitration, and (2) the movant included mandatory arbitration as one of ten (10) affirmative defenses in its answer, but delayed before filing its motion to compel arbitration. *Id*. at 118-119 (internal citations omitted).

Under the fourth *Hoxworth* factor—the extent to which the party seeking arbitration has engaged in non-merits motion practice—the court observed that it had found waiver where the arbitration movant had moved to dismiss for lack of prosecution. *Id*. at 119 (internal citations omitted). The court further observed that it had found waiver where the movant had opposed three motions to compel discovery, had filed motions to disqualify counsel and stay discovery, and had opposed motions to compel discovery. *Id*. (internal citations omitted).

Under the fifth factor—the degree of a movant's acquiescence to pretrial orders—the court observed that it had found waiver in cases based on the following conduct by a moving party: (1) attending three status conferences and a court-ordered mediation without objection and filing a Rule 26(f) Report; (2) participating in "numerous" pretrial proceedings; (3) participating in ten pretrial conferences; and (4) certifying readiness for trial and later seeking a continuance and proposing new trial dates. *Id*. at 119-120 (internal citations omitted.)

Finally, under the sixth factor—the extent to which the parties have engaged in discovery—the court observed that it had found waiver

where there had been "significant discovery activity," including interrogatories, disclosures, requests for production, depositions, and discovery-related motion practice. *Id.* at 120 (internal citations omitted).

**Fifth Circuit.** Under Fifth Circuit precedent, "…a party waives its right to arbitrate if it: (1) 'substantially invokes the judicial process' and (2) thereby causes detriment or prejudice to the other party." *Al Rushaid v. National Oilwell Varco, Inc.*, 757 F.3d 416, 421 (5th Cir. 2014) (internal citations omitted). The prejudice analysis has its own sub-test under which the court considers three particularly relevant factors: (1) whether the pretrial litigation activity related to the arbitrable claims; (2) the time and expense incurred by the party opposing arbitration in defending the litigation; and (3) the timeliness of the moving party's assertion of its right to arbitrate, either by motion or petition to compel arbitration. *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346 (5th Cir. 2004).

The court placed importance on the degree to which use of pre-trial discovery procedures by a party seeking arbitration may sufficiently prejudice the legal position of the opposing party so as to constitute waiver of the right of arbitration.

**Seventh Circuit.** The Seventh Circuit rejected waiver theories in cases where the defendant removed the case to federal court, filed a motion to dismiss, and participated in various scheduling conferences before moving to compel arbitration. *Cooper v. Asset Acceptance, LLC*, 532 Fed. Appx. 639, 641 (7th Cir. 2013) (discussing and distinguishing *Cabinetree of Wisconsin, Inc. vs. Kraftmaid Cabinetry, Inc.*, 50 F. 3d 388 (7th Cir. 1995) in which the defendant's removal of the case to federal court and participation in extensive discovery resulted in the waiver of its right to arbitrate). The *Cooper* court found no waiver and distinguished delay resulting from removal and awaiting the district court's decision on a motion to dismiss from delay caused by participation in extensive discovery. *Id.* at 642. The court also found that seeking arbitration fourteen (14) months before trial did not result in prejudice, but that delaying until six (6) months before trial did. *Id.*

**Ninth Circuit.** In order to establish waiver in the Ninth Circuit, the moving party must establish: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts. *Kelly v. Public Utility Dist. No. 2 of Grant County*, 552 Fed.Appx. 663, 664 (9th Cir. 2014). In *Kelly*, the Ninth Circuit upheld the district court's waiver ruling where the party seeking arbitration had litigated the case for eleven months before moving to compel, participated in pretrial discovery, and argued hearings on a preliminary injunction and a motion to dismiss. *Id.* at 664. In *Defrees vs. Kirkland*, 579 Fed.Appx. 538, 541 (9th Cir. 2014), the defendants waived their right to compel arbitration under individual releases of liability by waiting until after their first motion to compel under a derivative claim had proved fruitless before seeking arbitration. In the Ninth Circuit, however, many actions do not serve as the basis for waiver. For example, parties may litigate the jurisdictional question of standing without waiving a right to arbitrate and seeking dismissal of a claim without prejudice based on an arbitration clause will not trigger waiver. *See, e.g. Brown v. Dilliard's, Inc.*, 430 F.3d 1004, 1012 (9th Cir. 2005); *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d. 1266, 1270-71 (9th Cir 2002).

**Eleventh Circuit.** The Eleventh Circuit has found waiver in cases in which a party acted inconsistently with the right of arbitration by conducting discovery for more than a year, including many depositions, interrogatories, and the production of approximately 900,000 pages of documents, before the motion to compel arbitration was filed. *Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1277-78 (11th Cir. 2012). The court placed importance on the degree to which use of pre-trial discovery procedures by a party seeking arbitration may sufficiently prejudice the legal position of the opposing party so as to constitute waiver of the right of arbitration. *Id*. at 1278. In *Fulton County, Ga. v. Pearson*, 502 Fed.Appx. 816, 818 (11th Cir. 2012), the Eleventh Circuit held that Fulton County waived arbitration by litigating the case for more than two years, only to raise the issue of arbitration three days before the scheduled jury trial.

### *C. Takeaway from Waiver Survey*

In conclusion, a movant generally hurts his chances of successfully compelling arbitration by engaging in extensive pretrial activity, any merits-based litigation, and/or by delaying before moving to compel. More particularly, dispositive motions will almost certainly waive arbitration. Motions to dismiss may or may not result in waiver, often depending on whether the motions are merits-based or dilatory. Engaging in preliminary discovery probably will not waive arbitration, but participating in discovery hearings and complying with discovery orders without raising arbitration may result in waiver. Finally, irrespective of the level or nature of pretrial activity, delay weighs in favor of the non-movant and often triggers waiver. Navigating these considerations can be tricky and unpredictable. A good practice tip is to include the right to compel arbitration as grounds for defense or as an alternate claim and decide early in the case whether to assert such right.

## II. Contracts of Adhesion

Many plaintiffs try to avoid arbitration by arguing that the agreement is an unconscionable and unenforceable contract of adhesion. Although

definitions may vary slightly between jurisdictions, a contract of adhesion is generally a contract presented by a contracting party with superior bargaining power to another contracting party with inferior bargaining power on a "take it or leave it" basis. *See, e.g.*, *Kristian v. Comcast Corp*., 446 F.3d 25, 32 and n.2 (1st Cir. 2006). Under Texas law, one party must have absolutely no bargaining power for a contract of adhesion to exist. *See In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 371 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding).

The ever-increasing number of agreements entered online has become an emerging source of adhesion contract litigation.

"[I]n determining whether to enforce [arbitration provisions] in a contract of adhesion, [courts consider] not only to [sic] the take-it-or-leave-it nature and the standardized form of the document, but also… [(1)] the subject matter of the contract, [(2)] the parties' relative bargaining positions, [(3)] the degree of economic compulsion motivating the 'adhering' party, and [(4)] the public interests affected by the contract. *Delta Funding Corp. v. Harris*, 912 A.2d 104, 111 (N.J. 2006)(citations omitted). Ultimately, the court must determine whether the arbitration provision in an adhesion contract is unduly oppressive, unconscionable, or against public policy. The elements of enforceability and the burden of proof vary between jurisdictions. *See, e.g.*, *Norwest Financial Miss., Inc. v. McDonald*, 905 So.2d 1187, 1193 (Miss. 2005) (The Mississippi Supreme Court upheld the trial court's enforcement of arbitration clause found in adhesive loan agreement because parties resisting arbitration did not meet their burden of proving unconscionability); *cf. Dees v. Billy*, 357 Fed.Appx. 813, 815 (9th Cir. 2009) (The Court, applying Nevada law, held that the arbitration clause in adhesion contract was unenforceable because proponent of arbitration bore, but failed to carry, the burden of proving adhesion agreement was enforceable).

The ever-increasing number of agreements entered online has become an emerging source of adhesion contract litigation. One type of Internet contract is a "Click Wrap" agreement, in which website users are required to click an "I Agree" box after being presented with a list of terms and conditions. In *Kelker v. Geneva-Roth Ventures, Inc.*, 303 P.3d 777, 778 (Mont. 2013), the Montana Supreme Court dealt with a "Click Wrap" agreement and held that it was an unconscionable and unenforceable contract of adhesion. More specifically, the plaintiff submitted an online application for a payday loan with defendant lender that charged 780% annual interest, a rate higher than that permitted under the Montana Consumer Loan Act for payday loans. *Id.* at 779. The loan agreement, which the plaintiff executed electronically by clicking a box, contained an arbitration clause for "any claim, dispute, or controversy" arising out of the agreement. *Id.* The plaintiff sued in Montana state court, and the lender moved to compel arbitration. *Id.* The district court declined to compel arbitration, and the Montana Supreme Court upheld the denial. *Id.* at 783. Specifically, the Montana Supreme Court held the online agreement qualified as an adhesion contract and that the arbitration clause was unconscionable. *Id.*

In determining the unconscionability question, the court considered the following factors: (1) whether the arbitration clause was conspicuous and explained its consequences; (2) the disparity in the parties' bargaining power, business experience, and sophistication; (3) whether the party to be bound by the arbitration clause was represented by counsel at the time the agreement was entered; (4) whether economic, social, or practical duress compelled execution; (5) whether the parties actually signed the contractual agreement and separately initialed the arbitration provision; and (6) whether the arbitration clause was ambiguous or misleading. *Id.* at 781.

## III. Lack of Assent

Like any other contract, lack of assent is a defense to the enforceability of an arbitration agreement. Lack of assent issues may take the form of affirmative defenses (such as fraud in the inducement, duress, or undue influence) or may present as challenges to a claimant's ability to prove assent as an element of an enforceable contract. Assent issues are frequently implicated by "browsewrap" agreements, in which a website's terms and conditions of use are generally posted via a hyperlink but there is no requirement to assent to the terms and conditions with any affirmative action. *Nguyen vs. Barnes & Noble, Inc.*, 763 F.3d 1171, 1175-76 (9th Cir. 2014). Because no affirmative action is required, the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions. *Id.* at 1176.

When the assent issue is based on an affirmative defense of fraud in the inducement, undue influence, or duress, the alleged coercion must apply to the arbitration clause specifically, rather than the contractual agreement as a whole, to render the arbitration clause invalid. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967) (Language and policies of the Federal Arbitration Act required conclusion that a claim of fraud in the inducement of the entire contract was arbitrable pursuant to a broad arbitration clause covering "any claim or controversy arising out of the agreement," absent evidence that the contracting parties intended to withhold that issue from the arbitration provision.); *see also Great Earth Companies, Inc. v. Simons*, 288 F.3d 878, 889-890 (6th Cir. 2002); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999) (noting that fraud in the inducement

and duress defenses aimed at voiding the agreement as a whole are "questions for the arbitrator").

### IV. Sufficiency of Consideration

One common issue in consideration cases is whether an arbitration obligation must be supported by independent consideration or whether the consideration for the contract containing the provision is sufficient to support the arbitration clause as well. The majority view is that, as long as the contract containing the arbitration clause is supported by adequate consideration, such consideration also supports an arbitration obligation within the contract, even if the arbitration clause gives one party sole discretion to choose arbitration or litigation. *See Wilson Electrical Contractors, Inc. v. Minnotte Contracting Corp.*, 878 F.2d 167, 169 (6th Cir. 1989). In *Wilson Electrical Contractors,* the Sixth Circuit expressly rejected the district court's conclusion that the arbitration provision required independent consideration. *Id.* Other federal courts of appeal and state courts of last resort have followed this majority rule. *See, e.g.*, *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 792 (8th Cir. 1998) (concluding that, under Oklahoma law, mutual obligation to arbitrate is not required for enforceability of arbitration clause as long as the contract as a whole is supported by consideration); *Doctor's Associates, Inc. v. Distajo*, 66 F.3d 438,453 (2d. Cir. 1995) (Second Circuit opined that Connecticut courts would conclude that consideration supporting contract as a whole will cover arbitration clause within the contract); *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 552 (W.Va. 2012) (Accepting a certified question, the Fourth Circuit adopted the majority position and concluded that separate consideration for an arbitration clause is not required). On the other hand, the Supreme Court of Maryland espouses the minority view and held that an arbitration clause within an employment agreement is unenforceable for lack of consideration where the employer retains sole discretion to choose, amend, or revoke arbitration rules and proceedings. *Cheek v. United Healthcare of the Mid-Atlantic, Inc.*, 835 A.2d 656, 667 (Md. Ct.App. 2003).

The majority view is that, as long as the contract containing the arbitration clause is supported by adequate consideration, such consideration also supports an arbitration obligation within the contract, even if the arbitration clause gives one party sole discretion to choose arbitration or litigation.

Another common issue in consideration cases is whether an employee's continued employment under an employment agreement containing an arbitration clause is sufficient consideration to bind the employee to arbitrate disputes with the employer. The First, Fifth, Sixth, Seventh, and Eighth Circuits have held such consideration may be sufficient. *See, e.g.*, *Soto v. State Industrial Products, Inc.*, 642 F.3d 67, 73-76 (1st Cir. 2011) (applying Puerto Rico law); *Leath v. American Medical International, Inc.*, 125 F.3d 852 (5th Cir. 1997) (applying Texas law); *Dantz v. American Apple Group, LLC*, 123 Fed.Appx. 702, 709 (6th Cir. 2005) (applying Ohio law); *Tinder v. Pinkerton Security*, 305 F.3d 728, 734 (7th Cir. 2002) (applying Wisconsin law); *McNamara v. Yellow Transportation, Inc.*, 570 F.3d 950, 956 (8th Cir. 2009) (applying South Dakota law). The Ninth Circuit distinguishes between at-will employees and those who are not at-will employees. While continued employment may constitute sufficient consideration for an arbitration clause for at-will employees, continued employment is not sufficient consideration for not at-will employees. *Vedachalam v. Tata America International Corp.*, 339 Fed.Appx. 761, 763 (9th Cir. 2009). Additionally, the District of Columbia Circuit has held that continued employment after an employer's unilateral promulgation of arbitration provisions is not a "knowing agreement" and, therefore, may not constitute sufficient consideration. *Bailey v. Federal Nat'l Mortgage Ass'n,* 209 F.3d 740, 747 (D.C. Cir. 2000).

## PART FOUR: SELECTED TOPICS IN ARBITRATION AND LITIGATION

### I. Injunctive Relief Prior to Arbitration

Although neither the FAA nor the UAA explicitly provides for injunctive relief to maintain the status quo while arbitration proceedings occur, most courts will entertain such requests in appropriate circumstances. The factors considered in determining the propriety of injunctive relief are: the likelihood of success on the merits, the possibility of irreparable harm, the balancing of hardships, and the public interest. *See, e.g.*, *Teradyne, Inc. v. Mostek Corp*., 797 F.2d 43 (1st Cir. 1986); *American Express Financial Advisors, Inc. v. Thorley,* 147 F.3d 229 (2d Cir. 1998); *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 882 F.2d 806 (3d Cir. 1989); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley,* 756 F.2d 1048 (4th Cir. 1985); *Janvey v. Alguire*, 647 F.3d 585 (5th Cir. 2011); *Performance Unlimited, Inc. v. Questar Publishers, Inc.,* 52 F.3d 1373 (6th Cir. 1995); *Kiel v. City of Kenosha*, 236 F.3d 814 (7th Cir. 2000*);PMS Distributing Co., Inc. v. Huber & Suhner, A.G.,* 863 F.2d 639 (9th Cir. 1988)(Court has authority to grant writ of possession pending outcome of arbitration provided criteria for the writ of possession are met.); *but see Manion v. Nagin,* 255 F.3d 535 (8th Cir. 2001) (Courts should not grant relief unless arbitration agreement clearly permits such relief). *Manion* highlights that, as with virtually every topic discussed in this paper, the terms of the arbitration agreement may be critically important to your analysis.

State courts have also permitted interim relief to preserve the status quo while arbitration is pending. *See, e.g., Holiday Isle, LLC v. Adkins*, 12 So.3d 1173 (Ala. 2008); *Park Place Associates, Ltd. v. Bell Gardens Bicycle Club*, 2004 WL 3001044 (Cal. Ct. App. 2004) (injunctive relief permitted by statute); *Hughley v. Rocky Mountain Health Maintenance Org., Inc.*, 927 P.2d 1325 (Colo. 1996); *Flight Options Internat'l, Inc. v. Flight Options, LLC,* 2005 WL 5756537 (Del.Ch. 2005); *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 647 S.E.2d 102 (N.C.Ct. App. 2007); *Langston v. National Media Corp.*, 617 A.2d 354 (Pa. 1992); *MailSource, LLC v. M.A. Bailey & Assoc.*, 588 S.E.2d 635 (S.C.Ct.App. 2003); *but see Pedus Bldg. Services, Inc. v. Martin*, 1986 WL 11164 at *2 (Tex. App.— Houston [1st Dist.] 1986, writ ref'd n.r.e.) (not designated for publication) (noting that Texas state courts and the Fifth Circuit hold that the Federal Arbitration Act bars a court from issuing a preliminary injunction pending arbitration).

... the practical lesson is that motions based on the face of the pleadings and which do not require extensive discovery (such as Rule 12(b) motions to dismiss) are less likely to result in a waiver than those that require extensive discovery (such as motions for summary judgment.)

In those states which have adopted the Revised Uniform Arbitration Act, it is now clear, pursuant to statute, that courts may award preliminary relief before an arbitrator has been appointed. After appointment of an arbitrator, the arbitrator is authorized to issue provisional remedies. *See* RUAA § 8 available at http://www/uniformlaws.org/shared/docs/arbitration/arbtration_final_00.pdf. Other states have statutes which permit provisional remedies. *See, e.g.*, N.Y. C.P.L.R. § 7502(c); George Bundy Smith and Thomas J. Hall, *Criteria for Provisional Remedies In Aid of Arbitration*, 251 N.Y.L.J. (February 21, 2014), available at http://www.newyorklawjournal.com/id=1202643852037?keywords=criteria+for+provisional+remedies+in+aid+of+arbitration&publication=New+York+Law+Journal.

Once the arbitration proceedings have begun, it is not too late to seek equitable relief. Arbitrators have been held to have inherent authority to award interim equitable relief. *See, e.g., Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City*, 606 F.Supp. 692, 694 (S.D.N.Y. 1985). State courts have also permitted interim relief. *See, e.g.*, *Charles Constr. Co., Inc .v. Derderian*, 586 N.E.2d 992 (Mass. 1992) (awarded pre-arbitration security for payment of any future arbitration award). The procedural rules of the chosen arbitration forum may provide assistance, as the rules may explicitly permit or prohibit interim equitable relief by an arbitrator. For example, Rule 2 of JAMS Comprehensive Arbitration Rules and Procedures, permits "emergency relief." *See* http://www.jamsadr.com/rules-comprehensive-arbitration/. Similarly, R-37 of the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures permits "interim measures." *See* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG004103+revision=latestreleased.

## II. Dispositive Motions Prior to Arbitration

Will courts consider dispositive motions in actions which likely are subject to arbitration? This question generally arises when counsel is faced with responding to a suit in which a motion to stay the suit pending arbitration may be filed. The question also may arise if, faced with the prospect of such a suit, a party files an action for declaratory relief. Typically, the court will not know that a matter may be subject to arbitration until a party raises the issue. Until that time, the parties may file motions in the usual course. However, by undertaking motion practice, a party may be found to have waived its right to request arbitration. In jurisdictions where motion practice does not itself constitute a waiver of arbitration, courts generally examine the burden imposed on the non-moving party prior to an arbitration claim and the extent of the delay caused to the proceedings. *See* Section Three above for discussion of waiver and applicable waiver analysis in various jurisdictions.

As indicated above, the practical lesson is that motions based on the face of the pleadings and which do not require extensive discovery (such as Rule 12(b) motions to dismiss) are less likely to result in a waiver than those that require extensive discovery (such as motions for summary judgment.)Many state courts have utilized an analysis similar to that used in the federal courts. For example, the Supreme Court of New Mexico set out three "guiding principles" for determining whether a party has waived its right to pursue arbitration. Under New Mexico law, any analysis begins with a presumption in favor of arbitration and against finding a waiver. Second, a motion to compel arbitration will only be denied upon a showing of prejudice to the party opposing arbitration. Dilatory conduct alone does not constitute waiver. Third, a court will look at "the extent to which the party now urging arbitration has previously invoked the machinery of the judicial system" and, in doing so, provoked reliance by the other party in the manifested intent to waive arbitration and in the court's litigation of the case. *Board of Educ. Taos Municipal Schools v. The Architects, Taos*, 709 P. 2d 184 (N.M. 1985).

## III. Dispositive Motions Before Arbitrators

Neither the FAA nor the UAA expressly provides for dispositive motions. Edna Sussman and Solomon Ebere, *Reflections on the Use of Dis-*

*positive Motions in Arbitration*, NYSBA New York Dispute Resolution Lawyer, Vol. 4, No. 1, p. 28 (Spring 2011). However, courts have found that arbitrators have authority to grant such motions. *Id.* Furthermore, the 2000 Revised Uniform Arbitration Act expressly permits an arbitrator to decide a request for summary disposition of a claim or particular issues. *See* RUAA § 15(b) available at http://www/uniformlaws.org/shared/docs/arbitration/arbtration_final_00.pdf. Some of the major arbitration providers have also promulgated rules that specifically provide for arbitrators' consideration of dispositive motions. *See, e.g.*, Rule 32(c) of the American Arbitration Association's Construction Industry Rules, Rule 27 of the AAA's Employment Arbitration Rules, and Rule 18 of the JAMS Comprehensive Arbitration Rules.

The critical factors in determining whether an arbitrator may grant dispositive motion are (1) the provisions of the arbitration agreement concerning such motions; (2) the procedural rules of the chosen arbitration forum; and (3) the proclivities of your particular arbitrator.

Arbitrators traditionally have been reluctant to consider dispositive motions within arbitration proceedings. There are several reasons for this lack of enthusiasm. First, the scope of review of arbitration awards is very limited. Second, arbitrators may feel that, when compared to judges, they lack expertise in dealing with dispositive motions. Third, if the arbitrator errs in his/her interpretation of the applicable law, the review of the arbitrator's error of law is less robust than in an analogous judicial proceeding. In addition, because arbitration is supposed to be a cost effective, speedy process, arbitrators may be less concerned about the need for pre-hearing disposition to avoid costly discovery than their judicial brethren. Finally, arbitrators may feel that dispositive motions in and of themselves add to the cost of and cause delay in the arbitration process. *See* Michael D. Young and Brian Lehman, *Arbitrators Less Prone to Grant Dispositive Motions than Courts,* available at http://www.jamsadr.com/arbitrators-less-prone-to-grant-dispositive-motions-than-courts-06-26-2009/.

The bias against dispositive motions may also be institutional. For example, the Financial Industry Regulatory Authority ("FINRA") Rules provide only two bases for granting a motion to dismiss: "(A) the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or (B) the moving party was not associated with the account(s), security(ies), or conduct at issue." FINRA Rules 12504 and 13504, *Motions to Dismiss* available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7377.

The critical factors in determining whether an arbitrator may grant dispositive motion are (1) the provisions of the arbitration agreement concerning such motions; (2) the procedural rules of the chosen arbitration forum; and (3) the proclivities of your particular arbitrator. Know your arbitrator, and learn as much as you can about each prospective arbitrator before the final selection is made.

## IV. Third-Party Discovery in Arbitration

### A. Under the Federal Arbitration Act

Section 7 of the FAA provides, in relevant part, as follows:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.... Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C.A. § 7. The four critical components of this statutory section are: (1) any person to attend before them or any of them; (2) as a witness; (3) and in a proper case to bring with him or them any book, record, document, or paper; and (4) enforcement in the United States district court for the district in which the arbitrators, or a majority of them, are sitting.

### B. Document Production and Depositions

The federal circuit courts are split as to whether third-party discovery is permissible under the FAA, and, if permitted, the amount which should be allowed. The Second and Third Circuits have held that Section 7 of the FAA does not authorize arbitrators to pursue discovery from third-parties. *Life Receivables Trust v. Syndicate 102 at Lloyd's, London*, 549 F.3d 210 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004). On the other hand, the Eighth Circuit and several federal district courts have held that Section 7 of the FAA implicitly authorizes arbitrators to conduct discovery from third-parties. *See In re Security Life Insurance Co. of America*, 228 F.3d 865 (8th Cir. 2000); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685

F. Supp. 1241 (S.D. Fla. 1988); *Meadows Indemnity Co., Ltd. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994). The Fourth Circuit, in dicta, has suggested that discovery from third-parties might be possible in the case of "unusual circumstances" or "upon a showing of special need or hardship." *Comsat Corp. v. National Science Foundation*, 190 F.3d 269, 275-76 (4th Cir. 1999).

The federal circuit courts are split as to whether third-party discovery is permissible under the FAA, and, if permitted, the amount which should be allowed.

Any previous questions as to how the subpoena process works have seemingly been eliminated with the 2013 amendments to Rule 45 of the Federal Rule of Civil Procedure. Rule 45 now provides, in relevant part, as follows:

(a) In General

(2) *Issuing Court.* A subpoena must issue from the court where the action is pending.

(b) Service.

(2) *Service in the United States.* A subpoena may be served at any place within the United States.

(c) Place of Compliance.

(1) *For a Trial, Hearing, or* ***Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to **attend a trial** and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

**(A) production of documents**, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

**(B)** inspection of premises at the premises to be inspected.

(f) Transferring a Subpoena-Related Motion. When the **court where compliance** is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(g) Contempt. The court for the **district where compliance is required** — and also, after a motion is **transferred, the issuing court** — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

Rule 45, F.C.R.Civ.P. (emphasis added.)

Assuming you are able to convince an arbitrator or panel of arbitrators that specific third-party discovery is relevant and necessary (recall the FAA requires that the arbitrators issue summonses), Rule 45, F.R.Civ.P., makes it clear that, once issued, the summons may be served anywhere in the United States. However, there are express restrictions on where the discovery may occur. The "100 mile" restriction applies to document production and depositions other than the deposition of a party or a party's officers. The "state" restriction applies to depositions of parties and their officers and their testimony at trial. Enforcement proceedings must be commenced in the forum where discovery compliance is required. If necessary, the court sitting where compliance is required may transfer the matter back to the issuing court for a ruling. Problems abound, however. For example, the arbitration may be centered in a jurisdiction that generally permits third-party discovery, but the witness may be located in a jurisdiction which proscribes third-party discovery. Enforcement may be impossible.

There is at least one additional hurdle to obtaining judicial enforcement of a discovery subpoena. The FAA does not grant or create independent federal question jurisdiction to federal courts. *Moses H. Cone*, 460 U.S. at 25, n.32. There must be some other independent jurisdictional basis, such as diversity or federal question jurisdiction. *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005); *see also American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV(New World of Communications of Detroit, Inc.)*, 164 F.3d 1004, 1007-08 (6th Cir. 1999).

Possible solutions to these discovery hurdles may be found in other relevant documents. The arbitration agreement itself may permit discovery in arbitration proceedings, or the arbitration agreement may reference a specific arbitration entity whose rules permit discovery, which implies an agreement between the parties to permit discovery.

For example, FINRA's Rules permit discovery in both "customer cases," and "industry disputes." FINRA's Rules available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7377. Similarly, JAMS rules permit discovery. *See* JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases, available at *http://www.jamsadr.com/rules-comprehensive-arbitration/*.

The bottom line, however, is that obtaining third-party discovery in the federal courts under the FAA may present insurmountable hurdles. Counsel may have to consider using state court alternatives available under the UAA or the RUAA.

Imaginative counsel have been successful in pursuing compliance with a third-party subpoena by convincing the arbitration panel to convene a "special hearing" before a partial panel in the state where the witness is located so that the witness was appearing at a hearing, rather than being deposed. *See Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC,* 804 F.Supp.2d 808, 811 (N.D. Ill. 2011). In another case, counsel convinced the entire panel to move to the location of the witness. *Stolt-Nielsen,* 430 F.3d at 577. The bottom line, however, is that obtaining third-party discovery in the federal courts under the FAA may present insurmountable hurdles. Counsel may have to consider using state court alternatives available under the UAA or the RUAA.

### C. Uniform Arbitration Act

The UAA provides, in relevant, part as follows:

§ 7. Witnesses, Subpoenas, Depositions

(a) The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the Court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

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

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be the same as for a witness in the .... Court.

*See* Uniform Arbitration Act (1955 Act), § 7, available at http://www.uniformlaws.org/shared/docs/arbitration/uaa55.pdf. While the express language of the UAA requires that depositions must lead to information "for use as evidence," state courts have ruled that ordering discovery is within the implied power of arbitrators and have not necessarily restricted deposition subpoenas to witnesses who "cannot be subpoenaed or [are] unable to attend the hearing." *See, e.g.*, *Rains v. Foundation Health Systems Life & Health*, 23 P.3d 1249, 1254 (Colo.Ct.App. 2001)(Court held that UAA and the arbitration provision in the parties' contractual agreement were adequate to provide plaintiff the discovery she needed to establish her claims).

### D. Revised Uniform Arbitration Act

The Revised Uniform Arbitration Act (RUAA) provides, in relevant part, as follows:

**Section 17. Witnesses; Subpoenas; Depositions; Discovery.**

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.

(d) If an arbitrator permits discovery under subsection (c), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

The RUAA explicitly provides that an arbitrator may permit any discovery which he or she decides is appropriate under the circumstances, and explicitly references arbitration proceedings pending in another state.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the protection of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator in another State must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

See RUAA, Section 17, available at http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf. The RUAA explicitly provides that an arbitrator may permit any discovery which he or she decides is appropriate under the circumstances, and explicitly references arbitration proceedings pending in another state.

### *E. Practical "Nuts and Bolts"*

If your state law permits arbitrators to issue discovery subpoenas, the enforcement procedures concerning in-state respondents should be straightforward. If the responding party does not comply with the subpoena, seek an order from the arbitrators and then file a motion in state court seeking enforcement of the arbitrators' order. With respect to out-of-state respondents, if the state where the witness or the documents are located has adopted the RUAA, counsel should be able to petition the local court directly for enforcement of the subpoena. If, however, the jurisdiction where the witness or the documents are located has not adopted the RUAA, other, more convoluted means must be used to obtain compliance. Generally, the enforcement process is likely the same as that utilized for out-of-state discovery in a civil suit. Again, apply for an order from the arbitrators seeking issuance of a commission or letters Rogatory and then file the arbitrators' order with the state court requesting issuance of the documents. Take the commission or letters Rogatory to the jurisdiction in which discovery is sought, and, with the aid of a fellow FDCC member, have a subpoena issued in that jurisdiction. If necessary, pursue enforcement proceedings in the jurisdiction where the discovery is sought.

Several states have adopted the Uniform Interstate Depositions and Discovery Act (UIDDA) which simplifies out-of-state discovery; however, the UIDDA applies to subpoenas issued by "courts of record," which, by definition, does not include arbitrations. *See* Uniform Interstate Depositions and Discovery Act, Section 2(5) and Section 3 (Comment) available at http://www.uniformlaws.org/shared/docs/interstate%20depositions%20and%20discovery/uidda_final_07.pdf.

Imaginative counsel have been at work in this area also. Where discovery was not permitted under state law, counsel filed a complaint or petition for pre-suit discovery ostensibly seeking discovery necessary for initiation of claims in arbitration. *White v. Equity, Inc.*, 899 N.E.2d 205, 211 (Ohio Ct.App. 2008). In addition, opposing counsel may also desire discovery. Discovery by stipulation of the parties was permitted in *In the Matter of ACE American Ins. Co.,* 6 Misc.3d 1005(A), 2004 WL 3086861 (Sup.Ct.,N.Y.County 2004). Again, study the arbitration agreement and the rules of the arbitration provider to determine whether those documents may assist (or impair) your ability to obtain the discovery you seek.

## PART FIVE: POST-ARBITRATION PROCEEDINGS

Arbitration has concluded and the arbitrator has entered an award. What can the prevailing party do to enforce that award and, conversely, what avenues are available to the party dissatisfied with the award to obtain relief? You must first determine whether your arbitration is governed by the FAA or the UAA. If an arbitration case involves interstate commerce or maritime issues, the FAA applies, unless the parties have specified in the arbitration agreement that state arbitration rules shall govern the dispute.

### I. Enforcement of an Arbitration Award

Fortunately for the prevailing party, enforcement of an arbitration award is generally straightforward. The FAA, UAA and RUAA provide

simplified enforcement procedures that require only that the winning party file a motion in the appropriate court to confirm the arbitration award. *See* 9 U.S.C.A. § 9; UAA § 11; and RUAA § 22. Under the FAA, if the parties to an arbitration agreement agree that the judgment of a court will be entered on the arbitration award and specify the court in which the judgment will be entered, then at any time within one year after the award is made, any party to the arbitration may apply to the designated court for an order confirming the award. 9 U.S.C.A. § 9. If no court is specified in the parties' arbitration agreement, then application can be made in the U.S. district court for the district in which the award was made. *Id.* The court must confirm the award and enter judgment on the arbitrator's award unless the losing party files a timely motion to vacate, modify, or correct the arbitration award. *Id. See also, e.g.*, Joseph Colagiovanni and Thomas Hartmann, *Enforcing Arbitration Awards*, The 'Lectric Law Library, available at http://www.lectlaw.com/files/adr15.htm.

Judicial review of an arbitration award under either the FAA or the UAA is extremely limited. The FAA itself presumes that arbitration awards will be confirmed. Likewise, in state courts applying the UAA, courts have "an extremely limited role … in reviewing or countermanding an arbitrator's decision" and mere errors of law and fact do not typically constitute grounds for the vacation of an arbitration award.

Under Section 13 of the FAA, a party moving for an order confirming, modifying, or correcting an award must file the following documents with the clerk at the time the order is filed: (1) the arbitration agreement; (2) all papers dealing with the selection or appointment, if any, of additional arbitrators and each written extension of time, if any, within which to make the award; (3) the award; and (4) each notice, affidavit, or other paper upon which the application to confirm, modify, or correct the award is based. 9 U.S.C.A. § 13.

The UAA provides that arbitration agreements made in a particular state are enforceable in that state's courts. Section 16 of the UAA requires that all applications be made by motion consistent with local law or local rule of court. Upon entry of judgment, the clerk must include, as part of the judgment, documents nearly identical to those required under the FAA. *See* UAA § 15(a); RUAA § 25.

## II. Vacating, Modifying or Correcting an Arbitration Award

Under the FAA, a party dissatisfied with an award may file a motion to vacate, modify or correct the award within three months after the award is filed or delivered. 9 U.S.C.A. § 12. Under the UAA and RUAA, a motion to vacate, modify, or correct an award must be filed within ninety (90) days after the movant receives notice of the award or, if the movant seeks to vacate the award on the grounds of fraud or undue means, within ninety (90) days after the ground is known or, by the exercise of reasonable care, should have been known by the movant. UAA § 13 and RUAA §§ 23 and 24.

Judicial review of an arbitration award under either the FAA or the UAA is extremely limited. The FAA itself presumes that arbitration awards will be confirmed. *Roberson v. Charles Schwab & Co., Inc.*, 339 F. Supp. 2d 1337, 1339 (S.D. Fla. 2003); *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1288 (11th Cir. 2002). Likewise, in state courts applying the UAA, courts have "an extremely limited role … in reviewing or countermanding an arbitrator's decision" and mere errors of law and fact do not typically constitute grounds for the vacation of an arbitration award. *See Sharp v. Downey,* 51 A.3d 573, 579 and 583 (Md. Ct.App. 2012). According to one federal court of appeals, on judicial review of an arbitration award, "a court sits to 'determine only whether the arbitrator did his job – not whether he did it well, correctly, or reasonably, but simply whether he did it.'" *Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 478 (4th Cir. 2012)(internal citations omitted). The FAA limits courts' ability to vacate arbitral awards as part of its comprehensive scheme to replace judicial hostility to arbitration with a national policy favoring it. *Id.* (citing *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008)).

Section 10 of the FAA sets forth four statutory grounds for vacating an arbitration award. A federal court may vacate the award:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A § 10. Grounds for vacating an arbitral award under the UAA are similarly limited. Under the UAA, a court cannot vacate an award or refuse to confirm an award "on the ground that a court of law or equity could not or would not grant the same relief." *Sharp*, 51 A.3d

at 579(internal citations omitted). Rather, the limited circumstances in which a court may vacate an award are similar to those enumerated in the FAA. *Id.*

Whether the statutory grounds for vacatur of an award are exclusive has been the subject of controversy among the courts, and there is a split of opinion among the circuits. In 2008, the United States Supreme Court issued its decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 584 (2008), and held that the grounds enumerated in the FAA for vacating, modifying or correcting an arbitration award constituted the exclusive grounds for vacatur or modification of an award subject to the FAA. The Court also held that parties cannot, by contract, expand upon these statutory grounds. *Id.* However, the Court's holding was narrow and stated that, while Sections 10 and 11 of the FAA provide exclusive regimes for the review provided by the statute, these statutory sections did not exclude a more searching review based on authority outside the statute. *Id.* at 590.

Despite its seeming simplicity, *Hall Street* arguably created more confusion than clarity. Following *Hall Street*, both federal and state courts have struggled to determine just how "exclusive" the FAA's statutory grounds for vacatur are.

Despite its seeming simplicity, *Hall Street* arguably created more confusion than clarity. Following *Hall Street*, both federal and state courts have struggled to determine just how "exclusive" the FAA's statutory grounds for vacatur are. According to one commentator, *Hall Street* created at least four unanswered questions: (1) the current validity of the manifest disregard of the law doctrine; (2) how a judge's expansion of judicial review should impact a private party's expansion through contract; (3) the viability of other avenues of judicial review outside the FAA; and (4) whether the parties can still contract for expanded review by doing so within the text of the FAA. Robert Ellis, *Imperfect Minimalism: Unanswered Questions in Hall Street Associates, LLC v. Mattel, Inc.*, 32 Harv. J.L. & Pub. Pol'y 1187 (2009). Most notably, courts have considered whether "manifest disregard of the law" remains a valid ground for vacatur of an arbitration award. *See, e.g.*, *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

The Fourth Circuit has described "manifest disregard" as "an old yet enigmatic ground for overturning arbitral awards." *Wachovia Securities*, 671 F.3d at 480. Prior to *Hall Street*, federal courts relied on dicta from the United States Supreme Court's decision in *Wilko v. Swann*, 346 U.S. 427 (1953), as endorsing manifest disregard as a common law ground for vacatur separate and distinct from Section 10's statutory grounds. *Wachovia Securities*, 671 F.3d at 480–81. The pre-*Hall Street* standard for "manifest disregard" was that "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle." *Id.* (citations omitted).

The uncertainty resulting from *Hall Street* as to the status of manifest disregard as a basis for vacatur was arguably ameliorated by the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 559 U.S. 662 (2010). In *Stolt-Nielsen*, the United States Supreme Court vacated an arbitral award based on reasoning that closely tracked the majority approach to manifest disregard before *Hall Street*: noting that there was law clearly on point, that the panel did not apply the applicable law, and that the panel acknowledged that it was departing from the applicable law. *Wachovia Securities*, 671 F.3d at 483. The court stated:

> We do not decide whether "manifest disregard" survives our decision in *Hall Street Associates*…, as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth in 9 U.S.C. § 10. AnimalFeeds characterizes that standard as requiring a showing that the arbitrators knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it. Assuming *arguendo* that such a standard applies, we find it satisfied....

*Stolt-Nielsen*, 559 U.S. at 672 n.3 (citations omitted) (quoted in *Wachovia Securities*, 671 F.3d at 483). The Fourth Circuit and other courts have interpreted this statement by the Supreme Court to mean that manifest disregard continues to exist either "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur in the FAA." *Wachovia Securities*, 671 F.3d at 483. However, other jurisdictions do not recognize manifest disregard as a ground for vacating an arbitration award. *See, e.g. Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009); *Titan Tire Corp. of Freeport, Inc., v. United Steel, Paper & Forestry, Rubber, Mfg.,Energy, Allied Indus. & Service Workers International Union*, 734 F.3d 708, 716-17 (7th Cir. 2013) (citing *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577 (7th Cir. 2001) for the proposition that manifest disregard of the law does not provide a basis to overturn an arbitrator's decision).